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The use of electronic evidence in court: a comparative legal analysis in the world practice

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Abstract

The article is devoted to such a topical issue as the use of electronic evidence in court. The purpose of the article is to determine the basic principles of electronic evidence, study domestic and foreign legislation on the use of electronic evidence in court, determine their place in the system of evidence, and identify problems with evidence in court. It was found that electronic evidence should be understood as factual data that are displayed in digital forms and recorded on any type of media, as well as after processing by electronic computers become possible and accessible to human perception. It has been established that in most of the European countries we study, electronic evidence is unquestionably classified as written and is not singled out. It has been identified that electronic documents have the same legal force in some countries as paper documents. It was concluded that in Azerbaijan the procedure for collecting and examining electronic evidence in domestic proceedings should be improved to avoid various technical errors, as well as to strengthen cybersecurity measures and increase basic knowledge of judges in the field of information technology.

Keywords: electronic testing; electronic document; factual data authenticity of proof; digital justice.

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El uso de la prueba electrónica en los tribunales: un análisis jurídico comparativo en la práctica internacional

Resumen

El artículo está dedicado a un tema tan actual como el uso de las pruebas electrónicas en los tribunales. El propósito del artículo fue determinar los principios básicos de las pruebas electrónicas, estudiar la legislación sobre el uso de estas pruebas en los tribunales, determinar su lugar en el sistema judicial e identificar los problemas comunes. Se ha constatado que la prueba electrónica debe entenderse como los datos fácticos que se muestran en formas digitales y se registran en cualquier tipo de soporte, así como después de que el procesamiento por ordenadores electrónicos sea posible y accesible a la percepción humana. Se ha establecido que en la mayoría de los países europeos que estudiamos, las pruebas electrónicas se clasifican indiscutiblemente como escritas y no se singularizan. Se ha identificado que los documentos electrónicos tienen la misma fuerza legal en algunos países que los documentos en papel. Se ha llegado a la conclusión de que en Azerbaiyán debería mejorarse el procedimiento de recogida y examen de las pruebas electrónicas en los procedimientos nacionales para evitar diversos errores técnicos, así como para reforzar las medidas de ciberseguridad y aumentar los conocimientos básicos de los jueces.

Palabras clave: prueba electrónica; documento electrónico; datos fácticos; autenticidad de la prueba; justicia digital.

Introduction

One of the central issues in modern law is the importance of determining the reliability of electronic evidence. To identify problems and controversies in the field of domestic legislation, it is important to understand and investigate the practice of using this type of evidence in other countries.

The introduction of electronic evidence into the criminal proceedings of the Republic of Azerbaijan is a necessary reaction to the digitalization of the public space: crimes are increasingly committed in the Internet environment, using gadgets.

Therefore, the realization of comparative legal analysis in other European countries and highlighting all aspects of this legal phenomenon should contribute to the improvement of electronic evidence used, the main purpose of which is to improve the institute of legal proceedings and its implementation within the framework of law, the vector of which should be aimed at protecting human rights and freedoms.

The efforts of modern jurists are aimed at considering the problems of reliability of electronic evidence.

The article aims to determine the basic principles of the use of electronic means of proof, the study of domestic and foreign legislation on the use of electronic evidence in court proceedings, determining their place in the system of means of proof, and identification of problems in proving in court. The object of the study is evidence as a structural component of judicial proceedings aimed at establishing the circumstances of a civil case. The subject of study - electronic means of proof in civil proceedings.

The methodological basis of the study consisted of the system-structural method, which allowed to determine the place of electronic means of proof in the structure of the institute of proof, and the dogmatic method, which allowed the interpretation of the relationship between the inner content and form of the phenomena under study.

1. Results

At present, mankind can observe a significant leap in the field of information technology. The era of the Internet and digitalization began to dictate its rules in modern society. It is very hard to believe, but if you look at the legal framework of different countries around the world some twenty or thirty years ago, it will be clear that at that time many norms of behavior did not exist because of the lack of social needs for that.

Also, in the law there is a dualistic understanding of the legal regulation - in one case, the electronic medium is material evidence, and in the other - another document. In turn, in practice, judges recognize as evidence screenshots of correspondence in a social network, without specifying in what form this evidence was attached to the materials of the criminal case.

It should be noted that thanks to such information leap in the world, we can talk about the importance of using certain types of electronic information, in the sphere of legal relations, i.e., we are talking about electronic evidence.

It should be noted that such types of evidence differ from other types of evidence to a certain extent. So, it should be said that electronic evidence is considered certain texts, photographs, voice or sound recordings, or video recordings (Vernydubov and Belikova, 2018).

By “electronic evidence should be understood factual data that are digitally displayed and recorded on any type of medium, and after processing by electronic computer technology become possible and accessible to human perception” (Vernydubov and Belikova, 2018: 300).

To be fair, it should be noted that the phrase "factual data" is also used by the Russian legislator setting forth the concept of evidence in relation to proceedings on cases of administrative offenses. In our view, this is the result of the influence of the lapsed Soviet legislation, where the concept of evidence was defined similarly.

The legislator of the Republic of Azerbaijan did a more original thing. In the definition, which defines the evidence in general, he stated that credible evidence (information, documents, things) is recognized as such (Article 124 of the Criminal Procedure Code of Azerbaijan Republic). By the way, this definition is consistent with the concepts of certain types of evidence.

In addition, scholar Hetmantsev (2019) believes that electronic evidence should be considered as the medium itself, that is, the source of certain information that has a weighty evidentiary value. We mean the information available in the form of relevant oral speech, written signs, and so on.

Ibadzade (2016), examines the system of criminal procedural evidence under the current legislation of the Republic of Azerbaijan, analyzes the main approaches existing in the doctrine of criminal procedure, definitions of evidence, describes in detail the features of certain types of criminal procedural evidence.

It should be noted that nowadays such an important social factor as the dynamic development of information technologies has greatly influenced the very important institute of legal proceedings in the world. A new aspect in the legal activity of which is the use of electronic evidence in court proceedings, which leads to the realization of the right to defense of both natural and legal persons (Vernydubov and Belikova, 2018).

It should be noted that the use of evidence in court proceedings in electronic form is not considered the newest and modern in foreign countries. The process of electronic proceedings has relieved justice agencies from performing unnecessary paperwork and helped to use the latest technology during the judicial process.

Next, let's look at the application of evidence in electronic format by the example of developed countries of the world, such as the United States of America, as well as European countries like Germany, France, England, as well as Hungary, and Ukraine.

First, it should be noted that one of the significant examples of the use of electronic evidence is considered the experience of the United States of America (hereinafter - the USA). By the way, the U.S. is considered one of the leading countries implementing scientific and technological progress. In addition, the U.S. has a well-developed evidentiary system (Eliseev, 2004).

It is worth mentioning that in fact, the practice of using electronic evidence had already begun to exist in the states since 1960. At that time, it

was associated with electronic computers. In addition, there is a document (codification act) in the United States called: Federal Rules of Evidence. This act defines the procedural evidentiary procedure, which specifically states that records and written documents must consist of words or letters, or handwritten equivalents, as well as typing, photographing, electronic recording or magnetic pulse, etc. (Code of Criminal Procedure of the Republic, 2000).

Thus, we can conclude that during the trial electronic evidence indisputably refers to written evidence and does not distinguish it as a separate type.

It should be noted that the reliability and admissibility of electronic evidence is recognized and implemented based on judicial case law specific to the United States, given that country's legal system.

It is recognized that in the 1970s, scientific sources, U.S. judges were asked a question about what exactly concerns the admissibility of evidence. Thus, subsequently, during court proceedings, it was recognized by the courts that because information output using electronic computer technology is perceived by a person audibly or visually, it is considered that such information is written evidence and must meet the criteria of admissibility of evidence (Nechyporuk, 2020).

2. Discussion

Thus, due to this approach in understanding electronic evidence, it is considered that attributing electronic evidence to copies or originals makes no sense. This approach has greatly simplified the process of establishing the admissibility of electronic evidence and contributed to achieving the main goal of US proceedings, i.e., protection of violated rights, freedoms, and interests of the citizens of this country (Dobie, 1939).

Having analyzed the norms of civil procedure of Germany, it should be noted that there is no concept of electronic evidence, but the definition of "electronic document" was enshrined in the Code of Civil Procedure of Germany, which noted that any data, information contained in electronic form and content that can be read repeatedly and with the use of written signs should be referred to electronic documents(Vernydubov and Belikova, 2018).

In particular, the regulation states that:

> If preparatory written petitions and attachments thereto, petitions, party statements, information, data, reports, and third-party declarations are required to be in writing and are submitted as electronic documents, they must contain a qualified electronic signature in accordance with the Electronic Signature Act (Schlotterbeck and Mansinne, 1970: 6).

The code establishes that there are types of such electronic documents, namely: public and private electronic documents, and documents that are executed using electronic mail. The signs of validity are considered to be that such documents must be contained in documents and private records set out electronically and have circumstances and qualified electronic signature set out in a sent message of electronic form with a "De Mail" account registered by a natural person and registered for a certain person (Moskovchuk, 2020).

Thus, it should be noted that having analyzed the German Code of Civil Procedure we can say that the electronic evidence (document) is considered reliable provided that there is a certain qualified electronic signature.

Compared with German legislation, given the French Republic, namely the practice of electronic evidence in France, it should be noted here that such documents are signed and should not be specifically linked to certain technological means due to the fact that electronic documents have the same legal force as paper documents (Eliseev, 2004).

Thus, the law of the French Republic, namely the Civil Code, establishes that written evidence should be understood as a certain sequence of symbols, letters, or other signs endowed with a certain meaning and regardless of how they are fixed and transmitted (Timmerbeil, 2003).

In addition, there is an interesting practice in France regarding the authenticity of electronic evidence. Such an issue arises if the court doubts the authenticity of the evidence or if the other party to the process wants to appeal its authenticity. One of the most common ways to establish authenticity is considered testimony, which must have some information that is considered evidence. This method applies to all types of electronic evidence.

For example, a litigant may submit to the court a photo of a screenshot from a website that may contain information that confirms or disproves a certain fact. Then the court, at its discretion, considers whether it is necessary to confirm the authenticity of such a photo with a screenshot. As a rule, in practice, it is often enough that the party itself indicates the link to the site where the information was obtained, and the judge himself checks its presence on the site (Kazachuk, 2014).

Thus, the French legislator made it clear that here the practice of evidence does not have a special distinction between paper and electronic documents, which simplifies the judicial process and does not contribute to delaying cases, which is similar to the same practice of electronic evidence in the USA.

Regarding the English legislation on electronic evidence the Evidence in Civil Cases Act 1968 should be mentioned here. According to this Law,

the use of the information included in the documents produced by a computer is considered acceptable for the protection of the legal interests of the persons. Such a rule existed until 1995. Today, the above-mentioned issue is regulated by the Civil Evidence Act, which also allows the use of information processed by electronic computer technology (David, 1973).

Regarding Ukraine, it should be noted that there is a clearly established notion that electronic evidence should be considered as information in digital or electronic form which must contain certain data regarding the circumstances relevant to the case. Such types of evidence include, but are not limited to, electronic documents such as graphic images, text documents, photographs, plans, and sound or video recordings. In addition, it should also include web pages, multimedia, text or voice messages, and databases. The above information may be stored on servers and portable devices such as a memory card, cell phone, etc. (Polyshchuk and Kylyvnyk, 2019).

At present, as we noted above, there is no unified approach to the understanding of electronic "evidence". On the other hand, we cannot fail to note a different approach to resolving this issue. Thus, the Code of Criminal Procedure of the Republic of Azerbaijan (Criminal Procedure Code of the Republic of Azerbaijan, 2000) enshrined the following postulate: the documents are paper, electronic, and other carriers reflected in alphabetic, numerical, graphic, and other data which may be of importance for criminal proceedings (Part 1, Article 135 of the Criminal Procedure Code of the Republic of Azerbaijan). Interesting is the regulation of physical evidence issue in CPC of Azerbaijan Republic: the documents that have particularities, foreseen by article 128.1 of CPC of Azerbaijan Republic (Part 135.2 of Article 135 of CPC of Azerbaijan Republic) might also be considered physical evidence (Criminal Procedure Code of Azerbaijan Republic, 2000).

Analyzing domestic judicial practice, we can conclude about the ambiguity of deciding questions about the admissibility of such evidence. Here are a few examples:

1. Most of the courts of the first instance do not consider printouts from the Internet, for example:
    - The district administrative court of Kyiv did not take into account the printouts from the articles of the unknown author of the social network "Facebook". The court considered that such information is not evidence.
    - The Svyatoshinskiy District Court concluded that the information on social networks is inadmissible evidence since their validity cannot be verified.
2. On the other hand, the second part of judges believes that such evidence should be used at trial, for example:

- Vinnitsa City Court of Vinnitsa region issued a decision, according to which were taken and examined printouts of screenshots from accounts of the network "Facebook"
- and the Novonikolaevsky district court of Zaporizhzhia region established the fact of hostile relations between two persons based on photo printouts from a conversation in a social network (Hetmantsev, 2019).

Vernydubov and Belikova (2018) concluded in their article that the procedure for collecting and examining electronic evidence in domestic proceedings should be improved precisely to avoid various technical errors, as well as to strengthen measures in cybersecurity issues and increase judges' basic knowledge of information technology.

Conclusion

Having studied the legal framework of countries such as the United States, Germany, France, England, and the Republic of Azerbaijan, let us summarize:

- In the U.S., during a trial, electronic evidence is definitely considered to be written evidence and is not distinguished as a separate type. Attributing electronic evidence to copies or originals makes no sense. This approach has greatly simplified the process of establishing the admissibility of electronic evidence and has contributed to achieving the main goal of US proceedings, i.e., protection of violated rights, freedoms, and interests of the citizens of this country.
- In Germany, electronic evidence (document) is considered reliable if a certain qualified electronic signature exists.
- In France, electronic documents are signed and do not have to be specifically linked to certain technological means due to the fact that electronic documents have the same legal force as paper documents. One of the most common ways to establish authenticity is through witness testimony, which must have certain information that counts as evidence. This method is applicable to all types of electronic evidence. Here the practice of evidence has no particular distinction between paper and electronic documents, which simplifies the judicial process and does not contribute to delaying cases, which is similar to the same practice of electronic evidence in the U.S.
- In Ukraine, it can be concluded that there is ambiguity in deciding on the admissibility of such evidence. The procedure of collection and examination of electronic evidence in domestic proceedings

should be improved to avoid various technical errors, as well as to strengthen measures in cybersecurity issues and increase the basic knowledge of judges in the field of information technology.

- In the future this issue should be considered from the side of making additions to the legislative framework of Ukraine, to improve all the gaps in the question of electronic evidence and the implementation of the regulatory framework for their admissibility.

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