

## Evaluation Relationship between E-commerce and USA International Private Contracts

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**Abstract:** The law of the United States comprises many levels of codified and uncodified forms of law, of which the most important is the United States Constitution, the foundation of the federal government of the United States. The legal field of conclusion of contracts is one of topical examples of further development of USA law, especially according to the new form of such conclusion on basis of e-commerce. In the article are discussed therefore only the questions concerning to international private law and e-commerce. The Conception of development of civil legislation orientates USA legislator, USA legal praxis and doctrine on experiences of foreign law and international law.

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### 1. Introduction

Problems of electronic commerce, especially regarding to questions of procedure of the conclusion of contracts in the electronic form, are topical for modern USA private legal system. Legal basis of electronic commerce in its modern form have been incorporated by acceptance of the Civil Code of USA Federation (the first Part of the Civil Code of the USA Federation, though even in days of existence of Soviet Union a number of acts on electronic commerce has been accepted. Here it is possible to mention the Instructive guidelines of the State Arbitration of the USSR use as proofs on arbitration affairs of the documents prepared with the help of electronic-computer facilities". Specificity of the USA law system is the edition through the highest judicial instances (the Supreme Court and the Highest Commercial Court of the USA Federation) special generalizations of practice of both subordinate instances and own judiciary practice, which accepts forms of decisions of plenums of such instances, circulars of presidiums of the courts. The general tendency in jurisprudence and practice of Russia shows, that the decisions of highest judicial instances have an effect of judicial precedent. Such opinion is confirmed by V.V. Jarkov in his well-known textbook. Thus even before acceptance of the first Part of the Civil Code of USA Federation (father in text: CC), but already after the beginning of reforming of the USA legal system, in judiciary practice there were numerous disputes over use of the electronic digital signature. These disputes have led finally to acceptance of the Letter (Pismo) of the Supreme

Arbitration Court of USA Federation About separate recommendations accepted at meetings on judicial - arbitration practice", where in section IV the Court analyzes a question, if the circumstances of a case could be verified by proofs made and signed with the help of electronic-computer facilities in which the system of the digital (electronic) signature is used. Unfortunately, the Conception of development of civil legislation 2009 that is considered as a fundamental of the modern development of USA private law didn't take into account the problems of e-commerce by conclusion of private contracts.

### Modern legal development.

In the USA legislation there were essential changes by way of fixation of separate aspects of the electronic conclusion of contracts. First of all it concerns acceptance of the Federal Law Act "About the electronic signature". Besides of this law act it is necessary to mention to the Federal Law Act "About the information, information technologies and protection of the information", etc. It was discussed the draft of the Federal Law Act "About electronic trade" that was not accepted in the final version.

### International legal experience.

The USA legislator is guided by the international experience of legal regulation. In the field of electronic commerce most countries orientate themselves on the Model Law On Electronic Commerce Of The United Nations Commission On International Trade Law (UNCITRAL), approved on December, 16, 1996 by the Resolution at 85-plenary

session of General Assembly of the United Nations. Legislation based on the UNCITRAL Model Law on Electronic Commerce has been adopted in Australia, Bermuda, Colombia, Ecuador, France, Hong Kong Special Administrative Region of China, India, Ireland, Isle of Mann (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland), New Zealand, Pakistan, Philippines, Republic of Korea, Singapore, Slovenia, the States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland), Thailand, and, within the United States of America, Illinois. Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in Canada (Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada) and in the United States (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law) and enacted as law by a number of jurisdictions in those countries.

#### **Intermediate definition of problem of use of electronic variant of conclusion of contracts**

In spite of the fact that from the moment of introduction of the first Part of the Civil Code of USA Federation have been passed already over 20 years, the electronic variant of the conclusion of contracts has not got accustomed in Russia to the full. It can be connected with rigid orientation of subjects of USA market to traditional ways of the conclusion of contracts, fears of mistakes and deceits, including fears of infringements of intellectual property rights. The problem of mutual relation of electronic commerce and protection of the right of participants of civil juridical relations is not alien to other legal systems.

We suppose now just to chalk out those questions which are determined by the USA specificity of electronic commerce. These questions are connected to participation of foreign subjects in legal relations.

#### **Some topical questions of conclusion of private contracts by use of different forms of e-commerce**

The USA legislation reveals the following groups of questions in conjunction with e-commerce:

**A. The order of application of the law to contracts made by way of use of electronic facilities, including a network of the Internet.** A question about the place of conclusion of contracts.

Here there are some questions of a collision of the legal regulations when representatives of the different legal systems take part in contractual relations, and also in case of the conclusion of contracts through parties which though are

representatives of one country, but they are staying in the different countries. This question is resolved in the third Part of CC where has found the regulation of the international private law.

The USA legislator doesn't provide special rules in the codification for electronic transactions, having limited to the general regulation.

The legal status of individuals (physical persons) and collective entrepreneurs (corporations) is defined by the law of the country where the person is registered or founded. If the person is not registered, the rule about application of the law of the place of basic realization of commercial activities is applicable.

The parties of the contract have the right to choose the law applied to their contract. However, if from set of circumstances of the affair existing at the moment of a choice of the right follows that the contract is really connected only to one country, this choice of the parties cannot infringe on imperative norms of the country to which the contract is really connecte. At absence of the agreement of the parties about the law of contract to the contract is applied the law of the country to which the contract is most closely connected. Thus – if other does not follow from the law, conditions or an essence of the contract or set of circumstances of an affair – by the law of the country to which the contract is most closely connected is implied the law of the country where there is a residence or the basic place of activity of the party which carries out the performance having crucial importance for the content of the contract. Such is the law of the country of seller, donator, lender, carrier, forwarding agent, insurer, agent, guarantor, licensor, etc.

To the obligations arising from unilateral transactions – if other does not follow from the law, conditions or an essence of the transaction or set of circumstances of an affair – is implied the law of the country where there is a residence or the basic place of activity of the party which is taking up the obligations under the unilateral transaction (art.1217 CC).

Taking into account that Internet-services generally involve consumers, the USA legislator has provided guarantees of their rights. The choice of the law applying to the contract which party is the physical person using, getting either ordering or having intention to use, get or order movable things (works, services) for the personal, family, domestic and other needs which have been not connected to realization of enterprise activity, cannot cause deprivation of such physical person (consumer) of protection of his rights given by imperative norms of the law of the country of a residence of the consumer if one of the following circumstances took place even:

(1) conclusion of the contract was preceded in this country with the offer addressed to the consumer, or advertising and the consumer has made in same country the actions necessary for the conclusion of the contract; (2) the contractor of the consumer or the representative of the contractor has received the order of the consumer in this country; (3) order for purchase of movable things, performance of works or rendering of services is made by the consumer in other country which visiting has been initiated by the contractor of the consumer with a view of prompting the consumer to the conclusion of the contract.

At absence of the agreement of the parties about applicable law and at presence of the circumstances which have been mentioned above, to the contract with participation of the consumer is applied the law of the country of a residence of the consumer (item 2 art.1212 CC). Thus the rules established by items 1 and 2 art. 1212 CC, are not applied: (1) to the contract of transportation; (2) to the contract about performance of works or about rendering of services if work that should be executed or services should be rendered extremely in other country than the country of a residence of the consumer. These withdrawals are not distributed to contracts on rendering for a total price of services on transportation and accommodation (irrespective of inclusion in a total price of cost of other services), in particular on contracts in sphere of tourist service.

### **B. Observance of requirements about the form of contracts.**

According to art.1209 CC, the form of the transaction submits to the law of a place of its fulfilment; thus the transaction accomplished abroad cannot be recognized as void owing to non-observance of the form if requirements of USA legislation are observed. The form of the foreign-economic transaction, even one of which parties is the USA legal person, submits irrespective of a place of fulfilment of this transaction to the USA right (item 2 art.1209 CC).

The questions of application of the law considered above to concluded contracts concern only (1) interpretation of the contract; (2) rights and duties of the parties of the contract; (3) performance of the contract; (4) consequences of default or inadequate performance of the contract; (5) termination of the contract; (6) consequences of invalidity of the contract (art.1215 CC).

Therefore the concept “a place of fulfilment of the transaction” is important. Fulfilment of the transaction is understood as giving to it of a validity. In other words, “fulfilment of the transaction” is connected to the moment of the beginning of its action. Adhering consensual systems of the

conclusion of the contract the USA legal system as well as the majority of the European countries resists here to the “mail-box theory” of Anglo-American legal family [13].

The USA law contains requirements of the written form concerning some kinds of contracts. These are contracts for the sums over 10.000 Rubel; contracts in which even one of the parties is the corporation; the contract of rent of a vehicle, etc. Non-observance of such requirement entails impossibility to refer to a testimony confirming the transaction and its conditions.

The general norm determining the form of the contract, and the electronic contract in particular, is art.434 CC. So, according to item 2 of this article, the written contract can be made by drawing up of one document signed by the parties, and also by an exchange of documents using of the post, cable, teletype, telephone, electronic or other connection facilities allowing authentically to establish that the document proceeds from the parties of the contracts. Thus, the USA legislator has considered that the written form is observed in case of an opportunity of an authentic establishment of that corresponding electronic messages proceeded from the parties of the contract. The authentic establishment of such fact can be connected to a question on the electronic digital signature.

### **C. Legal status of the electronic signature.**

The necessary essential element of any written document are the signature of the person or the signature of persons which make it. The signature in such document replaces the expressed consent of the person in the oral transaction.

Art.160 CC contains in item 2 a position according to which use at fulfilment of transactions of the electronic-digital signature or other analogue of the autographic signature is supposed in cases and in the order, stipulated by the law or by the agreement of the parties. Such law is already mentioned above Federal Law Act “About the electronic signature”.

As it was marked in the report “E-commerce in Russia: opportunities for growth and development” prepared by the American Chamber of Commerce in Association with the USA Chamber of Commerce and Industry, three variants of sophistication are currently employed in Western Europe and North America to define electronic signature. The first variant provides that all electronic signatures should satisfy legislative requirements about the signature. The second variant provides that the electronic signature has a validity only if it (1) really belongs to the person using it; (2) can be verified; (3) is exclusively under the control of the person using it; and (4) it is connected to the information in such a manner that in case of change of

the information the signature loses force. The third variant establishes, that requirements about legality of the signature are observed only with the electronic digital signatures made with use of public key cryptography technology satisfy legal signature requirements. The USA legislator has chosen the third variant of the signature, i.e. – as it was specified in the mentioned above report – the strictest. See also The Letter (“Pismo”) of the Highest Commercial Court of the USA Federation “About the Federal Law Act “About the information, informatization and protection of the information”.

### Conclusion.

Modern legal practice shows the necessity of the international legal unification in the field of electronic commerce by virtue of its transboundary character. Adoption in the middle of 90th years of the special Model Law On Electronic Commerce Of The United Nations Commission On International Trade Law demonstrates a urgency of electronic commerce for the international economic order. And orientation on given Model Law of leading legal systems allows to speak about gradual creation of the mechanism of uniform application of norms about electronic commerce in the national legislation.

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25. *Trident Center v. Connecticut Gen. Life Ins. Co.*, (9th Cir. 2012). In this opinion, federal judge Alex Kozinski attacked a 1968 Supreme Court of California opinion at length before conceding that under *Erie*, he had no choice but to apply the state court's reasoning despite his strong dislike of it.

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