

## **ABSTRACT**

**of the dissertation for the degree of Doctor of Philosophy (PhD) in the specialty «6D030100 – Jurisprudence» by Zhetibayev Zhandos Kopzhassarovich on the topic: «Features of conclusion and execution of electronic transactions in the era of development of information and communication technologies »**

**Relevance of the research topic.** The use of new information and communication technologies in everyday life, along with electronic data exchange between subjects of civil legal relations, contributed to the formation of a completely new field of legal relations. The widespread use of new technologies in civil legal relations, taking place both in the production and in the market sphere, is one of the factors contributing to the rapid development of the country's economy. With the advent of such means of communication, a new type of "written" form was introduced for transactions of a civil nature, in particular, electronic transactions allowing remote transactions were opened, which led to serious changes in the ways of making transactions.

Speed and convenience are the main advantages of electronic document management. This allows each person to remotely enter into legal relations, significantly save time and effectively influence the interaction of subjects of civil law, providing elementary accessibility, and trust in each other. In addition, in practice, it affects improving the quality of life of the population, increasing the level of competition among entrepreneurs and achieving favorable results in relations in a market economy.

The Decree of the President of the Republic of Kazakhstan dated October 15, 2021 No. 674 "On approval of the Concept of Legal Policy of the Republic of Kazakhstan until 2030" pointed to the need to begin the development of the digital space, first of all, to improve the sphere of digitalization and informatization. At the same time, it is necessary to improve the legal regulation of information and communication technologies, e-commerce, data processing, digital assets, smart contracts, electronic documents, electronic transactions and electronic evidence on them. These amendments and additions cover both substantive law and procedural law.

The deep penetration and widespread use of new information technologies in the main spheres of society's life led to the beginning of complex processes of law enforcement and legislative practice. Since the general provisions of the Civil Code of the Republic of Kazakhstan (hereinafter referred to as the Civil Code of the Republic of Kazakhstan) and the norms reflected in special legislation cannot fully and exhaustively disclose the essence of the issue concerning electronic transactions. This leads to various disputes regarding the correctness of the method of regulating the process of electronic transactions. This leads to an erroneous formulation of the norms of legislation, an increase in the number of those who realize their unscrupulous intentions by using the weaknesses of the legislation. Therefore, today there is a need for a special regulatory legal act regulating the procedure for transactions in the electronic space.

Problematic issues such as the concept of an electronic transaction, the procedure for its execution and execution, the system of regulation of civil relations arising mainly from electronic transactions, are awaiting an answer from the legislator. Thus, it is necessary to effectively adapt the domestic legislative framework to the era of the development of new information and communication technologies, to identify the features of the conclusion and execution of electronic transactions.

At the same time, the commission of electronic transactions is regulated by the norm of general substantive law, and in its implementation it is based on a procedural norm, respectively, the norms of substantive law that have undergone changes and additions in accordance with the legal policy lead to changes in procedural legal norms. After all, if the development of information and communication technologies in Kazakhstan generates new norms concerning electronic transactions, then the norms of the Civil Procedure Code of the Republic of Kazakhstan must meet the requirements of the digital age. At the same time, a pre-trial settlement procedure is provided for in cases related to electronic transactions, regardless of the form in which it was made, the validity or invalidity of this transaction, the determination of the significance of evidence during the execution of the transaction. Thus, it is possible to trace the close interaction of the norms of substantive and procedural law for objective reasons and to show the scientific necessity of a comprehensive study of the topic of the dissertation.

**The purpose of the dissertation research** is to develop concrete proposals that contribute to improving the base of domestic legislation and law enforcement practice by analyzing legislation and law enforcement practice, legal regulation of legal relations arising based on electronic transactions in the era of information and communication technologies development.

**This goal is specified in the following tasks set for solving:**

- 1) To show the role of information and communication technologies in civil legal relations;
- 2) clarify the legal concept and essence of an electronic transaction;
- 3) Study of the features of an electronic transaction;
- 4) Analysis of international and domestic legal bases of regulation of electronic transactions;
- 5) Consideration of the procedure and properties of electronic transactions;
- 6) Identification of features of confirmation and recognition of completed electronic transactions;
- 7) Determination of the conditions for the modification and cancellation of obligations under electronic transactions;
- 8) Consideration of the specifics of providing electronic evidence during the execution, modification and termination of electronic transactions.

**The object of the research work** is civil and procedural relations arising in the process of concluding and executing electronic transactions concluded with the help of information and communication technologies.

**The subject of the research work** is legal norms on the regulation of relations arising from electronic transactions related to the development of information technologies in domestic, foreign and international law, general legal and judicial practice on their application, scientific doctrine in this field.

**Scientific novelty of research work.**

The dissertation work is the first fundamental research in the Republic of Kazakhstan in the state language, including the features of the conclusion and execution of electronic transactions. The research paper analyzes topical issues related to the legal regulation of electronic transactions, and the result of this research is a step towards improving domestic legislation and, in general, to promote the development of the doctrinal base in civil legal doctrine, especially in the state language. In particular, in the dissertation:

- the definition of the author's character to the concept of "electronic transaction" is given;
- the necessity of recognizing electronic transactions not as a form, but as a type of transactions made in writing is justified;
- in the era of the development of information and communication technologies, it was proposed to expand the ways of making transactions in writing;
- as an electronic transaction, the need for a ban on the remote conclusion of a will relating to unilateral transactions is determined;
- the domestic and foreign judicial practice regarding the invalidity of electronic transactions has been analyzed, recommendations on the formation of consistency in domestic judicial practice have been developed;
- the issue of providing electronic evidence in connection with the possibility of immediate unilateral destruction or modification of information on electronic transactions and their conclusion, modification, execution has been investigated and proposals aimed at improving legislation and judicial practice have been developed;
- A draft regulatory resolution of the Supreme Court of the Republic of Kazakhstan "On the recognition and evaluation of electronic evidence" has been developed.

**Practical and scientific significance of research work.**

The conclusions and provisions formulated in the study are recognized as the possibility of preparing amendments and additions to the Civil Code of the Republic of Kazakhstan, preparing other normative acts on the legal regulation of electronic commerce and electronic transactions in the Republic of Kazakhstan, improving procedural norms, as well as application in the field of education and judicial practice. As part of the research work, the author has developed proposals to eliminate legislative defects related to the procedure for making, executing and changing electronic transactions, their legal degree.

The results of the research can be widely used in higher educational institutions within the interdisciplinary disciplines of civil law, civil procedure law and other disciplines studying the areas of "transaction", "electronic transaction" and "electronic proof", when teaching students, undergraduates and in the framework of

scientific research. Also, the results of the study are subject to application in law-making activities in order to improve civil legislation.

**Approbation of the results of the study.** The main conclusions of the research work are reflected in the leading peer-reviewed scientific articles:

1. Электрондық мәмілені реттеуде заңнаманы жетілдірудің кезі келді // Collection of the V International Scientific and Practical Conference "GLOBAL SCIENCE AND INNOVATIONS 2019: CENTRAL ASIA". – Астана, 2019. – 351-354 p.

2. Сотта онлайн-несие қызметінен туындаған дауларды қарау мәселелері // Collection of the III International Scientific and Practical Conference "SCIENCE AND EDUCATION IN the MODERN WORLD: CHALLENGES OF THE XXI CENTURY". – Нур-Сұлтан, 2019. – 47-50 p.

3. Порядок и специфика заключения электронных сделок // Mater. international scientific conference "TOPICAL ISSUES OF JURISPRUDENCE". – Пенза, 2020. – 88-93 p.

4. Мәмілелерді рәсімдеу кезінде ақпараттық-коммуникациялық технологияларды пайдалану тиімділігі // Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan scientific and legal journal. No.2(60)-2020, 215-220 p.

5. Германия мемлекетінің тәжірибесі бойынша электрондық мәмілелердің құқықтық жағдайы // Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan scientific and legal journal. No. 3(61)-2020, 201-207 p.

6. Электрондық дәлелдемелердің азаматтық сот ісін жүргізудегі ерекшеліктері // Scientific and informational journal "Law and the State". No.3-4(88-89)-2020, 118-137 s.

7. Запрет на совершение завещания в электронном виде по законодательству Республики Казахстан: проблемы и пути их решения // Bulletin of Karaganda University. The series "Law". № 3(103)/ 2021, Pp. 163-169.

8. The Role of Information and Communication Technologies in Civil Law Relations: Analysis of the Civil Code of the Republic of Kazakhstan // Law, State and Telecommunications Review. 2021. Т. 13. № 2. P. 121–138.

**The structure of the research work** consists of an introduction, three chapters, including twelve subsections, conclusions, a list of references and three appendices and contains 181 pages.

**The first chapter** examines the situation of electronic transactions in the era of information and communication technologies. In the course of this study, the procedure for the use of information and communication technologies in civil legal relations, the role of e-commerce in the digital transformation of legal relations, the institution of "transactions" and the legal nature of electronic transactions were considered.

The author relies on the rule that a transaction is an act of personal behavior that is conscious and assumes the achievement of a goal. Despite the fact that an electronic document and an electronic signature represent a certain set of machine

information codes, it adheres to the position that an electronic transaction is a kind of written form of a transaction.

At the same time, in accordance with paragraph 1-1 of Article 152 of the Civil Code of the Republic of Kazakhstan, it is indicated that the written form of the transaction is made on paper or in electronic form; however, we believe that this provision of the Code requires changes. Since, within the framework of the Code, the word "form" is used in accordance with the oral and written forms used during the transaction, and in relation to its execution in electronic form, the use is inappropriate. Since Roman law, the institution of transaction recognizes only "oral" and "written" forms, whereas we call other renewable transactions a variety of these forms. While a transaction made on paper is traditionally made in a material environment, a transaction made in an electronic information space, which has become possible thanks to the development of information and communication technologies, has a written form there. Therefore, taking into account the difference in these two environments, electronic transactions can be recognized as a kind of transactions made in writing. In this regard, it is proposed to change the phrase "in electronic form" to "in electronic form", which is reflected in paragraph 1-1 of Article 152 of the Civil Code of the Republic of Kazakhstan.

The legal concept of information and communication technologies is still not clear in the legal sciences, and discussions within the framework of this issue are caused by a lack of convincing evidence, therefore, in the field of civil legal relations, the definition of the conceptual and terminological apparatus, including the essence of "electronic transactions", becomes relevant. At the same time, the definition of the legal nature of an "electronic transaction" began with the issuance of a definition for it, since there is no uniformity among scientists regarding the signs and definitions of an "electronic transaction". In addition, because in the domestic and a number of foreign countries the definition is not contained at the legislative level, the following definition is presented:

*"Electronic transaction - actions of individuals and legal entities expressed in writing in the information environment through the use of information and communication technologies based on the exchange of electronic data with the voluntary consent of the parties, as well as aimed at the emergence, modification or termination of civil legal relations."*

This definition includes its main features: firstly, that it is carried out in the electronic information space, which is a written transaction made in this environment; secondly, the emergence, modification or termination of civil legal relations; thirdly, an action based on the voluntary consent of the parties and aimed at their expression of will; fourth, based on the exchange of electronic data. In addition, the feature characterizing the need to identify persons making an electronic transaction was not included in the content of this definition, since the methods of signing the transaction were considered in the order of its execution.

**The second chapter** discusses the procedure for electronic transactions. At the same time, the peculiarities of the procedure for electronic transactions based on national and foreign experience, the legal nature of smart contracts with the

development of information and communication technologies and the grounds leading to the recognition of electronic transactions as invalid are investigated. As a result of the research work, a number of important points for improving the domestic legal system and legislative framework have been identified.

Firstly, an analysis of the international and national legal foundations of the legal regulation of electronic transactions suggests that a minimalist approach is acceptable for Kazakhstan, providing minimum requirements for working with an electronic digital signature and giving the parties the freedom to choose the method of signing that they consider acceptable (adopted in Australia, Canada, New Zealand, the USA and some others countries gives).

Analyzing the international and national legal bases of the legal regulation of electronic transactions, it was found that the regional associations of Singapore, the USA, Australia and the EU have more effectively and improved the legislation regulating electronic transactions. In the CIS countries, the regulations on the procedure for concluding and executing electronic transactions are insufficiently regulated, so far the legislation has not been sufficiently supplemented, which creates difficulties in the process of concluding them, changing essential requirements and ensuring the fulfillment of obligations.

Secondly, as a result of the research work carried out at the Institute of Inheritance Law on the issue of remote making of a will in electronic form, studied as a unilateral transaction, three grounds were identified for challenging this conclusion in law enforcement practice. Firstly, when making a will in electronic form, the problem of determining the will of the testator causes difficulties, since a notary remotely in electronic form cannot determine it. At the same time, if the will is drawn up electronically and remotely, this calls into question the compliance of the procedure for making a will with the requirements of the law. After all, if the testator voluntarily leaves a will at his discretion, then the possibility of leaving a will without the testator's will, with the compulsory participation of a third party, with its remote registration in electronic form increases, the means of preventing this circumstance are not covered by regulatory legal acts. Accordingly, the fact that the issue of leaving an electronic will at a distance has not been considered in detail at the legislative level is also disputed. Secondly, the remote leaving of an electronic will contributes to an increase in the number of possible frauds and cybercrimes by third parties, therefore, despite the fact that the legislation provides for legal liability for the actions of such unscrupulous persons, it is not necessary to create situations that provoke the commission of illegal actions that entail responsibility. Thirdly, in both of the above cases, inheritance leads to a violation of the rights and legitimate interests of legal entities. In this regard, there is a need to supplement paragraph 2 of Article 1050 of the Civil Code of the Republic of Kazakhstan with a new subparagraph: "3) it is prohibited to make a will in electronic form."

Thirdly, today in Kazakhstan, despite the widespread use of one-button transactions, "click contracts", "brause contracts", there are more and more cases when the text of the transaction is in an inconspicuous or unnoticeable place for the consumer, encumbrances one of the parties to the contract. The terms of the contract

concluded between these parties and the content of the contract are vague, inconvenient to read if familiarization with the content of the contract creates difficulties by forwarding links to other sites or if a person who sees, reads closely or enlarges the screen of a technical means to familiarize with the content of the transaction and violates the rights of the other party, covering all these circumstances of the transaction lead to invalidation.

At the same time, the main role is played by the requirements of "honesty, integrity and justice", which are requested by the Civil Code of the Republic of Kazakhstan. Since the encumbrance is imposed on one of the counterparties, that is, a procedural legal burden is imposed on the counterparty to familiarize himself with the contents of the transaction; his actions do not fall under the principles of "honesty, reasonableness and fairness", but go beyond it. Accordingly, the deliberately unfair actions of one party contradict and violate the norm of the Civil Code of the Republic of Kazakhstan that the rights and obligations of the parties are based on the requirements of "honesty, reasonableness and fairness".

In this regard, two proposals have been developed: firstly, Article 158 of the Civil Code of the Republic of Kazakhstan is proposed to be supplemented with paragraph 1-1 of the following content "1-1. If familiarization with the contents of the transaction by the offeror on electronic transactions is obviously difficult, the court will invalidate it or consider it in favor of the participant in this transaction." Secondly, it is proposed to amend the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated July 7, 2016 No. 6 "On certain issues of application by courts of the consequences of the invalidity of transactions and their invalidity", in particular, if, when making a transaction on the Internet, one party (the offeror) did not inform the other party (the acceptor) about the existence of the transaction or when making a transaction with the other party, in case of revealing facts that caused inconvenience, it is recommended to determine the invalidity of the electronic transaction.

**The third chapter** examines the specifics of the execution of electronic transactions, including the analysis of the grounds for changing and terminating obligations, the procedure for submitting electronic evidence for electronic transactions and mechanisms for protecting violated rights under these transactions.

Legal regulation regarding the fulfillment and enforcement of obligations under electronic transactions in Kazakhstan (mainly around the world) is at the stage of formation. This has a negative impact on the dynamics of electronic commerce, especially in cases concerning the legal status and regulation of digital assets, rights and money. The new technological and information reality dictates new principles of legal regulation of electronic transactions, covering all aspects of legal relations. Having settled some issues of legal relations and not paying attention to others, it is impossible to ensure a high level of digitalization of the economy and civil turnover. Kazakhstan is going this way now. At the same time, no matter what methods electronic transactions are carried out, they must contain clear and reasonable requirements for all participants and equal conditions for the protection of civil rights.

As an additional measure to increase the level of fulfillment and enforcement of obligations under electronic transactions, the author suggests using the experience of Australia in the execution of contracts in automated control systems. The prerequisite for such support is that deviations from the electronic contract often occur, and the use of automated solutions can facilitate the work with deviations. An increase in the number of electronic contracts and their connections with other types of corporate systems sooner or later requires a high level of their automation. One of the issues necessary to achieve this goal is to ensure a certain level of transparency regarding the performance of the concluded contract by the parties and the adoption of appropriate corrective measures based on it. This approach implies various options for ensuring contract management. Automated management of electronic contracts makes it possible to qualitatively assess the behavior of the parties and ensure the fulfillment and fulfillment of obligations under an electronic transaction.

Special attention needs to be paid to the evaluation of evidence in electronic form in the context of the problems of protecting violated civil rights in electronic transactions and arising from a lack of legislation in judicial practice. During the study, the following problems were identified: 1) in judicial practice, disputes arise about the recognition of a "screenshot" of an electronic document as electronic evidence; 2) in the courts of the Republic of Kazakhstan, it is not always possible to involve a specialist (expert) to evaluate evidence in electronic form; 3) input errors, technical violations in electronic communications, etc. regarding technical malfunctions, there is no clarity regarding the position of the legislator of Kazakhstan and the courts; 4) when checking the evidence presented by the participants in the case, the court does not have access to Internet resources containing information of significant importance to the case, due to their prohibition (blocking) by judicial acts on the territory of the Republic of Kazakhstan.

Due to the lack of clear provisions in the legislation on the evaluation of electronic evidence, many courts examine electronic evidence at their discretion. Taking into account the development of technologies and the method of law enforcement in a single arbitration and civil proceedings, it is necessary to regulate the provisions of the screenshot in the hierarchy of evidence. With regard to the evaluation of electronic evidence in court proceedings, taking into account relativity, suitability and sufficiency in resolving the case, a special regulatory resolution of the Supreme Court of the Republic of Kazakhstan is submitted:

- 1) the format of presentation of electronic evidence to the participants of the case when applying to the court with a claim, that is, the possibility of presentation on an electronic medium (CD) and transmission on another digital medium in case it is impossible to transport electronic evidence on a CD due to the features of electronic evidence;
- 2) the procedure for remote transmission of electronic evidence by the participants of the case to the court;
- 3) ensuring the quality of communication or videoconference by the person providing the electronic proof;



- 4) the possibility of determining by the judge the persons who submitted electronic evidence;
- 5) the obligation of the court to involve a specialist or appoint an expert examination in case of doubts about the authenticity of electronic evidence;
- 6) ensuring that judges conduct an assessment of electronic evidence in accordance with the established procedure;
- 7) Determination of the list of categories related to civil cases for which remote holding of a court session is not allowed.

At the same time, there is a need to expand the spectrum of the concept of "electronic document" proposed by the current civil legislation, as new information and communication technologies are developing and there are a number of analogues of digital signatures. These analogs are widely used in practice, for example, you can say "click contracts", "brause contracts", such electronic transactions are often made, however, domestic legislation does not introduce such documents into the framework of an "electronic document", since the concept of an "electronic document" regulates documents created by an electronic digital signature. Therefore, it is recommended to approach the term "electronic document" in a broad sense.

Electronic transactions cause lawyers a lot of questions that arise from the peculiarities of the online environment. This includes the role of the Internet, data privacy, identification of parties, the use of electronic digital signatures and the consequences of errors in electronic communications. The domestic legislation does not answer these questions yet. Similarly, in the future, innovative types of electronic transactions, in particular, smart contracts based on blockchain technologies, as well as "cloud contracts" and "mobile contracts", will require the attention of legislators. Taking into account the presence of non-traditional forms of transactions, the conclusion of electronic transactions requires a special approach and clearer regulation.

In conclusion, within the framework of the dissertation, topical and important issues for law enforcement practice were raised; the goals and objectives set for research work were achieved through a comprehensive analysis of these problematic issues.