ELECTRONIC EVIDENCE IN CIVIL PROCEEDINGS: RUSSIAN EXPERIENCE AND EUROPEAN LEGAL TRADITION

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ABSTRACT

This article examines the issues of electronic evidence - their legal nature, the procedure for a party disclosing and evaluation by the court. The author analyzes the works of both Russian and foreign experts on civil procedure, as well as on the issues of electronic technology. Furthermore, the authors have examined the previous related studies of Russian and foreign scholars, legislation of Great Britain, Germany, France and European experience represented by EU directives. In this study, it is attempted to consider not only the issues of exclusively legal analysis, but also the philosophy of proof. This term is actively used in foreign legal science, and there is a much broader legal methodology, that is, a general scientific methodology and an interdisciplinary approach are used actively.

Keywords: Electronic evidence. Legal nature. Disclosure of evidence. Forensic knowledge. Assessment of evidence.

PROVA ELETRÔNICA NO PROCESSO CIVIL: EXPERIÊNCIA RUSSA E TRADIÇÃO JURÍDICA EUROPEIA

RESUMO

Este artigo examina as questões das provas eletrônicas - sua natureza jurídica, o procedimento para a divulgação de uma parte e a avaliação pelo tribunal. O autor analisa os trabalhos de especialistas russos e estrangeiros em processo civil, bem como em questões de tecnologia eletrônica. Além disso, os autores examinaram os estudos anteriores relacionados de acadêmicos russos e estrangeiros, a legislação da Grã-Bretanha, Alemanha, França e experiência europeia representada por diretrizes da UE. Neste estudo, procura-se considerar não apenas as questões da análise exclusivamente jurídica, mas também a filosofia da prova. Este termo é usado ativamente na ciência jurídica estrangeira, e há uma metodologia jurídica muito mais ampla, ou seja, uma metodologia científica geral e uma abordagem interdisciplinar são usadas ativamente.

Palavras-chave: Provas eletrônicas. Natureza jurídica. Divulgação de provas. Conhecimento forense. Avaliação de provas.

PRUEBAS ELECTRÓNICAS EN PROCEDIMIENTOS CIVILES: EXPERIENCIA RUSA Y TRADICIÓN JURÍDICA EUROPEA

RESUMEN

Este artículo examina las cuestiones de la evidencia electrónica - su naturaleza legal, el procedimiento para que una parte revele y evalúe por el tribunal. El autor analiza los trabajos de expertos rusos y extranjeros sobre procedimiento civil, así como sobre los temas de tecnología electrónica. Además, los autores han examinado los estudios previos relacionados de académicos rusos y extranjeros, la legislación de Gran Bretaña, Alemania, Francia y la experiencia europea representada por las directivas de la UE. En este estudio, se intenta considerar no solo las cuestiones del análisis exclusivamente jurídico, sino también la filosofía de la prueba. Este término se utiliza activamente en la ciencia jurídica extranjera, y existe una metodología jurídica mucho más amplia, es decir, se utiliza activamente una metodología científica general y un enfoque interdisciplinario.

Palabras-clave: Prueba electrónica. Naturaleza jurídica. Divulgación de pruebas. Conocimiento forense. Valoración de pruebas.

INTRODUCTION

Currently, there are the works, the subject of which was electronic evidence, but it should be borne in mind that they considered electronic evidence only within the framework of certain codes. So, the first to be mentioned is the dissertation work by M.V. Gorelov "Electronic evidence in civil proceedings of Russia: theory and practice." This dissertation was defended in 2005. It should be noted that the monograph was written by A.P. Vershinin on the following topic: "Electronic document: legal form and evidence in court", which dates to 2000. Then there were the dissertations by S.P. Vorozhbit "Electronic means of proof in civil and arbitration proceedings" (2011) and Mitrofanova M.A. "Electronic evidence and the principle of immediacy in the arbitration process." In 2018 Vasilkova S.V. defended the following thesis "Electronic justice in the civil process". However, relatively recently, the CAS of the Russian Federation was adopted. There is a large array of foreign doctrine, which is devoted to electronic evidence in general, or to some specific aspects. Therefore, it is necessary to update the information on electronic evidence

METHODS

The authors used general scientific methods to study the evidence nature. Legal study is also facilitated by logical techniques in the form of analysis and synthesis, induction and deduction, comparison and generalization, analogy and typology. The formal legal technique made it possible to understand the essence and significance of legal norms governing the relations arising from the assessment of electronic evidence. The comparative legal method within the framework of domestic regulation was used to compare the procedure of electronic evidence disclosure. The author also used epistemology to study the essence of evidence. At the same time, some of the arguments and methodology are associated with the natural sciences in this work.

RESULTS AND DISCUSSION

The Russian Federation legislation does not define the concept of “evidence disclosure”. There is no single approach in the doctrine of law to understand this term. [The Arbitration Procedure Code of the Russian Federation No. 95-FZ (July 24, 2002)] The issue of evidence disclosure purpose has been studied poorly in modern Russian scientific literature. So, among the purposes of pre-trial disclosure of evidence, it is proposed to single out the following ones: conclusion of an amicable agreement, the use of alternative methods of dispute settlement, saving of judicial resources and the resources of the parties; saving the resources of the court for the case consideration, a potential defendant determination in a case of a court procedure (KUDRYAVTSEVA, 2019).

Thus, Professor Treushnikov suggests that the disclosure of evidence is familiarization with the content of evidence of other persons participating in the case. (TREUSHNIKOV, 2016) As for the normative consolidation, the part 3 of the article 65 of the RF Arbitration Procedure Code states: “Each person participating in a case must disclose the evidence to which he refers as the basis of his claims and objections to other persons, participating in the case, before the start of the court session or within the time period established by the court, unless otherwise provided by this Code." It can be noted that the disclosure of evidence is quite logically correlated with the principle of cooperation in the arbitration process. And it also shows a certain level of procedural integrity. Since a person who has been in good faith in substantive legal relations has no legitimate interest of behaving in bad faith during the process. Professor Sherstyuk notes that “the disclosure of evidence covers not only their presentation to the court, but also their designation, accompanied by a motion to obtain the necessary evidence”. (SHERSTYUK, 2004)

Thus, the Samara Regional Court stated that one should also study practice of individual courts. According to the Viber messenger correspondence provided by Ya., there was correspondence between the parties about the corporate phone, to which information on N. was sent, about the need to

submit reports since 24.07.2018, as well as the request to come and get remuneration and transfer the records and data of tourists (p.c. 105-110) [FOKINA, 2010]

As the part of the control activities carried out by officials videotaping is often used, and the courts accept videotapes as evidence (see, for example, the Resolution of the Fourth AAC on 12/06/2017 concerning the case N A10-6350/2016 (the fact of breaking the electricity meter seal) 4, the Resolution of the Fourth AAC dated on 08/10/2017 concerning the case N A10-2366/20171 (the fact of retail sale of alcoholic beverages without license was revealed). [Resolution of the Fourth concerning the case No. A10-6350 / 2016].

SMS messages and e-mail correspondence. As a rule, the parties do not discuss legally significant points of cooperation by SMS. However, the court may accept SMS as additional confirmation of certain circumstances, but not as independent proof (Resolution of the AC of the Ural District on 05/04/2016 concerning the case N A50-6436/2015).2 In this case, a message must contain specific data: dates, time, name of counterparties, other

information regarding the litigation circumstances. SMS or a message in a messenger program (for example, Skype, Viber, etc.) cannot do a good job, because often it is difficult to identify the correspondence parties and establish the circumstances relevant to the case (Resolution of the Seventeenth AAC on 12.01.2017 concerning the case N A50-10643/2016)3. Also, if the parties did not determine in a contract that this method of communication between the parties has binding force, the court will not take the correspondence into account (Resolution of AC of Sverdlovsk region on 12/13/2016 concerning the case N A60-50978/20164, the decision of the AC of Moscow on 06/27/2016 concerning the case N A40-8630/16-29-755). [Resolution of the RF AC on N 305-ES16-19166 concerning the case N A40-110430 / 2014].

Let us turn to foreign doctrine, which contains a description of the English term "discovery evidence". "Disclosure is the part of a legal process in which the parties exchange documents that are essential for the fair resolution of their disputes". English professor Neil Andrews writes the following: "Evidence disclosure performs four main functions: helps to achieve equal access to information; contributes to the resolution of disputes; helps to avoid so-called court pitfalls, i.e., the situations where a party is unable to respond properly to information suddenly disclosed during the last meeting; it helps the court to assess accurately the facts when making a decision on the case merits". (ANDREWS, 2012).

One should also talk about the information stored in electronic form (Electronically stored information). It is subject to constant review and development. "A document for disclosure purposes means anything that records information of any description. This is a very broad definition, including not only hard copies, paper records, as well as contracts, diaries, reports, notes and letters, but also electronic documents such as texts, messages and all related metadata, including temporary files, the data that could be removed"6. Let us refer to case law examples: the case of Digicel (Saint Lucia) Ltd & Ors v Cable & Wireless PLC & Ors [2008] EWHC 2522 (Ch). In this case, the court indicated that disclosure could extend to recovery and retrieval of backup tapes. It also confirmed that proportionality should be considered when requesting additional search for each piece of evidence that the parties should meet at an early stage to discuss disclosure issues. The case of Earles v Barclays Bank plc [2009] EWHC 2500. This case confirmed that anyone involved in civil litigation in England and Wales without knowing or adhering to disclosure rules is guilty of "gross incompetence".

Every legal system must somehow determine the truth of the factual issues. At one time, the courts in England and continental Europe relied on in-court checks - "proof" in the old sense of the English word (it meant the level of content) and goes back to the following saying: the proof of the pudding is in the eating. [Merriam Webster, Webster's Ninth New Collegiate Dictionary, 942 . (WEBSTER, 1991).

During a sworn trial, a plaintiff is required to swear an oath on the Bible or some "relic". During a trial, an accused may be asked, for example, to take the ring from the bottom of a cauldron of boiling water, and his hand will be tested to determine if he is healed completely or if there is a wound. This assumption will show whether he is guilty or not (this situation is also typical for the Russian process of those times. The rationale for the oath procedure was, apparently, theological: God would hit a person who swore falsely. Such views were widespread. [RICHARD, 2005]

In continental Europe, oath trials and probation would gradually be replaced by canon law and inquisition, and then by secular, national laws, which nevertheless still relied on torture to extract confessions even for civil procedure. (SADAKAT, 2005)

In 1766, Voltaire, who for a long time criticized the use of torture to determine guilt, complained about the practice of the courts in Toulouse, which recognized "not only evidence, but 1/4 and 1/8 of the evidence, that is, the derivatives from someone's opinion, i.e. rumors (here such type of evidence as "hearsay evidence" is meant, which is widely known in the English trial). So "Eight doubts can be excellent proof." But by this time the system had already been discredited and in 1808 it would be reformed under Napoleon.

In England, oath trials and trials were gradually replaced by the nascent system of jury trials. The first such trial was held in Westminster in 1220. The person accused of theft agreed to "submit to the will of the twelve neighbors" who were free and respected in the area.

CONCLUSIONS

During data exchange, their integrity must be maintained and demonstrated that the electronic evidence has not changed since the document was created, that is, attention should be paid to the time of its creation, storage, or transmission. The legislation on civil proceedings in many European countries was enacted before the use of electronic evidence, although many Member States have amended national legislation to accommodate the new form of evidence. However, some questions remain unresolved. Preservation is the process of maintaining and ensuring the integrity and original state of potential electronic evidence, i.e., they must be kept in a safe place so that protection against alteration and access to evidence are limited to those authorized to do so. As soon as the trial begins, it is necessary to use electronic evidence, which means that the evidence must be analyzed, and a final decision made.

Electronic evidence is any data obtained in the output of an analog device or a digital device of potential evidential value that is generated, processed, stored, or transmitted by any electronic device. (As set out in the draft EU directive on electronic evidence.)

SUMMARY

In § 371 par. 1 of the German Civil Procedure Code the law provides the fact that electronic documents are the objects for inspection. As for the printout of electronic documents, § 416 of the German Code of Civil Procedure regulates that they must be equivalent to the document if they have been certified by the issuing person or a public authority, which means that printouts without such a certificate and printouts of private electronic documents are not the documents in accordance with the German Code of Civil Procedure, but the objects for inspection1. Regarding the assessment of electronic means the Art. 142 of the German Code of Civil Procedure was set out in a version more favorable in terms of obtaining evidence (only since 2002). Currently, according to the German Code of Civil Procedure, the court can order a party to the proceedings or a third party to submit to the court the documents they possess, which are referred to by one of the parties (Anordnung der Urkundenvorlegung) (ZEIGLER; GIBSON, 2012). As already noted, written evidence is at the top of the hierarchy of evidence in French CPC. Because of its overwhelming importance, it is regulated in detail by the Code of Civil Procedure of France, the Articles 1316-1340. No other method of proof has received equal attention from the legislator. The concept of written evidence. For a long time, written evidence (alternatively called preuve par ecrit or preuvelitterale) was synonymous with paper evidence. This has been so widely accepted that there is no practical need for a legal definition. A consequence of technological advances is that courts have faced increasing difficulties in applying traditional concepts of evidence to new ways of document establishing and preservation (POLDNIKOV, 2020).

The Article 1316 of the French Civil Procedure Code states that "documentary evidence, or evidence in writing, arising from a sequence of letters, signs, numbers or any other signs or symbols that have an intelligible meaning, regardless of their carrier and means of transmission, is considered equal. Although this definition has been modernized due to electronic document inclusion, it remains somewhat classic. After all, an email is nothing more than a record recorded on an alternative medium (thus, video or audio recordings are excluded from this category). So, this article has examined the legal experience of electronic evidence in different European countries and ONE should point out the differences in regulation.

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