

전자계약에 관한 연구

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Study on the Electronic Contract

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요약

전자계약이란 과거 계약 당사자들이 대면으로 만나서 처리하던 계약서 작성·서명·관리 등의 일련의 계약 업무를 공인인증서 기반의 전자서명 및 암호화를 통해 시간과 공간의 제약 없이 온라인으로 계약서를 작성·체결·관리·보관하는 것을 의미한다. 최근 정보통신기술의 눈부신 발전과 초고속인터넷의 서비스가 보급되면서 이를 이용해서 이루어지는 거래계약으로 일정한 법률효과를 목적으로 두 사람 이상의 당사자가 전자적 의사 표시의 합의인 법률행위를 통하여 기업 생산성 향상 외에도 계약서류와 실제 구매·입고·지급 같은 전 과정을 조정할 수 있는 이점이 많아 급속도로 새로운 경제활동의 영역의 축으로 급부상하고 있는 것이 현실이다.

이러한 시대변화 속에서 전자계약의 성립과 관련하여 민법상 계약의 핵심인 당사자의 의사표시 등에 대하여 전혀 예상하지 못한 법률적인 여러 가지 문제점이 대두되고 있어 체계적인 법리구성이 요구되는 실정이다. 이에 따라 본 연구에서는 전자계약에 따른 문제점에 대한 고찰을 통하여 합리적인 개선방안을 제시하고자 한다.

▶ Keywords : 전자계약, 계약, 전자상거래, 전자적 의사표시, 전자서명

Abstract

The Electronic contract means creation·sign·management and storage of contract by online without limitations of the time and space through the electronic signature and encode which based on the Certificate instead of the past that treatment the contract such as creation·sign·management and storage of contract by face-to-face. Recently, the remarkable development of information and communication technology with supplying the high-speed Internet services. Accordingly, the transaction contract made by these also, the steady legal effect occurred by two or more parties by legal action which is the electronic agreement of expression. and it makes agreement improving corporate productivity and it can control the whole process such as contract

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documents and the actual buying * store * provision. Like this it has many benefits so, it suddenly rising as the new axis of economic activity area, it is a reality.

In this change of era, with the establishment of electronic contracts, there are many problems are occurred to the expression of parties which is core of the contract on civil code so, the systematic legal composition is required. Thus, in this study will propose the reasonable improvements about the issue of electronic contract through the consideration.

▶ Keywords : Electronic Contracts, Contracts, E-Commerce, Electronic Declaration of Intention, Digital Signature

I. Introduction

Recently remarkable development of computer science and technology, with based on the proliferation of Internet, many electronic business are made also various conveniences are offered and rapid changes are occurred in our life, and now it was developed in a manner that we can communicate with all the people in the world by computers global network. Also, the computers and global networks change the declaration and manner of intention as well as type of transaction. And it opened a new horizon of life and it is not an exaggeration to say.

Commonly in the knowledge and information society which the electronic contracts are commonplace, when legal person do legal action, the complex electronic device such as computers are much used as an important means. but, the development of modern science and technology are too fast So, requiring familiar the technology and do legal action to public can raise the new type issue. In these contract relations, to solve the unexpected problems it is deployment actively with institutionally. But, the Electronic contract is faster than the law can cope with the speed. So, to adapt the positive law to the real world, there are many

difficult legal issues have resurfaced.

Until now, General corporate electronic documents and framework act on electronic commerce, the act on the consumer protection in the electronic commerce transactions etc, Digital signature act and contract terms regulation act etc. are regulated as the Individual law and have enforced. However, electronic trading is generally recognized as a legal act, but these contents are applied individually by necessity without the relevant provisions of the Civil Code, and the electronic contract is also contract. Because of that, it is making the new legal challenge from applying the contract law. Therefore, to solve these problems, this study will propose the reasonable improvements as drawing the main problems about concept and establishment of electronic contract and the validity of electronic contract.

II. The Concept and Establishment of Electronic Contract

1. The Concept of Electronic Contract

In broad terms on the Civil Code, the Contract is the regal act which established by matching two or more each other opposed intention. Meanwhile electronic contract is the contract is concluded

through the network which has the internet services or similar capabilities for the purpose of exchange of goods and services by both parties. Other words, in the electronic contract, the agreement of both parties is established by the electronically ways. And at the normal contract, the contract established by the subscription which generate the legal effect and the consent. In this point there are differ from each other[1]. Therefore, electronic subscription and consent for electronic transactions are not the new form of contract, but it is just a type of approval the contract by electronically.

2. The Type of Electronic Contract

2.1 The Form of Facsimile Devices

Using the facsimile devices such as fax and scanner can sign the contract. In the case of a scanner, the contract document exchange electronic imaging by the scanner and after then, it is transmitted over the into the information processing device and communication network such as a computer etc.[2]. Meanwhile, the contract by facsimile, there are other cases by form of the transmission and reception. From the fax which is a facsimile to other party's facsimile or from the fax to other party's information processing device such as a computer.

2.2 The Form of Automated Device

The contract can be contracted by the automation devices such as a computer program. In the case of electronic contract by automated devices, the combine the both parties' intention which establish a contract is the case which recognized by silence, no act or act by one party who can consent the contract[3]. In the case of contracts by electronic automation devices by the existing contract law theory, the conclusion of the contract by an implied consent, realization of intent or conclusory intent etc. can recognize the establishment of the contract.

2.3 The Form of Information Processing System

Using by the information processing system can make the contract. This electronic contract means the legal act by combine with the computerized intentions of two or more parties using the information system which is connected by internet network for the purpose to occurrence of legal effect. And according to the contractor it can be classified as information processing systems electronic contract between individuals and business-to-business.

2.4 The Form of Internet Telephone etc.

↗The contract can be signed by using the Internet telephone or internet messenger and internet chat, etc. This electronic contract means established contract by deliver the computerized voices in real time through the Internet network, etc. Thus, the expression of will for the agreement of contract do not needs certain requirements such as orally, in writing[4]. Therefore, contract by the telephone has no big problem, but document ability diminishes too significantly, because of that there is a problem about the proving power.

3. Establishment and Validity of the Electronic Contract

3.1 Establishment of the Electronic Contract

To confirm the establishment timing, decide when the rights and duties occurred to contractor by contract is really important. On the other hand the case of electronic contract, about the timing of the establishment of contract which data can be a subscription? Which data can be consent? And be sent the notification of approval did not reach to an applicant, what happens to legal relation? Also, already transmitted data can be withdrawal or change can be a problem. On the Korean civil law, the contract theory was established by expectation that in principle, the contract will be made by oral or written. Because of that how regulate the each

problems in contract on the internet network is getting an important problem.

3.2 The Subscription and Consent

The subscription is one-sided and definitive intention for the purpose of establishing the contract combination with consent. Therefore, the contract does not satisfy only subscription, it is a legal matter which can be an element of the legal an element of the called the contract. Therefore, at the electronic contracts, one propose the propose quality and price of product, delivery place and other additional terms for contract on the computer screen or on the internet and when the other party accept its contents and requires a determination of whether the purchase or not it can be seen the subscription.

The consent is the expression of will that the recipient of subscription agrees with all contents of subscription and will make the contract to an applicant. Therefore, among the many products which are presented seller on a computer screen, the consent is the outgoing message which has intention by clicking a certain area on the screen.

3.3 The Effectuation of the Subscription and Consent

The effect of subscription occurs when the expression of will reaches the other party. In other words, when the subscription is accepted by the other party then the contract is established. The effect of the consent, when the seller approval then must comply with consent period in accordance with the provisions of the Civil Code Article 528, when the expression of will of consent is not expected by notion of trading and when an applicant does not want reaching the expression of will of consent, then not required that, when the fact that recognized just the expression of will of consent, the contract is established[5].

3.4 The Conclusion Time and Place of the Contract

If see the electronic contract as the contract between persons in remote places, the expression of will of consent for signing the contract occurs when it reach to an applicant until the period of acceptance. And if between people in conversation, the effectiveness time is regulated by Arrival Doctrine in accordance with the civil law[6].

The placement of establishment of an electronic contract is regard as the office or at each location of the writer or the recipient by Framework Act on Electronic Commerce Article 6 Paragraph 3, if there is more than two office, it regard as the office where mainly manage its electronic documents. However, the writer or recipient does not have offices, his permanent address is regarded as his office.

3.5 The Validity of Electronic Contract

When making a contract using the electronic means as a medium, it can also occur about the validity of contract. However, principle of freedom of contract with sign the contract related with completion, so, signed a contract by electronic means seems not problem[7]. However, trading the pornography, drug, etc. on the network can be invalidated by Article 203 of Civil Code as the violation of goodness custom and public order, dealing money is applied payment in illegal cause by Article 746 of the Civil Code.

III. The Issues of Electronic Contract

1. Inconsistencies of Intention and Expression

1.1 Manifestation of Unreal Intention

At the Electronic contract, if computer users select and input their mind differently than their inside mind and then the expression of will is effected by computer, In other words, manifestation

of unreal intention was made then it valid by Article 107 of Civil Code but, if other party knew or could know it was not unreal intention, then it can be invalidated[8]. In the process of natural expression, compare with the manifestation of unreal intention, the manifestation of unreal intention at the electronic expression there is no other problem except that just use computer or etc. and express. Thus, there is no obligation that the other party must investigate real intention of descriptor. And the case of electronic expression, the non-face-to-face is an important characteristic, so there are nothing the most cases of invalidate.

1.2 Fictitious Manifestation of Intention in Collusion

At the electronic contract the information processing apparatus cannot do the fictitious manifestation of intention in collusion or similar expression. So, actually be made collusion is performed between the parties in a natural way. Thus, at this type of electronic representation, cannot find any difference with the fictitious manifestation of intention in collusion except the concealment action is electronic representation. Therefore, in the case of e-commerce, it does not need to consider that the uniqueness of fictitious manifestation of intention in collusion of Article 108 Paragraph 1 of Civil Code. So, it will be able to accept[9].

1.3 Expression Due to Frauds

At the electronic contract, there is a wide variety of natural defective expression of computer by many reason compare with natural expression. So it is the problem that how to process the legal effect by defective expression of computer. In order to solve the problem, define the concept of misunderstanding. The concept of misunderstanding at the electronic representation is comprehensive recognizing an expression of computer user, so the

discordance between the expression of computer user and computer would be misunderstanding[10]. According to Korean Civil Code Article 109, the expression of will can cancel when there is a misunderstanding at the important part of legal act.

2. Other Issues of Representation

2.1 The Expression by Fraud and Compulsion

The expression must be determined fully effectively by free expression. However, if intention which should be determined freely interference from third parties and it works then it calls the defective declaration of intention. About this, there are two types' expression which is the expression by fraud and expression by compulsion. Computers do not have their own ability which can make a decision. So, fraud to computer is not possible and also compulsion to computer is impossible. And to do electronic expression works, fraud or compulsion by a third party is not influence to computer and it performed by computer users so, in this case it can cancel by Civil Code Article 110.

2.2 Representation by a Person of Limit Capacity

When the representation occurred by a person of limit capacity, applying the regulation about the person of limit capacity in Civil Code can be the problem. Due to the nature of electronic contracts based on trust and confidence between the parties, protect the safety of transaction is need but current Civil Code protect the person of limit capacity strongly and restrictively regulate other party who deal with the person of limit capacity. So it need to be interpreted in harmony between safety of the business and protection of the person of limit capacity[11]. Meanwhile, one of the major problems is when do trading without border, at the provisions of the minor's age, over 19 ages is adult in Korea, but if contract with other country which regulate the age of adult as over 18 ages, then the problem which

regulation will be followed is occurred such as a proper law and the trial jurisdiction.

2.3 Representation by an Unauthorized Person

When authorized person do trading by using the information of others it is an unauthorized representation and it cannot prove by prove the regulation of deputy on Civil Code, and when did not receive one's confirmation, a third party have to do at the option of the other party or implement the compensation for damages. Especially at the electronic contract, many legal problems are occurred, among them the most frequent is how prevent the counterfeiting and tampering about the contents of trade by unauthorized person.

2.4 Declaration of Intention by Deputy

The deputy on the electronic commerce is an intelligent agent who does electronic declaration of intention on behalf of the people for sale the goods and receipt of price by certain program. Currently the agent serves as a tool of person, but in the future, it is in the process of development that can deal by itself without intention of person one by one. According to the development of science, the problem about part of agent should be more cautious[12].

3. The Issues on Effect of Electronic Contract

3.1 The Issues of Effect of Electronic Contract

Once the contract is established, parties bear the bond and debt depending on the contents of the contract. In other words, seller bear the obligation for fulfill the benefits, and the buyer bear the debt fulfill the payment. Therefore, the trading was made through the Internet, the seller have to deliver the purpose of the payment to buyer, but if the seller did not delivery is purpose of the payment by his responsible reason, then he responsible for the buyer about contract liability. when the problem to the purpose of transaction has occurred, the seller has responsibility for security to buyer, and due to the

characteristic of the internet contract, its range seems and be applied the warranty responsibility on Civil Code Article 580 which related with the defect of stuff than the defect of right.

3.2 The Responsibility of Partaker in Electronic contract

In the electronic trading, when the no fulfillment of a contract is occurred by network manager and delivery supplier then the responsibility of seller can be a problem. As Article 467 Paragraph 2 in Civil Code, if it is not the specific thing debt the bringing debt will be fundamental principle for fulfillment of obligation and the debtor should have the responsibility of pay to entire process. Meanwhile, except for the default of an obligation responsibility by debtor due to negligence by implementation assistant, whether the creditor can hold implementation assistant responsible separately can be the problem.

3.3 Responsibility of Telecom Operator

At the electronic transactions, if the telecom operator has the negligence, there is no different view that he has the responsibility by the principle of own liability. However, the telecom operators put the exemption provisions about communication accident in the clause. Therefore, in case of the telecom operators, if problems occurred by force majeure such as natural disasters or out of self-care then to shirk responsibility is reasonable. But if it is occurred in his self-care area then bear the responsibility will reasonable.

3.4 Digital Signature Issue

In the Park Geun-hye government use the electronic signatures and certificates at the electronic bid for public in the Public Procurement Service and the bid for construction work at a local government. Also, general company uses the digital signature certificate to issue the electronic tax

invoices and exchange of electronic documents such as contract. Therefore, one of the challenges to authentication agencies, government and companies which use the electronic transactions should be resolved as soon as possible is expanding the range of application of electronic signature certificate[13]. In the current law, however, there is no regulation that mandating the use of electronic signature. So there are many problems.

IV. Improvement Plan of Electronic Contract

1. Inclusion of Terms into the Civil Code

When incorporating the terms which related with an electronic contract and using, above all the combination of the terms is most important. at the terms which currently in use, there are the electronic contract which is used currently by trading type, the contract of electronically type, automated intention which is used as in terms of the essential by electronic trading and dealing, and intention by computer, electronic and electronically type.

Meanwhile, the term which is used in Civil Code defined to only essential terminology and above this, there is no other provision. So, including as "electronic contract", "electronic expression of will" which widely known to public is may be the most rational way.

2. The Sending Timing of the Expression of Electronic will

The need for introduce the sending timing of the expression of electronic will in the Civil Code exists only when preserving the Article 531 Civil Code. In contrast, in the electronic trading there are many embarrassing cases that when is sending timing of the expression. So, it will be good to change the regulation about the reception timing on the

electronic documents and the framework act on electronic commerce as the arrival of the expression of electronic will to our Civil Code.

3. Amendment the Digital Signature Act

The digital signature is unique to the signer and can check the signer's identity objectively, and it is created under the signer exclusive control. If the content of an electronic document is changed, the digital signature is best way to confirm. So, it is regulated as electronic record which related with electronic document. Thus, clarify the concept of electronic signature and need to understand faithfully so, it will be good to use its form and words as simple expression "the record of electronic form".

4. Introduction of Duty to take Caution of Certification Authorities

About the electronic signature if the legal disputes occurred between each parties, regulate that who would bear the responsibility will be good. Thus, regulate about the signer and the certification authority's duty of care, and if it is violated, give shape about part of compensation for damage then, it is expected that there are the significant advances about reversion and share of each parties who surrounding electronic signature.

5. The Introduction of an Electronic Document Format

Certain form about document form should have in the electronic contract. At signing the contract and proof by electronic intention, it may be occurred the differences in writing with technical aspects, so, at least it should have the minimal format[14]. Current electronic documents and the Framework Act on Electronic Commerce have no regulation about requirements of format about electronic documents. Because of this, it seems to the strict legal regulations about Reliability and stability of

electronic documents is necessary. Therefore, the electronic document should be equipped the format and content which existing in the paper documents.

6. Modification of the Concept of Electronic Commerce

At define the e-commerce, do not regard at least some of the trading as the trading which processed by electronic documents, at least it need to re-regard an offer of consumer and providing information on sales of goods as the trading which is processed by electronic document. It cannot see that the trading can be the means of other acts as a trading and act. Thus, it is not appropriate as the define regulation of e-commerce[15]. Therefore, more realistic and practical define is required to be modified.

V. Conclusion

Thanks to the rapid development of computer science technology, brought many changes at the part of Civil Code through electronic media on the basis of free competition. This change makes human life conveniently. On the other hand, how to solve a variety of new forms of legal issues surrounding electronic contracts, use only the existing law and try to solve is the problem. Especially the legal issues of electronic contract has many problems at a wide range of legal and technical means, and the maintenance of the law accordance with the degree of development of science and technology and comprehensive and systematic legal legislation is required.

Therefore, in order to solve this problem: First, if transfer the terms which is used related with the electronic contract in Civil Code, it will be good to be transferred by terms as "electronic contracts", "electronic representation" which are widely known to the public. Second, about the sending timing of electronic intention, it will be good to change the

terms as the reaching of electrical intention and use intactly. Third, at the part of amendment the electronic signature, make clearly the concept of electronic signatures and need to stick to its expression of words, therefore use its format and wording as compact representation would be desirable. Fourth, the introduction of the duty of care of the certificate authority, if making clarify the compensation for damages surrounding digital signature, there will be significant advances about its reversion of responsibility and share. Fifth, at the electronic contract, strict legal regulation is necessary for the reliability and stability of electronic documents to the document format on document format. Finally, defining the electronic commerce is not adequate as a regulation, so realistic and a practical modification is needed.

Finally, to solve reasonably the issues which surrounding the electronic contract, the more systematic legislation is need.

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