

LEGAL PROBLEMS RELATED TO THE CONCLUSION AND EXECUTION OF CONTRACTS IN THE FIELD OF ELECTRONIC TRADE

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As part of the conclusion of contracts the offer and acceptance can be made in the form of electronic messages. This is in line with the UNIDROIT Principles and the principles of civil law established by the norms of civil law of the Republic of Azerbaijan. The issue of the possibility of an automated information system to conclude contracts on behalf of one of the parties is positively resolved. Such contracts are given unconditional legal force. To determine the legal relationship of an electronic nature due to the peculiarities that arise when concluding and executing electronic contracts online and offline, it is necessary to carefully analyze each specific case of concluding contracts. The problem of determining the place of conclusion of an electronic contract is optimally solved in the UN Convention on the Use of Electronic Communications in International Contracts by analogy with the conclusion of a contract on an aircraft or on the high seas.- The issue is resolved using the concepts of “location of the parties” and “time and place of sending electronic communications”.

Key words: offer, acceptance, electronic transaction, electronic contract, electronic trade.

The emergence of modern means of communication has significantly changed the forms and methods of concluding civil-legal contracts. Speed and convenience are the main advantages of electronic document circulation. In a market economy, promptness plays an important role and has a significant positive impact on the results of closing deals [6, p. 48-49].

The application of new information technologies in practice challenges the legal guarantee of contract work. Contracts concluded in electronic form in various areas of civil circulation have become widespread.

When characterizing electronic contracts, it is necessary to emphasize two main points - conclusion and implementation of the contract. The issue of whether the performance of the obligation arising from the contract is a transaction or not, is ambiguous in the science of civil law. In a number of scientific works, the fulfillment of the obligation is known as a transaction, and this is also confirmed by the materials of judicial practice. Other authors deny the implementation of the obligation as a feature of the transaction.

It appears that implementation of an obligation is not a transaction, neither independent nor a series of related transactions. When concluding a transaction, the parties have an obligation to fulfill it, and only the termination of this obligation leads to the termination of the transaction.

Article 329.3 of the Civil Code of the Republic of Azerbaijan provides for the conclusion of verbal agreement, according to that article, agreement that may be concluded orally shall be considered concluded where will of person to conclude agreement is obvious from his conduct [2, p. 117-118].

It should also be noted that until 2005, the Article 330 in the Civil Code of the Republic of Azerbaijan stipulated the procedure for concluding a separate transaction

for the implementation of the contract, but now that article has been removed from the Code [13].

Indeed, the implementation of the main transaction may require the conclusion of additional transactions, but this does not necessarily mean replacing the main obligation with a series of transactions. On the contrary, it is reasonable to conclude that from the moment of its conclusion to the moment of final performance, the contract (including actions aimed at its conclusion and implementation) is an ongoing legal relationship, and only the fulfillment of the main contractual obligation leads to the implementation of the transaction. This point is one of the bases for the division of contract law (doctrine transactions) and law of obligations (doctrine of obligations) in civil jurisprudence [5].

Thus, we can conclude that in addition to the conclusion of the contract, transaction includes (but is not actually a transaction):

- actions leading to the conclusion of the contract (offer and acceptance);
- actions aimed at fulfilling contractual obligations (handover of property, performance of works, provision of services, settlement of transactions, etc.);
- actions aimed at changing or terminating the main transaction (penalty agreement, agreement on compensation of mutual claims, transfer of rights, transfer of debt, etc.).

All of the above belong to electronic contracts, taking into account some features related to the form, method and time of conclusion and execution of the transaction, but their legal essence is not the same.

The civil legislation of the Republic of Azerbaijan determines the main provisions on the conclusion of contracts. According to Article 405.1 of the Civil Code of the Republic of Azerbaijan “A contract shall be deemed effective, in the event the parties arrive at an agreement in the required form on all of the essential contract terms. With respect to the subject of the contract, the essential terms shall be those named in this Code as essential or necessary for the contracts of this type, as well as the terms, upon which agreement must be reached on the request of one of the parties”. It is clear that this rule is universal

and applies regardless of the form of the contract - written or verbal, paper or electronic. Clause 2 of that article determines that the A contract is made by way of submission of an offer (proposal to enter into a contract) by one of the parties and its acceptance (agreement) by the other party.

According to the Civil Code of the Republic of Azerbaijan, terms and conditions related to the subject of the contract, terms and conditions named as important or necessary for those types of contracts in this Code, as well as all conditions on which an agreement should be reached at the request of one of the parties are considered important [14]. Thus, the said article defines the conditions necessary for the contract to be considered concluded; the stipulation on the form of the contract creates an inextricable link between offer and acceptance in the process of concluding the contract. UNIDROIT provisions on contract principles have been approved in the Civil Code of the Republic of Azerbaijan.

As for electronic communications, the situation does not change dramatically. The analysis of the United Nations Convention “On the Use of Electronic Communications in International Contracts” and the UNCITRAL Model Law “On Electronic Commerce” concludes that the offer and acceptance in the context of the conclusion of the contract may be carried out in the form of electronic communications.

Thus, based on the above and in accordance with established practice, the following methods of concluding contracts through electronic communications can be distinguished:

1. Posting of proposals on the Internet, which includes all important aspects of the contract. Here the terms of the contract are established on the terms specified in the offer, in which the will of the offeror to enter into a contract with anyone who responds. In this case, we are talking about the public (or general) offer and its acceptance. Article 408.7 of the Civil Code of the Republic of Azerbaijan states that, A proposal containing all sufficient contract terms, reflecting the will of the person making the proposal to enter into the contract on the terms mentioned in the pro-

posal, addressed to anyone who will respond, shall be deemed a public offer [15].

A classic case of using a public offer to conclude electronic transactions is the conclusion of a purchase and sale agreement on the seller's website. Any person who wishes to enter into a contract under the proposed conditions accepts the offer by filling out the electronic form of the contract and signing it. As we have already defined, the country currently uses a legally established analogue of a person's handwritten signature - an electronic signature.

However, this does not exclude the possibility of signing electronic contracts by other means. According to established legal custom on electronic information networks, credit card numbers are often used as signatures when concluding return agreements. Accordingly, the credit card number is unique and with its help it is possible to identify its owner with a high degree of certainty.

The peculiarity of this method of concluding an electronic contract is that there is not always another person "on the other side of the network". In practice, it is not uncommon to use an automatic device such as a coffee machine to conclude a public contract. Accordingly, due to the fact that a large number of deals are concluded on the websites of online stores and various e-commerce platforms, the conclusion of the contract and subsequent processing in the form of an order for the warehouse or a shipment order is carried out in a computerized manner. This casts doubt on the validity of contracts concluded by automated communication systems without the direct participation of a person, because an obvious flaw in the will, doubts about the will of the subject can be observed. The reasons for such prejudice to automated messaging systems are: the presence of errors in the program code, the failure of the technical equipment of the system, the possibility of gaining unauthorized access to the system, etc.

Special articles of the United Nations Convention "On the Use of Electronic Communications in International Contracts" give unconditional legal force to a contract concluded as a result of the interaction of a personal and

automated message system or systems [12, p. 28].

Therefore, until proven otherwise, the contract must be recognized as containing the true will of the parties.

2. Proposals to give offer. According to the Civil Code of the Republic of Azerbaijan and the United Nations Convention "On the Use of Electronic Communications in International Contracts", the proposals should be considered offers made through one or more electronic means of information open to anyone using information systems. These proposals are considered the offers to make offer proposals unless the offeror clearly indicates his/her intention to be binding upon acceptance. The most striking example of the offer proposals is a widespread advertising in mass communication networks. In addition, there may be offers to make offer proposals, such as sending catalogs, price lists by e-mail, sending various videos, presentation files or animated flash cartoons, which are placed on the first page of websites displaying various goods, works or services.

3. Conclusion of the contract between the parties through the classic offer and its acceptance: as a result of electronic negotiations in person or electronic negotiations, video or teleconference, via e-mail, etc. A person who wants to enter into a contract sends a signed offer to the potential counterparty. The proposal is a file containing the contract text and an electronic signature file. After receiving the offer, the acceptor signs it and sends the electronic signature file to the offeror or its own version of the contract terms signed in the same way. At the same time, the electronic contract exists only in the form of a record on the hard disk or other permanent storage device of the computer. After the negotiations, the parties sign the final version of the contract by electronic means, for example, with an electronic signature.

4. Some researchers identify the fourth type of concluding electronic contracts. It is assumed that such agreements can be concluded with each other by users of a specialized information network in accordance with the rules established by the owner of the network. An example of such transactions is con-

tracts on the market of short-term interbank loans concluded through the Reuter Dealing electronic system owned by Reuter Limited. The document containing the necessary conditions for such a deal and confirming the fact of its conclusion includes commonly accepted abbreviations in the Reuter Dealing system, as well as an informal dialogue between dealers. Reuter Dealing system user codes and dealer code serve as analogues of handwritten signatures of the parties.

Now let's focus on the issues of invalidity of electronic contracts. In general, the same arguments for invalidity are referred also to electronic transactions as to conventional transactions. Non-observance of the form of the transaction does not invalidate its legal force, except for the cases clearly specified according to the rule established by the Civil Code of the Republic of Azerbaijan. The parties to such transaction are deprived of the right to resort to witness statements in case of dispute (primarily about the fact of the conclusion of the agreement) to confirm the transaction and its terms, but they may submit written and other evidence. Thus, in order to carry out full-fledged e-commerce, the parties must correctly implement and verify their identification.

At the same time, non-observance of a simple written form leads to the invalidation of some transactions expressly stipulated by civil legislation, for example, an insurance contract, a guarantee contract, a loan agreement.

Also, the grounds for the invalidity of electronic contracts are other general grounds provided for in the Civil Code of the Republic of Azerbaijan. These include the following: as a result of abuse of power, under the influence of deception, violence, threats, a transaction concluded as a result of a representative of one party reaching an agreement with another party in bad faith or a person falling into a difficult situation, fake deal, unserious deal, a transaction concluded by limited or physically incapacitated person, a transaction concluded by a natural person who does not understand the meaning of his/her actions or is unable to direct them, a transaction concluded under the influence of an important

significant error, a transaction that goes beyond the legal capacity of a legal entity [15].

Apparently, one of the most common is a party's misconception about the identity of the counterparty and the method of conclusion and performance of the contract, which implies the mandatory application of counterparty verification of electronic transactions.

Information technologies that can be used during the conclusion of civil-legal contracts in electronic form include the following: remote service technologies (internet banking, client bank, etc.); correspondence by e-mail; use of codes, passwords, logins, SMS messages.

In particular, technical devices can be: computer; a tablet for creating a facsimile signature; fingerprint scanner for generating electronic signature keys; smartphone; payment terminal, etc. [4, p. 220]. When concluding contracts in the Internet space, the participants of civil contracts face a number of problems.

First, it is the difficulty of determining the place of conclusion of the contract. Secondly, the problem of proving the fact of the conclusion of the contract, as well as the immutability and security of the information mentioned in this contract. Third, the problem of determining whether the document came from the other party. Fourth, the ability to penetrate confidential information related to the terms of the contract, hacking [3, p. 46].

One of the main problems arising during the conclusion of contracts using electronic data is the difficulty of determining the place of conclusion of the contract. In practice, such questions arise most often in international private law. Their resolution is important to determine which jurisdiction applies to the contracts concluded and therefore to determine the applicable law in each particular case. The conclusion of an electronic contract in an electronic information network is transnational in nature and therefore falls within the scope of legal regulation of international private law. In electronic legal relations, this issue does not arise only when the counterparties are residents of different states.

The characteristics of electronic networks are that an offerer can post an offer on any

network server, regardless of its geographic location, not necessarily in the bidder's country of citizenship. As a rule, if the server hosting the contract form or robot programming does not belong to the offeror, then it does not know in which state the contract will actually be concluded. In turn, the partner can cancel reception from any state, as well as from places in the world that are not under the jurisdiction of any state: open seas, on board the plane. Similar questions arise when the recipient's color message passes through proxy servers that do not allow tracing the path of the message on the network.

The concept of location is often used when resolving conflicts related to the law applicable to the contract conclusion procedure (place of conclusion of the contract, location, place of residence). The United Nations Convention "On the Use of Electronic Communications in International Contracts" uses concepts such as "location of parties" and "time and place of sending and receiving electronic communications". Articles with the same name are also found in the text of the Convention. At the same time, the fact that the parties have commercial enterprises is particularly emphasized. The place of business of any of the parties is the place designated by the other party, unless the party making such designation alone proves that there is no place of business at that place. However, if the party does not indicate the place of work in the electronic contract, but has more than one place of work, then the place, where the contract is concluded, is considered the place with the closest connection to the electronic contract. It takes into account the circumstances known to the parties or accepted by them before the conclusion of the electronic contract or at any time [9, p. 541].

Most electronic transactions are concluded by individuals with legal entities or with each other. At this time, if an individual does not have a place of business, his or her usual place of residence is taken into account.

Also, Article 411 of the Civil Code of the Republic of Azerbaijan stipulates that, the place of conclusion of the contract shall be recognized as the place of residence of the natural person who sent the offer or the place

of legal entity if it is not directly indicated in the contract. The mentioned article states that In the event a contract does not contain the place of its execution, then it shall be deemed made in the place of the private person's living or in the location of the legal entity, which has submitted the offer [1, p. 188-189].

The Convention specifically states that any place cannot be a place of activity according of the following: (a) the equipment and technical means supporting the information system used by any party in connection with the conclusion of the contract are located in that place; or (b) other parties may also enter that information system [8, p. 122]. This is necessary in practice, for example, to distinguish a direct electronic contracting party from a provider with network servers or communication lines. At the same time, the existence of this information system for other parties is not a reason to consider it a commercial enterprise of one of the parties to the electronic contract.

An important innovation was Article 6.5 of the United Nations Convention "On the Use of Electronic Communications in International Treaties". This confirms the real extraterritoriality and transnationality of electronic information networks. The fact is that a network server is not always geographically located in the same state as the first-level domain to which it belongs. Accordingly, it has been established that if any party to an electronic contract uses a domain name or email address associated with a particular country, this does not in itself establish the possibility that his place of business is in that country [11, p. 414]. Indeed, the same e-mail address can be supported by several servers in the network, and in most cases the opposite happens - the same mail server has several e-mail boxes with different addresses. Therefore, a false impression may arise that a party's electronic contracting partner has a place of business in the country corresponding to the domain suffix of the party's email address. For these and similar cases, the Convention established the "reserve" rule.

The above was related to the issue of determining the places of the parties and their places of work. In modern electronic networks, the issue of the time and place of send-

ing and receiving electronic data, which is understood based on the methods of information transmission, is of fundamental importance. This problem has not yet been resolved in the legislation of the Republic of Azerbaijan, therefore, when describing it, relevant norms of international special law will be used.

Article 10 of the United Nations Convention "On the Use of Electronic Communications in International Treaties" defines that, the time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received [7, p. 215].

Thus, in the first case, we are talking about several information systems of electronic communication, and in the second case, it is about the transmission of electronic communication within an information system that can be used simultaneously by the sending and receiving parties.

The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee [10, p. 177]. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address. This applies not only to e-mail messages, it is also attributed to the transfer of text files between servers, fax messages, etc.

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**ПРАВОВЫЕ ПРОБЛЕМЫ,
СВЯЗАННЫЕ С ЗАКЛЮЧЕНИЕМ
И ИСПОЛНЕНИЕМ ДОГОВОРОВ В
СФЕРЕ ЭЛЕКТРОННОЙ ТОРГОВЛЕ**

В рамках заключения договоров оферта и акцепт могут быть сделаны в форме электронных сообщений. Это соответствует Принципам УНИДРУА и принципам гражданского права определенными нормами гражданского законодательства Азербайджанской Республики. В международных актах положительно решен вопрос о возможности автоматизированной информационной системы заключать договоры от имени одной из сторон. Таким договорам придается безусловная юридическая сила. Для

определения правоотношения электронного характера в силу особенностей возникающих при заключении и исполнении электронных договоров в режиме онлайн и офлайн, необходимо тщательно проанализировать каждый конкретный случай заключения договоров. Проблема определения места заключения электронного договора оптимально решена в Конвенции ООН "Об использовании электронных сообщений в международных договорах" по аналогии с заключением договора на воздушном судне или в открытом море. Вопрос решается с использованием понятий "местонахождение сторон" и "время и место направления электронных сообщений".

Ключевые слова: оферта, акцепт, электронная сделка, электронный договор, электронная торговля.