ХОЗЯЙСТВЕННОЕ ПРАВО И ПРОЦЕСС

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ELECTRONIC EVIDENCE IN ECONOMIC COURT

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SUMMARY

Modern society it is impossible to imagine without the informative computer systems. These systems have ability to keep, to pass and carry digital information. Taking into account the level of the informative computer systems actual enough there is an institute of electronic proofs. The amount of electronic data that can come forward as proofs increases with development of society and informative computer systems. A basic task to the court at the decision of dispute is all-round, complete and direct research of proofs that presentation in a court. The analysis of legal institute of electronic proofs is carried out in the article, description is given to this institute, identifies its main features and establishes the problems of electronic proofs in economic court.

Key words: electronic proofs, electronic information, electronic documents.

ЕЛЕКТРОННІ ДОКАЗИ В ГОСПОДАРСЬКОМУ СУДОЧИНСТВІ

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АНОТАЦІЯ

Сучасне суспільство неможливо уявити без інформаційних комп'ютеризованих систем. Ці системи мають можливість зберігати, передавати та переносити цифрову інформацію. У зв'язку з рівнем інформаційних комп'ютеризованих систем досить актуальним є інститут електронних доказів. Кількість електронних даних, які можуть виступати як докази, зростає з розвитком суспільних та інформаційних комп'ютерних систем. Основним завданням суду у вирішенні спору є всебічне, повне та безпосереднє дослідження доказів, які подані до суду. У статті здійснено аналіз правового інституту електронних доказів, надано характеристику вказаному інституту, виділено його основні ознаки та встановлено проблеми використання електронних доказів у господарському судочинстві.

Ключові слова: електронні докази, електронна інформація, електронні документи.

Statement of a problem. With the development of information technology in judicial practice, there all more often disputes in which electronic proofs come forward as means of proofs.

In a general view "electronic proofs" are totality of information that is kept in an electronic kind on all types of electronic transmitters and in electronic facilities. The feature of these proofs consists in that they can not be perceived directly, but must be interpreted definitely and analysed by means of the special technical equipments and software [1].

Analysis of recent research and publications. The study of the Institute of electronic evidence was devoted to the works of I.V. Bulgakov, R.S. Burganova, N.E. Blazhivska, O.T. Bonner, K.L. Branovitsky, O.P. Vershinina, S.P. Vorozhbit, M.V. Gorelov, D.D. Luspinok, M.O. Mitrofanova, T.V. Rudiy, R.V. Tertyshnikova and others.

However, in scientific literature only position is absent in relation to electronic proofs, and research of question in labours of foregoing scientists not in a complete measure answer the modern state of information technologies.

The purposes of the article. The purpose of the study in this article is the Institute of electronic evidence, the establishment of the problems of their application in the economic process and proposals to overcome the identified problems.

Presenting of the main material. Electronic proof in the Economic procedure code of Ukraine occupies an independent place at level with writing and material proofs.

The prescriptions of part of a 1 article 96 of Economic procedure code of Ukraine, that electronic proofs is information in an electronic (digital) form, that contains data about circumstances, that matter for business, in particular, electronic documents (including text documents, graphic images, plans, photos, video and audio recording and others like that), web sites (pages), text, multimedia and vocal messages, metadata, databases and other data in an electronic form. Such data can be kept, in particular, on portable devices (load maps, mobile telephones and others like that), servers, systems of reserve printing-down, other places of maintenance of data in an electronic form (including there is the Internet in a network) [2].

Consider some types of documents that contain electronic information.

Scientific literature under an electronic document determines a document that is created and can be used exceptionally within the limits of the computer informative system.

Article 5 of the Law of Ukraine "On electronic documents and electronic document circulation" stipulates that the information contained in the electronic document must include the required details of the document. Article 7 of the above-mentioned Law provides that the original of an electronic document is an electronic copy of a document with mandatory requisites, including an electronic signature of the author or a signature equivalent to his own signature in accordance with the Law of Ukraine "On Electronic Digital Signature" [3].

However, not all electronic documents can be used as an original.

Documents that can not be in electronic form:

– a certificate of inheritance;

– a document which according to the law can be created only in one original copy, except for the cases of the existence of a centralized repository of originals of electronic documents;

– in other cases, established by law [4].

As appropriately the professor noted A.T. Bonner, any electronic document can be transformed into a readable form. However after such transformation he, essentially, stops to be electronic and becomes a traditional document [5, p. 145]. Realization of such transformation of electronic documents is related to the envisaged legislation by research of writing documents and necessity of storage of them in the case file.

However, even the usual paper form of electronic documents does not guarantee leading to and research of actual circumstances that are part of the subject of its proof. This is due to the fact that when reproducing an electronic document on paper, it is likened to written proof. But if it has already been transformed into a written form, then all the requirements applicable to written documents aimed at guaranteeing the authenticity of the latter begin to apply. Therefore, a written document must contain all the necessary requisites, namely: the name and location of its creator, stamps, signatures of the persons who have concluded it, etc. However, all these details are not required if the parties have chosen the electronic form of making the document.

The least conflicting way of identifying electronic documents is the use by parties of electronic digital signature (hereinafter referred to as EDS) when entering into contracts.

According to Article 1 of the Law of Ukraine "On Electronic Digital Signature", the electronic signature is an electronic signature form obtained from the cryptographic transformation of the electronic data set that is attached to this set or is logically combined with it and allows it to confirm its integrity and identify the subscriber [6].

In accordance with part of a 1 article 3 of foregoing Law of EDS in its legal status equates to a personal signature (stamp).

That is, the presence of EDS on the document eliminates all the risks associated with the electronic form of documents and is a kind of guarantee. It is able to ensure the authenticity of the information required by the parties and provide the electronic document with legal validity.

Another way of legalizing electronic documents is to indicate in the text of the agreement the possibility of using an electronic document.

Thus, for that, to use electronic documents as valuable reliable proofs, it is necessary to follow the rules of procedural law, as well as standard techniques and methods for the collection, evaluation, research and use of electronic evidence.

As for the characteristics of electronic documents, then their specific features can be attributed:

1) the fact that they require the mandatory use of special details;

2) fixed on special electronic media;

3) the existence of a separate, recognized by the participants in the electronic document flow or approved by the competent authorities of the procedure for converting digital data into a document of the traditional regime;

4) impossibility of direct perception without the help of special technical and software tools;

5) in its content, as a rule, electronic documents are legal acts.

The largest form of electronic evidence on the amount of information that can be used as evidence is the information received from global information systems (in particular, the Internet). An example is the involvement by court information from Internet sites to the case files, as information posted on official web pages of public authorities, etc.

This type of electronic evidence should be allocated as an independent form, based on the following features:

1) Dynamic character. This feature can be viewed in two aspects: firstly, from the point of view of the dynamics of the existence of any information on the Internet – today it can be present on a certain web page, and tomorrow its owner can remove it and destroy it, including along with the web page itself (domain name). Secondly, direct use of network the Internet for presentation of court of proofs often touches cases, when information on the nature is dynamic: audio or videotape recording;

2) As a rule, a transmitter of digital information that keeps evidential information is very far from the place of legal proceedings, therefore it is impossible to submit the information medium to the court. Consequently, the only method of research of information is remained by a network the Internet, which provides rapid connection between the transmitter of information and the computer that a court will use during research of proofs.

Another type of information is text, multimedia and voice messages To them, in particular, belong correspondence an e-mail, SMS/MMS report and other. The separation of electronic messages into an independent form of electronic evidence is due to the following features:

1) As a rule, they do not use a digital signature that complicates the identity of the sender and the recipient;

2) Considerable difficulties in the actual dissociating of electronic sheet as totality of digital information from her transmitter for presentation in a court;

3) Mostly, controlled from remoteness of place of converting of digital information in a form suitable for perception a man, and places, where finds a server that keeps such information.

Under multimedia messages, you can understand the messages that are sent between mobile devices and have multimedia content (image, sound, video, etc.).

Metadata as a kind of electronic evidence contains information on social certainty, understanding of the content, context and structure of the electronic document. It is worth noting that metadata is a mandatory element in the process of storing an electronic document. In addition, the electronic document metadata has elements of legal process evidence of the integrity of the electronic document and its authenticity.

Another type of electronic information is the database. Under this type of information consider to count any well-organized set of data that includes charts, tables, presentations, stored procedures and other objects. The data in the database are based on the data organization model, that is, they contain them a description and may contain means for processing them.

So, after analyzing the main types of electronic evidence, it is possible with a confidence to highlight electronic documents as main type of the indicated proofs, that, in turn, have characteristic features are certain. They include content, context, and structure.

The contents of an electronic document are text or graphical parts documented information (information about individuals, objects, facts, events, phenomena and processes that he is folded).

The structure of an electronic document is its component parts without which a coherent document is impossible, which includes content, details and carrier.

As for the details of the electronic document, they should be placed in accordance with normative standards. Usually distinguish five basic details:

– the name of the organization in which the electronic document is created;

– the location of the organization (legal and postal address – if available);

– the name of the document;
– date of document creation;
– the code of the person who produced or approved the document.

It should be noted that the legislator did not provide a complete definition of an electronic document that would reflect all of its essential differences and did not foresee which mandatory elements it should have in order for the court to recognize it as proper evidence and to attach it to the case file.

Electronic documents are created for a certain purpose, and therefore have the appropriate functions. Document functions are determined by him its intended purpose. They can be implemented or not implemented in the process of document operation, depending on what purpose the author of the document laid down in its characteristics.

The main function of an electronic document is the transfer of information.

Thus for an electronic document are characterized by:

1) Authenticity – the property of an electronic document, which guarantees that the electronic document is identical to the declared;

2) Authenticities is the property of an electronic document in which the content of the electronic document is a complete and accurate representation of the verified operations, activities or facts and which can be trusted in subsequent operations or in subsequent activities;

3) Integrity is the state of an electronic document, in which no changes were made after its creation;

4) Suitability for use is the property of an electronic document that allows it to be localized and reproduced at any time.

A basic task to the court at the decision of dispute is allround, complete and direct research of proofs that presentation in a court. Judge in the process of assessing evidence, including electronic, carries out mental activity, which determines the affiliation and admissibility of evidence, their authenticity, sufficiency and mutual connection in general. This activity comes true in accordance with the laws of logic and in terms that is set by legal norms.

The difficulties that exist at present in the investigation of electronic evidence, in connection with specificity of individual acts of judicial research, give reason to believe that the assessment of evidence for a long time will be carried out according to the judge's internal convictions. But scientific researches, developments, must assist a volume that this persuasion was based on as possible more exact, complete, sound, implicit and objective grounds.

At present, in practice, some rules have been developed to ensure the reliability of electronic evidence and present them to the court:

1) If the electronic document contains graphic or textual information, a paper copy of it shall be printed, which shall be drawn up and certified by the authorized person and a copy of which shall be attached to the materials of the case. This copy is examined as a normal written document. A similar situation with the pages on the Internet;

2) If transactions, which are documented by an electronic document (an electronic document signed by the EDS), and the parties do not recognize the provision of the services, which are confirmed by this document, then a complex examination is based on data on the authenticity of the EDS;

3) If the electronic document contains audio or video information, it is usually done copying such files into a separate portable electronic medium, which is attached to the case materials and is investigated using special technical means.

The court must adhere to the following principles when assessing evidence:

– The principle of internal conviction;
– The principle of direct, complete, comprehensive and objective research of proofs in all totality;
– The principle of legality.

The principle of the judge's internal conviction is that the judge independently decides on the reliability of the evidence submitted and their sufficiency to make a legal decision in the case. That is, the judge's internal conviction is the personal attitude of the latter to a particular object, which appears in the process of consideration of the case and is based solely on evidence.

Under internal persuasion it follows to understand the opinion of judge formed during the trial of business. V.F. Boyko notes marks that internal persuasion is a world view of judge, that is formed from birth, during all life – id est it is vital experience, general culture, legal experience [7, p. 100]. Y.M. Groshev believes considers that internal persuasion of judge presents by a soba the realized necessity of judge, use to them of own opinions, looks and knowledge. It is related to sense of justice of judge, what which is considered as a form of public consciousness that combines the system of looks, ideas, presentations, theories, and also feelings, emotions and experiencing. They characterize attitude of people and task forces (including through actual behavior) toward the operating and desirable legal system [8, p. 64].

Having analyzed the above statements, one can conclude that internal conviction is an element of intellectual activity, which is directly related to the research and evaluation of evidence, which reflects the actual composition of the legal relationship existing in the case.

That is, the judge's internal convictions, like any other person, are based on his legal consciousness, world outlook, legal principles, ideas, theories, concepts that are the result of theoretical, rational analysis and reflection of legal reality.

As for the principle of the directness of the assessment of evidence, it means that the court must examine the evidence directly in the court session. This principle consists in the totality of the rules established by the law, which establish the way of the court adopting certain evidentiary objects that are relevant for the resolution of the case.

In order to establish certain facts, the economic court carries out direct research of written, material and electronic evidence, expert opinions, questioning witnesses, hears the explanation of the persons involved in the case, experts, and also announces such explanations, displays and conclusions, which are set out in writing.

The principle of completeness of the assessment of evidence means that the court is obliged to investigate and evaluate all evidence collected in the case, which, of course, is permissible.

As for the principle of comprehensiveness, it means that the court evaluates the evidence in a comprehensive way, taking into account the materials available in the case and the explanations of all those involved in the case.

The principle of objectivity in the assessment of evidence means that the court is an uninterested party in the resolution of the dispute and, accordingly, is impartial in assessing the evidence.

The affiliation and admissibility of evidence in a particular dispute are determined by the court, based on the requirements of the law.

It should be noted that the Economic procedure code of Ukraine prohibits the court, on its own initiative, from collecting evidence relating to the subject matter of the dispute, except in cases where the court has doubts about the fair exercise by the parties of their procedural rights or the performance of their duties in relation to certain evidence.

When considering a case in an economic process, the necessary conditions for the correct assessment by the court of evidence are:

– Establishment of communication of evidence with the circumstances of the case;

– Gathering evidence;

– Extraction of evidence.

Thus, to the nature of the connection the proofs, which are subject to the establishment of the circumstances of the case, include direct and indirect evidence.

Direct evidence is proof that it is directly related to the establishment of circumstances, in other words it refutes them (for example, a contract as a written proof directly confirms the presence or absence of certain conditions).

There are cases where the link between the evidence and the set circumstance is more complex and significant. In such cases, it is impossible to draw a clear conclusion on the evidence of the presence or absence of certain circumstances. Such evidence is considered to be indirect.

To use an electronic document as evidence in an economic process, it must be obtained in accordance with the procedural rules for the collection of evidence. However, the Economic procedure code of Ukraine does not contain procedural rules for the collection, extraction of electronic evidence. But for evidence, including electronic ones, to be recognized as admissible and used as evidence, they should be collected correctly.

When exercising justice, a judge, in the absence of legal regulation of this issue, at his own risk, shall attach to the case electronic materials in printed form, if the parties do not refute their authenticity.

As for the legal regulation of relations that arise between the economic court and the participants in the economic process, it should not be a barrier that prevents the protection of legitimate rights and the interests protected by the law of economic entities, on the contrary, it must correspond to those relations that which should be regulated.

Having analyzed the concept of an electronic document and the possibility of its application in economic legal proceedings, one can state the following. To use an electronic document as evidence in an economic process, it must be obtained in accordance with the procedural rules for the collection of evidence. However, the Economic procedure code of Ukraine does not contain procedural rules for the collection and removal of electronic evidence. For evidence, including electronic ones, to be recognized as admissible and used as evidence, they should be collected correctly.

It should be noted that law enforcement practice has long awaited the reaction of the legislator and has developed certain schemes for the use of electronic documents in the economic process.

At the moment, the following main problems can be distinguished in the application of electronic evidence in the economic process:

1. Absence at the legislative level of a single, complete comprehensive definition of an electronic document.

At the legislative level, the full definition of an electronic document that reflects all its significant differences and does not provide what characteristics it should have in order for the court to recognize it as proper evidence and attach to the case file are not provided.

To be used as evidence, an electronic document must contain only the information necessary to establish the existence or absence of circumstances relevant to the proper resolution of the dispute.

To consider an electronic document as an analogue of traditional (paper) is possible only in case of the possibility of its identification established by law.

In case with the electronic certification of signature on electronic documents it follows to bear in a mind, that not only the signature of proprietor of certificate of the key of signature but also absence of distortions makes sure in electronic documents. Confirmation of authenticity of electronic digital signature in an electronic document is the condition of the use of this document as proofs.

2. Absence at the legislative level of the single clear algorithm for collecting, extracting and submitting electronic evidence.

To use an electronic document as evidence in an economic process, it must be obtained in accordance with the procedural rules for the collection of evidence. However, the Economic procedure code of Ukraine does not contain procedural rules for collecting, extracting electronic evidence. But for evidence, including electronic ones, to be recognized as admissible and used as evidence, they should be collected correctly.

In the course of trial of a judge, in the absence of legal regulation of this issue at your own risk and the fear attach electronic materials in print, if the parties do not refute their authenticity, to the case materials. In an order to correct an unsatisfactory situation that was folded in the electronic documents with as proofs in business, it is necessary to complement Economic procedure code of Ukraine not only the norms for providing electronic correspondence between business entities legal force, also to envisage the clear order of rules in relation to collection, estimation and research of electronic proofs an economic court.

3. Ability to falsify electronic evidence.

It complicates the electronic workflow and the fact electronic documents are very easy to make changes, which, in turn, will always provoke doubts about their reliability.

Consequently, for the application of the Institute of electronic evidence in the economic process, it is necessary to overcome at least the main problems of the institute at the legislative level.

Conclusion. The difficulties that exist at present in the study of electronic documents as evidence, in connection with the specificity of individual acts of judicial investigation, give reason to believe that the assessment of evidence for a long time will be carried out according to the judge's internal convictions. But research, development should help ensure that this conviction is based on the most accurate, complete, sound, unconditional and objective grounds.

As for the legal regulation of relations arising between the economic court and the participants in the economic process, it should not be a barrier that prevents the protection of legitimate rights and the interests protected by the law of economic entities, on the contrary, it must correspond to those relations that are called to regulate.

In order to provide a proper legal assessment of electronic documents as evidence in economic legal proceedings, it is necessary to set out in the legislation a clear algorithm for the collection, removal, evaluation and investigation of electronic evidence by an economic court.

The inadequacy and imperfection of legislative regulation of information technology is a problem in using electronic documents as evidence.

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