

American University in Central Asia  
International and Business Law Department

**SENIOR THESIS**

for Bachelor Degree of the International and Business Law

**VALIDITY OF THE ELECTRONIC CONTRACT IN  
THE LEGISLATION OF THE KYRGYZ REPUBLIC**

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## ABSTRACT

This thesis research paper is devoted to identify the role of the electronic contracts in the legislation of the Kyrgyz Republic, whether electronic contracts are legal and whether they differ from regular contracts in the sense of their validity. By the end of the research paper the issue of the need in a new legal basis for such contracts in Kyrgyz legislation will be discussed. To answer the above stated question the author used the mixed quantitative and qualitative methodology, in particular analysis, synthesis and empirical research method. Prior identifying the validity of the electronic contracts, the paper will assess nature and role of electronic contracts. Therefore, Chapter I of the following thesis research paper will be concentrating on the role that electronic contracts play in different legislations. Existing normative legal acts of the Kyrgyz Republic that are related to electronic contracting were examined for the necessity and enforceability. Moreover, for comparative purposes the legal system of other countries as the European Union and the Russian Federation were reviewed. The subject of the electronic contracts include such legal relationships as B2C (Business to Consumer), B2B (Business to Business), C2C (Consumer to Consumer) and B2G (Business to Government). Each of them has many problems in the sense of validity and enforcement and is very broad. Therefore, the author found it appropriate to delimit the research to civil legal relationships that involve Business (legal entities). These are B2B and B2C model relationships.

## INTRODUCTION

Internet is entering into our life at an exponentially fast rate. Can you even remember the last time when you sent a handwritten letter via postal office? Statistics show that the number of Internet users in Kyrgyzstan has tripled its amount since 2009. (*see Annex 2 and Annex 3*) This means, that more and more people are getting involved in the electronic activities every day in the territory of the Kyrgyz Republic and around the world. Subsequently, this demonstrates the importance of the strong legal basis regulating civil legal relationships occurring in the Internet.

Concluding an electronic contract in cyber space is not news for a modern man. All over the world, many transactions are conducted electronically. Almost all of us are faced with the conclusion of electronic contracts every day. If we take even ATMs that we use to cash out money from a bank card, or when we load money into terminals in order to deposit units on our cell phone for our daily conversations, in these, and many other day-to-day activities, we are concluding electronic contracts. All over the world millions of transactions are conducted electronically, where the parties do not even physically see or meet each other. Online shopping, for example, gives to buyers an opportunity without leaving their house, to view, compare, select and buy the product with no help or advice of the shopping assistant. Moreover, negotiations, pricings, tender offers and many other business activities are concluded electronically.

However, what is the electronic contract? Does it need to be legally regulated? Is electronic contract lawful? Is it valid at all? Does it have its own distinctive characteristics relevant only for electronic contracts? Can the criteria for assessing the validity of regular contracts be used when determining the validity of electronic contracts? All of these issues raise many other questions, especially about the validity of the electronic contracts as a whole and its compliance to the legislation of the Kyrgyz Republic.

The purpose of the work is to identify the nature and role of electronic contracts and to determine, whether electronic contracts are valid and legal in the legislation of the Kyrgyz Republic. By the end of the thesis research paper the issue of the necessity in a new legal basis for such contracts in Kyrgyz legislation will be discussed. **The following research questions were arisen to achieve the indicated purpose:**

- Whether the legislation of the Kyrgyz Republic recognizes such contracts as electronic contracts?
- Whether electronic contracts differ from regular contracts, particularly in the sense of their validity?
- Whether there is a need to create a new legal basis for concluding electronic contracts?

In order to answer the above stated questions the author analyzed the legislation of the European Union countries. The European Union being one of the most developed countries in doing business, has a very strong legal basis for regulating legal relationships that occur as a result of conclusion of electronic contracts. Moreover, the legislation of the Russian Federation on the issue of the electronic contracting was also reviewed for comparative purposes, as Kyrgyzstan and the Russian Federation have the same background, legal system and both were part of the Soviet Union before.

First, let us determine, what the electronic contract itself is. Electronic contracts are the base for the electronic business. Many different electronic contracts all together make an electronic business. The term “electronic business” was first used by the IBM Company in its thematic advertisement campaign in 1997. They determined it as “...safe, flexible and complex approach in providing a consumer and differentiating consumer values through unification of the system and processes, which are the base for the main functions of business with the simplicity

and coverage that is provided by the Internet technologies.”<sup>1</sup> Thus, doing electronic business and concluding electronic contracts is safe, complex and simple to use. Since then, the electronic business is widely used starting with the large international companies ending up with the individual entrepreneurs.

In the opinion of the qualified lawyer specializing in the field of contracting law Madykov Murat “an electronic contract is a contract that is concluded with the help of electronic device of communication and computer technologies, without making a paper documents.”<sup>2</sup> Moreover, these contracts are concluded in a digital way, in cyber space. However, this definition should take into consideration cases when either offer or acceptance is made by the paper document. For example, if offer is made in an electronic document, but acceptance is made in a paper document or vice versa will it be an electronic contract? In order to make it clear, this definition should also include a word “either” [offer and acceptance]. Due to the fact that if the offer and acceptance, or whichever of them is made electronically, then, the contract will be concluded in an electronic way. Therefore, for purposes of this thesis paper, the term electronic contract is understood as any contract where offer and acceptance, either of them or both offer and acceptance are made with the help of the electronic device of communication is considered to be the electronic contract.

**The following tasks were posed to answer the research questions:**

1. To study the existing normative legal acts in Kyrgyz Republic that define and regulate electronic contracting;
2. To analyze the existing normative legal acts on electronic contracting of the foreign countries such as the European Union countries and the Russian Federation;

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1. Eimor D. Electronic business: evolution and/or revolution. M., 2001. p. 35.

2. Murat Madykov, “Nekotore yuridicheskie aspekty kupli-prodaji posredstvom seti Internet v sovremennom Kyrgyzstane.” *Pravo i Predprinimatel'stavo*, N 6 (December 2004): 47.

3. To assess, compare and discuss the electronic contract for the validity by the criteria for the regular contract validity assessment;
4. Make conclusion on a need for a new legal basis in the Kyrgyz legislation to regulate relationships that occur as a result of electronic contracting.

**Methodology used.** The conducted work is based on researches and works of the Russian, Kyrgyz, American and French legal scholars and practicing lawyers. In order to understand the differences, if there are any, between the validity of the regular contracts and electronic, the comparative-legal method and analysis was used. In particular, the electronic contract was tested by the contract validity criteria of the regular contracts. Furthermore, in order to get acquainted with the legal regulation tools of the foreign countries the legislation of the European Union countries and Russia were reviewed, which also used the comparative-legal method. The author used a case law study, as well as took interviews from the legal scholars and specialists working in this field using empirical method.

**Scientific novelty of the work.** Currently, this field of law has very few legal works and researches of Kyrgyz legal scholars and other specialists, which analyze the issue of legality of the electronic contract. Although electronic contracting is not a new field in the Kyrgyz legislation, this issue is being ignored either by the Kyrgyz legal scholars or authorized state bodies.

**Theoretical concernment of the work** is a consideration of the nature, legality and validity of electronic contracts in the Kyrgyz legislation and an attempt to give recommendations on harmonizing the legislation on electronic contracting through theoretical justification.

**Practical concernment of the work.** Since this work has three purposes, the conclusions made in this research may lead to further research as well as to make suggestion to amend the current legislation.



**Prior publication of the research study.** On February 15, 2013 the research paper on “Validity of the Electronic contracts in the Kyrgyz legislation” was reviewed by the selection committee of the “Kalikova and Associates” law firm in awarding the Scholarship Programs for young talented lawyers. As a result, they gave a high recommendation on this paper, as a part of this contest, the author of this research thesis paper has been given an opportunity to pass an internship at this law firm.

## **CHAPTER I. THE ROLE OF THE ELECTRONIC CONTRACTS IN THE LEGISLATION OF THE KYRGYZ REPUBLIC AND OTHER COUNTRIES**

In order to determine contract validity one must clearly understand what constitutes an electronic contract and what is the difference between regular contracts and electronic. Therefore, this Chapter will attempt to define the nature of the electronic contract and electronic document along with the role that it plays in the legislation of the Kyrgyz Republic and other countries.

First, normative legal acts that can regulate the electronic contracts existing in the Kyrgyz legislation will be examined. Further, the paper will discuss how the electronic contracts are handled in the legislation of other countries such as Russian Federation and European Union countries. These countries among many others were chosen for a reason. The legislation of the Russian Federation is very similar to the Kyrgyz legislation. Moreover, both Kyrgyzstan and Russian Federation were a part of the Soviet Union, so they share the same legal system and have started to exist as an independent country at the same time. This means, they both had the same amount of time to make amendments to their legislation and create new laws. Whereas, the European Union countries are among the most developed countries in the world in doing electronic business, so their legislation in this field is similarly developed. By analyzing the EU

countries legislation, the paper will consider which kind of laws Kyrgyzstan should enact to improve its legislation.

### § 1.1 The legislation of the Kyrgyz Republic

While electronic contracts concluded via Internet are getting more and more popular among users of Kyrnet,<sup>3</sup> norms of the Kyrgyz legislation are not ready to handle this new electronic field of civil legal relationships. Even though there is no separate law that specifically regulates electronic contracting, there are still some general normative legal acts that are able to regulate electronic relationships as a whole. They are the Civil Code of the Kyrgyz Republic,<sup>4</sup> the Customs Code of the Kyrgyz Republic,<sup>5</sup> the Civil Procedural Code of the Kyrgyz Republic,<sup>6</sup> the Law of the Kyrgyz Republic “On Electronic document and Electronic Digital Signature”,<sup>7</sup> Law of the Kyrgyz Republic “On Electronic payments”,<sup>8</sup> and the Law of the Kyrgyz Republic “On Legal protection of Programs for electronic devices and Databases.”<sup>9</sup>

#### *Attempts to introduce and regulate the electronic civil relationships.*

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3. Kyrgyz Network - users of Internet in the territory of the Kyrgyz Republic.
  4. GRAZHDANSKII KODEKS KYRGYZSKOI RESPUBLIKI [Civil Code](KYR)[hereinafter *the Civil Code*].
  5. TAMOZHENNIY KODEKS KYRGYZSKOI RESPUBLIKI [Customs Code](KYR)[hereinafter *the Customs Code*].
  6. GRAZHDANSKIY PROCESSUALNIY KODEKS KYRGYZSKOI RESPUBLIKI [Civil Procedural Code] (KYR)[hereinafter *the Procedural Code*].
  7. ZAKON Kyrgyzskoi Respubliki on elektronno0 cifrovoi podpisi [Law of the Kyrgyz Republic on Electronic document and Electronic Digital Signature] [Law on EDS] (KYR).
  8. Zakon Kyrgyzskoi Respubliki ob Elektronnyh Platejah [Law of the Kyrgyz Republic on Electronic payments] (Kyr.) [hereinafter *the Law on e-payments*].
  9. Zakon Kyrgyzskoi Respubliki o pravovoi ohrane program dlya elektronnyh vychislitel'nyh mashin I baz dannyh [Law of the Kyrgyz Republic on legal protection of Programs for electronic devices and Databases] [Law on Electronic devices and databases] (Kyr.)[hereinafter *the Law on EDS*].
  10. Postanovlenie Pravitel'stva Kyrgyzskoi Respubliki [Decree of the Parliament from 25<sup>th</sup> of August 2006, N 617] [Decree of the Parliament] (Kyr.).

Most of the above stated laws were enacted within the framework of the National Plan of 2003 (*later in the text – the Plan*) generated by the Government of the Kyrgyz Republic. The Plan focused on the development of electronic education, electronic parliament and electronic economy. According to the Plan, in 4 years, by 2007 the Government should have created an effective legal base for the development of the electronic contracting and electronic commerce. After this Plan was signed by the President, majority of the above stated laws were initiated and then enacted by the Parliament of the Kyrgyz Republic. As a part of the Plan, there was also created the project of the Law “On electronic commerce” initiated by the Parliament itself. However, this project law was suspended by a decree of the Parliament<sup>10</sup> and was never reviewed again. The reason why it was suspended and why is it still not being reviewed without a proper attention is unknown.

If this Plan were currently in effect, it would be much easier to regulate commercial legal relationships arising in the Internet. For the reason that the project law contained the provisions that would legalize some controversial issues such as subjects of the electronic contracting, equality of the electronic contracts with the paper contracts, the moment of conclusion of an electronic contract. The Plan contained a provision that said that if this Plan were successfully implemented, by 2010 electronic commerce of the Kyrgyz Republic would be able to generate about 1 billion USD and account for 25-30% of the total GDP of the Kyrgyz Republic. However, as we can see, it is 2013 and there is still no direct legal base for the electronic contracting and electronic commerce yet. Although the Plan of the Government does not have the legal base and is not legally binding, it contains the strategies that the Government is planning to use and goals that it is going to implement in a particular period of time.

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Even if the Plan has not been enacted by the state bodies, the legislation of the Kyrgyz Republic still contains the norms in several normative legal acts that recognize the electronic document and electronic contract. The fact that the Kyrgyz legislation contains such norms indicates that the electronic contracts are recognized within this legislation. The majority of the statutory instruments of the Kyrgyz Republic most of the time are referring to the electronic document, but not to the electronic contract. However, the electronic contract is a type of the electronic document. Therefore, all of the norms that regulate the electronic documentation are also relevant to the electronic contracts.

### ***Formation of the electronic contractual relationships.***

One of the main normative legal acts that recognize the electronic contract is the Civil Code of the Kyrgyz Republic (*later in the text - the Civil Code*). The Civil Code accepts the conclusion of the contract via electronic devices. Article 395.2 of the Civil Code states that “a contract can be concluded in a written form through creating one document signed by the parties; it can also be concluded through exchange of notes, messages...via ... electronic devices that can prove that the document is being sent by the party of the contract.”<sup>11</sup> The phrase “via electronic device” does not indicate to the electronic form of the contract, as it seems from the first sight. It only refers to the method that one is able to use in order to comply with the requirements to the written form of the contract. Thus, this article is recognizing only the electronic “way” of concluding traditional written form of the contract, but not the electronic “form” of the contract.

Moreover, the first part of the same article 395 of the Civil Code,<sup>12</sup> states that “if parties agreed on concluding a contract in a particular form, a contract will be considered to be concluded after it is made in an agreed form, even though the law did not require such form for this kind of agreements.” Thus, parties are free to choose to conclude their contract in whichever form they

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11. Article 395.2 of the Civil Code.

12. Article 395.1 of the Civil Code.

wish. However, the form that they chose should be recognized by the legislation. The legislation of the Kyrgyz Republic, in particular, the Civil Code recognizes only oral and written forms of the contract.<sup>13</sup> Thus, it can be concluded that the “electronic form” of contracting is not recognized by the Civil Code. Classic electronic contracts that are created, sent and signed with the help of an electronic device through electronic connection is simply the way of concluding the written form of the contracts, but not the form itself.

However, complying with the classic written form of the contract by concluding it via electronic device will not be enough to consider this contract as valid. The article 395.2 of the Civil Code also requires that the method of concluding a contract should be able to prove the authenticity of the party from whom the contract offer or acceptance is sent.<sup>14</sup> The problematic situation with the authentication is the most vulnerable part of the electronic contracting. One of the ways to authentically establish the party from whom the document is being sent recognized in Kyrgyzstan, is signing the contract with the Electronic Digital Signature (*later in the text - EDS*) based on the Law of the Kyrgyz Republic “On the electronic document and the Electronic Digital signature.” (*later in the text – Law on EDS*) This Law was enacted in accordance with the model law “On Electronic Digital Signature” which was adopted in St. Petersburg in 9<sup>th</sup> of December 2000 by the Decree of the 16<sup>th</sup> plenary session of the Interparliamentary Assembly of CIS countries.<sup>15</sup>

The Law on EDS also recognizes the electronic documents as such and sets some norms on the procedure of using the electronic digital signature. It states that all copies of the electronic

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13. *Id.* at Article 174.

14. *Id.* at Article 395.2.

15. Analytical report on introduction of the electronic documentation in the Kyrgyz Republic. UNDP Kyrgyzstan. (by Natalya Alenkina).

messages or documents signed with the EDS shall have a power of original.<sup>16</sup> Moreover, it equalizes the EDS with the sign manual of a person.

However, the usage of the electronic digital signature is not that widespread as it should be, in fact, only few companies and individuals use the EDS. The Law on EDS itself is very concise and easy to execute, however, the problem is in its implementation and on the poor state budget. (*more discussed in Chapter 2.3*) Therefore, it is unreasonable that the Law exists for almost 9 years, but the implementation is staying in one phase, not moving anywhere.

In most of the cases, concluding the electronic contracts itself is not enough in order to finish electronic contracting procedure. The purchased via Internet goods should be paid in an electronic form as well. There is the Law of the Kyrgyz Republic “On Electronic payments” (*later in the text – Law on e-payments*) that regulates electronic relationships between subjects of the civil contractual relationships as the continuation or a second step of the electronic contracting procedure. The safe and legal payment procedure is very important for the electronic contracting because it provides parties with a good and safe condition for usage of their money and a particular convenience. These motivates them to conclude electronic contracts. Article 1 of the Law on e-payments defines the document of electronic payment as “a type of the electronic payment document made in an “electronic form.”<sup>17</sup> It is very remarkable that the electronic form as such is not recognized by the Civil Code, which has the higher position in the hierarchy of normative legal acts of Kyrgyzstan. Whereas, the Law on e-payments, taking lower position in the hierarchy of normative legal acts recognizes the electronic form of creating a document.

Later, article 6.2 states that electronic payments are made through sending the electronic payment documents of the addresser to addressee via communications channels.<sup>18</sup> Further, the Law on e-payments defines the communications channel as telephone, telegraph or telex

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16. Article 56 of the Law on EDS.

17. Article 1 of the Law on e-payments.

18. *Id.* at Article 6.2.

channels, radio and satellite-based channels, as well as cable channels.<sup>19</sup> The Law on e-payments gives broader definition of the electronic communication devices and channels than the Civil Code, broadening the legal scope of the electronic documentation and contracting. However, this law mostly regulates the procedure of payments and transfers for the banks, but not the validity of the electronic documents or the concluded electronic contracts.

While concluding sales and purchase contract one must clearly understand that goods will pass the declaration procedure through the customs of the Kyrgyz Republic. Therefore, it is important that the appropriate normative legal acts on customs should contain norms that would recognize the electronic documentation and contracting. The Customs Code of the Kyrgyz Republic recognizes the electronic documents in the case of declaring goods and showing the information that is needed for customs control. Particularly article 272 of the Customs Code states that “the process of the customs formalization can be made in an electronic way of providing the documents and information.”<sup>20</sup> Moreover, the Customs Code recognizes the electronic cyber space as such, by accepting it as a place, where the customs control is made.<sup>21</sup> The term “electronic way” of providing documents the Customs Code defines as the “electronic informational technology that is able to transfer messages.”<sup>22</sup> This means that any electronic device that is able to transfer messages from one destination to another will be allowed during the customs declaration of the goods.

Since many separate electronic contracts make up the system of the electronic commerce or electronic business the issue of its recognition under the legislation of the Kyrgyz Republic is also very important. Electronic commerce is recognized by the Law of the Kyrgyz Republic “On

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19. *Id.* at Article 8.3.

20. Article 272 of the Customs Code.

21. *id.* at Article 314.

22. *id.* at Article 355.

securities market.”<sup>23</sup> The Law recognizes the trade system of non-securities market, which is serving the contracts with the securities via paper and electronic devices. This means that the trade system of the non-security market is allowed to be made in an electronic way, being the form of the electronic commerce.

### ***Enforcement of the electronic contracts in the courts.***

Moreover, while discussing the recognition of the electronic contract and electronic document in the Kyrgyz legislation, the issue of possibility of the electronic document usage as a proof is raised. Will the electronic contract and document be recognized by the state courts in case of disputes is another question to raise. The Civil Procedural Code of the Kyrgyz Republic recognizes electronic document and contract as a proof by allocating that “documents and materials received through fax, electronic or any other communication device, the authenticity of which is proven, will be accepted as a proof as any other paper document.”<sup>24</sup> This means that if authenticity of the contract will be determined, the court will accept this document or contract as evidence of the contractual relationship while ruling on the case. However, the possible ways of proving the authenticity of the contract limited to either signing the document with an EDS or getting a notary certification for the document by the Kyrgyz legislation.<sup>25</sup> The valid, legal EDS is not available in Kyrgyzstan for this moment (*discussed in Chapter 2.3*) and the notary officials are not able to approve the authenticity of the electronic contract. First, due to the fact that approving the authenticity of the document is simply not included to the list of the scope of duties of the notary in the Law of the Kyrgyz Republic “On notary.” Second, in order to approve the contract, the notary official should be able to actually see the process of the contract conclusion.

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23. Zakon Kyrgyzskoi Respubliki o Rynke Cennyh bumag [Law of the Kyrgyz Republic on the Securities market ] [Law on Securities market](Kyr.).

24. Civil Procedural Code article 75.1.

25. Civil Procedural Code article 88.



However, due to a specific nature of the electronic relationships where the parties enter into civil legal relationships in the cyber space it is impossible, at least inconvenient, to conclude a contract in the presence of the notary person.

There is another way of proving the authenticity, it is when the court may appoint an expert the authorized state body to verify the authenticity of the document.<sup>26</sup> The parties apply to the court and bring their electronic documents as an evidence of their relationship. Whereas, the court in order to establish the authenticity of the contract will appoint an expert procedure of the document. However, in Kyrgyz Republic, there is no governmental state body or any other organization that would be able to make an expertise of authenticity of the electronic document. Neither the Ministry of the Kyrgyz Republic of Communications and Transport does that, nor other private companies. Therefore, in Kyrgyzstan if somebody will have a dispute on an electronic contract relationship, parties simply would not be able to prove the validity of their contract relationship in the court.

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To sum up, electronic documentation and contracting is not a completely new field of law for the Kyrgyz legislation. There are normative legal acts that can be used while regulating the electronic documents and electronic contract relationships. However, there is no separate normative legal act that would regulate the electronic legal relationship directly and this sphere has many problems.

Although there was an attempt to regulate the field of electronic relationships by the Parliament of the Kyrgyz Republic by making Plans, initiating project laws on the electronic sphere unfortunately, these Plans are not accomplished, laws are not enacted and existing norms do not work properly. Moreover, the measures that were taken in order to accomplish the plans

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26. Civil Code article 173.

such as the Law “On electronic commerce” started very well, but then stopped and is being ignored for this moment. Analysis of the Kyrgyz legislation determined that there is no such thing as the “electronic form” of the contract in the Kyrgyz legislation in general, but the Civil Code recognizes the “electronic way” of concluding the written form of the contract. However, using electronic way of concluding a contract is allowed only in case if the authenticity of the document will be possible to determine. Moreover, the Law on EDS also does not establish the legal status of the electronic document as equal to the paper document. Subsequently, the same with the electronic contract, it is not equal to the paper contract as any of the laws give a special legal status to it.

On the other hand, there are normative legal acts that recognize the electronic form of the contract and electronic commerce. They are the Law on e-payments that identifies the electronic form of the contract and the Law on Securities Market that recognizes the electronic commerce as a form of the trade system of the non-security market. Moreover, the issue of bringing the electronic documents as evidence to the courts in case of disputes is problematic in Kyrgyzstan. De jure, the Civil Procedural Code recognizes the electronic documents as a proof in the dispute, but de facto, it is impossible to bring them as evidence due to lack of authorization instruments of the electronic document and contracts.

Generally, normative legal acts in Kyrgyz legislation that regulate the electronic relationships vastly differ from each other. They do not have the same terminology used while determining such terms as the electronic document, electronic devices, communications devices, etc. In some of them the definition is broad, and in others its limited to one word. This brings misunderstandings and misleading in legal regulation of the electronic relationships.

As statistics show, there is a rapid increase in the number of users of the Kyrnet last 3 years. (*see Annex 2 and Annex 3*) This means that as more people of Kyrgyzstan are going to be

involved with the Internet sphere, the more problems the legal system is going to face due to the lack of norms that straightly regulate electronic contract relationships. Moreover, this will stop the process of the business development and general growth of economy of the Kyrgyz Republic. Based on the data given by the Invesp.com in 2011 the sales volume in the sphere of the electronic commerce was \$ 680,6 billion. By the prognosis of the same agency, this amount will only grow and in 2015 it will reach up to \$1,5 trillion.<sup>27</sup> Being the part of the international community and taking the first place among CIS countries in Internet development, Kyrgyz Republic should create a safe and convenient legal platform for the users of the Kyrnet.

## § 1.2 The legislation of the Russian Federation

Even though Kyrgyzstan and the Russian Federation have the same legal background being the part of the former Soviet Union, the legislation of the Russian Federation is much more developed in the sense of regulating the issue of electronic contracting and electronic commerce. The normative legal acts in the Russian Federation are reaching only hundreds whereas in other developed countries, but it can reach thousands.

One of the normative legal acts that are executed in direct way, without changing any of its provisions is the Civil Code of the Russian Federation (later in the text – *Civil Code of RF*).<sup>28</sup> It contains a number of legal provisions allowing the possibility of concluding transactions through electronic exchange of information, as well as giving the option of using electronic signature and make non-cash payments in the credit and banking.<sup>29</sup> The provisions of the Civil Code of RF are more or less the same with the Civil Code of the Kyrgyz Republic in a sense that they both recognize the electronic way of concluding a contract, but not the electronic contract.

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27. “Electronic commerce 2011,” *System Integra*, last accessed 10 April 2012, <http://www.e-pepper.ru/forum/thread800.html>.

28. GRAZHDANSKII KODEKS ROSSIYSKOI FEDERACII [Civil Code](RUS)[hereinafter *the Civil Code of RF*].

29. *Id.* Articles 410 and 3301.

The legislation of the Russian Federation has many laws that are specially dedicated to problems of the electronic documentation and contracting. One of them is the Federal Law of the Russian Federation dated from January 10, 2002 N 1-FL "On electronic digital signature" which regulates the legal status, procedure of issuance of the EDS, procedure of its usage, security and establishment of its authenticity. In April 2011, this Law was amended and called the law "On electronic signature" excluding the word "digital". As a result, the sphere of usage and types of the electronic signatures that can be used in the electronic contracting procedure were widened.

There are numerous normative legal acts related to the use of electronic documents in separate spheres. Federal Law of Russian Federation "On placing orders for goods, works and services for state and municipal needs," is one example of it. The main objective of the law is the effective use of state funds, the development of fair competition and prevention of the corruption while ordering goods for a state needs. The law mostly regulates the relations connected with the placement of orders, establishes a uniform procedure for the placement of orders, and provides publicity and transparency of order placement.<sup>30</sup> According to paragraph 1 of Art. 41.2 of the law all documents and information are sent or are posted on the official website in an electronic form. Documents and information shall be signed by the electronic signature of the person that, according to Section 5, Art. 42.2 of the Law is able to authentically establish the party from whom this document is being sent. This means that the document will have a power after it is signed with the electronic signature.

Since the legislations of the Russian Federation and Kyrgyz Republic have the same origin, many normative legal acts and norms are the same as discussed in the Chapter 1.1. Therefore, the author decided to concentrate on the differences that two legislations have while regulating electronic legal relationships.

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30. Federalniy zakon o razmeshenii zakazov na postavku tovarov, vypolnenie rabot, okazanie uslug dlya gosudarstvennyh i municipalnyh nujd [The Law on purchasing goods, services for the state needs] (RUS).

The fact, that the Law on EDS of the Russian Federation had faced the amendments and became the Law “On Electronic signature” can be as an indication of that the state authorities are taking some steps in order to develop the field of electronic legal relationships. This Law was amended so that the legal scope of the procedure of signing the electronic document with EDS and types of electronic contracts would broaden giving more opportunities for the subjects to use the electronic documentation and contracting.

Simultaneously, with the development of the legal framework regulating relations in the sphere of electronic commerce, in 1992 the Bureau of Special Technical Measures under the Ministry of Internal Affairs of the Russian Federation was formed. One of the areas of activities of the Bureau is to fight against crimes in the cyber electronic field. The Bureau is fighting the illicit proliferation of electronic and special technical equipment, fraud in electronic payments, child pornography on the Internet. The government of the Russian Federation has created the special state body that will be responsible for regulating the legal relationships in the Internet. This is enough to understand that appropriate steps that are being taken. At least the issue of the cyber space regulation is not ignored by the state authorities.

In 2000 the State Duma of the Federal Assembly of the Russian Federation was handed a draft federal law "On electronic commerce."<sup>31</sup> However, after long discussions it was rejected and sent back for revision, due to the fact that it has not yet fully meet the needs of society and does not fill in the gaps of the current Russian legislation in this field.<sup>32</sup> However, later, in 2001, the 6<sup>th</sup> of June it was enacted by the State Duma and from that moment on, the electronic civil legal relationships are protected by the law of the Russian Federation.

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31. Federalniy zakon ob elektronnoi torgovle [The Law on electronic commerce] [hereinafter: *the law on e-commerce*] (RUS).

32. “Moscow Linertarium,” *Institute of freedom*, last accessed 26 June 2012, <http://www.libertarium.ru>.

The Law of the Russian Federation “On electronic commerce” is very well written and covers every problematic aspects of the electronic documentation and contracting. It is concentrated in the civil relationships of the legal entities and individuals who are working and are registered as the individual entrepreneur.<sup>33</sup> However, it automatically means that it cannot be applied for the legal relationships between the individuals who are engaged in the electronic civil legal relationships for their personal individual needs. It unifies all the controversial and vulnerable issues of the electronic legal relationships such as form of the electronic contract, bringing the electronic document as a proof, usage of copies and originals of the electronic documents, the moment and place of offer and acceptance and the content of the information in the electronic document. The law on e-commerce recognizes all types of innovations in the sphere of law such as electronic agents and shrink-wrap and browse-wrap agreements (*More discussed in the Chapter 2*) Moreover, it states that the fact that a document or the process of exchange of messages or a document is made in an electronic way is not a well founded ground for considering this electronic document or a contract invalid. Furthermore, it equalizes the electronic document with the regular document, obviously, if it is possible to establish the authenticity of the document.

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To sum up, the legislation of the Russian Federation is able to fully regulate the electronic legal relationships that occur among the subjects of law. Even though Russian Federation started its full independence from the Soviet Union at the same time as the Kyrgyz Republic, its legal instruments that are used to regulate the electronic relationships are able to keep up after the realities of the Internet development in the Russian Federation.

The separate law “On electronic commerce” that regulates all the controversial issues of the electronic legal relationships is a very concrete and specific legal instrument. It is better and

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33. Article 16 of the Law on e-commerce.

more convenient when there is a separate normative legal act instead of different norms in several normative legal acts. Moreover, most of the times, the norms that are contained in different normative legal acts contradict to each other, use different terminology while referring to the same things. Therefore, the Parliament of the Kyrgyz Republic should take into consideration that enactment of the Law “On Electronic commerce” will be able to fill in the gaps that are in the legislation.

### **§ 1.2 The legislation of the European Union**

Before analyzing the legislation of the European Union community it should be noted that the current position of the EU on the legal regulation of electronic document includes the achievement of some of the results - this is mainly the development of uniform laws in independent states with very different legal systems and traditions. In order to understand the difficulty of this issue, we must remember that the purpose of the European Union community is to create a uniform legal order, and in promoting trade, investment and development of the free movement of citizens. Therefore, despite the presence of harmonization of legislation, it is just one of the means to achieve the main goal, and certainly not the law itself. In other words, it is only an intention, but not the law itself.

The most important EU legislative instrument that gives legal effect to its documents is the directive. They contain binding effect that member states must comply within the specified period, but the forms and methods achieved results are chosen by the states themselves.

In the field of electronic documents and electronic contracts, there are two directives: Directive on Electronic Commerce 2000<sup>34</sup> (later in the text – *the DEC*) and the Electronic Signatures Directive ON 1999<sup>35</sup> (later in the text – *the DEP*).

Article 9 of the DEC<sup>36</sup> requires states to give legal force to the contract in an electronic form that will prevent the creation of obstacles to their use and prohibit the denial of their validity only on the basis that it is created in the electronic form. Obligations and the benefits arising from the DEC, are applicable only within the European Union.

Whereas, the DEP is more detailed and provides basis for legal recognition of the electronic signature and the requirements for member states in the field of the certification of electronic signature. Article 5 of the DEP states that "electronic signatures based on qualified certificate and created by a secure means" are equivalent to handwritten signatures.<sup>37</sup> However, later, it argues that the electronic signature may not be denied legal effect only based on the ground that it was created without the use of qualified certificate or secure funds.<sup>38</sup> Despite these definitions, the text of the DEP is technology neutral. One of the main requirements is to ensure that the maximum welcoming security is achieved than with a particular device or method of creation of the electronic signature.

Article 2 defines "electronic signature" as those electronic signatures, which must meet the following requirements: 1) uniquely linked welcoming signatory party, 2) is sufficient to identify it, and 3) is created with the use of funds under the exclusive control of the signatory, and 4) associated with the data, to which it relates, in such a manner that any subsequent changes to these

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34. 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 [hereinafter: *the Directive on electronic commerce*].

35. Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures [hereinafter: *the Directive on electronic signature*].

36. Article 9 of the Directive on electronic commerce.

37. Article 5 of the Directive on electronic signatures.

38. *Id.* at Article 9.



data it becomes apparent.<sup>39</sup> In order to verify an electronic signature the "certificate" is used. The certificate is electronic credential that links the data to verify the digital signature with a particular person and confirms the identity of that person. Thus, there are some criterions on the nature of the electronic signature and the authenticity of it is checked by the certificate.

Further, the paper will analyze on how the provisions of these two Directives is supposed by the legislation of the member states of the European Union. The main objective here is to predict the possibility of establishing uniform rules for handling electronic documents within the EU and choose the direction of improving the legislation of the Kyrgyz Republic in the field of electronic contracting and documentation.

### *The legislation of Germany.*

German approach to give effect to electronic contracts by requiring a manual signature is to construct a strict regime. The act that gave legal effect of electronic signatures on concluding the electronic signatures was cancelled. Additional technical requirements were involved to the Digital Signature Ordinance. These regulations jointly formed the legal basis for the verification of digital signatures and certification authorities.

Germany is the process of regulating the use of cryptographic public / private key in the process of which affected the technical requirements for certification bodies, which must be fully consistent with the law in order to obtain approval to operate. The main focus of the law is on building the infrastructure of digital signatures, but not for the recognition of legal validity of contracts electronically. This is due to lack of possibility attempts, absence of specific provisions relating to the validity and scope of the use of digital signatures in electronic transactions. In opposite, the law contains technical standards for certification bodies to which they must meet to obtain a license.

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39. *Id.* at Article 2.

Since the official recognition of the legal validity of electronic documents equal to the paper is not guaranteed by the German legislation, as is done in DEP, then there are two problems of harmonization of legislation. First, the absence of a formal legal recognition of electronic documents leads to the need for additional comments on the covered transactions. Currently, there are a large number of legislative requirements that electronic or digital signatures do not match. Thus, the definition of transactions that may be in electronic form, requires an analysis of the legislation and, as a consequence, increase the value of the transaction.

The second problem is the applicability of the standard digital signature to the foreign certification bodies. Digital signatures are created from the body of another member state, that may be recognized only if they are able to demonstrate the same level of security. For countries not members of the EU section 15 (2) specifies that digital signatures may be recognized as equivalent only if there is international or intergovernmental agreements.

Deficiencies and excessive rigidity of the standards contained in legislative initiatives in 1997, contrary to the requirements of two European Directives. Therefore, the German government has developed additional acts to replace the existing law, and further integration with DEP.<sup>40</sup> These are: the German proposal on the basics of Digital Signature Act of 16 August 2000, the Bundesrat adopted March 9, 2001<sup>41</sup> and entered into force on 21 May 2001.<sup>42</sup> It does not put an equal sign between the electronic and hand-written signatures, rather it creates a basis for compliance with DEP. There is still a mandatory set of rules for the creation and issuance of certificates that can be recognized in accordance with the Directive, however, electronic signatures, by definition, are self-sufficient in order to be evidence of the transaction in the electronic form. The first part of the law formulates the goal of the whole act: laying the

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40. *Baker & McKenzie*. Last accessed on 03/04/2013 <http://www.bmck.com/ecommerce/germany.htm>.

41. Federal Republic of Germany, "Signature Law Passes Bundesrat and Can Take Effect Without Delay", (March 2001) Bundesregierung Background Information - Germany in the Global Economy, Fr 2001/03/09.

42. Law Governing Framework Conditions for Electronic Signatures and Amending Other Regulations, BGBl. Teil I S. 876 vom 21. Mai 2001 [hereinafter: the Civil Code of France].

foundations for electronic signatures. It would seem that it is much more in line with the Directive than in the previous law. However, instead of regulating the treatment of electronic signatures, the law continues to build the infrastructure of digital signatures.

If changes are made, it will guarantee the use of electronic signatures in all spheres of economic activity, regardless of whether public relations signatures are used. New and improved SigG to some extent moderated the German position on electronic signatures, but did not reach the goal of effective legislation on the legal recognition of contracts in electronic form.

### *The legislation of France.*

March 13, 2000 the French government passed a law amending Chapter VI of the Civil Code of France<sup>43</sup>, which is mainly limited to the shape and the probative force of treaties. The emphasis made changes aimed at creating common rules allowing equalize validity of electronic documents and signatures with handwritten form in all spheres of legal relationships.

Article 1316 of the Civil Code of France recognizes as evidence of letters and numbers, or any other sign or symbol, whose value can be easily figured out regardless of the method of creation and transmission.<sup>44</sup> The equivalence is much more liberal than in the German law, which recognizes the validity of only a certain type of electronic signature. Article 1316-2 specifies that in case of controversial between the electronic and hard copy, the court shall determine which of them has the most probative value.

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43. Loi no. 2000-230 du 13 mars 2000, JO, 14 Mars 2000, 3968. The text of the law may be found in [http://www.legifrance.gouv.fr/citoyen/jorf\\_nor.ow?numjo=JUSX9900020L](http://www.legifrance.gouv.fr/citoyen/jorf_nor.ow?numjo=JUSX9900020L)

44. Article 1316 of the Civil Code of France.

Signature requirements laid down in Article 1316-4 of the Civil Code of France provides that an electronic signature can satisfy the requirements for legally binding documents, if it points to the person who created the signature and confirms the consent of the parties to make any action on the obligation. Next article 1316-4 of Civil Code of France states that "a reliable means of identification" and "guaranteeing communications" are defined in the Directive on Electronic Signature which was adopted 30 March 2001.<sup>45</sup> Despite the fact that the provisions of the Civil Code of France is neutral relative to the technologies used to create an electronic signature, the Decree contains more detailed requirements that the Civil Code does not have.

Thus, we can say that the position of France is even more liberal than those of the DEP, as it provides the electronic documents the same level of recognition of their validity without reference to specific technological means. Despite the fact that the rules currently advances made in electronic signatures satisfies only digital signature technology, rules are not limited to this type of authentication.

### ***The legislation of the United Kingdom.***

The implementation of the two EU Directives began with the Law on Electronic Communications, which received Royal Assent on May 25, 2000 (later in the text – *the Act*).<sup>46</sup> The Act proposes to expand the scope of legal recognition of electronic signatures that meet certain general criteria and criteria for similarity and equivalence.

The act does not impose mandatory certification of signatures. In addition, the simplified mechanism of certification: a specific electronic signature is considered certified if any person whether before or after the transfer of information will confirm that the signature mechanism of its creation or transfer is valid and the authenticity and integrity of the information too.

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45. Decret no. 2001-272 du 30 Mars 2001 pris pour l'application de l'article 1316-4 du code civil et relatif a la signature electronique.

46. Electronic Communications Act 2000 (UK)

Although the Act, due to the specifics of the legal system, regulates in detail the subject, it is also addressed to a number of issues. The Act just created a guarantee that the documents signed by electronic signature will be accepted in court. Everything else in Act Article 8, refers to the competence of the Cabinet of Ministers; apparently this way and will be conducted to further regulate the use of electronic signatures. In general, such a position is designed for active use cases.

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Summing up, the author would like to go back to the beginning of this issue - the construction of uniform European rules on electronic documents and contracts. Despite the attempts made by the EU Commission, the legislation turned out different in different EU member countries. There are a couple of reasons for that. First, differences in national legal traditions and legal systems. For common law countries such as the United Kingdom – it is characterized by an approach limiting government interference in private affairs. Moreover, the electronic document and contract shall not be subject to strict regulation. For Germany, the nature of government approach to the regulation of many areas of activity, and the resulting electronic document was under strict state control.

Secondly, the validity of the electronic document and electronic contract is somewhat new problem. It had not been evolved in practice that widely yet. Therefore, the legislations of the EU countries did not analyze this problem and its solutions in depths. In the future, probably, there will be a unified approach.

Third, different states use different approaches giving the opportunity to be an example to other EU states in regulating the electronic legal relationships. Thus, other member states of EU will take their approach as model to create their own and harmonize their legislation accordingly.

## CHAPTER II. THE VALIDITY OF THE ELECTRONIC CONTRACT

This chapter will focus on the issues of validity of the electronic contract within the legislation of the Kyrgyz Republic; it will discuss and analyze paragraph by paragraph every criterion for assessing the regular contract validity. These are the subject of the contract, the consent of the party to be bound, form of the contract and the content of it. After testing the electronic contract's validity by the assessment criteria for validity of a regular contract, it will be determined if the electronic contracts are any different from the regular contracts in the sense of its legality and the consequences of its invalidity.

In order to declare the contract valid, it needs to be tested for compliance to the four elements of the validity of the contract. The contract should be representing the unity of the four elements (1) subjects – the legal capacity of those, who are involved in the transaction, (2) the consent of the subject - the unity of will and expression of this will, (3) form of the contract, and (4) the content of it. Any defect of one or several of above stated elements of a contract validity, leads to its invalidation.<sup>47</sup> In this chapter, the electronic contract will be tested according to 4 elements of contract validity, after which we will be able to make conclusions about the legality of the electronic contract as a whole.

### § 2.1 SUBJECT

During the conclusion of a regular contract, it is possible to visually see the person, who is entering into the contract. While concluding the electronic contract, it is difficult to determine, who really is entering into civil legal relationship. For example, in the case given on the web page of the international law firm Roche & Duffay, Company A had a problem with the bank

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47. Sergeev A. P. and Tolstoy Yu. K., *Uchebnik Grajdanskoe Pravo. Tom 1.* (Moskva: TK Velbi i Izdatelstvo Prospekt, 2005), p. 113.

account, which was opened in the Bank B.<sup>48</sup> These two legal entities, Company A and the Bank B concluded a contract of the bank account service. In 1999 from Company A's bank account 29.580.850 Russian rubls were written off by the electronic order. However, Company A claimed that this payment order was not given by anybody from the Company A. Therefore, the Company A filed a claim to the court claiming that the Bank B stole their money. Nevertheless, courts of two instances concluded that the Bank B was not guilty. The court found that the Company A could not prove that the disputable payment order was given by other person, but not by its representative. First, in the following payment order there was a valid electronic signature of the Company A's deputy general director. Second, the disputable payment order was signed by the electronic signature, which was in the particular diskette. Company A did not provide any proof of loss or any other removal of the diskette from the ownership of the person, who had a right for its usage. Third, experts of the Company A were not able to prove that the informational system worked in a freelance regime or that there was an unsanctioned access to it. Consequently, the claim of the Company A was dismissed.<sup>49</sup> Based on this case, the use of the Electronic Digital Signature (*later in the text - EDS*) does not guarantee protection from an unauthorized access to the system and signing of the document by the third parties. On the other hand, it is difficult to determine, whether actually somebody else used the EDS of the Company A and signed the disputable payment order or Company is just trying to be enriched by the funds of the Bank B. Therefore, the burden of proof of signing the disputable payment order by an inappropriate person is on the side of Company A, which failed to prove it. As a result, the law suit of the Company A was dismissed. The rule of the case seems fair enough because in the national and international legislation, there is a presumption of innocence, where a subject is considered to be guilty only if proven so. Therefore, the burden of proof is in the side of a party, which is accusing the other to

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48. *Note: names of the companies were hidden in the web page in order to protect the commercial secret of the companies*

49. Roche & Duffay, "Problemy deistvitel'nosti sdelok, sovershennyh v elektronnoi forme," *Roche & Duffay*, last modified November 14, 2012  
<http://www.roche-duffay.ru/articles/pdf/Force%20of%20agreement.pdf>.

prove that it is guilty. In our case Company A accusing the Bank B in a fraud and stealing of their money, could not prove that the disputable payment order was signed by an inappropriate person.

In an electronic arena it is very difficult to know that it is an adult, with legal capacity who is entering into civil legal relationship and concluding the contracts. The Civil Code of the Kyrgyz Republic (*later in the text – Civil Code*)<sup>50</sup> states that subject, which is entering into civil legal relationship must be full age adult, who can fully understand his/her own actions.<sup>51</sup> However, at the time of concluding the contract, through the Internet shop or the web page from which it is possible to get the discount coupons they do not check to the adulthood and the legal capacity of a subject. For example, in one of the deal-of-the-day website BeSmart.kg<sup>52</sup> that features discounted gift certificates usable at local or national companies, they sell a coupon for 50% discount from an online sex-shop goods. (*see picture 1*) While buying the coupon, there is no check to the legal capacity or the age of a person who is buying this coupon. What will happen if a 14 year old teenager will buy this coupon? If we refer to the Civil Code, concretely to the articles 190, 191<sup>53</sup> it says that if the citizen, who is not adult yet, concludes a contract, then this contract is considered to be void. Therefore, companies doing business through the Internet should carefully think about the security and the illegal access of an underage subjects, who are entering into civil legal relationships. Moreover, because of this, they might have huge financial losses because it has to restate anything that was got from the contract when the contract will be declared void.

Recently the services of the electronic agent have become a very popular among businesses throughout the world. An electronic agent is a computer program, which is used by a human being for initiating or answering on his/her behalf to the electronic messages or conclusion

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50. GRAZHDANSKIY KODEKS KYRGYZSKOI RESPUBLIKI [Civil Code][KODEKS](KYR).

51. Article 56 of the Civil Code.

52. <http://besmart.kg/events/>.

53. Article 56 of the Civil Code.



of the electronic contracts without the person's knowledge of it.<sup>54</sup> An electronic agent can make an offer or accept an offer on behalf of a human being. In other words, it is a programmed by a person computer program, which is acting on behalf of the certain person or a company. The program is not allowed to go beyond permitted programmed actions. This means, that it will make an offer and acceptance in compliance with those standards that were initially programmed into it. Moreover, other side of the contract is not informed that the second party of the contract is using an electronic agent in making offer or acceptance.

Civil Code of the Kyrgyz Republic affirmatively accepts only two types of subjects: legal entities and physical persons.<sup>55</sup> However, it says nothing about the "electronic subjects". Does it mean that the contract, signed with the help of an electronic agent, will automatically be declared as invalid or totally is not a contract at all? Although, the Civil Code accepts the agents as the subjects of the civil legal relationships, who are acting on behalf of a person or a legal entity, it should be noted that by the term "agent" the Civil Code means a person or a legal entity, but not an electronic agent. This can be noted through the definition of the agency contract where "one party (the agent) is responsible for a certain remuneration to make legal and other actions by the order of the other party (principal)..."<sup>56</sup> Since the agent is working for a certain remuneration and in our case the electronic agent is not getting any payment for its activity, it can be concluded that the legislation of the Kyrgyz Republic is not recognizing the electronic agent as such.

However, if we start to analyze, the natural questions that can be asked is whether the contracts concluded by the electronic agent without direct human intervention is legally binding to the person or a legal entity concluding that contract. It is important to differentiate the capacity and the absence of personality. As Mazeaud explains the incapacity is linked to a person, therefore assumes a personality. An individual or a group from which the legislator has taken away the

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54. Institute for Information law, "Formation and validity of online contracts," *Institute for Information law, (Faculty of Law, University of Amsterdam)* (June 1998): 14, accessed December 5, 2012  
<http://home.uchicago.edu/~mferzige/rapportbernardine.pdf>.

55. Article 176.1 of the Civil Code

56. Article 843 of the Civil Code

personality, does not have the judicial life, and therefore, is not a person in the eye of the law. Therefore, the absence of personality is not an absence of legal capacity to conclude a contract.<sup>57</sup>

While the electronic agent is concluding an electronic contract, it is acting on behalf of a person or a legal entity, who showed his consent to be bound by the actions of the electronic agent at the moment of entering the terms and criteria for the electronic agent to meet prior offering or accepting the offer from the other party. Therefore, the fact that the contract was concluded by the computer program should not be considered as invalid contract just because its appearance and conclusion was made by the subject that is not recognized by the legislation of the Kyrgyz Republic. The most important thing in here is that the parties agree with the essential conditions of the contract and the proper conclusion of the contract. However, in order to eliminate such issues the appropriate changes should be made in the agency law and the legislation of the Kyrgyz Republic as a whole.

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To sum up, electronic contracts have its unique character in comparison to the regular contracts while determining the subject of the contract. Since either offer and/or acceptance are concluded in electronic borderless cyber space, it is difficult to determine who really is entering into civil legal relationship and whether this subject is capable to do so. Moreover, the solutions used by many developed countries as using the EDS for verification of the authenticity of the party, may also be in danger and have problems with an unauthorized use by the third parties. This can create many problems and challenges during the disputes on determining the validity of the concluded contracts. Moreover, with the rapid development of the technologies such computer programs as electronic agents, acting on behalf of a person or a legal entity should have a legal capacity to conclude a contract. Kyrgyz legislator should think beforehand of these and many other issues that the companies doing business and the users of such services can face and

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57. E. M. Weitzenboeck, "Electronic Agents and the formation of contracts," *International Journal of Law and Information Technology*, Vol 9, No 3, pp. 204-234 citing to Mazeaud, Mazeaud & Chabas, *Leçons de Droit Civil - Tome II - 1er vol. Obligations: Théorie Générale*, 7th ed., (Éditions Montchrestien: Paris 1985), p. 98.

improve its own legislation.

## § 2.2 CONSENT OF THE PARTY

The legislation of the Kyrgyz Republic identifies well-known to the US law and EU law term *consent of the party* as the *subjective side of the contract*. It can be defined as the inside will of the party, the true consent to be bound and be liable by this contract.<sup>58</sup> The consent of the party of the contract must be present in order a contract to be valid. That means that will of the party to conclude a contract must be the same as their actions in connection with the contract.<sup>59</sup> In general, it is very difficult to determine the will of the person entering into civil legal relationship because we certainly do not know what thoughts the person has inside and what his true intentions are. However, we are still able to see how the will of the person is expressed in signing a contract, paying for goods purchased, acting silent etc. These kinds of actions show and express the will of the party to conclude a contract and be bound by it.

The Civil Code of the Kyrgyz Republic recognizes only three ways of expressing the inner will. First, it is a direct expression of the will, which is done orally or in a written form. It is when a party directly indicates the willingness to conclude a contract. Second, an indirect expression of the will, where from the conclusive action of the party it should be clear about the true will of the person, who is entering into civil legal relationship. Third, it is the silence, which can also be considered as agreeing with the terms of the contract.<sup>60</sup> However, other than those traditional types of the will expression set in the legislation of the Kyrgyz Republic, there are many other types of the will expression in the other developed countries legislation. These types of a will expression of a party can be determined through clicking the button, opening the box or just

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58. Sergeev A. P. and Tolstoy Yu. K., *Uchebnik Grajdanskoe Pravo. Tom 1.* (Moskva: TK Velbi i Izdatelstvo Prospekt, 2005), p. 76.

59. Sergeev A. P. and Tolstoy Yu. K., *Uchebnik Grajdanskoe Pravo. Tom 1.* (Moskva: TK Velbi i Izdatelstvo Prospekt, 2005), p. 76.

60. Article 174 of the Civil Code.

visiting the web page. Although this type of parties consent is quite similar to the ones that the Kyrgyz legislation has, it has its own distinctive characteristics.

The ‘‘Clickwrap’’ contract is a type of an online contract, which encourages all users to carefully read the terms of the contract, and then click the ‘‘I agree’’ or ‘‘OK’’ button. From that moment on, when a person clicked this button, the contract is considered to be concluded.<sup>61</sup> The clearest definition of the clickwrap agreement was given by the court in *Specht v Netscape Communications Corp.* case:

A click-wrap license presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked. For example, when a user attempts to obtain Netscape's Communicator or Navigator, a web page appears containing the full text of the Communicator / Navigator license agreement. Plainly visible on the screen is the query, "Do you accept all the terms of the preceding license agreement? If so, click on the Yes button. If you select No, Setup will close." Below this text are three button or icons: one labeled "Back" and used to return to an earlier step of the download preparation; one labeled "No," which if clicked, terminates the download; and one labeled "Yes," which if clicked, allows the download to proceed. Unless the user clicks "Yes," indicating his or her assent to the license agreement, the user cannot obtain the software.<sup>62</sup>

Thus, concluding a clickwrap agreement is the only way of entering into a civil legal relationship and be bound by it. If a person do not agree with the terms of the license agreement and do not click the appropriate icon, then, the agreement will be cancelled immediately.

At first sight, it might seem that no contract can be signed only by clicking one button and which is even more outlandish is to be legally bound and liable to it. However, in the case of *Hotmail Corporation v. Van\$ Money Pie Inc.* the court accepted the Clickwrap contract as valid, since the plaintiff, the provider of the email services in the Internet, demanded its subscribers, carefully read the ‘‘Terms of the service’’ that forbade the use of Hotmail for sending spam or

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61. G. E. Evans, ‘‘Online contracts,’’ *Queen Mary Intellectual Property Research Institute*, United Kingdom: 7, accessed October 28, 2012, <http://gaileevans.com/GEEvansOnlineContracts2006.pdf>.

62. *Specht v. Netscape Communications Corp.*, 306 F 3<sup>rd</sup> 17 (2d Cir. 2002).

pornography documents. The court ruled that creating any Hotmail e-mail account, or becoming a Hotmail subscriber, for purposes other than those permitted by Hotmail's Terms of Services, including sending spam e-mail or operating a spamming business, or sending or advertising or promoting pornography and/or sending e-mails for any commercial purpose... is in violation of the contract obligations.<sup>63</sup> Thus, the court accepted the Clickwrap agreement as the contract, where defendants while creating emails in Hotmail ticked "I agree" button. This could be equalized to their consent to be bound by the Terms of Service of the Hotmail email.

However, there might be some cases when clicking the icon is not necessary to prove the will expression of the party. For example, in case of the *Register.com, Inc. v. Verio, Inc.* the defendant was claiming that there is no agreement relationships between him and a plaintiff because plaintiff could access to the database without ticking the "I agree" button. The court ruled in favor of plaintiff Register.com, holding that contractual relationships could be formed whether or not users are required to express their will prior to use a product or service.<sup>64</sup> Based on the ruling of this case, it can be concluded that it is not necessary to show directly the will of the party as a sign that he/she agrees to be bound by the terms of the license agreement. The submission of the query can be qualified as the consent of the party to be bound by this agreement. Moreover, it is enough to assume a contract to have a legal basis.

Clicking the button, after one carefully reads the conditions of the contract can actually be considered as a will expression, since the pressing of the button is a willful act and nobody makes him/her to do it. If one disagrees with the conditions of the agreement, he/she can simply not press the "I agree" button and make no further actions towards this agreement. This will show that he/she disagrees with the terms of the license contract and thus, does not make himself bound by it.

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63. Hotmail Corporation v. Van\$ Money Pie Inc., 47 U.S.P.Q. 2d 1020, 1998 WL 388389 (April 1998, N.D.Cal.).

64. *Register.com, Inc. v. Verio, Inc.*, 256 F3d 393 (2d Cir. 2004).

However, any legislation around the world on the consumer protection, notes that the purchaser at the time of purchase should know that he/she is entering into a binding legal contract. Moreover, the agreement should be drafted so, that the nature and terms of the agreement can easily be understood and if needed some parts of it, should be highlighted or capitalized.<sup>65</sup> Only if the company meets these requirements and the consumer or a user clicks the “I agree” button after he/she carefully read terms or continues to use the product and make further actions towards the contract and then violates it, only then, the party is liable for non-compliance with the contract. However, it is an obligation of a person who is signing the contract to review the terms carefully prior signing it or making further actions in the contract.

The “Browsewrap” agreement is a type of online contracts, where one can be required to follow the terms of the license, which protects the information contained in the web page, it is typically presented at the bottom of the Web site where acceptance is based on “use” of the site.<sup>66</sup> The terms of the agreement are described in details right in the web page. The moment of opening the web page will be considered as the beginning of civil legal relationship.<sup>67</sup> This type of agreement is very useful for the web page holders and users as well. However, it is the most restrictive and discriminating to users, putting them in the weak position type of a contract. Only the fact that one entered to the web page means that he/she should follow all the rules of the agreement and is liable under it, does not matter whether he/she agrees with the terms of it or not. If one is in the web page and is using the information it contains will automatically mean that he/she agrees with the terms of the agreement.

However, it should also be mentioned that for the purposes of the consumer protection law, the conditions of the agreement should be concisely and clearly written in the web page like

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65. Burdett Morgan Williamson & Boykin LLP, Internet and Computer Law, *A Texas Law Firm with Offices in Amarillo and Lubbock*. <http://www.bmwb-law.com/internet-and-computer-law.html>.

66. Ian Rambaran, Robert Hunt, “Are Browse-wrap Agreement all they are wrapped to be?” 9 Tul. J. Tech. & Intell. Prop. 173 (2007) <http://www.kfmlaw.com/library/browsewrapabstract.pdf>.

67. G. E. Evans, “Online contracts,” *Queen Mary Intellectual Property Research Institute*, United Kingdom: 7, accessed October 28, 2012, <http://gaileevans.com/GEEvansOnlineContracts2006.pdf>.

in the clickwrap agreement. For example, in the case *Pollstar v. Gigmania Ltd* the dispute arose, when the defendant Gigmania copied the announcement and used it for his own commercial purposes that was in the web page of the plaintiff Pollstar.com. Any information that the web page contained could be used for personal use only, but not commercial. Pollstar filed a breach of contract claim. It alleged that any user of its pollstar.com web site is immediately confronted with a notice that use of the web site is subject to a license agreement, which is set forth on the web site. Pollstar states that by clicking on the access button to retrieve any of the information contained in the web site, Defendant agreed to be bound by the terms of the License Agreement. The defendant was claiming that their legal relationship was not regulated by the browsewrap agreement because the terms of the contract were not visible for a regular user of the web page. The court agreed with the claim of the defendant about the requirement to make all the terms visible to an average user, however, it ruled a case in favor of the plaintiff.<sup>68</sup> First, the notification about the terms of use of the information contained in the web page should be visible and recognizable to every user of the web page.<sup>69</sup> However, in the pollstar.com's license agreement notice was a small gray text on a gray background, which is very difficult to recognize. Therefore, this case motivates the web pages to put the terms of the agreement in a visible to everybody place, moreover, these terms should be written in a clear and concise way. However, the fact that the user concretely did not see the terms of the agreement on the web page does not mean that he/she is not liable under it. This shows that the moment when the user entered to the web page, his/her liability under the civil legal relationship and this agreement starts.

The "Shrinkwrap" agreement is a type of an online contract, where one becomes a party of the civil legal relationship and concludes a contract, at the moment of opening the box that contains a product. Mostly, this type of contract is for the producers of the computer programs

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68. *Pollstar, vs. Gigmania Ltd.*, (No. CIV-F-00-5671 REC SMS).

69. See also *Specht v. Netscape Communications Corp.*, 306 F3d 17 (2d Cir. 2002)., *Ticketmaster Corp. v. Tickets.com, Inc.*, *Hubbert v. Dell Corp.*.

that are sold in the CD or diskette in a box.<sup>70</sup> This type of the contract is the most difficult for determining the true will of a person. The fact that a person opened the box will show his/her expression of the will and the consent of a person for the usage of the following product. The Shrinkwrap agreement causes many disputes and cases brought to the courts worldwide.

In the case of *ProCD Inc. v. Zeidenberg*<sup>71</sup> defendant bought a CD-ROM database with a license restriction, limiting the consumer purchaser to non-commercial use. The existence of a license restriction was declared by shrinkwrap packaging but the terms were inside the packaging and not on the outside. Defendant ignored the license and resold the information on the CD database. ProCD Inc. filed a lawsuit against Zeidenberg claiming that he violated the terms of the shrinkwrap agreement. Court ruled the case in favor of the plaintiff.<sup>72</sup> The reasoning that the court gave was that based on the norm in an American Law that states that if a buyer is presented with additional terms and offered the opportunity to reject and return the goods and subsequently does not reject the goods, then the buyer will have accepted those terms. The defendant concluded contract with the producer of the product, by the fact that he kept it to himself after opening a box, although he could return it to the producer after he learnt about the rules of the agreement.<sup>73</sup> Consequently, it can be concluded that the fact that one opened the product and did not return it to the producer after learning the terms of the agreement may be equalized as a will expression of the party to conclude a contract with the producer and be bound by the terms of that agreement written on the box.

However, there are some cases when except the terms that are written on the box, there are additional terms written in a paper inside the box. According to the *Arizona Retail Systems, Inc. v*

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70. G. E. Evans, "Online contracts," *Queen Mary Intellectual Property Research Institute*, United Kingdom: 7, accessed October 28, 2012, <http://gaileevans.com/GEEvansOnlineContracts2006.pdf>.

71. See also - *Klocek v. Gateway, Inc*, *Bowers v. Baystate Technologies* (320 F.3d 1317).

72. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)

73. Brandon L. Grusa, "Contracting beyond copyright: *PROCD, INC. v. ZEIDENBERG*," *Harvard Journal of Law & Technology*, 10, no 2 (Winter 1997): 5, accessed November 23, 2012, <http://jolt.law.harvard.edu/articles/pdf/v10/10HarvJLTech353.pdf>.



*Software Link, Inc.* case the court concluded that this kind of additional terms of usage of a product that are inside the box are not valid. Since the buyer agreed with the conditions written on the box before opening it and the terms of usage, what he found out after he opened a box should not make him liable under this agreement.<sup>74</sup> From this case, it can be concluded that for a shrinkwrap contract, the most important thing is that the buyer should agree with the terms of the agreement written on the box, after which he/she opens the box, and it means that he agrees with the terms of the agreement. However, any information on terms that he receives after he opens the box containing the licensed product, will be not binding for him to follow. This might seem odd at first sight how terms of the license agreement can have no legal force. Nevertheless, this is the nature of the shrinkwrap agreement, where a party of the contract is acquainted with terms of the license prior opening the box containing licensed product. Anything that he finds out after he opens the box will be considered to have no legal basis.

All the above given agreements for some extend may be found in the Kyrgyz legislature as particular types of acceptance that is recognized by the Civil Code of the Kyrgyz Republic. For instance, a silent acceptance – it is when will of a party, his consent to be bound can be seen from the conclusive actions of this party. In this type of will expression the actions of the party towards this agreement play an important role than of what he says or writes on a paper. For example, a person buys a flight ticket to London from the Delta Airlines. The fact that he bought the flight ticket particularly from Delta Airlines but not from the other companies shows his consent to agree with the terms of the Delta Airlines, that it provides for its flights. It is not necessary to create a written contract (*although it is possible if parties wish so*). The conclusive action of a person expressed in buying the ticket will be enough to state that there is a contract relationship between this person and the Delta Airlines. The same in the Clickwrap and Shrinkwrap agreements, where there is no need to conclude a written document with the terms of the contract

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74. *Arisone Retail systems, Inc., v. The Software link, Inc.*, (No. CIV 91-1553 PHX RCB).

in order to legally fix the contract relationships. The fact that a person clicks the button or opens a box containing the product protected by the license can be interpreted as a conclusive action showing that he wants to conclude this contract in order to be bound by it.

However, the situation is a bit different with the Browsewrap agreement. Simply opening a web site cannot be regarded as proof that the contract was concluded. For a contract, to take place there is a need in offer and acceptance of the parties. Also, mutual will expression, mutual consent of the parties to be bound by the agreement should exist.<sup>75</sup> Assuming that this will be a silent acceptance and the consent of the party is expressed through conclusive actions as article 174 of the Civil Code provides is not correct. To justify a particular action as a conclusive action of the party towards concluding a contract, it should be directly obvious that the party is willing to conclude a contract from the actions of the party. The true will of the party might be obvious only when a party accepting the offer has got acquainted well enough to accept it. One of the requirements of the offer is that it should be fairly certain and direct.<sup>76</sup> (See § 2.3 for more details) However, in a browsewrap agreements the person might not even see that the information contained in this web page is a subject to a license. Accordingly, it seems that if the person had not have an opportunity to get acquainted with the offer (conditions of use) and as his/her actions started to download / use the product, the transaction cannot be considered valid.

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The will expression in the electronic contracts is very different from the will expression in regular contracts. Instead of the direct, indirect or silent will expression, in electronic contracts expression of will may occur by clicking on the particular button, entering into a web page or opening the box. Although in the legislation of the Kyrgyz Republic there are three types of the

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75. Article 172 of the Civil Code.

76. Article 396 of the Civil Code.

will expression, we can identify the clickwrap, browsewrap and shrinkwrap contracts as a silent accept. However, appropriate amendments to the legislation should be made.

### § 2.3 THE FORM OF THE CONTRACT

The determination of the form of the electronic contract is debated all around the world. Although, many scholars support the opinion that it is totally different from all existing forms of the contract, the prevailing opinion is that an electronic contract is a type of the written form of the contract. Specific cyber area in which contracts are concluded and executed as well as the uniqueness of the usage of the electronic contracts as a proof, brings us to the conclusion that it is not adequate to put an equal sign between an electronic and a regular form of the contract.

If we refer to the Civil Code of the Kyrgyz Republic, the form of the contract can be oral and written.<sup>77</sup> Any contract can be concluded orally, unless otherwise: a) by law or by agreement of the parties, it is not required to be concluded in a written form, b) they are executed at the same moment with concluding or entering into the contract, c) the contract is in a written form, but there is an agreement between the parties on its oral performance.<sup>78</sup> All other transactions must be concluded in a written form. Which of the above given forms of the contract can identify the electronic contracts? Oral? Written? “Electronic?”

According to the Kyrgyz legislation a contract must be in a written form at the request of a party, or when the law directly states that this type of contract must be concluded in a written form. Another element is that it should be concluded between an individual and a legal entity or between two legal entities. Other element is that if the total amount of the contract is more than 10 times of the minimum calculation index of the Kyrgyz Republic<sup>79</sup> Since, many subjects that are involved in the business through the Internet are legal entities or private entrepreneurs, who also

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77. Article 174 of the Civil Code.

78. *Id.*

79. *Note: in Kyrgyzstan the minimum calculation index is 100 soms, so, 10 times of it will be equal to 1000 som.*

have the status of the legal entities<sup>80</sup> and since the following research is delimited to the legal relationships of B2B and B2C, further, this thesis paper will be looking to this type of contracts, where legal entities or private entrepreneurs are involved.

First, let us define what the contract that is concluded in a written form is. According to the Civil Code of the Kyrgyz Republic, the contract should be concluded *“by making one document, that expresses the content of the contract and is signed by the party or parties who are concluding a contract”*<sup>81</sup> However, for the multilateral contracts, there is also another way of concluding it in a written form – it is the exchange of the “letters, messages, telegrams, teletypograms, telephonograms, by the facsimile, electronic, or other type of communication or other way, which can trustworthily determine that the document is coming from the party of the contract.”<sup>82</sup> Based on the following definition, it can be stated that the contract is considered to be concluded in a written form only if there was an exchange of documents by the help of any type of the electronic devices. In other words, after the parties exchanged the messages by the email the written form of the contract is considered to be concluded. However, this position is not accurate because the above stated article directly says that the exchange of the messages is considered to have a lawful base only in those cases, if it will be possible to trustworthily determine the identity of the party by the contract and a person or a legal entity on behalf of which the message was accepted. One of the solutions that can be found is signing any electronic document with the Electronic Digital Signature (EDS) that can authentically verify the identity of the party concluding a contract. In Kyrgyz legislation, there is the Law of the Kyrgyz Republic “On electronic documents and electronic digital signature” (later in the text – Law on EDS) that regulates the any electronic relationship between subjects of law in using the EDS. However, EDS and other similar to it computer programs are not that widespread in Kyrgyzstan for this moment. As the Deputy

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80. Article 58.2 of the Civil Code.

81. Article 176.1 of the Civil Code.

82. Article 395.2 of the Civil Code.

Director of the Civil Initiative on Internet Policy Elnura Kudaibergenova said in her interview “The problem is not in the Law on EDS itself, but in how is it used in practice.” According to the Law on EDS authorized body that should be creating and distributing the EDS is the State Enterprise InfoCom.<sup>83</sup> By the words of Elnura Kudaibergenova, after the enactment of the Law on EDS, InfoCom ordered the soft program from Russia called CriptoPro, with the help of which it will be possible to create and functionalize the EDS within the Kyrgyz Republic. The problem is that the EDS which is created by the help of the CriptoPro soft is not recognized in the world. This is the real problem because Internet relationships cannot be bordered, limited to the territory, language or any other distinctions. This means that the EDS issued by one country should be recognizable not only in the other country, but also in the whole world. For example, if there will be an international contract concluded between a Kyrgyz individual entrepreneur and a Swedish legal entity and if the contract is signed by the EDS from the both sides, the EDS used by the Kyrgyz individual entrepreneur will not be recognized by the Swedish legal entity. The commercial activities of the Kyrgyz individual entrepreneur will be limited. Therefore, legal entities and private entrepreneurs do not use the EDS at all, and therefore it is not popular among them.

Recently, there was a private company created called DosTek. This is a company that also creates EDS, however, it uses other type of soft which is already tested and recognized in international arena. The other problem is that the DosTek is a private company, but according to the article 8 of the Law on EDS, the authorized body that shall be creating and distributing the EDS in Kyrgyz Republic, which is a state enterprise InfoCom. This means that the EDS that is given by the private company DosTek is illegal according to the Law on EDS. Therefore, no matter if the EDS that is issued in the DosTek is recognized in the international arena, will be

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83. Postanovlenie Pravitelstva o sozdanii Gosudarstvennogo predpriyatiya. [Decree of the Parliament on creating the State enterprise “InfoCom”] (Kyr.).

considered as illegal according to the law. Since the InfoCom is a State Enterprise, it gets funded by the state, and the state budget on its part is not ready to finance another soft that will be recognized internationally because of its costliness. For that reason, the subject of the usage of the EDS in Kyrgyz Republic is very complicated and controversial. Either the legislator should change and make some amendments to the Law on EDS, or the state budget should finance the new soft program for creating an EDS that will be recognizable internationally.

Since offer can be the electronic announcement/note on the web page of the offerer or his/her message by the email, then such actions as payment for the good, services and objects of the intellectual property can also be considered as the acceptance. Accordingly, offer should not necessarily be in a written form in accordance with the article 396.1 of the Civil Code, which states that an “offer is the proposal addressed to one or several concrete persons, which is definite enough and shows the willingness of the person, who made an offer to consider himself/herself as if he/she concluded a contract with the addressee, who will accept the offer.” This article does not say that the offer should be in a written form. If the offer is made to a concrete subject and shows the real willingness of the offerer to conclude a contract, then this can easily be considered as an offer. Thus, the Civil Code of the Kyrgyz Republic do not put any limitations in the form of the offer, it just gives the elements that the offer should contain in order to be valid. Thus, it can be concluded that the Kyrgyz legislation allows that a contract will be concluded through the Internet. However, the significant conditions of the contract should be present in the offer depending on what type of the contract is being concluded.

As it was mentioned before, some contracts should be concluded in the written form as it is required by the Civil Code of the Kyrgyz Republic. However, what are the consequences of not following the written form of the contract? In such cases, the Civil Code of the Kyrgyz Republic says that the consequences for non-compliance with the written form of the contract involves the

deprivation of the parties to bring testimonials of the witnesses as evidence of the transaction.<sup>84</sup> However, this also means that the law does not deprive parties of the contract the right to rely on the same electronic documents as evidence, as the parties are entitled to rely on other evidences.

Nevertheless, there are several specific cases in which the law directly provides that the failure to comply with the required form leads to the immediate invalidity of the contract. For example, art. 735 Civil Code speaks directly about the invalidity of the insurance contracts and credit agreements in case of non-compliance with the written form of the contract required by the Civil Code. Moreover, it is absolutely impossible to conclude foreign contracts in any other form than the written, in other words, the contracts with a foreign element should be concluded in a written form.<sup>85</sup> Also, contracts that require state registration in the appropriate authorities<sup>86</sup> or transactions that require notarization type of contracts directly stated in the Civil Code of the Kyrgyz Republic entails the automatically invalidity of the contract.<sup>87</sup> Based on above stated, it can be concluded that not all transactions can be concluded electronically, even if the electronic form of the offer and accept is not prohibited by the law. There are still some contracts the non-compliance with the forms of which will lead to the automatically invalidity of the whole contract.

Contracts under the offer-acceptance scheme in the electronic field already exist in the Kyrgyz legislation and for quite a long time. Art. 15 of the Law of the Kyrgyz Republic "On the Legal Protection of Software and Databases" (later in the text – Law on Software)<sup>88</sup> indicates that retail and providing extensive access to a computer programs and databases the special, other than traditional, procedures for the conclusion of contracts are allowed. The special procedure indicates the terms of the contract in the computer programs, software and databases. Specificity

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84. Article 178 of the Civil Code.

85. *Id.* Article 1190.2.

86. *Id.* Article 180.

87. *Id.* Article 181.

88. Zakon Kyrgyzskoi Respubliki o Pravovoi zashite Program I baz dannyh [Law of the Kyrgyz Republic On the Legal Protection of Software and Databases] (Kyr.).

of such contracts consists in the fact that the contract is concluded after the sale and purchase occurred. However, in the case of the sales and purchase contract through the Internet the copy might not exist, or in other words, it can match with the contract for the use of a computer program or database. In this case, there is no specificity, on the contrary this is the usual procedure for the conclusion of the contract by the means of the article 399 of the CIVIL CODE. It is a case when the offer and its terms are presented in the original product itself, and the quiet recognition of user demonstrated by starting to use the software program can be identified as the acceptance.

The above stated norm is formulated incorrectly since the offer might be presented in a quite different ways as it was discussed in the chapter 2.2. This places the acceptor in a certain dependence on the manufacturer of the program, in such sensitive area as software production. However, it may be relevant in understanding the logic of the legislator in such a complex area as the regulation of civil legal relations in the Internet.

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To sum up, the Kyrgyz legislation neither recognizes the electronic form of the contract nor prohibits the parties to use such form of the contract. However, it should be mentioned that the Civil Code of the Kyrgyz Republic directly states that some specific contracts should be concluded sharply in a written form and non-compliance with this requirement will lead to the immediate invalidity of the contract concluded. This way, such contracts as insurance contracts and credit agreements as well as the contract with the foreign element must be concluded in a written form only. Moreover, such contracts that require the notary approval or a state registration also cannot be concluded electronically because the legislator created a special procedure and form for them. Although, the electronic form of the offer and electronic form of the acceptance



already exists in Kyrgyz legislation in the Law on Software,<sup>89</sup> in the execution of such norm that allows to electronic offer and acceptance the offer is made with the product itself and the acceptance is starting to use the product, which is simply a silent accept recognized by the Civil Code of the Kyrgyz Republic.

## **§ 2.4 CONTENT OF THE CONTRACT**

The final criterion for the validity of contracts is the content of the transaction. This means that the nature and content of the transaction should not contradict the legislation of the Kyrgyz Republic. In other words, contracts with the vices of content of the transaction are the ones that are concluded for the purpose, knowingly contrary to the basics of law and morality, and pretended bargains. These types of contracts are determined by the legislator as the ones that have no legal basis for the transaction. No legal basis – no contract relationships.

In general, all transactions with the defect in its content are void, except for those, which are specified in the Civil Code of the Kyrgyz Republic as voidable. A voidable transaction is that contract, when there is a need of a court ruling in order to declare it as invalid. Thus, the contract can be determined as invalid only after a particular decree of the appropriate court of the contract being so. The void transaction is the one, which does not require any state body to declare it as invalid. In opposite, it is a contract which is invalid from the very beginning because the aim of the parties is against the law and morality that much, that it obviously should be considered as invalid.

Also, the Civil Code of the Kyrgyz Republic differentiates two types of void contracts: fraudulent contract and a sham contract.<sup>90</sup> The fraudulent contract is a contract, where parties conclude a contract just for visibility without willingness to be bound by it and create appropriate legal consequences set in the contract. A sham contract is a contract, which is concluded in order

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89. Law of the Kyrgyz Republic “On the Legal Protection of Software and Databases” from 30<sup>th</sup> of March N 28, Bishkek.

90. Article 188 of the Civil Code.

to veil another contract. Both, fraudulent and sham contract are void.<sup>91</sup>

If we analyze the contracts that are concluded in the Internet space with the regular contracts to the criteria as the content of the contract, then, it can be stated that electronic contracts are not any different from the regular contracts. Therefore, since the content of the electronic contract cannot differ from the usual contract this element of validity of the contract is considered to be the same.

The problem of the content of the electronic contract is not in its non-compliance with the law and morality, but many questions arise after it is declared by the special decree of the appropriate court as invalid. After the electronic contract is declared to be invalid, the regular restitution procedure starts. The restitution is a procedure, where both parties should return to each other anything that he/she got as a result of this contract. If it is already impossible to return it, then, it should be returned not in a natural form, but in a monetary.<sup>92</sup>

However, there are such cases as when all the things that are received by the parties as a result of the contract are confiscated by the state to the budget of the Kyrgyz Republic. For example, the contract that is concluded with the aim, which contradicts to the social and state interests, is considered to be voidable contract. If one party did not know about the bad aim of the other while concluding a contract, everything that the party with a good faith had before concluding a contract should be returned to it. However, all the things that the party with the bad aims owe will be confiscated to the state budget of the Kyrgyz Republic. If both parties were aware of that the content of their contract contradict to the law, morality and the social interest, then, everything that is owed by both parties will be confiscated to the state budget of the Kyrgyz Republic.<sup>93</sup>

Now, let us look into the restitution from the side of the electronic contract. Since the civil legal relationships between the subjects occur and start to functionalize in the cyber space, in the

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91. Article 188 of the Civil Code.

92. Article 184.2. of the Civil Code.

93. *Id.* Article 187.

Internet, it is impossible to determine the state, to the law of which it will refer in case of disputes. Accordingly, to the budget of which state will the confiscated things go is also difficult to determine.

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Although the element of the electronic contract validity as the content, seems the same with the validity of the regular contracts for the first sight, it has many features that are appropriate only for electronic contracts. This way, the restitution and confiscation modus operandi are uncertain procedures for the field of electronic contracts. Appropriate norms of the International Private law and the national laws of countries throughout the world should be taking into consideration such norms in their legislation.

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Summing up all the above stated in this chapter, it is important to note, that the criteria for assessment of the contract validity indicates that an electronic contract and a regular transaction is not that different from each other at some degree. However, they have certain characteristics and traits that are unique and refer only to this type of contracts. Thus, at the moment of conclusion of electronic contracts, it is challenging to see or identify the actual subject that is entering into civil legal relationship and whether this subject is capable to do so. Electronic contracts that many developed countries use the EDS for verification of the legitimacy of the party signing the contract, may also cause many problems and is burdened by the possibility to be used by unauthorized third parties. Moreover, such new electronic innovation programs as the electronic agents are problematic for the legislation of the Kyrgyz Republic at the moment by not being recognized at all.

Next, the true will of contracting parties and the expression of their consent in electronic contracts also differ from regular contracts. Instead of the direct, indirect or silent will expression

that are recognized by the legislation of the Kyrgyz Republic, in electronic contracts expression of will may occur by clicking the particular button, entering into a web page or opening the box. We can identify the clickwrap, browsewrap and shrinkwrap contracts as a silent accept, although these types of the will expression are not directly stated in the Kyrgyz legislation. Then, the form of an electronic contract can vary depending on the type and subject matter of the contract itself. The Kyrgyz legislation neither recognizes the electronic form of the contract nor prohibits the parties to use such form of the contract. However, the Civil Code of the Kyrgyz Republic directly states that some specific contracts should be concluded sharply in a written form and non-compliance with this requirement will lead to the immediate invalidity of the contract concluded. Subsequently, the content of the contract is really important in assessing the validity of electronic contracts. Although the content of the contract are the same in regular contracts, as not contrary to the law, morality and the public order, the result of declaring a contract invalid for non-compliance with the content criteria has huge difference. This way, the restitution and the confiscation procedures are not definite yet in the electronic contracts since the contract was made in a borderless cyber space, which is not a subject for any countries law by its nature.

Kyrgyzstan is not particularly in an urgent need of an excellent legal regulation of legal relations arising from the Internet. However, the statistics (*Figure 2 and Figure 3*) shows that the growth rate of Internet users in Kyrgyzstan is growing exponentially. This means that more and more citizens of Kyrgyzstan are involved in the internet relationship that should be regulated by law.

Currently, the existing laws in the legislation of the Kyrgyz Republic are unable to manage the volume of all the relationships that occur on the Internet. However, it is still possible to tight it up with the existing in the Kyrgyz legislati legislation norms. However, the law should be straight while regulating relationships that occur in modern world. Obviously, the legislator cannot foresee every single relationship that might occur while creating laws, however, it should keep up

after the developing civil relationships that is already being practiced by its citizens such as the electronic contracting. Therefore, the appropriate laws should be enacted and the proper amendments to the existing laws in the Kyrgyz legislation should be done by the appropriate state bodies in order to make a strong legal basis for its citizens in any sphere.

## **CONCLUSION**

Internet is entering into our life with a high rate. Every day we are faced with the conclusion of the electronic contract. As more people are getting involved to the Internet sphere the more legal problems they are going to face, and the government of the Kyrgyz Republic will not have a strong legal base for protection of interests of its citizens. Electronic documentation and contracting is not a completely new field of law for the Kyrgyz legislation. There are normative legal acts that can be used while regulating the electronic documents and electronic contract relationships. However, there is no separate normative legal act that would regulate the electronic legal relationship directly and this sphere has many problems. Even though there were attempts from the Parliament of the Kyrgyz Republic to introduce and regulate electronic civil relationships, they stayed as a model to which the Kyrgyzstan has to strive for. Moreover, the measures that were taken in order to accomplish the plans such as the Law “On electronic commerce” started very well, but then stopped and is being ignored for this moment.

Analysis of the Kyrgyz, Russian and European Union countries legislation determined that there is no such thing as the “electronic form” of the contract in general, but the “electronic way” of concluding the written form of the contract is recognized in many states. However, using electronic way of concluding a contract is allowed only in case if the authenticity of the document will be possible to determine. Moreover, the Law on EDS also does not establish the legal status of the electronic document as equal to the paper document. Subsequently, the same with the

electronic contract, it is not equal to the paper contract as any of the laws give a special legal status to it.

While examining the criteria for the validity of the electronic contracts it was determined that the electronic contracts have its unique character in comparison to the regular contracts while determining the subject of the contract. Since either offer and/or acceptance are concluded in electronic borderless cyber space, it is difficult to determine who really is entering into civil legal relationship and whether this subject is capable to do so. Moreover, the solutions used by many developed countries as using the EDS for verification of the authenticity of the party, may also be in danger and have problems with an unauthorized use by the third parties. This can create many problems and challenges during the disputes on determining the validity of the concluded contracts. Moreover, with the rapid development of the technologies such computer programs as electronic agents, acting on behalf of a person or a legal entity should have a legal capacity to conclude a contract. Kyrgyz legislator should think beforehand of these and many other issues that the companies doing business and the users of such services can face and improve its own legislation.

The will expression in the electronic contracts is very different from the will expression in regular contracts. Instead of the direct, indirect or silent will expression, in electronic contracts expression of will may occur by clicking on the particular button, entering into a web page or opening the box. Although in the legislation of the Kyrgyz Republic there are three types of the will expression, we can identify the clickwrap, browsewrap and shrinkwrap contracts as a silent accept. However, appropriate amendments to the legislation should be made.

The Kyrgyz legislation neither recognizes the electronic form of the contract nor prohibits the parties to use such form of the contract. However, it should be mentioned that the Civil Code of the Kyrgyz Republic directly states that some specific contracts should be concluded sharply in

a written form and non-compliance with this requirement will lead to the immediate invalidity of the contract concluded. This way, such contracts as insurance contracts and credit agreements as well as the contract with the foreign element must be concluded in a written form only. Moreover, such contracts that require the notary approval or a state registration also cannot be concluded electronically because the legislator created a special procedure and form for them. Although, the electronic form of the offer and electronic form of the acceptance already exists in Kyrgyz legislation in the Law on Software, in the execution of such norm that allows to electronic offer and acceptance the offer is made with the product itself and the acceptance is starting to use the product, which is simply a silent accept recognized by the Civil Code of the Kyrgyz Republic.

Although the element of the electronic contract validity as the content, seems the same with the validity of the regular contracts for the first sight, it has many features that are appropriate only for electronic contracts. This way, the restitution and confiscation *modus operandi* are uncertain procedures for the field of electronic contracts. Appropriate norms of the International Private law and the national laws of countries throughout the world should be taking into consideration such norms in their legislation.

Based on these, my recommendations would be:

- ✓ Make amendments to the Law on EDS giving full powers to “Dos Tech” to be an authorized state body to issue the EDS;
- ✓ Enact the Law “On electronic commerce”;
- ✓ Recognize the electronic agents as subjects of law and make appropriate amendments;
- ✓ Reflect in the appropriate normative legal acts recognition of the click wrap, shrink wrap and browse wrap will expressions.

As statistics show, there is a rapid increase in the number of users of the Kyrnet last 3 years. (*see Annex 2 and Annex 3*) This means that as more people of Kyrgyzstan are going to be

involved with the Internet sphere, the more problems the legal system is going to face due to the lack of norms that straightly regulate electronic contract relationships. Moreover, this will stop the process of the business development and general growth of economy of the Kyrgyz Republic. Based on the data given by the Invesp.com in 2011 the sales volume in the sphere of the electronic commerce was \$ 680,6 billion. By the prognosis of the same agency, this amount will only grow and in 2015 it will reach up to \$1,5 trillion. Being the part of the international community and taking the first place among CIS countries in Internet development, Kyrgyz Republic should create a safe and convenient legal platform for the users of the Kyrnet.



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## ANNEXES

## Annex 1.



## Annex 2.



## Annex 3

