

Proceedings of IYSC, (2021), vol. 10

Journal homepage: <http://journals.sdu.edu.kz/index.php/iysw>

2021 International Young
Scholars' Conference



**REGULATION OF THE SMART-CONTRACTS IN THE CIVIL LAW OF THE
REPUBLIC OF KAZAKHSTAN**

Kuzdeubayev Nurtas

Suleyman Demirel University, Kaskelen, Almaty, Kazakhstan

Abstract

The rapid growth of digitalization transformed most business activities, where the role of technology is prevailing. One example would be the emergence of smart contracts. The smart contract is the contract between two or more parties, contractual terms of which can be automatically enforced without the intervention of a trusted third party with the help of blockchain technology. Although it has several benefits, the term “smart-contract” is not reflected in the legislation nor the practice of dispute resolution is evolved. This article analyses Kazakhstani legislation for the placement of the smart contract in the law system compared to the other type of traditional contracts.

Keywords: smart contract, contract law, civil law, creation of smart contract.

Түйіндеме

Әлемдегі технологиялардың қарқынды дамуы адамдардың күнделікті өмірін ғана емес, онымен қоса кәсіпкерлік саласындағы біршама іс-әрекеттерді өзгертті. Бұның бір мысалы ретінде смарт келісім-шарттардың пайда болуын атап өтуге болады. Смарт келісім-шарт дегеніміз шарттың ережелері үшінші тараптың қатысуынсыз, блокчейн технологиялар арқылы орындалатын екі немесе одан да көп адамдардың арасындағы жасалған шарт. Смарт келісім-шарттардың біршама артықшылықтары болса да, бұл ұғым заңнамада ешқандай көрініс таппаған не практикада кездесетін жағдайлардың шешімі де қарастырылмаған. Заңнамада реттеулердің болмауы практика кезінде көптеген қиындықтарды туғызуы мүмкін. Осы мақалада қазақстандық заңнамадағы

смарт келісім-шарттардың алатын орны мен өзге дәстүрлі келісім-шарттармен салыстырмалы талдау жүргізіледі.

Түйінді сөздер: смарт келісім-шарт, келісім-шарт құқығы, азаматтық құқық, келісім-шартты жасау.

Аннотация

Растущая роль технологии в современном мире трансформировала большинство бизнес-операции. Одним из примеров может послужить появление смарт-контрактов. Смарт-контракт это договор, составленный между двумя или более лицами, условия которого могут автоматически выполняться без вмешательства доверенной третьей стороны с помощью технологии блокчейн. Несмотря на то, что данное новшество имеет ряд положительных сторон, в законодательстве не закреплено понятие “смарт-контракт”, из-за чего может возникнуть проблемные вопросы в правоприменительной практике. Целью данной статьи является определение места “смарт-контракта” в казахстанском законодательстве в сравнении с другими традиционными видами договоров, а также определение признаков смарт-контракта, которые должны быть положены в основу правового регулирования тех отношений, которые возникают с момента заключения смарт-контракта.

Ключевые слова: смарт контракт, договорное право, гражданское право, заключение контракта.

Regulation of the smart contracts in the civil law of the Republic of Kazakhstan

The rapid development of the technology industry in recent years forced us to adapt to the completely different system. We started changing our habits, and started to adjust to the new reality. However, it should not be only the humans who get used to, but also the legislation should be adapted to the new trends. Law is the system that regulates the public relations, i.e. the state-individual relations and relations between individuals. It is important to note that the law should cover the relations between parties that are automatized to some extent to give the legal foundations for the operations. Smart contracts can be one example of the latest achievements in technology, which are not covered by the current Kazakhstani legislation.

Smart contract is an agreement between parties, whose execution operates automatically. There are certain specific characteristics that are inherent to the smart contracts: a) they operate on the basis of the Blockchain technology; b) contract is created in the form of computer code; c) once the smart contract is created, it is almost impossible to make alterations to the contract; d) independent and automated fulfillment of obligations. Smart contracts operate based on the blockchain technology. In order to conclude the smart contract, the parties of the contract should transmit the code, containing the terms of the contract, into the block of chain. Those terms will be performed automatically only if the outcome of smart contract is met. The example of smart contracts may be the crowdfunding system or delivery services and etc.

There are different definitions of “smart contract” in the juridical literature. A. Saveliyev in his work defines smart contract as “a contract that exists in programmatic form of code, implemented on the Blockchain platform, which ensures the autonomy and self-enforceability of the terms of such an agreement for predetermined circumstances”¹. On one hand, this definition might seem appropriate, but this definition loses its concept, if we transmit

¹ Савельев А.И. Указ. соч. 32-60

the code to the other decentralized platform. Other authors describe smart contract as an “an electronic algorithm describing a set of conditions, the fulfillment of which entails certain events”².

This term is also not enshrined in the most of the legislations of other foreign countries, but in some countries smart contract is defined in the bylaws or in the draft of legislative alterations. In paragraph 9 of Appendix No. 1 to the Decree of the President of the Republic of Belarus "On the Development of the Digital Economy", a smart contract is defined as "a program code intended for functioning in the register of transaction blocks (blockchain), another distributed information system for the purposes of automated execution and (or) execution of transactions or other legally significant actions"³. On January 22, 2019, the Italian Senate published a draft of legislative act, according to which the blockchain should be recognized by Italian law. The specified project proposes to establish the basis for the regulation of any relations associated with the use of blockchain technology.

The term “smart contract” is not defined in the Kazakhstani legislation, but it is mentioned in the project of EAEU “Eurasian network of industrial cooperation, subcontracting and technology transfer”, according to which states would cooperate to build technological infrastructure, including the service for providing the opportunity to conclude smart contracts.

Smart contract as a contract in a traditional meaning

The question arises on the essence of smart contract. Is smart contract the contract in a traditional way or just a simple electronic algorithm? What is the legal foundation of smart contracts?

² Скудутис М. Автограф в облаках // Расчет. 2016. N 2. С. 20-22.

³ О развитии цифровой экономики // Официальный интернет-портал Президента Республики Беларусь URL: http://president.gov.by/ru/official_documents_ru/view/dekret-8-ot-21-dekabnja-2017-g-17716/ (09.04.2019).

According to the Article 378 an arrangement of two or several individuals concerning the establishment, amendment or cessation of civil rights and obligations shall be recognized as agreement. The smart contract matches this definition. Firstly, in order to create smart contract, a person should express their will as creating a traditional contract in written or oral form. Secondly, they mediate the transfer of certain values (e.g. cryptocurrencies) from one person to another, in connection with which they mediate the economic relations of exchange. Thirdly, after the commission of such actions, the person is bound by the terms of such an agreement, although, as will be shown below, the nature of such bondage differs significantly from that arising in traditional agreements. Finally, the fact that a certain agreement was concluded by means of a computer or automatically does not affect the possibility of its qualification as a contract in the civil law sense.

Creation of the smart contract.

According to the general principle in Kazakhstani legislation, the parties have the right to choose the form of the transaction. Thus, Article 152 of the Civil Code of the Republic of Kazakhstan provides that transactions in writing can also be concluded in electronic form. Usually, those electronic contracts are signed by the electronic digital signature.

The concept of "electronic digital signature" is defined in p. 16) Art. 1 of Law No. 370-II, according to which it is "a set of electronic digital symbols created by means of an electronic digital signature and confirming the authenticity of an electronic document, its ownership and the invariability of its content." Thus, it is affirmed that the written form of a transaction made in electronic form means the creation of a document qualifying as an electronic document "in which information is presented in electronic digital form and certified by means of an electronic digital signature.

Article 153 of the Civil Code of the Republic of Kazakhstan states that failure to comply with the simple written form of the transaction deprives the parties of the right, in the event of

a dispute, to confirm its completion, content or performance with testimony. The parties, however, have the right to confirm the completion, content or performance of the transaction by written or other evidence, apart from testimony. Smart contract, in this case, is advantageous, since it is easier to determine the moment of its creation. The moment of entering into a smart contract is a time when an acceptance record is entered, the same program code is activated in the register record block.

The possibility of the existence of "smart" contracts, contrary to public policy.

The problem of using Blockchain technology to commit illegal actions is not new and has been actively discussed since the time when information began to appear about the use of Bitcoin as a means of payment for drugs, weapons, illegal content, killer services, etc. in the vastness of the Darknet - a segment of the Internet, access to which is impossible by means of ordinary browsers, without the use of special protocols and software. Article 116 classifies the objects of the civil law into three groups: objects that can be freely circulated, objects that are withdrawn from circulation, objects with restricted circulation (permitted for certain groups of subjects under specific circumstances). Thus, smart contracts can also be used to achieve illegal goals. The literature provides an example in which the subject of such an agreement may be payment for hacker services: as soon as the system receives proof of their provision based on cryptographic verification, for example, in the form of added lines of code to the target site, the system will unblock and transfer the payment in the form of cryptocurrency to the account specified by the contractor⁴. Absence of regulation and its difficulty may create such situations, when smart contracts are made to achieve illegal means. For a smart contract, the legal status of an object and its negotiability are irrelevant, provided that such an object can exist in the digital environment. Thus, despite the fact that the relevant agreement will be invalid from the point of view of law, it will still be performed. Perhaps the only thing that the law can do in

⁴ Pavan Duggal. Blockchain Contracts & Cyberlaw.

such cases is to initiate the process of bringing to criminal responsibility the parties to such an agreement in the event of their successful de-anonymization through operational-search measures.

Alteration of the contract.

It is believed that once the code is transmitted to the block, it is almost impossible to change the information. Thus, the norms stated in the Article 401 of the Civil Code might not be applicable as there is no opportunity to enact any changes in the signed smart contract. However, this problem is more technical rather than legal. However, the parties, by their agreement, can create an additional agreement (additional smart contract), also securing it by blockchain in a new block of this chain. The additional agreement will contain the new terms of the original agreement, while the information about the old agreement will still be retained in the chain. The procedure for changing the agreement must be described in the initial contract itself. If it is not stipulated, that both parties can make alterations consensually, one party individually can not make a new contract. The blockchain will retain both the original agreement and the additional one. Thus, you can simply trace the history of interaction between the parties, taking into account all subsequent changes to the agreement.

Conclusion

As technology is changing our minds about everyday activity, the legislation should also adapt to those changes. Implementation of technologies is already happening in practice, thus the government's role is to create a legal foundation for those activities. It is crucial because unregulated relations between parties may create a conflict, which would be hard to solve. Current mechanisms related to traditional contracts are not sufficient enough, since it do not consider the technological aspects of creation of smart-contracts. The most comprehensive approach, which includes all the features of a smart contract, seems to be the approach

according to which a smart contract, while not acting as an independent or separate type of contract, nevertheless predetermines a civil contractual relationship that has specific features.

References

1. A. Saveliyev. Указ. соч. С. 32-60.
2. М. Skuditus. Автограф в облаках // Расчет. 2016. № 2. С. 20-22.
3. On the development of the digital economy // The official internet portal of the President of the Republic of Belarus URL:
http://president.gov.by/ru/official_documents_ru/view/dekret-8-ot-21-dekabrja-2017-g-17716/
4. Pavan Duggal. Blockchain Contracts & Cyberlaw.
5. A.Y. Saveliyev. Contract law 2.0: smart contracts as start of an end of traditional contract law
6. A.Y. Ahmedov. To the questions of the sign of smart contracts