International Journal of Engineering & Technology, 7 (4.36) (2018) 213-216

International Journal of Engineering & Technology

Website: www.sciencepubco.com/index.php/IJET

Research paper

Using Digital Documents and Materials in Civil and Arbitration Procedures

Nikolay M. Golovanov

PhD (Law), Professor,Saint-Petersburg State University of Architecture and Civil Engineering

Abstract

The research topicality is due to the broad use of digital documents and materials in civil circulation, and the imperfection of the existing legislation in determining their legal status. This situation negatively influences the evidential significance of the digital documents and materials when presented in civil and arbitration procedures.
The article objective is to reveal the lacunas in the legal regulation of digital documents and materials as evidences when investigating disputes in general and arbitration courts, and to elaborate proposals for their elimination.
The key approach to the research was the legal analysis of legislative and departmental normative legal acts mentioning digital documents, and the analysis of special literature in this sphere of social relations.
The main results of the research are: formulating the definition of a digital document setting its most general features and enabling to establish this definition as a legal one; setting the criteria for distinguishing a digital document and a digital material, an original and a copy of a digital document; defining digital documents and materials as direct or indirect evidences, depending on their evidential significance.
The conclusions presented in the article can be used by legislators when correcting the norms of the Civil Procedural Code of the Russian Federation (CPC RF) and Arbitration Procedural Code of the Russian Federation (APC RF), other special laws, and by judicial agencies when administering justice on civil cases.

Key words: *law, document, copy, signature, evidence.*

1. Introduction

Civil and arbitration procedural legislation interprets evidences as the information about facts obtained in the order stipulated by law, which serve as the basis for the court to determine the presence or absence of the circumstances justifying the claims and objections of the parties, and other circumstances significant for the correct investigation and disposition of the case.
Digital documents and materials are not mentioned as sources of information about the above circumstances in Art. 55 of the Civil Procedural Code of the Russian Federation (CPC RF) or Art. 64 of the Arbitration Procedural Code of the Russian Federation (APC RF), which stipulate the types of such sources. Both Procedural Codes stipulate only the admissibility of documents, signed with a digital signature, as written evidences, and only in the cases and in the order stipulated by a Federal Law or another normative legal act or treaty (Art. 71 CPC RF, Art. 75 APC RF). The extensive normative base regulating such cases and order, including the acts sometimes contradicting each other, complicates submitting documents, signed with a digital signature, as evidences in civil court procedure. Quite frequent are cases when courts reject such documents as admissible evidences due to the fact that their sending to the receiver's e-mail, stipulated by the relevant agreement, does not imply that they were actually received by the person [16], as well as in cases when the parties had not reconciled in the agreement the regime of technical facilities implementation providing the signature identification [14].
The drawbacks of the existing legislation regulating this sphere of social relations were highlighted by many researchers, among them V.B. Goltsov [5], I.A. Dmitrik [8], V.A. Popov [15], I.V. Reshetnikova [18], O.I. Chorna [25].
This situation makes it necessary for the juridical science to theoretically interpret the legal basis of digital documents and the practice of the "Proving and Evidences" institution implementation in courts, as well as to elaborate recommendations for improving it.

2. Methodological basis of the research

The article is based on the concepts of distinguishing between a written document and a digital document as two separate types of documents [1, p. 479], the inadmissibility of referring a digital document to written evidences, as it lacks an essential feature of such evidence – the written form [13, p. 145], and the essence of evidence as integrity of its form and content [7, p. 259].

3. Results

The author agrees with the opinion that a written document and a digital document are different types of documents. It is wrong to identify them with each other. A written document, as a rule, has a form of a paper carrier with signs applied on it, made with a certain coloring agent, visually perceived and distinguished by a human being; the form of a digital document is determined by the digital equipment, its content is stored in the memory of a digital carrier, which can be transferred to another similar carrier. This implies stipulating a digital document as an independent means of proving. This proposal is all the more justified as using digital

documents is actively popularized both in the court practice and the practice of state government. The examples are Part 1.1. and Part 1.2. of Art. 35 CPC RF, para. 2 of Art. 41 APC RF, which stipulate that the case parties are entitled to submit to the court documents in digital form, including in the form of a digital document, signed with a digital signature. The possibility of submitting digital documents is also stipulated in the Taxation Code of the Russian Federation (item 3 Art. 80); Federal Law of 01.04.1996 No. 27-ФЗ "On individual (personified) accounting in the system of state pension insurance" (item 2 Art. 8); Federal Law of 06.12.2011 No. 402-ФЗ "On accounting" (Art. 10); Order of the Ministry of Transportation of the Russian Federation of 19.01.2000 No. 2Ц "Rules of filling the transportation document in railway transport" (item 1.10); Statute of the Central Bank of Russia of 19.06.2012 No. 383-П "On the rules of monetary funds transfer" (item 1.24); Order of the Ministry of Economic Development of the Russian Federation of 23.125.2015 No. 968 "On establishing the order of submitting the data contained in the Aggregate State Register of Real Estate, and the order of informing the applicants about the service procedure concerning the submission of the data contained in the Aggregate State Register of Real Estate" (item 4), and others.

The possibility to sign contracts using digital documents is stipulated in Part 2 Art. 434 of the Civil Code of the Russian Federation. In compliance with this Article, a written contract can be signed by exchanging digital documents, which enable to reliably state that the document comes from a party of the contract. However, the contractors cannot implement this opportunity due to the lack of legal regulation of digital documents exchange. These issues have long been solved in the western countries, specifically, in the USA, where it is possible to change written contracts by sending the appropriate digital messages [28].

Let us consider the notion of "digital document". According to item 11.1 Art. 2 of the Federal Law of 27 July 2006 No. 149-ФЗ "On information, information technologies and protection of information" (further − Law on Information), a digital document is understood as documented information, presented in digital form, i.e. in the form suitable for human perception by using electronic devices, as well as for transmitting via information-communication networks or processing in informational systems.

The above definition has a number of drawbacks: first, it does not specify the notion of "documented information"; second, the applied definition concerning the electronic devices does not reflect the possibility to use other information technologies for presenting information in digital form; third, it stipulates only transmitting and processing information in digital form, which narrows the sphere of digital documents circulation, excludes creating, storing and copying of the digital information.

The State Standard GOST 50.1.031-2001 "Recommendations on standardization…" [6] stipulates that a digital document must consist of two parts: the identification part, containing the identifying attributes (name, time and place of creation, author's details, etc.) and a digital signature, and the content part, including the text, numeric and/or graphic information, processed as an integral whole.

Observing these requirements makes a digital document legally valid, as it enables to state its relevance and admissibility as evidence in civil and arbitration procedures. The relevance is provided by the content (general) part, where the circumstances are stated which pertain to the case, while the admissibility is provided by the identification (specific) part, enabling to check the observance of the procedural form of presenting the appropriate means of evidence. The most important is a digital signature; it is it that differentiates a digital document from all other digital materials, which have no details or have them, but without a digital signature. This is supposed to be the main criteria for distinguishing between these types of documents and determining their legal effect.

Federal Law of 6 April 2011 No. 63-ФЗ "On digital signature" stipulates the following types: simple digital signature and reinforced digital signature. The latter is subdivided into the reinforced non-qualified digital signature (further − non-qualified digital signature) and the reinforced qualified digital signature (further − qualified digital signature) (Part 1 Art. 5).

The simple digital signature allows confirming the fact of forming the digital signature by a certain person, via using codes, passwords and other means.

The non-qualified digital signature is formed by cryptographic transformation of information using the key of a digital signature and the means of a digital signature. This allows not only determining the person who signed the digital document, but also discover the fact of changing the digital document after it had been signed.

The qualified digital signature has the same properties as the non-qualified one, but differs from it, having a qualification certificate issued by an accredited certifying center. The certificate indicates the key for checking the digital signature, which, in turn, used the means for its creation and checking, complying with the requirements stipulated in the Law on digital signature.

Part 1 Art. 4 of the Law on digital signature stipulates that the participants of the digital interaction may use digital signatures of all types, if does not contradict the normative legal acts or agreement between the parties. Part 3 of the same Article specifies the inadmissibility of recognizing the digital signature and (or) a digital document signed with it as void on the sole basis that the digital signature had been created not by hand, but with the use of digital signature means.

Taking the above into account, we propose the following definition of a digital document. A digital document is information entered at a digital carrier, having details which allow its identification; a digital document can be created, processed, stored and transmitted by different digital means.

Considering the issue of using digital documents and materials as evidences in civil and arbitration procedures, the following should be taken into account.

According to the existing court practice, digital documents and materials are printed and, alongside with other documents and materials, are adduced to the case. As the content of a digital document signed with a simple digital signature, and digital materials located in the Internet, can, by the time of investigating the case in a court procedure, be changed or deleted from the information-telecommunication network, it is expedient to notarize such digital documents and materials in advance, resorting to the institute of providing evidences by notaries. This juridical institution, stipulated by Chapter 22.2 of the "Fundamentals of Legislation of the Russian Federation on Notary System" of 11 February 1993 No. 4462-1, though not directly referring to digital documents and materials created by interested persons, does not contradict to it, and is actively used in practice.

If it is necessary to confirm the equivalence of the digital document and the paper document, one should take into account the requirement of Part 3 Art. 6 of the Law on digital signature, which stipulates that this can be done only if the digital document was signed with a reinforced digital signature. In other cases, the order of determining the equivalence of such documents must be stipulated by the parties in the written agreement between them.

The procedural legislation attributes great role to distinguishing between an original document and its copy. According to Part 2 Art. 71 CPC RF and Part 8 Art. 75 APC RF, written evidences are submitted in the original or in the form of a duly certified copy. The court may require to submit the original of a document, if the documents copies are presented to court in a digital form (para. 2 Art. 2 CPC RF, para. 2 Part 3 Art. 75 APC RF).

The definitions of an original document, a duplicate, and a copy of a document, related to their production on a digital carrier, are given in the above-mentioned State Standard GOST 6.10.4-84 "Unified documentation systems":

- the original document is, in this case, understood as the chronologically first recording of the document on a digital carrier, containing an indication that this document is original**;** the original of a machine recording is the chronologically first recording of the document copy printing with a computer on a paper carrier, containing an indication that this document is original (item 3.2);
- the duplicates of a document on a digital carrier are understood as all chronologically later recording of the document on a digital carrier, which are authentic in their content and containing an indication that these documents are duplicates (item 3.3);
- the copies of a document on a digital carrier or a machine recording are understood as documents, copied from the original, or a duplicate of the document on a digital carrier or a machine recording onto another carrier of information, which are authentic in their content and containing an indication that these documents are copies (item 3.4).

The above definitions show that the main distinction of the original, a duplicate and a copy of a document is the indication of their being as such. If there is no relevant indication, it is impossible to distinguish between the original, a duplicate and a copy of a document, as they are all identical in their content.

There was an opinion expressed in the literature that the terms "original" and "copy" cannot be used in relation to digital documents [20, p. 16]. In this respect, we can note that a digital document on a digital carrier, transmitted to another digital carrier without any alterations of the text, is the same original digital document as the initial document. All its identical variants will be considered as the same document having the same legal effect, provided their authenticity is confirmed. Copies of a digital document is information from the original of a digital document, entered in a digital form on a magnetic carrier (diskette, flash card), separate from the machine carrier. Each of such copies must be certified in the order stipulated by law, and contain an indication that it is a copy of the relevant digital document. The diskettes and flash cards can be subjoined to the case investigated in court.

4. Discussion

The juridical science does not have a unanimous opinion relating to the definition of a digital document. For example, M.V. Larin counted up to forty such definitions [12]. Substantially, they are similar to that given in the Law on Information. The definitions differing from the legal one mainly focus attention on individual features of a digital document. Thus, A.I. Zemskov points out that a digital document is a "conceptually complete massif of information, entered with machine-read means on a machine-read carrier" [10, p. 40]. V.F. Yankova states that a digital document is an information object ensuring information-communicational interaction without the use of paper − in electronic (digital) form [26].

It is worth noting that the definitions of a digital document can be different, but the notion should be unified, reflecting its most general features. The present work states the following general features: location of information on an electronic carrier; presence of the details allowing information identification; possibility to manage the information. We consider that this interpretation of the notion of a digital document can be included into the Law on Information when it is corrected.

As for the digital documents as evidences used in the civil and arbitration procedures, some authors refer digital documents to written evidences [17; 3; 4; 21; 23], others – to material ones [13;2; 18;11], still others – to the combined evidences, comprising the features of both written and material ones [19; 9].

A digital document cannot be regarded a written evidence, because the information about the circumstances significant for the correct investigation and disposition of the case is presented in an electronic form, and not on a paper carrier in the form of an act, a contract, a certificate, or business correspondence, as stipulated in Art. 71 CPC RF and Art. 75 APC RF. According to the above Articles, the written evidence is presented to the court in the original or in the form of a duly certified copy. A digital document in the original and all its duplicates can be presented only on a monitor screen, and its copies – on a magnetic carrier (diskette, flash card). For this reason, we cannot agree with R.O. Khalikov, who proposed to regard as a duplicate of a digital document its reproduction on a paper carrier, certified with a signature of an authorized person (a notary, or a person having the right to perform notary actions) [24, p. 158].

A digital document and its copies (diskette, flash card) cannot be regarded material evidence as well, because, according to Art. 73 CPC RF and Art. 76 APC RF, that can be only the objects which, by their appearance, properties, place of finding and other features, can serve as the means of establishing the circumstances significant for the correct investigation and disposition of the case. The fact that a digital document cannot be perceived per se, that its carrier is an object and that to familiarize oneself with a digital document one has to use a monitor screen or another electronic carrier of information, does not turn it into an object; from the viewpoint of proving, it is digital information that is of interest, not the carrier it is placed on.

For the above reasons, we cannot agree with the opinion, expressed by M.V. Zhizhina [9], that a digital document produced with computer devices would serve as written evidence, and in case of its arrangement – as material one.

We also ought to dwell upon the evidential significance of digital documents, which is not duly illuminated in the literature yet. Taking into account the degree of elaboration of the digital documents' legal basis, their evidential significance depends on the degree of protection of the digital signature of the document. Hence, the highest evidential significance will be shown by the digital documents signed with the reinforced qualified digital signature, then the document signed with the reinforced non-qualified digital signature, and finally – the document signed with the simple digital signature. The electronic materials without a digital signature demonstrate a very low evidential significance; to increase it, one should resort either to the notary certification of information, or to additional means of proving.

As for the requirements to the reliability of information transmitted by electronic communication means, its stability and confidentiality, impossibility of its rejection and annulment [29], the Russian legislation does not completely meet these requirements. The main drawback in this respect is the possibility to doubt the use of a digital signature by its legal owner even in the case when the digital document is signed with the reinforced qualified digital signature.

In the USA, this problem is solved as follows. The certificate issued to the owner of the digital signature is a digital document, signed with a digital signature of the organization which issued it. The certificate contains information about the organization, an open key, and information about the owner of the digital signature. The receiver of the digital message is sent several documents. Accordingly, upon receiving the digital message, the receiver can check first the certificate with the generally accessible key, and then, with the open key from the certificate, check the main document [30].

5. Conclusion

Considering the issues of using digital documents and materials as evidences in civil and arbitration procedures allows making the following conclusions:

- a digital document is an informational object on an electronic carrier with the details allowing its identification;
- a digital document is a document intended for use within informational system, presented in electronic form and certified with a digital signature;

- a digital document consists of two integral parts: the general and the specific. The general part of a digital document consists of information representing the content of the document and information about the addressee the specific part consists of information containing the identifying attributes, and one or two digital signatures. The specific part may contain additional data necessary for checking the digital signature (digital signatures) and identification of the digital document, which are stipulated by technical normative legal acts;
- a digital signature is the determining criteria for the issues of distinguishing between a digital document and a digital material, as well as for applying digital evidences;
- a digital document, signed with the reinforced digital signature, can be considered direct evidence when used in civil and arbitration procedures, as it enables to determine the person who signed the digital document, and to discover the fact of making changes in the document after it was signed;
- a digital document, signed with the simple digital signature, can be considered direct evidence only in case of its notary certification on the date of signing the document, as this enables to exclude the fact of making any changes in the document. Otherwise, a digital document will be viewed as indirect evidence;
- the degree of evidential significance of a digital document depends on the type of a digital signature used for signing it;
- digital materials are materials transmitted via electronic mail and located in the Internet. They can be considered direct evidence only in case of simultaneous observance of three conditions: identification of the person who sent them or placed them in the Internet; excluding the fact of changing the content of the material by the moment of its presenting as evidence in the court; and notary certification of the information content at the moment of its receiving by electronic mail or familiarizing with it in the Internet; all other digital materials can be considered only indirect evidence in court.

We ought to focus attention on the following. In the courts of the Russian Federation, the only criterion of authenticity of a digital document is the presence of a digital signature. Another approach is taken in the USA. Digital documents are recognized by the courts as admissible evidences in case of their authenticity confirmed not only by a digital signature, but also by witnesses' testimonies, written declarations of the digital document's receiver and other indirect evidences [27]. We believe that the Russian civil and arbitration procedural legislation should develop in that direction, as it significantly simplifies the disposition of cases by the courts.

6. Recommendations

Due to the increasing use of digital documents and materials in civil circulation and a large number of normative legal acts regulating the individual spheres of interaction with digital documents and materials, legislators ought to produce the legal definition of not only a digital document, but a digital material too, as well as to define the legal status of the digital documentation, to complement the list of evidences with regulated indication to digital documents and materials, to regulate the procedural order of presenting and assessing digital evidences in courts. All this will provide a reliable juridical protection of the participants of digital interaction in case of various civil-legal disputes and their investigation in the general and arbitration courts.

References

[1] Bonner A.T. Traditional and non-traditional means of proving in civil and arbitration procedure. - Moscow: Prospekt, 2014. - Pp. 613.

[2] Bonner A.T. Evidential significance of the information obtained from the Internet // Law. – 2007. - №12. – Pp. 85-98.

[3] Vershinin A.P. Digital document: legal form and evidences in court. - Moscow: Gorodets, 2000. - P. 247.

[4] Vorozhbit S.P. Digital means of proving in civil and arbitration procedure: PhD (Law) thesis. Saint Petersburg, 2011. - P. 25.

[5] Goltsov V.B. Private legal relations in the functioning of units of the state system of emergencies prevention and elimination of the Russian Federation: Monograph. Khanty-Mansiysk, 2008. - p. 447.

[6] GOST 50.1.021-2001. Recommendations on standardization. Information technologies of a product life cycle maintenance. Technological thesaurus. Part 1. Stages of a product life cycle (adopted and enacted by the Decree of the State Standards Agency of the Russian Federation of 02.07.2001 No. 256-ст).

[7] Civil procedure: tutorial / Ed. M.K. Treushnikov. 2nd edition, improved and completed. – Moscow: Gorodets, 2007. - P. 784.

[8] Dmitrik I.A. Means of implementing the civil rights and executing the liabilities using the Internet. Abstract of PhD (Law) thesis. Moscow, 2007. - P. 30. http://lawlibrary.ru/izdanie62918.html (access date 20.01.18)

[9] Zhizhina M.V. Document as a carrier of evidential information in the modern civilistic procedure. http://zakoniros.ru/?p=19474 (access date 18.01.2018).

[10] Zemskov A.I. Digital publications: Special course syllabus. – MGUKI. Moscow, 2002- P. 40.

[11] Zigura N.A. Computer information as a means of proving in the Russian criminal procedure. Abstract of PhD (Law) thesis. Chelyabinsk, 2010. - P. 20.

[12] Larin M.V. Managing documentation in organizations: issues of history and methodology. Abstract of Doctoral (History) thesis. Moscow, 2000. – P. 30.

[13] Medvedev I.G. Written evidences in the private law of Russia and France. - Saint Petersburg: Yuridicheskiy tsentr press, 2004. - P. 407.

[14] Resolution of Federal Arbitration Court of Moscow district of 5.10.2000 in case No. КГ-А40/4465-00. https://www.lawmix.ru/fas-msk/123583 (access date 19.01.18)

[15] Popov V.A. Features of digital documents examination and their application as evidences in civil and arbitration procedures https://cyberleninka.ru/article/n/osobennosti-issledovaniya-elektronnyh-dokumentov-i-ih-primeneniyu-v-kachestve-dokazatelstv-v-grazh (access date 18.01.18)

[16] Resolution of Federal Arbitration Court of the Far East district of 16.11.2012 No. Ф03-5177/2012.http://www.klerk.ru/doc/302684 (access date 20.01.18)

[17] Issues of registering the rights, establishing and certifying the facts of civil law: collection of articles / A.D. Batueva, Yu.V. Vinichenko, S.A. Gromov, et al.; Editor-in-Chief M.A. Rozhnova. – Moscow: Statut, 2013. – P. 336.

[18] Reshetnikova I.V., Semenova A.V., Tsaregorodtseva E.A. Comment on court errors in the practice of APC RF implementation. Moscow, 2006. - P. 464.

[19] Sedelnikova D.B. Issue of using digital evidences in civil and arbitration procedures // Law order: history, theory, practice. – 2017. - №2 (13). – Pp. 31-34.

[20] Semiletov S.I. Documents and documentation as an object of legal regulation. Abstract of PhD (Law) thesis. Moscow, 2003. - P. 27.

[21] Sinyakova M.V. Written evidences in civil and arbitration procedures. Abstract of PhD (Law) thesis. Moscow, 2007. P. 32.

[22] Reference book on proving in civil legal procedure / Ed. I.V. Reshetnikova. 5th edition, improved and completed. – Moscow: Norma, Infra-M, 2011. – P. 496.

[23] Temergalieva T.A. Digital documents as evidences in court // Juridical scientific network: //www.sovremennoepravo.ru/ (access date 17.01.18)

[24] Khalikov R.O. Digital digital signature and digital document as means of proving in civil and arbitration legal procedures // Proceedings of the Institute of Social and Humanitarian Knowledge and the Russian International Academy of Tourism. Joint edition. — Kazan, 2005. - Pp. 158-173.

[25] Chorna O.I. Can digital documents be an evidence of duly fulfilled commitments? // Records management. - 2015. - № 1. http://www.top-personal.ru/officeworkissue.html?355

[26] Yankovaya V.F. Digital document as an object of Documentation Studies. Bulletin of Volgograd State University. Series 2. Linguistics. 2013. №3 (19). https://cyberleninka.ru/article/n/elektronnyy-dokument-kak-obekt-dokumentovedeniya (access date 18.01.18)

[27] Stevenson K.L. Courts Confront Admissibility of Text and Instant Messages // American Bar Association. Litigation News Online. 2008.

[28] US District Court for the Southern District of Florida.CX Digital Media, Inc. v. Smoking Everywhere, Inc. CaseN 09-62020-Civ. Judgment of 23 March 2011.

[29] Han B. Building trust in e-commerce in China: Is the Electronic Signature Law enough? // ProQuest Dissertations and Theses. 2005. Pg. 23. ProQuest.

[30] Digital signature legislation // Civil Engineering. 1998. №6. Pg 54. ProQuest.