МІЖНАРОДНЕ ПРАВО

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HUMAN RIGHTS IN THE INTERNATIONAL LEGAL REGULATION OF ELECTRONIC DOCUMENT CIRCULATION IN THE INFORMATION SOCIETY

Formulation of the problem. The internationalization of international economic relations and globalization have necessitated international unification and harmonization of legislation in the field of electronic document management, the purpose of which is to exchange information between participants in relations located in different states. In this regard, it seems impossible to ensure effective legal regulation of these legal relations within one country without taking into account the established approaches in international practice and foreign legislation. The unification of the rules on electronic documents and their use in contractual relations are based on economic and legal reasons. One of these factors was the emergence and development of new means of communication, as a result of which economic relations went beyond the boundaries of individual states and ceased to be tied to a specific national territory. Among the reasons specific to this area, it should be noted the emergence of new ways of certifying the authenticity of documents and new forms of documents, through the exchange of which it is possible to conclude, execute contracts, and perform other legally significant actions for civil and international circulation. The benefits of using new technical means have necessitated the need to establish legal requirements for such use. However, the issuance of special acts at the domestic level will not contribute to the development of international trade, since the law of each state has its own characteristics, due to centuries-old traditions and modern interests of the state in various fields.

The state of research of the topic. Analysis of recent research and publications. Relations on the use of electronic documents, electronic digital signatures, electronic commerce (commerce) are studied in scientific works: A. Ananiev, I. Balabanov, A. Baranov, M. Braginsky, A. Vershinin, M. Dutov, I. Zhilinkova, V. Kopylov, V. Naumov, S. Petrovsky, O. Stepanenko, A. Chuchkovskaya, A. Shamraev and others.

The aim of the article. The aim of the article is to study the features of the legal regime for the use of electronic documents and electronic digital signatures at the international and supranational (regional) levels, as well as taking into account the legislation of foreign countries, taking into account the formation of the information society and the use of the latest information technologies.

Presentation of the main material. Taking into account the indicated features of the electronic document exchange, it should be recognized that in this area, in order to meet the needs of the development of electronic document management, it is important to develop uniform material standards. Traditionally, there are several forms of unification. In some cases, states change their legislation according to the type of rules of law of another state, but this form does not contribute to the development of uniform rules in several states at once, since the actions of various states, their goals and directions for their achievement are not coordinated. Another form of unification is the adoption by a number of states of exemplary laws or other recommendations developed by bodies specially created for this purpose or by way of concluding international treaties. The United Nations Commission on International Trade Law (UNCITRAL) played the most important role in this direction. The third form of unification is the conclusion of an international treaty, by virtue of which the participating states assume the obligation to bring their legislation in the area specified in the treaty in accordance with the way it is defined in the treaty [4].

International legal unification in the field of regulation of electronic document management took

place in stages, taking into account the needs of practice and differences in the legal systems of states. At the initial stage of international legal unification in the field of electronic document management, the UNCITRAL Model Law "On Electronic Commerce" was developed. Preparation of this Law in the early 90s. was due to the expansion of the use of modern means of communication for the conclusion of international trade transactions. At the same time, there was legal uncertainty about the legal force or validity of electronic communications. In deciding to develop model legislation on electronic commerce, UNCITRAL was guided by the fact that, in a number of countries, existing legislation governing the transmission of messages and the storage of information is outdated, as it does not provide for the use of electronic commerce. All this created obstacles to international trade, which was largely carried out using modern means of message transmission [3]. The aim of this Model Law was to provide national legislators with a set of rules that could address such legal obstacles and create a more robust legal framework for "electronic commerce". The regulation was based on a "functionally equivalent approach", based on an analysis of the goals and functions of the traditional requirement for paper documents in order to establish how these goals or functions can be achieved or performed using electronic commerce methods. With the help of this Model Law, it was supposed to solve two main problems of electronic document management: the inability to provide electronic documents as written evidence in court, and distrust of electronic messages.

The Model Law under consideration recommended declaring the probative value of data messages and establishing the legal basis for the use of data messages in international trade. The Model Law defines as a core presumption the essential presumption that information cannot be denied legal effect, validity or enforceability simply because it is in the form of a data message, and the presumption that the information in the form of a message conforms to the requirements of the written form. The Model Law establishes an important provision for international trade that an electronic signature created or used outside the host State has the same legal effect in the host State as an electronic signature created or used in the host State if it provides a substantially equivalent level of security [5]. If there is an agreement between the parties on the use of certain types of electronic signatures or certificates, such an agreement is considered sufficient for the purpose of cross-border recognition. The Model Law on Electronic Commerce has been enacted in a number of countries and is recognized as the most important benchmark for legislation relating to electronic commerce. At the next stage of international legal unification in the field of electronic document management, in order to implement the principles laid down in the Model Law "On Electronic Commerce", in order to promote the use of electronic signatures, the UNCITRAL Model Law "On Electronic Signatures" was adopted in 2000. The risk that different countries would adopt different legislative approaches to electronic signatures required the preparation of unified legislative provisions that would lay the foundation for the basic rules for regulating this international phenomenon in order to achieve legal harmonization of technical compatibility.

At this stage, it was necessary to agree on the rules regarding the legal recognition of electronic signatures by establishing a method for assessing, in a technologically neutral way, the practical reliability and commercial adequacy of the methods for performing an electronic signature [6]. The Model Law on Electronic Signatures was adopted in addition to the Model Law on Electronic Commerce and was intended to provide significant assistance to States in strengthening their legislation governing the use of modern authentication methods, as well as in the development of such legislation in those countries where it is did not exist at that time. The law directed the states to determine the conditions for the use of an electronic signature and establish criteria for the reliability of the behavior of a certification service provider. The law proposed to use any method of creating an electronic signature that meets the established reliability requirements. The Law proposes practical standards on the basis of which the technical reliability of an electronic signature can be assessed [7, p. 139].

According to Art. 6 of the UNCITRAL Model Law on Electronic Signatures, an electronic signature is data in electronic form contained in, attached to, or logically associated with a data message that can be used to identify the signatory in connection with the data message and indicate whether that the signatory agrees with the information contained in the data message. Electronic signature functions: identification of the signatory and confirmation of his consent to the information.

At the third stage of international legal unification in the field of electronic document management, the United Nations Convention "On the Use of Electronic Messages in International Contracts" was adopted on November 23, 2005. The Convention is an example of universal unification, which creates conditions for involving more states in the trade turnover, and not just members of regional associations. At this stage, it is necessary to adopt uniform rules aimed at removing barriers to the use of electronic messages in international contracts, which will increase legal certainty and commercial predictability and help states gain access to modern trade channels [8, p. 26]. The Convention develops the provisions of the UNCITRAL Model Laws. At

the same time, it is more focused on the conclusion of transactions between trading partners who have not established contractual relations in the traditional way. The Convention unifies such fundamental aspects for counterparties as: terminology, location of the parties, time and place of sending and receiving electronic messages, invitations to submit offers, the form of the contract, the consequences of errors in electronic messages.

The Convention recognizes the legal force of contracts concluded between automated systems, which is important because in such cases there is a possibility of challenging the validity of the contract on the grounds that the will of the participants in the transaction was not properly coordinated. According to Art. 12 of the Convention, a contract concluded in this way cannot be deprived of validity or enforceability on the sole basis that no individual has reviewed or interfered with each individual operation performed by automated message systems or concluded as a result of the contract [9, p. 15]. One of the problems in the conclusion of transactions using electronic means is the problem of determining the location of a commercial enterprise. In this regard, the most important provision of the Convention is that its implementation does not take into account the fact that the commercial enterprises of the parties are located in different states. The Convention establishes that the fact that a party uses a domain name or e-mail address associated with a particular country does not, of itself, create a presumption that its place of business is located in that country. The Convention extends its provisions to the use of electronic messages in the conclusion or execution of various contracts in the business field. Thus, the UN Convention was the first act of conventional unification aimed at removing barriers to the use of electronic messages in international contracts. International conventions, as a rule, are based on the legal norms of various national legal systems and represent general rules acceptable to many states. Therefore, it is not so much the signing and ratification of a particular convention, but its application in the national law of states that leads to mutual enrichment and the creation of a legal regime that is favorable for most market participants [10].

An example of regional harmonization of legislation on electronic document management is the harmonization process within the European Union. Directive 97/7/EC of May 20, 1997 dealt with the protection of consumer rights in relation to distance contracts, providing them with additional rights and guarantees compared to the general procedure by regulating in detail the provision of information to the consumer, the right to refuse performance, the deadline for performance. An important provision of the Directive was the recognition of contracts concluded without direct contact between the parties, i.e. using remote means, legally valid. This Directive was aimed at developing trade and increasing the competitiveness of the EU countries.

On December 13, 1999, the European Union adopted Directive 1999/93/EC on electronic signatures, which was aimed at facilitating the use of electronic signatures and promoting their legal recognition. The Directive takes a technologically neutral approach and does not establish any specific technology for creating an electronic signature in order to create more opportunities for the development of trade relations. The Directive defines a two-level system of electronic signatures: an electronic signature and a qualified electronic signature. At the same time, not only an electronic signature based on a certificate has legal force, but also a simple electronic signature. However, if a qualified electronic signature is equivalent to a handwritten signature, then a simple electronic signature serves as a method of authentication [2]. The directive is based on such principles of legal regulation of the considered legal relations as: providers of certification services have the right to freely offer their services without prior permission; certification services can be provided by both legal entities and individuals, provided that they are established in accordance with national law; there is no need to create a system for regulating electronic signatures used exclusively within systems that are based on voluntary agreements between a certain number of participants; electronic signatures will be used in a wide variety of circumstances in the widest range of proposed, new services and products related to or using electronic signatures; the definition of such products and services should not be limited to the issuance and management of certificates; the legal legitimacy of electronic signatures used in systems with an indeterminate number of participants and their admissibility as evidence in litigation must be recognized. On the basis of this Directive, fundamentally new concepts of laws were adopted in Germany, Italy and other countries [11, p. 18].

Directive 2000/31/EC of 8 June 2000 on certain legal aspects of the information services sector, in particular electronic commerce on the Internet market, aims to ensure the proper functioning of the EU internal market, by ensuring the free movement of information services, which in turn is achieved by creating a harmonized legal system for the provision of electronic signatures and related services. Member States must ensure that their legal system permits the conclusion of contracts by electronic means. The EU Directives are an example of harmonization in the sense that they are supranational acts and oblige the EU Member States to bring their domestic law in line with the prescriptions of these Directives. At the same time, the Directives give states the freedom to choose their own forms and methods used to

achieve this result, which preserves the legislative sovereignty of states, and this is also important, since in the context of different economic models and interests, the adoption of uniform norms is inexpedient and requires fundamental changes in all national legislation. These Directives laid down common concepts and principles of legal regulation. On their basis, new national acts of the EU Member States were revised, amended or adopted [12, p. 24]. If we compare the regional unification of the EU with the universal unification of the UN, then it can be noted that the EU Directives borrowed and developed the main provisions of the UNCITRAL Model Laws. The EU Directives are based on the same presumptions that were originally formulated in UN acts (on the recognition of electronic signatures, on their use as evidence, on the permission to conclude contracts by electronic means, on the recognition of legal force for foreign certificates under certain conditions of the Directive).

The adoption of the Directives led to the fact that European countries began to update and unify their laws in this area. In England, the implementation of the EU Directives began with the Law on Electronic Communications on May 25, 2000. The Law allows the use of electronic signatures as evidence to establish the authenticity and integrity of an electronic message, but the Law did not create a presumption of equivalence of an electronic signature with a handwritten one, since the concept of "handwritten signature" in the legislation of Great Britain is absent at all [13, p. 87]. In France, the Law of March 13, 2000 "On giving probative force to information technologies and on electronic signatures" amended chapter VI of the French Civil Code on the principles of proving the existence of a contract, namely: electronic documents and electronic signatures are recognized as legally equivalent to documents and signatures made by hand. At the same time, an electronic document is considered as written evidence and is admissible if it allows you to identify it with the person from whom it originates, without violating the integrity of the document itself.

The Decree on Electronic Signature, which was adopted on March 30, 2001, added a new type of electronic signature, a secure one, which must be created by means under the sole control of the signer and which ensures that any change made to a document after it has been signed can be easily identified. According to Article 2 of the Decree, the presumption of reliability of a secure signature is fixed in the case when it is verified using a "qualified electronic certificate" from an independent certification body [14, p. 68]. In Germany, in 2001, a new version of the Electronic Signatures Act was adopted. Germany has abandoned the mandatory licensing of services in this area and has introduced voluntary accreditation, indicating that the service provider complies with the requirements of the Law. Declaring the freedom to choose electronic signatures, the German Civil Code, in order to increase confidence in the use of an electronic signature in civil legal relations, establishes some cases when a certain type of electronic signature must be applied imperatively. So, if the written form of the contract prescribed by law is replaced by an electronic one, then each of the parties must sign the document emanating from it with a qualified electronic signature [16]. In Italy, the Law of March 15, 1997 No. 59 established that an electronic document is equivalent to writing and has the force of evidence only if it was signed with a digital signature. However, on February 22, 2002, the Decree came into force, where it is established that "an electronic document signed by means of an electronic signature satisfies the requirements of a handwritten signature. The same document must be admissible as evidence, given the security of its creation. If an electronic document is signed with a digital signature or other type of qualified signature, and the signature is based on a qualified certificate and created using a secure device, then this is unconditional and complete evidence, unless it was the result of a forgery of the certificate. Thus, digital signatures have great legal force in Italy and can only be refuted in case of forgery. The usual electronic signature can always be refuted by the second party in the dispute [15, p. 35].

Conclusions. The adoption of the EU Directives and their implementation in the national legislation of the EU member states led to the fact that if initially electronic document management became widespread in the United States, then later it became the most popular in Western Europe. Thus, it can be stated that significant results have been achieved in private international law in unifying the rules on electronic document management. Uniformity in the regulation of electronic information exchange has been achieved not only through the unification of norms, but also through private unification by the parties themselves of contracts for the exchange of information using electronic means.

Strengthening the mutual influence of national economies and legal systems requires the improvement of the norms of national legislation in this area so that they comply with international standards. Existing differences in national legal regimes governing the electronic exchange of information can significantly limit the ability of businesses to enter international markets. Under these conditions, the importance of using foreign experience to improve national legislation increases. Based on international experience in this area, it is necessary to build such a legal regulation of electronic document management that would regulate those relations that cannot be settled by the participants in legal relations. At the same time, it is necessary to take into

account the principles of technological neutrality and functional equivalence.

References

1. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on the electronic commerce). *Official Journal of the European Communities*. 2000. L. 178.
2. Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community Framework for Electronic Signatures (Electronic Signatures Directive). *Official Journal of the European Communities*. 1999. L. 13
3. UNCITRAL Draft Model Law on Electronic Commerce http:/www.uncitral.org/texts/electcom/ml-ecomm.htm
4. Серго А.Г. Правовое регулирование электронной коммерции http://www.rol.ru/news/it/legal/interview.htm
5. Шамраев А. Развитие европейского права электронной коммерции. www.e-managment.ru/e-law-euro.htm
6. Шамраев А. Право электронной комерции. Электронный документ: правовая форма и доказательство в суде. М.: Городециздат, 2000. 242 с.
7. Дутов М. Сравнительный анализ европейского законодательства в области электронного документооборота. *Предпринимательство, хозяйство и право*. 2002. № 8. С. 25-28.
8. Завидов Б.Д. Электронная цифровая подпись: правовое значение. М.: Экзамен, 2001. 21с.
9. Ананько А. Электронная форма сделки в международной торговле http://www.law.net/law/doc/a124.htm
10. Соловьяненко Н. Электронная подпись в правовом лабиринте. *eCommerce World*. 2001. № 2. С. 16-22.
11. Язев А. Электронный документооборот: основыне понятия. *Мир электронной комерции*. 2001. № 1. С. 22-27.
12. Чучковська А.В. Правове регулювання електронної комерції. К.: ЦУЛ, 2007. 224 с.
13. Макарова М.В. Електронна комерція. К.: Академія, 2002. 357 с.
14. Плескач В.Л. Електронна комерція. К.: Знання, 2007. 563 с.
15. Агеев В. Правовое регулирование цифровой підписи в Германии http://worldoflaw.ageyev.org/ageyev_dig_sig01.htm
16. Симонович П.С. Регулирование электронной цифровой подписи нормами права: международный опыт. *Журнал современного права*. 2002. № 3. С. 93-104.

Summary

Piliuk S. V., Borshchenko V. V. **Human rights in the international legal regulation of electronic document circulation in the information society.** – Article.

The research is based on current international legislation, legislation of EU and legislation of foreign countries. On the grounds of this documentary basis the notion of e-commerce is analyzed, legal relationships related to this notion, the use of electronic documents and electronic signatures is discussed.

The internationalization of international economic relations and globalization have necessitated international unification and harmonization of legislation in the field of electronic document management, the purpose of which is to exchange information between participants in relations located in different states. In this regard, it seems impossible to ensure effective legal regulation of these legal relations within one country without taking into account the established approaches in international practice and foreign legislation. The unification of the rules on electronic documents and their use in contractual relations are based on economic and legal reasons. One of these factors was the emergence and development of new means of communication, as a result of which economic relations went beyond the boundaries of individual states and ceased to be tied to a specific national territory. Among the reasons specific to this area, it should be noted the emergence of new ways of certifying the authenticity of documents and new forms of documents, through the exchange of which it is possible to conclude, execute contracts, and perform other legally significant actions for civil and international circulation. The benefits of using new technical means have necessitated the need to establish legal requirements for such use. However, the issuance of special acts at the domestic level will not contribute to the development of international trade, since the law of each state has its own characteristics, due to centuries-old traditions and modern interests of the state in various fields.

Strengthening the mutual influence of national economies and legal systems requires the improvement of the norms of national legislation in this area so that they comply with international standards. Existing differences in national legal regimes governing the electronic exchange of information can significantly limit the ability of businesses to enter international markets. Under these conditions, the importance of using foreign experience to improve national legislation increases. Based on international experience in this area, it is necessary to build such a legal regulation of electronic document management that would regulate those relations that cannot be settled by the participants in legal relations. At the same time, it is necessary to take into account the principles of technological neutrality and functional equivalence.

Kew words: human rights, international legal regulation, electronic commerce, electronic document circulation, electronic document, electronic signature.

Анотація

Пілюк С. В., Борщенко В. В. **Права людини в міжнародно-правовому регулюванні електронного документообігу в інформаційному суспільстві.** – Стаття.

На підставі міжнародного законодавства, наднаціонального законодавства ЄС та законодавства зарубіжних країн проведено аналіз сутності та змісту електронного документообігу, визначені правовідносини, які складають це поняття, досліджено поняття та використання електронних документів та електронних підписів.

Інтернаціоналізація міжнародних економічних відносин та глобалізація зумовили необхідність міжнародної уніфікації та гармонізації законодавства у сфері електронного документообігу, призначення якого полягає в обміні інформацією між учасниками відносин, що перебувають у різних державах. У зв'язку з цим неможливим забезпечити ефективне правове регулювання даних правовідносин у межах однієї країни без урахування підходів, що склалися в міжнародній практиці та зарубіжному законодавстві. В основі уніфікації норм про електронні документи та їх використання у договірних відносинах лежать

причини економічного та правового характеру. Одним із таких чинників стала поява та розвитку нових засобів комунікації, внаслідок чого економічні відносини вийшли за межі окремих держав та перестали бути прив'язаними до конкретної національної території. Серед причин, характерних для цієї сфери, слід зазначити появу нових способів посвідчення справжності документів та нових форм документів, за допомогою обміну якими можливе укладання, виконання договорів, вчинення інших юридично значущих для цивільного та міжнародного обороту дій. Переваги використання нових технічних засобів викликали необхідність закріплення юридичних вимог до такого використання. Однак видання спеціальних актів на внутрішньодержавному рівні не сприятиме розвитку міжнародної торгівлі, оскільки право кожної держави має свої особливості, зумовлені багатовіковими традиціями та сучасними інтересами держави у різних сферах.

Посилення взаємного впливу національних економік та правових систем потребує вдосконалення норм національного законодавства у цій сфері для того, щоб вони відповідали міжнародним стандартам. Існуючі відмінності в національних правових режимах, що регулюють електронний обмін інформації, можуть значною мірою призвести до обмеження здатності комерційних підприємств виходити на міжнародні ринки. D умовах підвищується значимість використання зарубіжного досвіду для вдосконалення національного законодавства. Ґрунтуючись на міжнародному досвіді в сфері, що розглядається, необхідно побудувати таке правове регулювання електронного документообігу, яке регламентувало б ті відносини, які не можуть бути врегульовані самими учасниками правовідносин. При цьому необхідно враховувати принципи технологічної нейтральності та функціональної еквівалентності.

Ключові слова: права людини, міжнародно-правове регулювання, електронна комерція, електронний документообіг, електронний документ, електронний цифровий підпис.