ARTICLE:

DIGITAL EVIDENCE AND E-SIGNATURE IN THE RUSSIAN FEDERATION: A CHANGE IN TREND?

By **Alex Dolzhich**

The concept of electronic signatures and digital evidence in Russia has initially been developed by the 'arbitrazh' courts.[1] These courts exercise judicial power of the state and have nothing to do with arbitration, but the name is a soviet legacy (although the term 'commercial courts' would be a more appropriate definition). The rules of procedure for arbitrazh courts are laid down at the federal level by laws enacting the Arbitrazh Procedural Codes. The first Arbitrazh Procedural Code which directly allows electronic evidence came in force in 2002, but relevant court practice stems from the early 1990s.

To help promote the notion of electronic evidence, the Supreme Arbitrazh Court of the Russian Federation (SAC) issued a series of information letters. Information letters are addressed to the lower courts, and whilst they do not impose any binding authority, they are highly persuasive. The first information letter on the subject was circulated in 1992, announcing that SAC 'deems it possible to accept as evidence documents signed by an electronic signature' (Information letter dated 24 April 1992 No. К-3/96). In 1994, SAC informed that 'where parties have prepared and signed the contract by electronic means using an electronic (digital) signature, in case of disputes arising out of such a contract, they may present to the arbitrazh court evidence also certified by an electronic (digital) signature' (Information letter dated 19 August 1994 No. С1-7/ОП-587). In 1995, the SAC confirmed that 'if the legal force of the document is certified by an electronic digital signature, such document may qualify as evidence in arbitrazh courts' (Information letter dated 7 June 1995 No. С1-7/ОЗ-316).

It is possible to observe how the emphasis gradually altered from the concept of 'electronic signature' to 'electronic digital signature'. The latter term appeared in the list of alternatives for a manuscript signature in the Model Civil Code of the CIS of 1994 and Model Law 'On electronic digital signature' of 2000 (adopted by the Resolutions of the Interparliamentary Assembly of the CIS Member Nations), which in turn influenced the corresponding laws of the Russian Federation. The same concept is now widespread in the Russian subordinate legislation that provides for legal acts to be done by electronic means.

The legal definition of an electronic digital signature under the Russian law is very narrow. Article 3 of the Federal Law 'On electronic digital signature' No. 1-FZ dated 10 January 2002 (E-signature law) defines it as a 'requisite of an electronic document intended to protect such electronic document from forgery, generated by cryptographic transformation of information using a privacy key encryption, which allows to identify the owner of the signature key certificate and to determine that the content of the document has not been changed'. That is, in additional to identifying the functions of the electronic signature, the E-Signature law also prescribes specific technical standards.

Relying on these provisions, Russian courts historically took a very conservative approach towards electronic evidence. While e-mails signed with a certified digital signature were likely to be accepted as evidence (for instance, see *Rostelecom v Sberbank*,

[1] *Issues related to the use of electronic signatures in client-bank relationships fall outside the scope of this article. Please refer to Olga I. Kudryavtseva, 'The use of electronic digital signatures in banking relationships in the Russian Federation', Digital Evidence and Electronic Signature Law Review, 5 (2008) 51 – 57.*

Resolution of Federal Arbitrazh Court of Moscow Region dated 5 November 2003 No. КГ-А40/8531-03-П; *Saint Petersburg Newspaper v Federal Tax Service*, Resolution of Federal Arbitrazh Court of Nort-West Region dated 6 June 2005 No. А56-17988/2004; *Irkutsk Oil Company v PIK-France*, Resolution of Federal Arbitrazh Court of Volgo-Vyatski region dated 12 August 2005 No. А19-20241/03-13-Ф02-3079/04-С2), regular e-mails were not.

For instance, in 2006, Ayan brewery (Ayan) sued the Agency of Business Information (ABI) for defamation. ABI was accused of circulating defamatory e-mails alleging that Ayan watered down its drinks. ABI denied it had ever sent such e-mails. Ayan called several persons as witnesses who were officially subscribed to the ABI mailing list and used it as a daily news-source. The witnesses testified they had received the relevant e-mails. However, the Federal Arbitrazh Court of Volgo-Vyatski region found this evidence inadmissible. The court argued that e-mails were not signed with a digital electronic signature as required by the E-signature law, therefore the sender could not be identified (Resolution dated 13 June 2006 No. А74-3408/05-Ф02-2057/06-С2).

In November 2008, the Federal Arbitrazh Court of Moscow Region ruled on a dispute between the entrepreneur Vladimir Matochkin and Euroset, a major mobile telephone reseller. In 2007, Euroset contracted Vladimir Matochkin to assemble and install outdoor signs for Euroset shops. Under the framework contract, specific terms of each task were to be agreed upon in schedules to the contract. It was specifically provided that the parties could exchange counterparts by facsimile transmission, electronically or otherwise. Mr Matochkin argued that there was an established practice whereby a Euroset manager sent an e-mail to him with information that set out the scope of work and the timetable; and once the work was done, Mr Matochkin responded by e-mail with photographs of the assembled outdoor signs. Mr Matochkin also attached to his replies scanned copies of the additional agreements and transfer and acceptance acts to be signed by Euroset. There were a total of 51 additional agreements for the aggregate amount of 8.2 million roubles, out of which 4.5 million roubles was settled. Having produced print-outs of e-mails with the agreements (both paid and unpaid), Mr Matochkin claimed the remainder and statutory interest. However, the Federal Arbitrazh Court of Moscow Region agreed with the court of first instance that since the additional agreements were not executed, the claim was unfounded. The e-mails were not admitted as evidence due to lack of certification.

In April 2009, the Ninth Arbitrazh Court of Appeal affirmed the judgment of the Arbitrazh Court of Moscow in the case of *ABM Holding v N and L (HK) Ltd*. N and L (HK) Ltd (N&L) was a Hong Kong manufacturer that was prepaid by ABM Holding (ABM) for goods to be sold. The Arbitrazh Court of Moscow found the contract to be governed by the Russian law and UN Convention on contracts for the international sale of goods 1980 (CISG). Under the contract, all amendments should have been in writing and signed by the authorized representatives of the parties. ABM sought to avoid the contract and recover the advance payment made to N&L on the basis of a contractual provision that allowed doing so if the seller was 20 days late. N&L argued that the contractual delivery period was extended in later e-mail correspondence between the parties. The court, however, rejected the e-mails as inadmissible evidence. The court ruled that the authenticity of the e-mails was not certified by an ISP or any other telecommunication services provider, and therefore it cannot be determined whether the senders were authorized representatives of the parties. The court further noted that both Russia and China have made a reservation under CISG article 12, preserving the domestic requirement in relation to contract form. Referring to CISG article 13 for guidance ('For the purposes of this Convention 'writing' includes telegram and telex'), the Ninth Arbitrazh Court of Appeal reiterated its conclusion to reject e-mails (Resolution dated 6 April 2009 No. 09АП-3703/2009-АК). The resolution was later set aside by the Federal Arbitrazh Court of Moscow Region, but only because the parties reached an out-of-court settlement (Resolution dated 25 June 2009 No. Ф05-4996/09).

The cases cited above serve a good illustration of the formalistic view prevailing among Russian lawyers. Obligatory requirements to the written form of contracts have long roots in Russian law, dating back to the XVII century. Failure to comply with these requirements generally renders agreements unenforceable, but in certain cases (such as cross-border contracts) they are void.

At the time of writing, the Russian tax authorities tend to dispute the validity of contracts and, generally, financial documents that do not have an original manuscript signature or explicit indication of the signatory and its authority, to disallow tax deductions and refunds. There is also a widespread concern that people intent on taking over a company will make use of any relaxed requirements to the form of contracts to

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forge the documents to enable illicit takeovers. To an extent this assumption must be correct. However, corporate raids and hostile takeovers were commonplace in Russia despite the strict form requirements. The recent decrease in their numbers is probably due to the anti-corruption measures that have been introduced and the public discussion of takeovers, which has resulted in close attention by the government. As indicated by the experience of some common law countries, any Statute of Frauds may facilitate more frauds and perjuries than it prevents. The same conclusion derives from the Russian case law – conclusive evidence may be rendered inadmissible if there is no paper document with a manuscript signatures or e-mail with a certified digital signature attached, regardless of the practice that the parties have established between themselves.

Some changes are beginning to appear. On 25 April 2007, the Russian Federation was the tenth state to sign the UN Convention on the Use of Electronic Communications in International Contracts, dated 23 November 2005. The Convention now has 18 signatories, but no ratifications have been deposited as yet. The Convention is based on a functional equivalency principle, somewhat opposed to the current Russian legislation. If it enters into force and is ratified by the Russian Federation, the entire approach to digital evidence will need to be revised. Article 5 of the Convention will then be very helpful. It provides that in the interpretation of the Convention, 'regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade', which basically means international case law shall be taken into account by the Russian courts.

In addition, two recent cases decided by the Federal Arbitrazh Court of Moscow Region may indicate a tentative change in trend.

In December 2008, the Federal Arbitrazh Court of Moscow Region affirmed the interpretation of article 75(3) of the Arbitrazh Procedural Code so as to allow scanned copies of documents received by e-mail as written evidence. The defendant contended that the evidence was unreliable: the documents were presented as uncertified copies; they did not bear an original manuscript signature or seal impression. The court, however, followed the contract, which specifically provided for this type of communication (Case No. A40-19739/08-10-141) (for a more detailed note on this case, see page 281).

In February 2009, the Federal Arbitrazh Court of Moscow Region quashed the resolution of the Ninth Arbitrazh Court of Appeal and seems to have supported the judgment of the first instance. The latter was rendered by the Arbitrazh Court of Moscow, in that e-mails were accepted where the contract required communications to be in writing. There was no dispute as to the existence and content of e-mails; the only argument advanced was that e-mails had no legal effect and did not constitute writing under the Russian law. The judgment found such approach contrary to the actual relations of the parties and principles of reasonableness and good faith. However, the outcome of the case remains to be seen at the time of writing (Case No. A40-43946/08-93-94) (for a more detailed note on this case, see page 282).

Alex Dolzhich, LL.B. (Hons) (Moscow State Institute for International Relations) is a Vice-President of the global capital markets practice at KIT Finance Investment Bank. He is interested in how the law will respond to the digital environment of capital markets transactions, given the legal rules are written for the physical environment.

alexander.dolzhich@gmail.com