European Proceedings of
Social and Behavioural Sciences
EpSBS
www.europeanproceedings.com
e-ISSN: 2357-1330

DOI: 10.15405/epsbs.2020.03.136

II International Scientific Conference GCPMED 2019
"Global Challenges and Prospects of the Modern Economic Development"

PROBLEMS OF EVIDENCE IN THE CONDITIONS OF DIGITALIZATION OF ECONOMIC JUSTICE

E. N. Churakova (a)*, P. P. Lang (b), A. V. Loshkarev (c)
*Corresponding author

(a) Samara State University of Economics, 443090, Soviet Army Str., 141, Samara, Russia, churakovaen@gmail.com
(b) Samara State University of Economics, 443090, Soviet Army Str., 141, Samara, Russia, petr.lang@mail.ru
(c) Samara State University of Economics, 443090, Soviet Army Str., 141, Samara, Russia, 2482337@mail.ru

Abstract

In this article, the authors study the influence of such a legal phenomenon as e-justice on the institution of judicial evidence, as well as investigate the attempts of modern procedural science to identify a special legislative niche for electronic evidence. Studying theoretical issues of evidence in digital form as part of the arbitration process, the authors analyze the emergence of new data carriers that carry facts significant for a lawful and informed ruling, and conclude that there is no need for a radical modernization of the classical doctrine of evidence in civil process, but there is an urgent need to re-evaluate the existing process of evidence from the perspective of information technology. The authors of the proposed article see the adaptation of doctrinal views on the place of electronic evidence in the general theory of evidence law as the most promising area of research. This issue is relevant for judicial practice, which, for reasons that are currently understandable, cannot do without technical and information difficulties in the extraction, identification and authentication of electronic evidence. In recent years, Russian economic justice has been confronted with "new evidence": screenshots of web pages, electronic correspondence of persons involved in the dispute. The authors analyzed the types of evidence proposed by the legislator used by participants in economic disputes considered by arbitration courts in the context of the digitalization of Russian society, studied the practice of enforcement of "new means of proof" in the framework of economic justice.

2357-1330 © 2020 Published by European Publisher.

Keywords: E-justice, e-proof, screenshot, e-mail, social networks, SMS.

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Noncommercial 4.0 Unported License, permitting all non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

https://doi.org/10.15405/epsbs.2020.03.136
Corresponding Author: E. N. Churakova
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

1. Introduction

The development of the digital economy in Russia is currently considered a priority area of the public policy. The process of active implementation of modern information technologies did not pass by legal proceedings. Many states are actively using information technology to shape e-justice, and it is a global trend. As a result of these processes, the term "e-justice" appeared, which migrated from the sphere of information technology to the legal field and affected not only substantive, but also procedural law.

It is difficult to overestimate the role of information technology in the administration of economic justice as a necessary element of the digital economy. New economic realities require an adequate format of guarantees for the exercise of judicial rights protection for participants in economic relations. Business activity in social networks, IT business, and generally the use of modern information technologies in civil turnover in the digital economy has had a significant impact on the evidence-based tools (Čizmić & Boban, 2017) provided to participants in economic disputes resolved by arbitration courts. In the light of the formation of a single digital space in Russia, the implementation of the National Program Digital Economy of the Russian Federation (2019), the digitalization of individual state institutions, the existing rules of the arbitration and procedural legislation on evidence and evidence itself gain a new meaning. There is a need to define criteria allowing the use of electronic evidence in resolving economic disputes.

2. Problem Statement

The subject of this study is information technology in the system of judicial evidence in arbitration cases in Russia. It is necessary to identify the difficulties that arise in connection with the influence of information technology not only in the means of evidence, but also on their procedure before the opposing side and the arbitral tribunal. It is necessary to determine whether the existing procedural and legal basis is sufficient for the active use in the administration of justice of evidence that has a digital basis, whether it is possible for the court to conduct their research and evaluation.

3. Research Questions

The following questions are research tasks:

- to study the practice of using modern means of evidence based on information technology in economic justice;

- to highlight the existing theoretical and practical problems of using such evidence;

- to determine whether there are reasons for changing judicial practice in terms of the existing generality of judicial evidence standards, which have stood in time and allowed the uniformity of this practice in connection with digital difficulties of the extraction, identification and authentication of electronic evidence.

4. Purpose of the Study

The purpose of the study in accordance with the research questions is to determine the place of such evidence as electronic correspondence, screenshots, webpages in the evidence system as part of the

https://doi.org/10.15405/epsbs.2020.03.136
Corresponding Author: E. N. Churakova
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

classical doctrine of evidence. The study is applied, as sometimes the arbitration practice does not do without technical and information difficulties in the extraction, identification and authentication of electronic evidence. At the present stage, the development of legislation should be determined not only by technical features and emerging judicial practice, but first of all by procedural science, which should implement and adapt to the classical theory of evidence, first of all, such concepts of the technological order as "informatization in the administration of justice" and "electronic" proof of fact".

5. Research Methods

The methodology of the study bases on general scientific methods of cognition, in particular, the analysis of the phenomena studied and the synthesis of the results of the study, induction, deduction. In the process of developing various aspects of the research topic, formal-logical, systemic methods of cognition were used. When revealing the legal nature of electronic evidence, the comparative legal method was used when comparing with categories such as written evidence, material evidence, etc.

6. Findings

Over the past few years, parties of arbitration courts economic disputes litigation have increasingly resorted to information contained in the information and telecommunication network Internet to justify their position in the case, presenting electronic correspondence, screenshots of pages of websites and mobile applications, etc. Very often the reliability of such information questioned, and therefore there is a need to certify the inspection of such information by a notary (Meneghetti, Quintavalle, Sala, & Tomasi, 2019). Naturally, this entails additional costs, sometimes quite considerable. In April 2019, the Plenum of the Supreme Court of the Russian Federation (Decree of the Plenum of the Supreme Court of the Russian Federation, 2019) formulated a new legal position regarding the probative value of such information. The country's supreme judicial body noted that the law does not establish evidence that can be considered admissible, allowing to establish whether there was a violation or not. Therefore, the court is authorized to accept any evidence if it is provided for by the current procedural legislation, and the evidence that is obtained on the Internet can be fully attributed to it.

The main requirement for printouts of materials from the Internet is an indication of the address of a page on the Internet and the exact time for recording such information. In this case, the courts will consider such evidence on an equal basis with the rest. In addition, the said resolution emphasizes the right of the court to independently inspect a website during the trial if it is urgent. Despite the fact that these explanations were given by the Plenum regarding the consideration of disputes on the protection of intellectual property rights, judicial arbitration practice is already shaping in this trend on other categories of economic disputes.

The current Russian legislation does not contain a legal definition of "screenshot", but traditionally it is understood as a screen shot on which a computer monitor or the screen of a gadget is captured as the user sees it at a specific time and date. Screenshots have evidentiary power, but the law does not clearly define the procedure for obtaining, presenting and disclosing such evidence.

The position regarding the screenshots, which was stated by the Supreme Court, is not new: lawyers regularly have to deal with the need to introduce printed materials from the Internet to the court. But the clarification of the Supreme Court solved the problem of the admissibility of such evidence and its form. Now, screenshots can be certified by the party in the case and there is no mandatory requirement for mandatory recording of information on screenshots by a notary by drawing up a protocol for website inspection. We believe that notarization makes sense when there is a risk of distortion or seizure of evidence by the time the court can independently verify the page on the Internet at the address indicated by the party, and requirements for the form – such printouts can be certified by the case party. Unfortunately, the risk of losing evidence in the digital environment is still quite high, often as a result of unfair actions of interested parties (Kurcer, 2015).

The number of lawsuits related to the settlement of disputes arising from obligations to provide advertising services in social networks, in particular on the social network Instagram, is increasing in order to attract an audience to Instagram accounts. To establish legally significant circumstances in the case, the arbitration courts consider not only the protocols for examining evidence by a notary, but independently examine the accounts.

Also, the subject of investigation in court in order to establish the circumstances of the case may be business correspondence of the parties recorded in electronic form (Roscini, 2016), via e-mail, WhatsApp, Viber messengers, etc. In judicial practice, the question of admissibility of such correspondence as evidence is decided depending on whether there was an agreement between the parties on the exchange of information in electronic form, for example, by including a special clause on this in the agreement indicating specific e-mail addresses or mobile phone numbers for communication. Currently, practice has formed two diametrically opposite approaches to solving the question of the evidentiary power of such correspondence.

According to the first approach, the parties should have an agreement on the exchange of information in electronic form, either as a condition of an agreement, or as a separate agreement on such an exchange. In this case, the agreement should indicate the electronic addresses to which such correspondence can be carried out. According to the second approach, the fact of having an exchange agreement in electronic form does not have to be recorded as an agreement of the parties on paper or be signed by electronic signature, the parties' behavior in concluding and executing an agreement is sufficient, from which it follows that electronic correspondence is admissible. An example would be the exchange of scanned copies of signed contracts, payment of bills, etc. via e-mail. With this understanding, the estoppel principle is also observed, which does not allow the party to continuously demonstrate its consent to electronic document exchange and then refer to the inadmissibility of electronic messages as evidence due to the absence of a written agreement on the exchange of information in electronic form (Feyzulla-Zade, 2018).

The well-established judicial arbitration practice indicates that a legally significant message can be sent in any form corresponding to the nature of the message and relations, when choosing a form, it is necessary to account the possibility to establish reliably subsequently from whom the message came and to whom it was addressed.

https://doi.org/10.15405/epsbs.2020.03.136
Corresponding Author: E. N. Churakova
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

In civil proceedings, the displacement of written documents in their classical form by electronic ones, but as written ones, is increasing. As a result, there are processes of digitalization of legislation and digitalization of the economy (Proskuryakova, 2018).

The result of the assessment of legislative shortcomings are conclusions that do not always correlate with well-established scientific and legislative axioms related to the theory and practice of judicial evidence. Confirmation of this fact is the presence of three points of view on the essence of electronic evidence, which are reflected in the Russian science of procedural law. The first campaign corresponds to the position of the legislator, according to which electronic evidence refers to written evidence; the second approach relates electronic evidence to material; according to the third approach, evidence obtained from the digital environment is an independent means of proof.

We believe that the second and third approaches are not based on the classical doctrine of evidence, but only on the external form of evidence presentation. We agree with the authors, who determine the place of electronic evidence in accordance with the first approach (Golubtsov, 2019).

According to the legislator, all documents and materials made in the form of digital, graphic records, including those obtained by facsimile, electronic or other communication, using the Internet, documents signed with an electronic signature in the manner established by the legislation of the Russian Federation, or executed otherwise allowing to establish the authenticity of the document by way, are written evidence in the case.

The classification of electronic documents as written evidence is based on the fact that the information contained in electronic documents is a human thought (concepts, judgments, conclusions, etc.) about existing reality. In cases where the document is a photograph or other reflection of reality that does not contain a thought, it cannot be accepted as written evidence. Such a document should be examined as evidence. Today, in evidence-based activity, writing has an advantage, which indicates that the legislator recognizes the self-sufficiency of this form, even for electronic evidence. The legalization of digital information has already laid down the plane of procedural law (Lasmoles, 2018). This obliges the legislator to reform the legal regulation of the procedures for the legalization of digital information or, at a minimum, to establish additional criteria for the legalization of documents in electronic form. A document reflecting the content of analogue evidence, and one that is filled with electronic stuffing, in its substantial being does not have fundamental legal differences that would be able to reflect on the procedural legal consequences of their use as instruments of struggle or competition in an adversarial process. The reliability of the evidence is related to the conformity of the content of the evidence with its validity. This quality of evidence is not related to the means of its transfer to the court. So, the evidence is recognized by the court as reliable if, as a result of its verification and research, it turns out that the information contained in it is true. Validation entirely depends on the fact that a fact of reality exists exclusively in an electronic (digital) environment or it exists outside it, but is transferred to an electronic (digital) environment. Rules and procedures for electronic evidence can and should be introduced into legal proceedings in accordance with current regulatory rules (Roscini, 2016), and not vice versa. The question arises as to whether the procedural and legal basis is enough for introducing electronic evidence and the possibilities for their investigation by the court for the administration of justice. We believe that, at the legal level, the presumption is lacking that electronic evidence has the same evidentiary power as

https://doi.org/10.15405/epsbs.2020.03.136
Corresponding Author: E. N. Churakova
Selection and peer-review under responsibility of the Organizing Committee of the conference
eISSN: 2357-1330

that presented in analog sources. So far, such a presumption seems to exist only in practice. The process of rationalization and optimization of justice, expressed today in its translation into a civilized electronic format, should not be contrasted with the stability and significance of its procedural form. Digital technologies that prevail in the modern world should not change the essence of law and the essence of its theories and institutions (Nenkov, Petrova, & Dyachenko, 2016). The "figure" with all its benefits remains an external catalyst for the development of the law. We consider it impractical to introduce a new means of proof – electronic evidence, because it is only a matter of form that does not affect the purpose of evidence. Documents in electronic form can serve both to obtain the necessary and sufficient factual data on the circumstances to be established in the case, and to obtain such, along with other evidence available in the case.

7. Conclusion

We believe that the procedural difficulties associated with the identification and authentication of digital evidence, as well as the concerns associated with the possibility of distortion, loss lie solely in the technological plane, but not in the legal one, the creation of a new procedural array seems unnecessary. The solution should be sought not in the doctrinal analysis of the rules on electronic evidence and their change, but in the technological and regulatory rules related to the identification of electronic documents and digital security.

References

Čizmić, J., & Boban, M. (2017). Electronic evidence in the judicial proceedings and computer forensic analysis. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 38*(1), 23-48. https://doi.org/10.30925/zpfsr.38.1.2

Decree of the Plenum of the Supreme Court of the Russian Federation "On the application of part four of the Civil Code of the Russian Federation", from April 23, 2019 No.10 (2019). Retrieved from: http://www.consultant.ru/document/cons_doc_LAW_323470 Accessed: 10.09.2019. [in Rus.].

Feyzulla-Zade, A. Yu. (2018). Admissibility of electronic evidence in civil proceedings. *Arbitration and Civil Procedure, 6,* 40-44. [in Rus.].

Golubtsov, V. G. (2019). Electronic evidence in the context of e-justice. *Bulletin of the Civil Procedure*, *9*(1), 170-188. [in Rus.].

Kurcer, A. E. (2015). Microfilming technology for long-term storage of electronic documents. *Bulletin of an Archivist*, *1*, 241-250. [in Rus.].

Lasmoles, O. (2018). La difficile appréhension des blockchains par le droit. *Revue Internationale de Droit Economique, 32*(4), 453-469. https://doi.org/10.3917/ride.324.0453

Meneghetti, A., Quintavalle, A. O., Sala, M., & Tomasi, A. (2019). Two-tier blockchain timestamped notarization with incremental security. In P. Mori, M. Bartoletti, S. Bistarelli (Eds.), *Proceedings of the Second Distributed Ledger Technology Workshop, 2334*. Pisa: CEUR-WS.

Nenkov, N., Petrova, M., & Dyachenko, Y. (2016). Intelligence technologies in management and administration of justice. *Proceedings of the 3rd International Multidisciplinary Scientific Conference on Social Sciences and Arts* (pp. 385-392). Albena, Bulgaria.

Proskuryakova, M. I. (2018). E-Justice in Germany: Current status and development prospects. *Bulletin of Saint-Peterburg University of Law*, *9*(3), 433-477. https://doi.org/10.21638/11701/spbu14.2018.312

Roscini, M. (2016). Digital evidence as a means of proof before the international court of justice. *Journal of Conflict & Security Law, 21*(3), 541-554. https://doi.org/ 10.1093/jcsl/krw016

The National Program "Digital Economy of the Russian Federation", approved by the Presidium of the Presidential Council for Strategic Development and National Projects, from June 4, 2019. No. 7 (2019). Retrieved from: http://www.consultant.ru/document/cons_doc_LAW_328854 Accessed: 10.09.2019. [in Rus.].