

Civil Legal Handling of Electronic Transactions: The Essence and Modern Realities

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Mira A. Zhumadilova*

<https://orcid.org/0000-0002-4083-0354>

Yerkin Sh. Dussipov**

<https://orcid.org/0000-0001-6546-4576>

Gulnar I. Arginbekova***

<https://orcid.org/0000-0002-6132-9761>

Bolat Zh. Aitimov****

<https://orcid.org/0000-0001-7928-8550>

Yelena V. Milova*****

<https://orcid.org/0000-0003-3421-5141>

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Abstract

[Purpose] The purpose of the article is to consider the issue of civil law regulation of electronic transactions in many countries.

[Methodology/Approach/Design] The authors used the dialectical method of cognition of social and legal phenomena and general scientific research methods, such as analysis, synthesis, a systematic approach.

[Findings] General features of legal regulation of electronic transactions were explained. The relevance of electronic transactions is shown on the example of regulatory legal acts in this field in Kazakhstan. Advantages and disadvantages of digitalization in the field of electronic transactions were analysed. Special attention was paid to current realities of electronic transactions and electronic tendering during a pandemic. It was concluded that the advent of digital opportunities simplifies a life greatly, but since these relations are not directly regulated by the laws of several countries, great risks are created. And the adoption of new standards will reduce risks in terms of the circulation of digital rights, the purchase of financial assets and the use of new means of payment.

* Doctoral Student at the Department of Civil Law, Zhetysu University named after I. Zhansugurov, Taldykorgan, Republic of Kazakhstan. E-mail: zhumadil_mir@gmail.com.

** Full Doctor in Law, Professor at the Academy of Public Administration under the President of the Republic of Kazakhstan, Astana, Republic of Kazakhstan. E-mail: y.dussipov@yahoo.com.

*** PhD in Law, Head of the Department of General Education and Law, Bolashak University, Kyzylorda, Republic of Kazakhstan. E-mail: arginbekova91@gmail.com.

**** Full Doctor in Philosophy, Head of the Department of Criminal Law Disciplines, Zhetysu University named after I. Zhansugurov, Taldykorgan, Republic of Kazakhstan. E-mail: aitimov_b@yahoo.com.

***** PhD in Law, Associate Professor at the Department of Strategic Development, Monitoring and Quality Management, Korkyt Ata Kyzylorda University, Kyzylorda, Republic of Kazakhstan. E-mail: ye.milova8@yahoo.com.

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INTRODUCTION

The formation and development of the institution of transactions in the field of civil law relations has a long history. Since the conclusion of transactions relates to a market management, it is therefore possible to conclude that transactions occurred at the earliest stages of development of the state. Throughout the development of the state, obligatory relations, relations regarding transactions were accompanied by the adoption of legislative acts on them (ABENOV et al., 2019; ABDRIMOV et al., 2013). Today electronic transactions are quite common. These are transactions between counterparties located in different cities, and registration of rights to real estate. Today, there are 5.11 billion unique mobile users in the world, which is 2% more than in 2019. In 2019, the Internet audience totalled 4.39 billion people, which is 366 million (9%) more than in January 2018; 3.48 billion users are registered in social networks (BAKIROV et al., 2021). Compared with the data at the beginning of last year, this indicator increased by 288 million (9%); Today 3.26 billion people access social networks from mobile devices. This is 10% more than last year, when 297 million less people used social networks on their mobiles. There are 109.6 million Internet users In Kazakhstan, the penetration rate is 76% (ISSAYEVA et al., 2020).

Companies enter into transactions online, for example, by signing an agreement through the exchange of scan copies. But the tax authority often considers such transactions to be non-concluded, because, for example, the concept of field tax audits suggests that managers should meet in person. But in practice, transactions have long been transformed. Information in electronic form, signed with a simple electronic signature or an unqualified electronic signature, is recognized as an electronic document, equivalent to a paper document signed with a handwritten signature, in cases established by federal laws, normative legal acts adopted in accordance with them or an agreement between participants in electronic interaction (LAW OF THE REPUBLIC OF KAZAKHSTAN NO. 370-II..., 2003). Thus, the legal force of an electronic signature can be given by signing an agreement on its use. For example, participants in electronic interaction may agree that receiving an electronic message from a specific email address will be equivalent to signing a document with a simple electronic signature. The user may be asked to register a personal account as a necessary term for using a particular service (TUGZHANOV et al., 2010).

Judicial practice confirms the possibility of using a Short Message Service (SMS) code as a simple electronic signature. Sender information may also be

contained in message metadata. But here is the simplest option for the exchange of scan copies, photographs have not been consolidated in electronic transactions: that is, there are electronic offers and acceptance transactions, and from the point of view of legislation, such an agreement is considered as not concluded. A scientist (FABRICHNOV, 2008) in his work, in fact, recognizing the difference between electronic and documentary forms of expression of will, however, declares their identity of their legal nature. The authors believe this assertion to be incorrect since the electronic form should be considered as a documentary substitute (legal fiction), A.G. Fabrichnov ignores the psychophysical nature of the signature of a person without which there can be no transaction. Others believe that this transaction is made verbally and in a consistent manner (TATARKIN, 2009). There are also those who argue that such transactions can be made both in written and in oral (in the broad sense 'verbal') form (ROMEL, 2009). Here, the legislator speaks of the need to exchange documents, and not to provide the necessary information to agreement participants to each other.

The purpose of the article is to study the essence and modern realities of the civil legal handling of electronic transactions. The methodological basis of the study is the dialectical method of cognition of social and legal phenomena. This method gave the general direction of scientific research and allowed to study the features of the institution of consequences of transactions invalidation considered in work in the civil law of the country in the dynamics of its formation and development. Also, the methodological base of this study is constituted by general scientific research methods, such as analysis, synthesis, and a systematic approach.

SPECIFICS OF LEGAL REGULATION OF ELECTRONIC TRANSACTIONS

It is important to pay attention to the current stage of development of new information technologies, which inexorably leads towards the automation of many operations, including civil law relations. In this regard, there is a need for continuous improvement of the transaction form, which, for example, is carried out by participants in obligations to pay in cash in the form of electronic payments. In the electronic form of the transaction, most often there is no objective possibility of physical individualization of the participant in the legal relationship, since any such signs in the actions performed on electronic devices simply do not appear. At least, such a conclusion can be made by analysing the norms of civil law, in which the legislator tries to replace the natural biological qualities of a person with their legal substitutes, thereby ignoring his physical nature. In fact, it is transformed from an individual into a kind of legal entity (CIVIL CODE OF THE REPUBLIC OF KAZAKHSTAN, 1994), for which anyone who has the

ability to access electronic means of formulating a will (IP address, electronic signature), and the like, can make a deal. The meaning of the legal capacity, individual legal status and other similar traditional civil law categories is lost.

The importance of studying the form of a transaction as a legal fact giving rise to a legal relationship of one or another property is now especially relevant. In literature, the old problem of the science of civil law about the so-called “freedom of transaction form” is raised again. In the period of development of the science of civil law, this issue was not recognized as relevant and was practically not investigated. So, for example, since the adoption of the Constitution of the Republic of Kazakhstan (1995), which proclaimed the principle of “freedom of contract”, the science of civil law has again addressed the problem of “freedom of form of transaction” (NIYAZBEKOVA et al., 2016; SEMENYUK et al., 2018; SEMENYUK et al., 2019).

Regarding the form of the transaction giving rise to the legal relationship for cashless payments in the form of electronic payment, there is no unequivocal opinion in the modern scientific literature. But the fact that this problem exists and is relevant is recognized by all researchers (RYKOV, 2009; DANCHUK et al., 2021). First of all, the legislator himself, in fact, denies the written nature of transactions made in electronic form in general (CIVIL CODE OF THE REPUBLIC OF KAZAKHSTAN, 1994), and transactions for settlement in cash in the form of electronic payment, in particular. To eliminate this contradiction, the legislator is forced to resort to fiction, and replace the written form of the transaction with its documentary substitutes, giving the phenomenon those properties that it, in fact, does not possess. The need to resort to fiction already testifies to the depravity of the current institution of the transaction form, and the impossibility of implementing the proclaimed principle of its freedom in the exercise of subjective law.

The electronic form of the embodiment of will is in no way connected with the individual physical characteristics of a particular person. Their use levels the physical person. The creation of a well-known fiction does not solve the problem of individualization of the transaction participants. The peculiar nature of the electronic document and electronic signature cannot provide reliable information about the person who completed the transaction. It will always be relatively reliable. Any presumption of the reality of will inevitably leads to the priority of formalizing the source of subjective law. The arisen problem of the transaction form made by the participants in the obligations to pay in cash, carried out in the form of electronic payments, becomes foremost and relevant. The dynamics of the development of property relations is such that the electronic form of the transaction is becoming increasingly important in the lives of people and the activities of legal entities (HUSEJINOVIC and HUSEJINOVIC, 2021). It is

completely possible that in the short term, this form of transaction will become dominant.

Researchers of the phenomenon are trying to adapt such actions into one of the forms proposed by the legislator. These are unsuccessful attempts, because by their nature the electronic form of the embodiment of the will does not correspond to any of those forms in which, according to the legislator, a deal should be concluded (DMITRIK, 2007). The fact that electronic transactions are a special form of civil transactions was not announced today by civilists (VENGEROV, 1978). Given the trends in the development of electronic communications and their increasing importance in the economic life of the country in general, and in civil circulation in particular, the electronic form of transactions should be singled out as an independent form in which participants in civil relations can embody will. The developed regulatory legal acts in the field of electronic transactions in Kazakhstan are presented in Table 1. From Table 1 it can be seen that electronic transactions are very relevant in Kazakhstan, in connection with this, various legal documents are being developed related to the regulation of electronic transactions.

No.	Name
1	Civil Code of the Republic of Kazakhstan No. 268-XII dated December 27, 1994 (as amended on 10.01.2020) (CIVIL CODE OF THE REPUBLIC OF KAZAKHSTAN, 1994)
2	Order No. 176 of the Minister of Finance of the Republic of Kazakhstan “On approval of the Rules for transactions monitoring” dated March 16, 2015 (ORDER NO. 176..., 2015)
3	The Law of the Republic of Kazakhstan No. 434-V “On Public Procurements” (as amended on 01.01.2020) dated December 4, 2015 (LAW OF THE REBUBLIC OF KAZAKHSTAN NO. 434-V..., 2015)
4	The Law of the Republic of Kazakhstan No. 88-V “On state services” dated April 15, 2013 (as amended on November 25, 2019) (LAW OF THE REBUBLIC OF KAZAKHSTAN NO. 88-V..., 2013)
5	The Law of the Republic of Kazakhstan No. 401-V “On Access to Information” dated November 16, 2015 (as amended on November 25, 2019) (LAW OF THE REBUBLIC OF KAZAKHSTAN NO. 401-V..., 2015)
6	The Law of the Republic of Kazakhstan No. 418-V “On Informatization” dated November 24, 2015 (as amended on 01.01.2020) (LAW OF THE REBUBLIC OF KAZAKHSTAN NO. 418-V..., 2015)
7	The Law of the Republic of Kazakhstan No. 94-V “On personal data and their protection” dated May 21, 2013 (as amended on December 28, 2017) (LAW OF THE REBUBLIC OF KAZAKHSTAN NO. 94-V..., 2013)

8	The Law of the Republic of Kazakhstan No. 11-VI “On Payments and Payment Systems” dated July 26, 2016 (as amended on 10.01.2020) (LAW OF THE REPUBLIC OF KAZAKHSTAN NO. 11-VI..., 2016)
9	The Law of the Republic of Kazakhstan No. 202-V “On Permits and Notifications” dated May 16, 2014 (as amended on 01.01.2020) (LAW OF THE REPUBLIC OF KAZAKHSTAN NO. 202-V..., 2014)
10	The Law of the Republic of Kazakhstan No. 544-II “On the Regulation of Trading Activities” dated April 12, 2004 (as amended on 01.01.2020) (LAW OF THE REPUBLIC OF KAZAKHSTAN NO. 544-II..., 2004)
11	The Law of the Republic of Kazakhstan No. 567-II “On Communications” dated July 5, 2004 (as amended on 10.01.2020) (LAW OF THE REPUBLIC OF KAZAKHSTAN NO. 567-II..., 2004)
12	The Law of the Republic of Kazakhstan No. 370-II “On electronic document and electronic digital signature” dated January 7, 2003 (as amended on November 25, 2019) (LAW OF THE REPUBLIC OF KAZAKHSTAN NO. 370-II..., 2003)
13	Code of the Republic of Kazakhstan No. 377-V “Civil Procedure Code of the Republic of Kazakhstan” dated October 31, 2015 (as amended on 05/06/2020) (CODE OF THE REPUBLIC OF KAZAKHSTAN NO. 377-V..., 2015)
14	Resolution of the Board of the National Bank of the Republic of Kazakhstan No. 208 “On approval of the Rules for the execution of non-cash payments and (or) money transfers on the territory of the Republic of Kazakhstan” dated August 31, 2016 (as amended on 28.11.2019) (RESOLUTION OF THE BOARD OF THE NATIONAL BANK OF THE REPUBLIC OF KAZAKHSTAN NO. 208..., 2016)
15	Code of the Republic of Kazakhstan on taxes and other obligatory payments to the budget (Tax Code) (as amended on 05/06/2020) (CODE OF THE REPUBLIC OF KAZAKHSTAN NO. 120-VI..., 2017)
16	The Code of the Republic of Kazakhstan No. 235-V on “Administrative Offenses” dated July 5, 2014 (as amended on May 16, 2020) (CODE OF THE REPUBLIC OF KAZAKHSTAN NO. 235-V..., 2014)
17	Order of the Minister of Finance of the Republic of Kazakhstan No. 222 dated February 16, 2018 On approval of the Rules, terms and form of provision by persons engaged in electronic goods trade and applying the norms of the tax legislation of the Republic of Kazakhstan in terms of reducing the estimated amount of corporate income tax, reducing the taxable amount of individual entrepreneur’s income for the taxable income of an individual entrepreneur, and reducing the taxable income of an individual on taxable income individual entrepreneur information on such activities (as amended on December 12, 2019)

	(ORDER OF THE MINISTER OF FINANCE OF THE REPUBLIC OF KAZAKHSTAN NO. 222..., 2018)
18	Resolution of the Board of the National Bank of the Republic of Kazakhstan No. 202 “On approval of the Rules for the issue, use and redemption of electronic money, as well as requirements for electronic money issuers and electronic money systems in the Republic of Kazakhstan” dated August 31, 2016 (as amended on 08/27/2018) (RESOLUTION OF THE BOARD OF THE NATIONAL BANK OF THE REPUBLIC OF KAZAKHSTAN NO. 202, 2016)
19	Order of the Minister of Finance of the Republic of Kazakhstan No. 221 “On approval of the Rules, terms and form for the submission of information by persons engaged in the shipment, transportation, delivery of goods in electronic goods trade at the request of state revenue authorities” dated February 16, 2018 (as amended on December 18, 2019) (ORDER OF THE MINISTER OF FINANCE OF THE REPUBLIC OF KAZAKHSTAN NO. 221..., 2018)
20	Minutes of the meeting No. 28-1/57 dated February 28, 2017 on the development of electronic commerce in the Republic of Kazakhstan (MINUTES OF THE MEETING NO. 28-1/57..., 2017)
21	Order of the Minister of National Economy of the Republic of Kazakhstan No. 98 On approval of the Rules for maintaining the register of public services dated November 20, 2014 (as amended on March 10, 2020) (ORDER OF THE MINISTER OF NATIONAL ECONOMY OF THE REPUBLIC OF KAZAKHSTAN NO. 98..., 2014)
22	Order of the acting Minister of Investment and Development of the Republic of Kazakhstan No. 1271 “On approval of the Rules for posting information on web-site of open budgets” dated December 30, 2015 (as amended on July 23, 2018) (ORDER NO. 1271..., 2015)
23	Order of the acting Minister for Investment and Development of the Republic of Kazakhstan No. 74 “On approval of requirements for the content, maintenance and information filling with electronic information resources of the e-government web-site” dated January 26, 2016 (ORDER NO. 74..., 2016)

Table 1 – Regulatory Legal Acts in the Field of Electronic Transactions.¹

ADVANTAGES AND DISADVANTAGES OF DIGITALIZATION IN THE FIELD OF ELECTRONIC TRANSACTIONS

Digital regulation has pitfalls. It should be admitted that the mechanism of legislative regulation of electronic transactions has not been fully developed.

¹ Elaborated by the authors.

Currently, cybercrime is spreading, one of the pressing problems. This concept refers to the commission of crimes in the field of high technology. Cybercrime is any illegal action in the electronic sphere that is committed using or against computer technology. Today, virtually none of the Internet users can be completely immune from fraud in the digital world (SULEIMENOV et al., 2022). Unfortunately, the law in a digital space is not fully developed yet and cannot guarantee the punishment for illegal actions on the Internet. Therefore, the introduction of the concept of digital rights and electronic transactions will not save society from fraud, it will not protect copyrights, it will not save from illegal transactions, including real estate. The digital space cannot be fully regulated, since it is developing outside the framework of one country, development in other countries is much more formed. Changes in electronic transactions will not change the statistics on the use of the Internet in financial transactions (ABDRAIMOV et al., 2013; SANALIEVA et al., 2018).

In Kazakhstan, in the revision prepared for consideration in the first reading, the draft legislation contained the term ‘digital money’, but in the subsequent it was withdrawn. Under them was recognized a set of electronic data (digital code or designation) not certifying the right to any object of civil rights, created in a decentralized information system and used by users of the system to make payments. It was consolidated that digital money is not obligatory for receiving all types of payments (they are not legal means of payment), however, in cases and under conditions established by the law, they can be used by individuals and legal entities as a means of payment. Thus, virtual money settlements will not actually develop, their own cryptocurrency will not appear. Legislation actually establishes rights and electronic transactions. Cashless funds, non-documentary securities, property rights will acquire the following structure: things (including cash and documentary securities); other property, including property rights (including cashless funds, uncertificated securities, digital rights).

Initially, the draft legislation had a broader definition. The contract was considered concluded

“in cases where a person expresses his will using electronic or other similar technical means (for example, by transmitting a signal, including when filling out a form on the Internet), if, under the terms of such a will, the indicated actions are sufficient to express a will or if from the prevailing custom in the relevant field of activity it follows that the performance of these actions is recognized as observing the written form of the transaction”.

In fact, the parties could independently determine whether the contract is concluded or not.

Digital rights and electronic transactions should be regulated primarily to protect the parties of transactions themselves. It is very important to establish the turnover of such objects. Currently, financial assets issued in electronic form are developing. Transactions will be easier to carry out, for example, by signing on the site, carrying out the will. For these purposes, sending SMS notifications can be used. A single biometric system can be used to identify individuals who expresses a will. For example, it will not be possible to make and agree testaments by electronic or other technical means, which will protect the heirs from transferring property to unfair persons. At the same time smart transactions will receive a spread. They imply that under certain conditions the information system itself can perform the necessary actions: the simplest example is auto payment, which can be set up in a commercial bank. Thus, digital rights are a modern synonym for freedom of enterprise, freedom of information interaction, freedom of the Internet, free flow of capital, and contractual freedom.

CURRENT REALITIES OF ELECTRONIC TRANSACTIONS AND ELECTRONIC TENDERING DURING A PANDEMIC

In connection with the ongoing pandemic that comes into force immediately, the United Nations (UN) Secretariat already requests filing applications and proposals only by electronic means. The tender documents issued by the procurement staff of the UN Secretariat indicate the following submission method. Sellers are encouraged to follow the latest request/bidding instructions sent by their respective procurement officials and contact them if they do not receive new request/bidding instructions. Suppliers are advised that the UN does not require or accept physical requests/bids, whether by courier, FedEx, DHL, personal delivery, or similar physical means. Opening of public auctions (tenders). All open auctions were cancelled immediately. Suppliers who submitted bids as a result of an invitation to bid were able to request a summary offer sheet (which included the list of suppliers who submitted bids and the total cost of their bids) within 30 days of the tender opening date by email. Suppliers who submitted proposals as a result of the request for proposals were able to request a list of suppliers who submitted proposals within 30 days of the tender opening date by email.

The contractors demanded that the procedure of the European Union (EU) became digital during a pandemic and beyond Opening of public tenders. All open tenders were cancelled immediately. Suppliers who submitted applications as a result of invitations to tender were able to request an abstract list of proposals (which included a list of suppliers who submitted applications and the total cost of their applications) within 30 days from the date of opening of the tender by e-mail. Suppliers who submitted proposals as a result of the request for proposals

were able to request a list of suppliers who submitted proposals within 30 days from the date of tender opening by e-mail. Contractors demanded that EU procedures become digital during the pandemic and beyond. On the process of localizing a pandemic and considering tenders, a question arises that is asked by each consultant working with the European Union. There is a decrease in the volume of short-term work offered by the development department of the commission by about a third in March, and was expected in April-May (BUSURMANOV et al., 2016).

Tele mediated work is relevant in many areas, such as macroeconomic analysis, public finance management, the situation is normalized, more electronic tendering transactions are encouraged. When conducting tenders, it was decided to allow the submission of proposals and invoices in electronic format, taking into account current agreements on tele mediated work. The European Federation of Management Consultant Associations, and the European Federation of Consulting Engineer Associations, have requested the Commission that all procedures become digital during the coronavirus pandemic. In a pandemic, the traditional process of electronic procurement in the European Union, both for expressing interests and for submitting applications, asking that documents be printed, signed and sent in their original form, cannot be supported. The same applies to reports, invoices and supporting documents during the project implementation, they wrote.

The joint letter calls on the commission to allow the sending of all documentation in electronic form using technical means ensuring the confidentiality of financial proposals and receiving documents. Wynroc welcomed the commission's decision to launch the new OPSYS online system as part of the 2018 SIEA framework contract. This covers only a part of the total procurement, and is difficult to deploy during a pandemic. To be able to work with OPSYS, you need to register, have a special number, it takes a lot of time to get this. It's complicated. Need a lot of documents. And, considering the current circumstances, it will be really impossible to obtain these documents. The commission needs to find a temporary solution, and then, of course, continue to work on the e-procurement system in the longer term.

Experts predict that digital work arrangements in the EU designed to combat the blockage of coronavirus will continue. Sending documents worldwide with couriers no longer makes sense, and many donors have already switched to fully digital. France. The pandemic that hit France is a serious violation for current and future tender procedures for public procurement and contracts in the country. Companies that are in a process of signing a government contract (purchase or concession contracts) may anticipate the consequences of COVID-19. Current tender procedures are likely to be suspended or delayed. Due to the situation with

COVID-19, public hospitals or customers who need, for example, special IT equipment or telecommunications equipment, may need to purchase medical equipment or other equipment urgently (COMMUNIER and WEISS, 2020; JOMARTOVA et al., 2021).

The state buyer may terminate the current tender procedure, but must justify its decision to refuse. The decision of the procedure waiver should be based on good reasons, such as the need to ensure equal competition between candidates. Government purchasers should report this decision to all candidates. Applicants participating in the tender process may appeal this decision to be left to the administrative courts. The containment measures adopted in France since March 18, 2020 after the pandemic spread did not allow the majority of government purchasers to conduct numerous tender procedures that were involved, since site visits or interviews were not possible.

A public buyer may extend the duration of the tender and currency of the tender under certain conditions. The government purchaser must request candidates for consent to this extension. If all candidates agree to extend the validity of their proposals, the state purchaser may set a new deadline and extend the validity of already submitted proposals. If the candidate does not agree with such an extension of time, the state purchaser cannot postpone the deadline for the tender procedure and can either conclude the contract in the initial term or refuse it.

On an emergency basis (Article R. 2161-8 3 of the Procurement Code of France) (CODE DES MARCHES PUBLICS, 2006), the state purchaser may decide to reduce the deadline for receipt of applications to expedite the tender procedure. An emergency leads to events caused by the state buyer, or events that were unforeseen for the state buyer. In case of litigation, the administrative courts, on the basis of an analysis of a particular case, determine whether the conditions of a simple state of emergency are met. In case of emergency (Article R. 2122-1 of the French Procurement Code) (CODE DES MARCHES PUBLICS, 2006), the state purchaser may decide to sign a public procurement contract without any tender procedure. The imperative urgency hypothesis is limited, it should come only from external circumstances that could not be provided for by the state purchaser, and prevent them from observing the normal terms of the tender. In case of a pandemic, health crisis, government purchasers (e.g., hospitals, ministries) and hospitals can order medical equipment on this basis. However, as indicated by the legal department of the Ministry of Economy by decree of March 19, 2012, these orders must be limited in time and amount strictly necessary to meet the urgent health needs, even if these orders need to be updated.

CONCLUSIONS

Thus, in the course of studying the research topic, it was found that in civil law, a transaction acts as a universal means of individual regulation of social relations and therefore is an integral part of civil turnover. Effective legal regulation of this institution is one of the conditions for ensuring the sustainability of civil turnover and stable economic development of society as a whole. The significance of the institution of transactions in the civil law system determines the relevance of studying all issues related to it, including the types and forms of transactions. So, in Kazakhstan, a number of transactions can be concluded in electronic form:

After identifying users in the information system, their further behaviour is subject to the algorithm of the computer program. A person acquiring a digital right will automatically receive this item upon the occurrence of certain circumstances. The transaction will be executed without additional orders of the parties: the digital right will be debited from the seller, and money from the buyer. Thus, the will of a person aimed at concluding an agreement also includes the will aimed at fulfilling the obligation. Additional requirements may be established by the law and by agreement of the parties that the form of the transaction must be met (execution on a form of a certain form, sealed with a seal, etc.), and provide for the consequences of non-compliance with these requirements. The requirement for a signature is deemed to be fulfilled if any method is used to identify reliably the person who expressed the will.

The Law on Access to Information refers to the exchange of electronic messages, each of which is signed with an electronic signature or another analogue of the handwritten signature of the sender of such a message. It seems that in case of contracts executed on paper, one of the methods for reliable determination of a person may be handwriting examination. A new feature has been introduced for the agreement on the provision of information services: an obligation may be provided for one or both parties not to take actions for a certain period of time, as a result of which the information may be disclosed to third parties.

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Contact:

Universidade de Brasília - Faculdade de Direito - Núcleo de Direito Setorial e Regulatório
Campus Universitário de Brasília
Brasília, DF, CEP 70919-970
Caixa Postal 04413

Phone: +55(61)3107-2683/2688

E-mail: getel@unb.br

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