



## CHALLENGES AND PERSPECTIVES OF LAW AND DIGITALIZATION: CASE STUDY OF CONTRACT LAW

*Scientific review paper*

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### ABSTRACT

*The paper focuses on highlighting the weaknesses and lack of legislation for the electronic notarization of electronic contracts, not only in Kosovo's business field. The idea of electronic notarization is new in Kosovo and is considered a complex task for the regulation of contractual obligations, which condition the modern activities of e-business. The dynamics and dimensions of e-business development strongly influence the change in the techniques of concluding formal contracts at a distance through information technologies. New legislative practices in the modern world are successfully managing to eliminate or reduce these obstacles, which unintentionally complicate and slow down contractual legal relations between business partners. Notary services are no exception to this trend. Despite the positive trend, the legislation in Kosovo seems to be only in its beginnings, and as such it does not enable and guarantee business partners the electronic notarization of contracts, but unfortunately, there is no debate and no concrete initiatives so far. The first phase, which would better regulate this field, concerns the standardization through the validation of these contracts in the territory of Kosovo through criteria that prove and guarantee the accuracy of the contract.*

**Keywords:** e-business, electronic contract, electronic notarization, law, validation

### INTRODUCTION

IT technologies are present in almost all public relations areas requiring the same active development in the legal field. The increase in the dynamics of the movement of people, capital goods, and services remains stable, reliable, and safe only by guaranteeing at the same time a high quality of new service with a quick reaction through legal regulation. In these conditions, even the notary as a public support service has managed to transform into an advanced legal institution. The understanding of the importance of the development of digital

technology in modern society in the field of a notary by giving this institution the initiative, at the expense of the parties, without attracting budget funds, has managed to create a complete legal-electronic infrastructure that increased the security of important legal information as well as the speed and quality of receiving notarial services. The basis for this infrastructure is usually common (unique) notarial information systems (López Jiménez, Ditmar, & Vargas Portillo, 2022). The common information system of public notaries usually acts as a reliable repository for every notarial document. On the other hand, it serves as a unique high-tech tool that changes the nature of

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all notarial activities. In certain countries, the final transition to electronic document management was implemented in recent years. In this function, almost all notarial acts are registered in the registers within the common notarial information systems in electronic format. The creation of such electronic systems guarantees and allows the provision of operational control of important legal information and prevents fraudulent actions with notarial documents. As a result, these systems stabilize and accelerate the circulation of civil services. Thanks to the development of electronic notaries, clients receive services in a convenient way from “one window”. Therefore, for the authentication of real estate transactions, the notary obtains data from the necessary registers and then sends the authenticated contract for ownership registration. In addition, electronic forms related to business matters are notarized in almost the same procedure. Thus, notary offices have rightfully acquired the status of suitable offices for the verification, registration, and notarization of many services, which are also acceptable from a territorial point of view around the world (Lubis et al., 2022). In this way, the notaries have become an electronic governing partner, which is efficient and effective. As such, within the framework of electronic interaction with other sectors, the notary can cooperate with the Tax Administration, the Ministry of Internal Affairs, the Central Bank and commercial banks, municipal property services, and other important bodies in the country (Ahto, Pöld, Tarmo, & Vallner, 2011). In the countries that have not developed this segment, the notary system must soon build and implement the common electronic notary system, closely related to the civil status office and Business Registration Agencies. This way, the notarial system will have accurate data of all parties and commercial companies, thus creating a reliable database that can also be used by the service of bailiffs.

### THE NOTARY SYSTEM IN KOSOVO

The notary activity in Kosovo began in 2004 as a project of the Swiss Agency for Development and Cooperation (SDC), where Swiss notary experts supported the UNMIK Department of Justice in drafting the Law on the Notary System in Kosovo. The support lasted until mid-2006 and included the drafting of the law, the discussion of the law among relevant actors, the drafting of legislation, etc. (IHN, 2017). The second phase of the project (2008-2011) was supported by the Ministry of Justice in implementing the law on notaries. The

Swiss support consisted of the drafting of relevant secondary legislation, the training of 200 notary candidates, and support in the organization of the examination process for notary candidates. In September 2011, the Ministry of Justice certified the first 48 Kosovar notaries (including 3 non-Albanians and 10 women (Telegrafi, 2011)). Phase 3 of the notary project (2012 to 2014) aimed to consolidate the notary system in Kosovo. In addition to training the first group of 48 licensed notaries and the Chamber of Notaries, this phase created the final structure for entering the profession and training within the service. Moreover, the aim was to harmonize the legal framework related to the notary service. The organization and functioning of the notary as a public activity in Kosovo, including the working conditions and methods of notaries, are regulated by Law No. 03/L-010 for the Notary of Kosovo (Law No. 03/L-010, 2008). This law entered into force in November 2008 to form the Notary system in Kosovo, which would contribute to advancing the justice system in general. Considering the political, social, and economic circumstances, without a doubt the creation of the notary system is considered one of the biggest successes that Kosovo has achieved after 1999. However, especially in the last two or three years, it turns out that this system should be reviewed anyway understanding of the completion of the legislation and the range of services it should offer. The introduction of the notary service in the legal system of the country is regulated by the creation of norms that regulate the work of notaries. The entirety of these norms can also be called by the common name the Kosovar notarial law, which is part of the country's legal system where the notary is incorporated. In determining the definition of notarial law, the types and characters of the norms that regulate the activity of notaries are distinguished. The Law on Public Notary in Kosovo contains norms that regulate the organization of the notary service, the status of notaries, the conditions for performing the public notary service, the appointment of notaries, the termination of the public notary service, the functions and responsibilities of public notaries and the supervision of the work of public notaries. The above-mentioned norms constitute organizational notarial law. The drafting of notarial acts, their legal effect, and evidentiary power are also regulated by the Law on Public Notary of Kosovo so these norms represent notarial procedural law. These norms regulate the procedure to be followed by every notary about official actions. They are equivalent to the norms that apply to proceedings in civil,

extrajudicial, and administrative processes. The Law on Notary contains norms that regulate the form, content, and other elements of notarial acts for legal matters. The notary is obliged to recognize and implement the provisions of other laws and regulations in his work (Law on Obligatory Relations, Law on Property-Legal Relations, Law on Inheritance, Law on Business Companies, etc.). These are norms of a material-legal nature that are applied during the drafting of notarial acts and notaries need to know them so that these acts produce the desired legal effects and have the formal and material originality of a public document. So, notarial law or notary covers a wide range of different branches of law. This includes substantial norms, procedural norms, and organizational norms. In Kosovo, the responsibilities of public notaries are defined by the Law on Notaries, the Law on Obligations, the Law on the Family, the Law on Out-of-Contestation Procedures, the Law on Commercial Companies, etc. In general, it can be said that the responsibilities of public notaries are mainly from the following areas: jurisdictions in the field of family relations; jurisdictions from juridical relations; jurisdictions in the field of inheritance; competencies in the field of notarization - legalization, solemnization, storage of documents and securities, etc. Based on the provisions of the Kosovo Notary Law, the notary is authorized to perform the following tasks: compile and certify public notarial documents; certified notarial documents, drawn up by a party or by a third party; accept documents for cash, payment orders, checks, public bonds, securities, as well as other assets; Furthermore, in terms of the out-of-contestation procedure, it commences the following works: undertakes actions in the out-of-contestation procedure: the drafting of the notarial testament; inheritance review; deciding on the inheritance in extrajudicial procedure; evaluation of the public sale of movable and immovable assets in extrajudicial proceedings, and especially in cases of voluntary sales; storage of inheritance documents, money, securities, and valuable assets and, performing other duties assigned by law. The Law on Public Notary of Kosovo provides the form of a notarized document for legal actions, the conclusion of which produces significant legal effects or involves parties that need special protection. The parties to the contract and the entire legal system are interested that, through these provisions, legal actions are formulated clearly and without objections by persons capable and authorized to perform these legal actions. Thus, the

rights and obligations of the parties are balanced and clearly defined, so that there are no legal disputes during their implementation or without eventual problems recorded in the relevant public registers. The form of notarial processing is provided for several transactions in Kosovo law as the form "ad solemnities" or the condition of their validity. Failure to perform these legal actions in that form results in the invalidity of the legal action. If the parties did not bind the legal action in the form of a "notarized document", after having executed it in its entirety or its main part, the question of authentication of such work may arise. The goal of the legislator is the provision of the highest quality legal services by an impartial third party, which would aim at greater legal certainty and the avoidance of disputes. This leads to the conclusion that the form of the notarized document is mainly provided for the public interest, without which authentication would not be possible. In 2021, the Kosovo Parliament approved Law No. 08/L-022 for electronic identification and trusted services in electronic transactions (Law No. 08/L-022, 2021), through which are regulated and standardized the electronic identification methods and schemes, conditions of use of electronic signatures, electronic seals, electronic time stamps and devices, registered electronic services for court procedures, etc. Moreover, the conditions for issuing and using qualified certificates for the certification of services and authentication of the website, and trusted services in transactions or electronic documents have also been regulated. In this way, essential preconditions have been created for the notarial system to gradually enable the transition to electronic services. In reality, this law has been harmonized by Regulation (EU) No. 910/2014 of the European Parliament and of the Council of July 23, 2014, for electronic identification and trusted services for electronic transactions in the domestic market, which repealed Directive No. 1999/93/EC. Following the arguments, the Kosovo notary system does not offer services for the notarization of formal electronic contracts. This in particular represents one of the most serious problems and obstacles for business entities that develop activities in the territory of Kosovo. If we analyze the dynamics and the increasing volume of businesses in the country, then it results that the notary system must move in terms of the regulation and electronic notarization of these services. To advance this public service, it seems the Ministry of Justice has started to move in the direction of revising the primary and secondary legislation, strengthening the supervision system,

digitalization as well as increasing the security of the notary system (Gazeta Shqip, 2021). The current notarial system in Kosovo, at least until now, has excluded the possibility that notarial contracts can be concluded in electronic form, which seems too prohibitive and contrary to the reforming tendencies of this aspect of legislation to the needs of electronic market operations.

### **BINDING AND VALIDITY OF ELECTRONIC CONTRACTS**

Legally valid electronic contracts are a prerequisite for the development of electronic commerce and other civil transactions. In addition, to obtain a wide acceptance of electronic contracts, as a requirement is the legal validity of digital signatures including the further development of electronic commerce (Dahris et al., 2022). Based on international sources and comparative legislation, electronic contracts can be concluded in any way that they clearly express an agreement or an acceptance of the negotiating parties or, in this sense, the operation of electronic intermediaries (Gambino & Stazi, 2021). Of course, to avoid uncertainty, the legislation of the majority of European countries is mostly defined in the implementation of Article 9 of the Electronic Commerce Directive, which protects the parties from the unwanted or accidental conclusion of contracts. For a contract concluded in this way to produce a legal effect, the parties must offer each other the possibility of controlling all points of the contract, especially the price and the possibility of correcting errors after which an agreement can be reached and, contractual effects take place (European Commission, 2022). Normally, contemporary legislations regulate and allow the conclusion of an electronic contract, not only through the Internet but also through other information systems. For this contract, UCITA uses the term “computer information transaction” (Prasad & Pallavi, 2022). The UNCITRAL Model Law defines the same legal term as activities of a commercial nature undertaken through the exchange of information created, stored, or transmitted by electronic, optical, or analog means, including EDI 61 by electronic mail, telegram, telex, fax, etc (Osmanovic, 2022). In the terms used the economic and IT meaning and connotation prevails. By the principle of contractual freedom and consensual, the UNCITRAL Model Law and all comparable legislation, including international sources, unequivocally now recognize the validity of electronically concluded contracts. The Directive on electronic signatures requires

member states to provide advanced systems for electronic signatures that have the same legal effect as traditional signatures (Fairfield & Selvadurai, 2022). Hence, in Kosovar law and other comparable legislations, the electronic form is equated with the traditional written form only when this is expressly a condition for the validity of the contract. And, even in situations where a handwritten signature is required. Exceptions to this principle are most often made by certain contracts and other legal actions that still need to be bound traditionally and which are most often referred to as contracts that transfer rights over real estate (except lease rights), contracts where the objective law expressly requires the form.

### **IMPACT AND EFFECTS OF THE UNIQUE ELECTRONIC NOTARY SYSTEM**

The unique electronic notary system is a complex of software and hardware designed to provide efficient work for notaries and their interaction with state agencies of notaries and with the Ministry of Justice of the country. The interaction provides the population and business entities with high-quality legal notarial services, timely and reliable reporting for notarial actions, state registration as a subject of intellectual property, etc. (Halleux, Hendricks, Maliene, & Nordahl, 2023). The transition from traditional notarization to notarization of documents in electronic form is not just a matter of assigning electronic signatures and seals to a notarized document or storing writing for organizations. It is considered to be a modernization process that changes the way of performing the notarization service and the form of notarized documents followed by changes in other relevant procedures and processes. For electronic notarization, changes are required not only in the relevant legal provisions and notarization processes but also in notarization practitioners (notary practice organizations, notaries, secretaries, etc.) and notarization applicants must also make major changes in their approach and skills (Lubis et al., 2022). Electronic notarization is the certification of the document by a notary using electronic means. One method of this is to use digital signatures and seals to authenticate and confirm validity with digital certification (Gracale & Mekka Putra, 2022). Electronic notarization is the process in which a notary attaches an electronic signature and notarized seal using a secure key to an electronic document (PDF or Word). An electronic document exists as electronic data in computer-readable form rather than as words



on a page of printed paper. Some examples of electronic documents are: word processing documents, e-mail messages, Portable Document Format (PDF) files, and scanned documents in an image format, such as popular Adobe software and websites, etc. An electronic document, such as a mortgage agreement, has the same properties as a paper version but is created and maintained electronically, usually through a computer program or a website (Björk, 2002). In many documents, the terms “E-Notary” and “Digital Notary” are the same. Consequently, it is understood in the sense that the Public Notary certifies documents electronically. One method of electronic notarization is digital use. It can be understood that the “digital transformation of notarial activities” is a fundamental change in the way of organization, design, implementation, and management of the provision of the notarial service. Wang (2011) argues that processes and activities based on digital technology create greater value and efficiency (Wang, 2011). The main functions of the electronic notary must be the certification and execution of acts of a legal nature that are carried out in electronic form. To perform notarial acts in electronic form, a software package for notarization is necessary, which must be installed by each person who is authorized to perform some notarial acts in electronic form. To perform notarial acts in electronic form, it is necessary to be equipped with a digital signature and the possibility of setting a time stamp in the performance of notarial acts (López Jiménez et al., 2022). Furthermore, false documents in notarization activities are a problem, especially those that prove the ownership and the right to use the property. Notaries mainly use skills and knowledge to identify fake documents when handling notarized documents. Thus, notaries must have direct contact with paper documents, using their senses to look for security marks or traces of forgery. If electronic notarization is carried out without data on the real owners and on the origin of the property from land management agencies, there is a high risk of forgery, thereby compromising the work of notaries and the security of transactions (Bui Nguyen & Phan, 2022). Similarly, the situation of forgery of notary applicants is also on the rise, while the notary database is not linked to population data. Thus, notaries still have to rely on checking paper identity documents to determine the authenticity and forgery of the papers. This is the main reason for rejection when setting up electronic notarization.

## CONCLUSION

Our society is relying more and more on an economic system that is mainly based on the mechanism of contracts. At the moment, our society from an economic point of view is changing into an even more contemporary information society. One of the most important indicators showing this change is the growing digital economy. But, although the economic community still does not have confidence in electronic contracts, their further development will not be able to disclose their full potential and benefit to us. More and more countries are adopting legal frameworks to ensure electronic commerce and electronic notarization, driving the need to secure and recruit personnel who have legal and IT skills to become electronic notaries. This article highlights the urgent need for certain countries, including Kosovo, to take concrete actions to regulate primary and secondary legislation in the field of enriching the assortment of notary services. They also include the need for a unique integrated platform from an electronic point of view in public institutions. This complex platform must be based on registries that ensure justice in electronic notarization, authentication of the user’s identity, and encryption of data transmission by blocking and preserving the signature process. Electronic notarization (e-notarization) in its most basic and common form is the process of a notary placing his or her electronic signature or digital certificate on an electronic document. The digital signature or certificate is generated by a complex mathematical formula (algorithms) that includes coding and decoding (encryption) technology. The basic elements of notarization, including the personal appearance of the signatories at the notary office, still apply. But, instead of a paper document and a physical notary stamp, the notary puts the identifying information digitally into a document as electronic information in a computer-readable form. The electronic notary must be part of a public system that performs a certain function of authenticating an electronic document with an electronic seal. In this way, he is given the right to guarantee the authenticity of documents and legal force by placing a special “time stamp” on the electronic document jointly with the electronic signature of the public notary, including performing the necessary notarial actions in electronic form. The time stamp serves as proof that the document existed at some point and

enables the necessary changes to be made. The notary is an organized, quite compact, and transparent system that is related to the administrative-territorial state division. The activity of the public notary is focused on performing the necessary functions of public law, being entirely impartial. The public status of the notary's archive can be done electronically. The main goal of notaries is to guarantee the legal security of civil circulation using various technical and legal means, including modern technologies. In the implementation of information technology, the notary can use the verification of the authenticity of notarial documents and powers of an attorney coming from a certain person, such as a notary of the electronic system and a notary with a unique character. Moreover, through IT, it is possible to authenticate copies of electronic documents necessary for court proceedings, transfer documents in electronic form through a notary, keep minutes of joint stock company meetings, use video programs in various processes that are then authenticated by a notary, creating files with documents in electronic form, etc. A register of notarial acts can also be kept in electronic form by duplicating the results of storage in notarial chambers. Through IT, the consideration of disputes in the courts will be much faster and easier because the evidence is submitted electronically. However, to ensure information and data security for electronic notarization, it is necessary to take security measures at several levels, such as network, user verification, and database. At the same time, verification and data encryption must have a mechanism for authorization of access. And, codification of information and data related to access to services and information must guarantee the security of the website's operation.

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