UDC 347.440+347.441
DOI https://doi.org/10.32849/2663-5313/2021.11.01

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Briukhovetska, Maryna (2021). Civil law regulation of information technology (IT) contracts. *Entrepreneurship, Economy and Law*, 11, 5–10, doi https://doi.org/10.32849/2663-5313/2021.11.01

CIVIL LAW REGULATION OF INFORMATION TECHNOLOGY (IT) CONTRACTS

Abstract. ***The purpose*** is to analyze and substantiate the expediency of settling legal relations arising in the IT sphere by means of the contract, definition of the legal nature of the specified type of contracts.

Research methods. The work is based on general scientific and special methods of scientific knowledge.

Result. Taking into account these methods, the article considers the current problems of civil law regulation of information technology contracts. The concept of "information technology" and its substantive components are considered. It is determined that the development of the IT sphere stimulated a noticeable change in public relations. As a result, there is an urgent need to create an appropriate mechanism for legal regulation. It is established that the most effective way of such regulation is the conclusion of a relevant agreement. The author also analyzes the legal nature of these agreements. The analysis of judicial practice is carried out, and it is determined that courts characterize IT contracts differently. Examples of judgments of the Supreme Court, whic\h contain conclusions on the content and legal nature of IT contracts, are given. The bills regulating the performance of labor functions remotely are analyzed. The research studies the legislation on creating an environment that will stimulate the development of the digital economy in Ukraine. The legal regulation of concluding contracts in digitalization is considered.

Conclusions. The author concludes that the transformation of traditional spheres of public activity has occurred due to the application of innovative technologies. Therefore, an IT contract should be recognized as a type of contract that regulates public relations in the intellectual and information sphere. The conclusion of such an agreement is the most appropriate way to settle the relevant type of legal relations. At the same time, the specified type of the contract, considering its features, must be statutory consolidated in the provisions of the Civil Code of Ukraine.

Key words: civil law regulation, information technology, provision of services, IT contracts, judicial practice.

1. Introduction

The development of the digital economy in Ukraine contributes to the emergence and expansion of new models of legal relations. Innovative technologies create a new reality that requires the adaptation of almost all legal institutions. To realize human capacity in such conditions, there is an obvious need to create a clear framework of legal regulation. In the scientific literature, the concept of "information technology" means a set of interdependent information processes (Firsova, 2013).

Moreover, the international literature states that information technologies (IT) cover any form of technology, that is, any equipment or technique used by a company, institution, or any other organization that systematizes and processes data. This process includes computational, household devices, telecommunications technologies, as well as consumer electronic means of use and broadcasting as it becomes increasingly digital. The rapid development of information technology began in the mid-1960s. Over the past decades, technology has spread to virtually every area of society and has almost inextricably linked the areas of public life: industry, education, medicine, science, professional telecommuting, entertainment, and business (Grauer, 2001).

In these circumstances, it seems that the contract is the most effective form of legal consolidation of the desired economic content of the parties.

2. Determination of the essence of the IT contract in civil law and scientific doctrine

Article 6 of the Civil Code of Ukraine stipulates that the parties have the right to enter into an agreement that is not provided for by acts of civil law but meets its general

principles, the so-called "unnamed contracts". An important condition for concluding this type of contract is the agreement of the parties on its subject (Civil Code of Ukraine, 2003).

In particular, it is also determined that the parties have the right to settle in the contract, which is provided by acts of civil law, their relations, which are not regulated by these acts, namely to conclude a "named contract" taking into account the subject of such a contract.

In the author's opinion, the specifics of the application of the principles of legal regulation peculiar to IT include the presumption of transparency and reliability of information, its effective use, which is the object of legal relations. The legal relations arising in the field of information technology are characterized by specific features.

It should be noted that free modeling of IT contracts does not always minimize the risks for each party. Despite the dispositive nature of these contracts, their interpretation, amendments and additions are often difficult because they set a precedent.

Nowadays, the only legal nature of the contract, which would regulate IT legal relations, remains uncertain. The application of the Commercial Code of Ukraine or the Civil Code of Ukraine does not directly determine the specifics of the essential conditions necessary to regulate the creation or use of various objects of the IT sector.

K. Yefremova considers the content of Internet relations and emphasizes that their regulation is an important area of work of lawyers. It is necessary to clearly define the basic concepts of these relations, ways to regulate them, to pay attention to their subjective composition (Yefremova, 2014, p. 8).

N. Kuchakovska notes that the current legislation does not have a single approach to the concept of a contract form. According to the scientist, the form of the contract is a way to reflect the mutual will of the parties to the contract towards its content on the appropriate media. The scientist considers the procedure for concluding electronic contracts by agreeing and sending them via the Internet and states that the current legislation needs to be improved in the research area (Kuchakovska, 2016, p. 64).

Simson O.E. rightly says that most companies operate in different countries, therefore, this format of work significantly affects the execution of legal relations. These specifics are clearly reflected in the agreements concluded between such entities. The scientist points to the fact that the IT law of Ukraine is still developing and also has its own features that follow from the state of the IT market. In Ukraine, the IT industry ranks third in terms of exports. Almost 54% of customers are the United States, which accounts for more than half of the global IT services market (Simson, 2017).

I. Koval holds that the legal form of contractual relations within the framework of attracting exclusive rights to innovation should create conditions for reducing risks in intellectual property relations. At the same time, the scientist emphasizes the need for legislative regulation, as well as functional and specialized legal framework (Koval, 2015, p. 52).

K. Kustovska, analyzing the legal nature of the information technology contract, marks that it is a kind of a contract for work and labor. It is reasonable to think that an important prerequisite for the final desired outcome is the proper and timely execution of contractual relations in the field of production of information outputs, the proper implementation of each party's obligations (Kustovska, 2017, p. 35).

3. Judicial practice of the application of IT contracts

Analyzing the case law, one can repeatedly find the conclusions of the courts on the mixed nature of contracts in this area.

For example, in case № 910/2683/19, the defendant and the plaintiff concluded a contract under which one party undertook to provide comprehensive creative, informational, digital, advertising, marketing, promotions services, services for design development and functional content of the website, supply of software, as well as provide other services related to the promotion of the brand, product and services on the Internet defined by this agreement, and the other party undertook to accept and timely pay for services / works / software security (Supreme Court ruling, June 2020).

The courts of first and appellate instance resumed that the concluded agreement is mixed by its legal nature and contains elements of agreements for the provision of services, contracting, production and transfer of intellectual property rights, etc. At the same time, the Supreme Court found unreasonable and disregarded the applicant's allegation that the courts of previous instances, in violation of Article 236 part 4 of the Commercial Procedural Code of Ukraine, had failed to take into account the Supreme Court's findings as of October 2, 2012 in Case 23/236 on the application of part 4 of Article 822 of the Civil Code of Ukraine, as the contract has no features of a construction contract.

Thus, if the parties have erroneously incorrectly named or chosen the type of contract, then to settle the legal relations arising between them, the legal classification of the contract,

in fact, is carried out by the courts during the judicial settlement of the dispute between the parties.

To implement an effective management of intellectual property in the digital space, on April 15, 2021, the Verkhovna Rada adopted in first reading the draft Law "On Stimulating the Development of the Digital Economy in Ukraine" № 4303 (hereinafter referred to as "the Law № 4303") (Draft Law № 4303, 2020).

As defined in the explanatory note, the purpose of the bill is to form an advanced digital economy in Ukraine in the coming years and increase the share of high-tech products and services in Ukraine's total GDP (gross domestic product) to 10 percent.

The provisions of the bill propose to create Diia City – an environment (ecosystem) that will stimulate the progress of the digital economy, developments in advanced technologies with high added value, and the formation of the knowledge economy.

The legislator determines the option of choosing a contractual form of employment contract in the registration of employment relations between residents of Diia City and their employees, which solves a number of problematic issues of employment and performance of their direct functions.

Thus, according to statistics provided by the State Labor Service, the largest number of violations in the field of employment are committed by IT companies. To avoid the conclusion of employment contracts, companies use circumvention of the law. For example, they conclude contracts with natural persons-entrepreneurs, which allow the actual admission to work of employees without concluding an employment contract, keeping shadow tax documentation and hiding the real amount of wages (Lukash, 2019, p. 81).

Thus, the need for the adoption of this bill is noticed in the objective need to create an independent legal direction, using traditional institutions of private and public law not limited to the classical concepts of civil doctrine.

It should be highlighted that as a result of the development of digital economy, which is also called IT – network economy, the concept of "virtual organization" is increasingly used in the information society. O.V. Bignyak defines it as "the adaptation of business to the conditions of the post-industrial society that exists in the realities of the digital environment, when the leaders of organizations begin to understand that business will develop only when the organization is strongly connected with modern technologies, including the Internet" (Bignyak, 2018).

After the active transition of employees of all types to remote work, which was caused by the consequences of the spread of respiratory disease COVID-19, there was a need to take measures to regulate labor relations.

Many international companies, such as Microsoft, Apple, Google, consider the remote form of work as prospects for the development of labor relations in general (Clayton, 2021).

However, Ukrainian legislation is still at the initial stage of the development of statutory regulation of such legal relations.

Therefore, in 2020, the bill "On Amendments to Certain Legislative Acts to Improve the Legal Regulation of Telework" was registered. Based on the content of the explanatory note, the main purpose of the adoption of the law is to reform the old legislation, adopted in 1995, in the context of digitalization. This bill came into force on February 4, 2021 (Law of Ukraine № 1213-IX).

With regard to the legal regulation of the conclusion of contracts, it should be noted that the draft Law № 4303 conceptually new interprets the institution of compensation and recovery of damages for improper performance of the contract.

The legislator proposes to use such a concept as "assurance" with the introduction of a relevant article in the Civil Code of Ukraine, referring to the ineffectiveness of the current rule on the legal consequences of an agreement in which one party misled the other party on material circumstances. Thus, the draft determines the possibility for the parties to agree on a list of assurances provided regarding the circumstances and relevant to the conclusion, performance or termination of such an agreement.

Analyzing the outlined issues, it should be noted that the assurance should be understood as written guarantees of compliance with the actual circumstances that are essential to the contract. In fact, assurance is a mechanism for preventing risks by the parties.

At the same time, the provisions of this bill provide for the non-obligation to prove all the constituent elements of a civil violation. The option of payment of compensation is determined on the model of the English institute of indemnity, the essence of which is that one party to the contract may oblige the other party to pay compensation in the event of contractual circumstances not related to breach of obligations. Compensation is paid regardless of the intent and fault of the person who undertakes to pay the compensation.

This position is not entirely consistent with established case law and civil law provisions.

The Supreme Court in the case № 759/2997/17-ts considering the issue of imposing a penalty for late fulfillment of obligations under the contract for the provision of services for the development and implementation of Internet-oriented software, concluded that the courts should assess the arguments of the executor guilt in his actions, as well as the agreement of the parties on non-fulfillment of obligations regardless of the deadlines (Supreme Court ruling, March 2020).

Thus, in the opinion of the Supreme Court, the appellate court unreasonably rejected the arguments of the defendant to establish the circumstances relevant to the proper resolution of this case, in particular the absence of his guilt in non-performance of the service contract and unreasonable penalty.

The provisions of the mentioned draft also provide for the avoidance of unjustified reduction of compensation in court, unless the party proves that it did not intend to increase the damages. In such cases, the courts must rely on the evidence base to promote compliance with the principles of fair trial.

A separate problem, in the author's opinion, is the recognition of electronic documents (electronic contracts) as court evidence. At present, there is no proper legal regulation in the procedural codes, which would detail the fundamental possibility of using such evidence.

The exercise of the rights of the parties significantly depends on the legal nature of the contract in terms of its voluntary or legally binding nature. The Draft Law № 4303 will ensure the conditions for the conclusion and proper fulfillment of IT contractual obligations, protect the rights of the parties to the contract in the introduction of innovative technologies in private law relations.

The scientific literature contains numerous scientific positions that an important tool for legal regulation of the IT market is the creation of an effective regulatory framework that will promote the development of the Ukrainian market of information technology. Thus, the specified legal regulation should include provisions on protection of intellectual property rights, antitrust policy, regulate fair competition, determine industry standards. In addition, it is essential to take measures to combat cybercrime and trafficking in information technology. These measures should be aimed at promoting the advancement of the IT market and information society, as well as the implementation of international agreements in national law (Lytvyn, 2011, p. 83).

4. Conclusions

Given the above, the author concludes that in Ukraine, the digital economy has begun to develop rapidly, resulting in new models of legal relations. Thanks to the use of innovative technologies, the transformation of traditional spheres of public activity has taken place. This requires the adaptation of almost all branches of law to such a process. Thus, there is an obvious need to create a clear mechanism of legal regulation not similar to other, new areas of legal relations.

In our opinion, an IT contract should be recognized as a type of contracts that regulates public relations in the intellectual and information sphere. An IT contract is an agreement between a customer and a contractor to provide services or perform work in the field of information technology. The definition of intellectual property rights transferred under this agreement is crucial in its content. The peculiarity of such contracts lies in the fact that it can be concluded even through a mobile application.

Entering into an IT contract is the most appropriate way to settle legal relations arising due to the provision of relevant services and performance of work. At the same time, this type of agreement, given its features, should have a clear legislative enshrinement in the provisions of the Civil Code of Ukraine, which will determine its legal nature and regulate the procedure for concluding and terminating.

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ЦИВІЛЬНО-ПРАВОВЕ РЕГУЛЮВАННЯ ДОГОВОРІВ У СФЕРІ ІНФОРМАЦІЙНИХ ТЕХНОЛОГІЙ (IT)

Анотація. ***Метою статті*** є аналіз та обґрунтування доцільності врегулювання правовідносин, що виникають у сфері інформаційних технологій (IT), за допомогою договору та визначення правової природи цього виду договорів.

Методи дослідження. Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання.

Результати. З огляду на зазначені методи у статті розглядаються актуальні проблеми цивільно-правового регулювання договорів, що укладаються у сфері інформаційних технологій. Розглянуто поняття «інформаційні технології» та його змістові складники. Визначено, що в результаті розвитку IT-сфери відбулася помітна зміна суспільних правовідносин, унаслідок чого виникла

нагальна необхідність створення відповідного механізму правового регулювання. Констатовано, що найефективнішим способом такого регулювання є укладення відповідного договору. Автором також проаналізовано правову природу вказаних договорів. Проведено аналіз судової практики та визначено, що суди по-різному характеризують договори у сфері ІТ-технологій. Наведено приклади судових рішень Верховного Суду, у яких містяться висновки щодо змісту і правової природи ІТ-договорів. Проаналізовано законопроєкти, що регулюють виконання трудових функцій дистанційно. Приділено увагу вивченню законодавства щодо створення середовища, яке стимулюватиме розвиток цифрової економіки в Україні. Розглянуто правове регулювання укладення договорів в умовах діджиталізації.

Висновки. Унаслідок дослідження обґрунтовано, що в результаті застосування інноваційних технологій відбулася трансформація традиційних сфер суспільної діяльності. Тому ІТ-договір варто визнати як вид договорів, що регулюють суспільні відносини в інтелектуальній та інформаційній сфері. Укладення такого договору є найдоречнішим способом урегулювання зазначених правовідносин. Водночас цей вид договору, з огляду на його особливості, повинен мати чітке законодавче закріплення в положеннях Цивільного кодексу України.

Ключові слова: цивільно-правове регулювання, інформаційні технології, надання послуг, ІТ-договори, судова практика.

The article was submitted 12.11.2021
The article was revised 03.12.2021
The article was accepted 24.12.2021