

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage <http://ajee-journal.com>

Case Note

E-EVIDENCE AND E-COURT IN THE CONTEXT OF THE COVID-19 PANDEMIC: A STUDY FROM UKRAINE

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To cite this note: *A Naichenko 'E-evidence and e-court in the context of the Covid-19 pandemic: A study from Ukraine'* 2021 4 (12) *Access to Justice in Eastern Europe* 163–181. DOI: 10.33327/AJEE-18-4.4-n000091

To link to this note:

To link to this note: <https://doi.org/10.33327/AJEE-18-4.4-n000091>

Submitted on 5 Sept 2021 / Revised 9 Sept 2021 / Revised 17 Sept 2021 / Approved 18 Oct 2021

Published online: 01 Nov 2021 View data

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CONFLICTS OF INTEREST

The author declares no conflict of interest of relevance to this topic.

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ACKNOWLEDGEMENT

The author would like to express her gratitude to the reviewers for their remarks and recommendations, which allowed her to improve the manuscript.

CONTRIBUTOR

The author was the sole contributor to the intellectual discussion underlying this paper, writing, and translating, and accepts responsibility for the content and interpretation.

E-EVIDENCE AND E-COURT IN THE CONTEXT OF THE COVID-19 PANDEMIC: A STUDY FROM UKRAINE

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Abstract The possibility of using information technology in courts can be called a novelty and a progressive innovation in Ukraine. This is an important factor in improving the efficiency of the openness and transparency of justice and simplifies judicial procedure, shortens court proceedings and procedural time limits, reduces operating costs, and saves time for all the participants of the process while cases are under consideration.

Due to the rapid spread of COVID-19, rapid judicial reforms have taken place around the world to ensure access to justice in this new environment.

Insufficient levels of information and technical support for the courts in Ukraine, the lack of a single format for data exchange between automated document management systems of various instances and specialisations, imperfect information protection systems, and insufficient regulation of the information legislation remain problematic issues in the functioning of e-justice systems, all of which require further study. Addressing these issues will help justice in Ukraine to reach a new level in the coming years.

Since the e-justice system is aimed at optimising the work of courts through the informatisation of processes, and electronic means of proof are designed to ensure the rights of litigants to use electronic information, the interaction of the notion of electronic evidence with the e-justice system is quite possible. This interaction will increase the efficiency of the judiciary and the quality of justice.

This article examines the development of information technology in the courts of Ukraine, including during the COVID-19 pandemic, analyses court decisions rendered in the context of the pandemic, and reflects on the real state of the judicial system in the adoption and examination of electronic evidence. It should be noted that the procedure for processing, submitting, and examining electronic evidence is currently not fully regulated, so the use of electronic evidence in litigation is not always effective.

All of the above indicates the need to refine the current procedural codes in terms of introducing clear rules for the collection, execution, submission, and examination of electronic evidence.

Keywords: e-justice, electronic evidence, the Unified Judicial Information and Telecommunication System

1 INTRODUCTION

The constant development of information technology has an impact on all spheres of public life, and the justice system is no exception. For a long time, practicing lawyers have had many

questions about the possibility and admissibility of using information created by electronic means as evidence in court proceedings.

For years, the judicial system of Ukraine did not consider this type of evidence an appropriate or admissible method of proof. Only after the legislative adoption in 2017 of the institution of electronic evidence as a separate type of evidence was a little progress made in their implementation and research.

However, at present, electronic evidence for the court remains an institution that is not fully regulated, as there is no algorithm at the legislative level for the presentation, examination, and evaluation of electronic evidence.

Today, e-justice is actively used in many countries around the world. Ukraine has also introduced an e-justice system because, in the era of rapid development of information technology, the issue of e-justice is a necessity rather than merely a desire to improve oneself.

2 THE ELECTRONIC EVIDENCE IN UKRAINE

In 2017, during the harmonisation of the legislation on ensuring the proper functioning of the Unified Judicial Information and Telecommunication System, the legislators also enshrined in the procedural codes a new, unified concept of electronic evidence and stated that it is information in an electronic (digital) form containing data on circumstances relevant to the case, in particular, electronic documents (including text documents, graphics, plans, photographs, video and audio recordings, etc.), websites (pages), text, multimedia and voice messages, metadata, databases, and other data in electronic form (Part 1 of Art. 96 of the Code of Commercial Procedure of Ukraine,¹ Part 1 of Art. 100 of the Code of Civil Procedure of Ukraine,² and Part 1 of Art. 99 of the Code of Administrative Proceedings of Ukraine³).

Art. 5 of the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' stipulates that the information contained in an electronic document shall include the obligatory details of the document.⁴

The analysis of regulation shows that the key role in the creation of an electronic document is played by the successful verification of a qualified electronic signature (hereinafter referred to as QES) of the person certifying the electronic copy of the document. This procedure allows the court to establish the origin of the document, its authorship, and integrity (the fact of not making any changes to the document after signing).

It should be noted that an electronic certificate of signature on electronic documents certifies not only the signature of the owner of the signature key certificate but also the absence of distortions in electronic documents. Confirmation of the authenticity of an electronic digital signature in an electronic document is a condition for using this document as evidence. However, the current legislation addresses this issue quite controversially.

1 The Code of Commercial Procedure of Ukraine of 6 November 1991 <zakon3.rada.gov.ua/laws/show/1798-12> accessed 5 September 2021.

2 The Code of Civil Procedure of Ukraine of 18 March 2004 <zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 5 September 2021.

3 The Code of Administrative Proceedings of Ukraine of 6 July 2005 <zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 5 September 2021.

4 Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' of 22 May 2003 <zakon0.rada.gov.ua/laws/show/851-15> accessed 5 September 2021.

If a person submits an electronic copy of evidence, the court may demand the original of the evidence provided. In case of failure to provide the original of the required evidence, this evidence is not taken into account by the court if the court has doubts about its authenticity.

After analysing the legal requirements for the institution of electronic evidence, we can identify the following main features:

- an intangible form;
- the availability of obligatory special details;
- the possibility of the existence of the original electronic evidence in several places simultaneously;
- the ability, without loss of the characteristics, to be copied to different devices;
- appropriate technical means must be used for reproduction.

The legislators do not stipulate mandatory features that electronic evidence must have in order for a court to recognise it as proper and admissible evidence and attach it to the case file.

However, in practice, there is a situation when electronic evidence is not examined by the court as direct evidence due to the technical unpreparedness of the court. Courts evaluate as direct evidence either a copy of an electronic document on paper (when the electronic document contains textual or graphic information) or an expert opinion.

Thus, since electronic evidence is in electronic form, it does not require conversion and can be immediately attached to the electronic court file, and evidence that cannot be converted into an electronic form will be stored as an appendix to the case (for example, a hard drive with log files on it, in case of a dispute about the authenticity of the submitted electronic evidence).

Thus, according to the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation,' an electronic document is a document in which the information is recorded in the form of electronic data, including obligatory details of the document. Part 2 of Art. 8 of the aforementioned Law clearly establishes the norm according to which the admissibility of an electronic document as evidence cannot be refuted only on the grounds that it has an electronic form.⁵

Given the above, we can identify the following specific features of electronic documents:

- 1) they require mandatory use of special obligatory details;
- 2) they are recorded on special electronic media;
- 3) the existence of a separate, electronic document circulation recognised by the participants or approved by the competent authorities, and procedure for converting digital data into a traditional mode document;
- 4) the impossibility of direct perception without the help of special hardware and software;
- 5) in their content, as a rule, electronic documents are juristic acts.

The largest type of electronic evidence in terms of the amount of information that can be used as evidence is information obtained from global information systems (in particular, the Internet). An example is the use by judges of information from Internet sites in case files, such as information posted on the official websites of public authorities, etc.

Another type of information is text, multimedia, and voice messages. These include, in particular, e-mail correspondence, SMS/MMS messages, etc. Singling out electronic messages as a separate type of electronic evidence is due to the following features:

⁵ Ibid.

- 1) as a rule, they do not use digital signatures, which complicates the identification of the sender and recipient;
- 2) there are significant difficulties in the actual separation of an e-mail as a set of digital information from its carrier for presentation in court;
- 3) for the most part, there is quite a distance between the place of conversion of digital information into a form suitable for human perception and the place where the carrier that stores such information is situated.

Multimedia evidence is messages with multimedia content (images, sound, etc.) that are sent between mobile devices.

Metadata as a type of information characterises or explains certain information (for example, the author, date, index, subject and keywords, resource type, format, source, language, scope, description, barcode, etc.).

The lack of clear legal regulation at the legislative level of the procedure for obtaining, evaluating, and examining electronic evidence complicates the process of application of the above electronic evidence in court proceedings.

No less problematic is the lack of legal regulation of the interaction between the institution of electronic evidence and the e-justice system.

According to Art. 76 of the Civil Procedure Code of Ukraine and Art. 73 of the Code of Commercial Procedure of Ukraine (hereinafter referred to as 'the Code'), evidence is any data on the basis of which the court establishes the presence or absence of circumstances (facts) justifying the claims and objections of the parties and other circumstances relevant to the case (part one).⁶

The admissibility of evidence is of either a general or special nature. The general nature is that, regardless of the category of cases, the requirement to obtain information from the statutory means of proof in accordance with the procedure for collecting, presenting, and examining evidence should be complied with. The special character consists in the necessity of certain means of proof for certain categories of cases or the prohibition of using some of them to confirm the specific circumstances of a case.

The judgment of the European Court of Human Rights in *Shabelnyk v. Ukraine* (application no. 16404/03) of 19 February 2009 states that, although Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to a fair trial, it does not establish any rules on the admissibility of evidence as such, as this is primarily a matter governed by national law⁷ (see the judgment in *Schenk v. Switzerland*, 12 July 1998⁸ and *Teixeira di Castro v. Portugal*, 9 June 1998⁹).

Evidence on the basis of which it is possible to establish the circumstances that are the subject of proof is appropriate. The court does not consider evidence that does not relate to the subject of proof. The subject of proof is the circumstances that confirm the stated requirements or objections or have other significance for the case and shall be subject to establishment when making a court decision (Art. 76 of the Code).¹⁰

6 The Civil Procedure Code of Ukraine of 18 March 2004 <zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 5 September 2021; the Code of Commercial Procedure of Ukraine of 6 November 1991 <zakon3.rada.gov.ua/laws/show/1798-12> accessed 5 September 2021.

7 *Shabelnyk v Ukraine* App no 16404/03 (ECtHR, 19 February 2009) accessed 5 September 2021.

8 *Schenk v Switzerland* Series A no 140 (ECtHR, 12 July 1998) accessed 5 September 2021.

9 *Teixeira di Castro v Portugal* App no 44/1997/828/1034 (ECtHR, 9 June 1998) accessed 5 September 2021.

10 The Code of Commercial Procedure of Ukraine of 6 November 1991 <zakon3.rada.gov.ua/laws/

The principle of admissibility of evidence is that the court accepts for consideration only those pieces of evidence that are relevant to the case. The Supreme Court notes in its rulings that the rule of admissibility of evidence is mandatory not only for the court but also for persons who are the subjects of evidence (the parties and third parties) and submit evidence to the court. The question of whether the evidence is admissible is finally decided by the court.¹¹

Taking into account the described requirements of the procedural legislation and analysing some provisions of the legislation, in particular, Arts. 73, 77, 91, and 96 of the Code, I found that courts in addressing cases conclude that the parties to the cases have the right to submit electronic evidence in the following forms to substantiate their claims and objections:

- 1) the original;
- 2) an electronic copy certified by an electronic digital signature;
- 3) a paper copy certified in the manner prescribed by law. A paper copy of electronic evidence is not considered written evidence but is one of the forms in which a party has the right to submit electronic evidence (part three of Art. 96 of the CCP of Ukraine). This, in turn, is a means of establishing data, based on which the court establishes the presence or the absence of circumstances (facts) substantiating the claims and objections of the parties to the case and other circumstances that are relevant to the solution of the case (paragraph 1 of part 2 of Art. 73 of the Code).¹²

Thus, the submission of electronic evidence in a paper copy does not in itself make such evidence inadmissible.

3 USING THE 'ELECTRONIC COURT' SUBSYSTEM FOR THE SUBMISSION OF ELECTRONIC EVIDENCE

Currently, the main means of information support for the judicial system of Ukraine is the Automated Court Records System, i.e., a set of separate local databases of courts, bodies, and institutions of the justice system. The existing system only supports the exchange of record-keeping data by exchanging data packages between disparate database management systems installed in courts, bodies, and institutions of the justice system.

It should be noted that such an inefficient principle of building an automated system does not provide sufficient productivity of information interaction between the local systems and the central one, as well as the relevance and reliability of information in the central system.

There is no single software in the courts that automates record keeping. The most common computer programs are 'D-3' (for general courts) and 'Records of a Specialized Court' (for administrative and commercial courts), which are administered by the State Enterprise 'Information Judicial Systems'.

The author of this article works in court and can confirm through personal experience that some courts use other software products, in particular, the Kyiv Court of Appeal uses the Automated Electronic Document Management System 'Appeal' developed by the Kyiv Court of Appeal; the Criminal Court of Cassation of the Supreme Court and the Civil Court

show/1798-12> accessed 5 September 2021.

11 Ruling in case no 922/51/20 [2021] The Supreme Court. United state register of court decisions <<https://reyestr.court.gov.ua/Review/94517830>> accessed 5 September 2021.

12 The Code of Commercial Procedure of Ukraine of 06 November 1991 <zakon3.rada.gov.ua/laws/show/1798-12> accessed 5 September 2021.

of Cassation of the Supreme Court – the Automated Record Keeping System of a High Specialized Court of Ukraine, developed by the High Specialized Court of Ukraine for Civil and Criminal Cases; the Supreme Court uses the Unified Automated Record Keeping System of the Supreme Court, developed by the Supreme Court.¹³

The use by courts of various software products that are poorly integrated with each other does not ensure the integrity of information on the activities of courts, bodies, and institutions of the justice system, complicates its generalisation, processing, and use.

Currently, the operation of software products for automation of court records ('D-3', 'Records of a Specialized Court') is carried out using outdated software of the database management system Firebird 2.5. As a result, the system does not have high enough performance when performing certain tasks.

To ensure the logging of court sessions by technical means, local software and hardware systems of different types are used in the courts, which have different formats for recording the results of the logging, complicating the interaction with other software. Files containing the results of the logging are stored on optical disks in each separate court; remote access to them is unavailable.

The existing software and software and hardware complexes used in the courts cannot ensure the accomplishment of a number of functional tasks, in particular:

- the available resources of data warehouses, due to their limitations and obsolescence, do not allow for reliable storage and productive processing of procedural and other documents in courts, data exchange between courts and the central system, and storage of court cases and other documents in a centralised electronic archive;
- the existing functionality of the Automated Court Document Management System does not allow for joint work with documents;
- the developed subsystem 'Electronic Court' needs to be finalised and integrated with other subsystems of the Unified Judicial Information and Telecommunication System (UJITS), including taking into account the need to register official e-mail addresses, to delimit access rights to view court documents;
- the existing video conferencing subsystem is limited by the number of specially equipped premises (workplaces) and does not ensure the mobility of video conferencing;
- the software for video broadcasting of court hearings and organising of video conferencing does not use a consolidated centre for processing, storage, and reproduction of multimedia information;
- the organisation of user registration and the distribution of rights of access to the subsystem does not allow it to be used effectively;
- remote access of users of the UJITS to any information stored in electronic form in accordance with differentiated access rights is not possible without the introduction of centralised user account management policies, which are currently absent in the system (being implemented at the application level for each subsystem);
- the existing Unified State Register of Judgments does not support the possibility of differentiated access rights of its users, the possibility of integration with other modules and subsystems, in particular, to ensure interaction with the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations, as well as does not provide an appropriate level and quality of depersonalisation of information;
- the interaction of automation systems of courts, bodies, and institutions of the justice system with other automated, information, and telecommunication systems of law enforcement agencies, the Ministry of Justice of Ukraine, and its subordinate bodies

¹³ Judicial information systems <<https://ics.gov.ua/ics/about/acts>> accessed 5 September 2021.

and institutions is carried out by using a large number of separate modules instead of a consolidated information node;

- the existing systems of automation of courts, bodies, and institutions of the justice system do not meet the requirements of technical protection of information for information and telecommunication systems where information with restricted access is processed, in particular, personal data, investigation secrecy, medical secrets, adoption secrets, official information, etc., and are vulnerable to information threats.

No less problematic is the lack of legal regulation of the interaction between the institution of electronic evidence and the subsystem 'Electronic Court'.

According to the provisions of the legislation of Ukraine, the court is obliged to ensure procedural equality of the parties. In this case, the court must not allow procedural advantages of one party over the other, must equally require the parties to perform their procedural duties, and apply the same measures of procedural responsibility to the parties.

An integral principle of the right to an adversarial trial is to give each party to the proceedings the opportunity to consider and challenge any evidence or allegations put forward in order to influence the judgment (item 87 of the judgment of the European Court of Human Rights in *Salov v. Ukraine* (Application no. 65518/01 of 6 September 2005)).¹⁴

It is worth noting that the 'Electronic Court' is only one of the modules of the UJITS through which the parties and the court have to communicate with each other. This should happen through the electronic offices of users and judges. However, at present, the functioning of electronic offices of judges is not provided by the developers, which makes full-fledged work of the 'Electronic Court' virtually impossible.

It is assumed that, with the help of this subsystem, the users will also be able to access information that is accumulated, stored, and processed in other parts (subsystems) of the UJITS, in particular, in the programs of automated systems of court record keeping ('Records of a Specialized Court', D-3, etc.).

It should be noted that any document transmitted through a chain or system of devices undergoes repeated copying (this is due to the functionality of networks), so when evaluating such evidence, the judge must be sure that the file did not change during transporting, through, for example, the subsystem 'Electronic Court'.

For an electronic document, this issue is resolved through the use of a qualified electronic signature. At the beginning of the movement of the document, the person fixes it with his/her QES (thus immobilising its structure), and the recipient, having checked the QES, can be sure that the document really has the form in which it was sent.

As for other types of electronic evidence, it should be noted that they are quite mobile and easy to change. Therefore, for example, an analogue audio recording (on film) should be properly turned into electronic evidence (digitised). However, it should be understood that not every audio or video file automatically becomes electronic evidence; it must be preserved in such a way that the court has no doubts about its integrity.

Given that electronic evidence in the case of receipt through the subsystem 'Electronic Court' does not require translation, as it has an electronic form, the latter will be immediately attached to the materials of the electronic court case.

¹⁴ *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005) accessed 5 September 2021.

4 JUSTICE IN THE CONTEXT OF THE COVID-19 PANDEMIC: A STUDY FROM UKRAINE

According to Arts. 3, 8, 9, 21, and 55 of the Constitution of Ukraine,¹⁵ the right to judicial protection and access to justice refers to inalienable human rights and freedoms and at the same time guarantees the protection of all other rights and freedoms recognised and guaranteed in accordance with generally accepted principles and norms of international law.

From the aforementioned constitutional provisions, it follows that justice as such must ensure the effective restoration of rights and meet the requirements of equity.

Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as 'the Convention') guarantees everyone the right to a fair trial, including, but not limited to, the right to consideration of his/her case.¹⁶

The right to a fair trial covers an extremely wide field of various categories – it concerns both institutional and organisational aspects and the peculiarities of the implementation of particular court procedures. A peculiar mechanism that allows us to understand, interpret, and apply the Convention is the practice of the European Court of Human Rights, which it sets out in its decisions. The scientific literature suggests that the right to the hearing of a case means the right of a person to seek protection in court and the right to have his/her case considered and decided by the court. A prerequisite for the observance of this right is that the person must be able to exercise these rights without any restrictions, obstacles, or complications.

As is well known, in 2019, a new infectious disease caused by the detected SARS-CoV-2 virus – COVID-19 – appeared and spread around the world. Thus, throughout Ukraine, the Cabinet of Ministers of Ukraine, from 12 March 2020 to today, instituted a quarantine related to the prevention of the spread of the acute respiratory disease COVID-19. In a letter of 16 March 2020 no. 9-rs-186/20, the Council of Judges of Ukraine recommended that the courts introduce a special regime for the period of quarantine measures. On 19 March 2020, the Supreme Council (Verkhovna Rada) Committee on Legal Policy adopted an appeal to the citizens of Ukraine on the functioning of the judiciary during the quarantine period, emphasising that the recommendations proposed by the Council of Judges of Ukraine were aimed at ensuring epidemiological safety in courts. The State Judicial Administration of Ukraine in a letter of 20 March 2020 no. 14-5711/20 noted that the institutions of the justice system could be classified as institutions at risk of the COVID-19 infection spread.

The independence and inviolability of judges are guaranteed by Arts. 126 and 129 of the Constitution of Ukraine stipulate that judges shall be independent in the administration of justice and shall be subject only to the law. Art. 3 of the Constitution of Ukraine stipulates that a person, his/her life and health, honour and dignity, inviolability, and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the activities of the state. The establishment and protection of human rights and freedoms is the main duty of the state.¹⁷

The above gives grounds to believe that the administration of justice by judges in open court hearings with the direct participation of the parties to the proceedings in the context of the emergency and quarantine regime declared by the Cabinet of Ministers of Ukraine to prevent

15 Law of Ukraine 'The Constitution of Ukraine' of 28 June 1996 <zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 5 September 2021.

16 The Convention for the Protection of Human Rights and Fundamental Freedoms, ratified on 2 October 2013 <zakon.rada.gov.ua/laws/show/995_004#Text> accessed 5 September 2021.

17 The Constitution of Ukraine was adopted at the fifth session of the Verkhovna Rada of Ukraine on 28 June 1996 <zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 5 September 2021.

the spread of COVID-19 poses a threat to the life and health of judges, participants in court hearings, court staff. At the same time, in accordance with Art. 8 of the Constitution of Ukraine, the principle of the rule of law is recognised and operates in Ukraine. The Constitution emphasises that the right to a fair trial cannot be restricted in a state of war or emergency.¹⁸

Thus, the right to a fair trial cannot be restricted either. However, in determining a fair balance between a person's right to a safe environment for life and health and the right to a fair trial, the priority is a person's natural right to life and a safe environment recognised as such by all civilised peoples and nations and being a common heritage of the European legal tradition, a positive obligation, which in Ukraine is imposed on the state. Thus, the establishment and protection of human rights and freedoms is the main duty of the state (Art. 1 of the Constitution of Ukraine).

In view of the above, on 26 March 2020, the High Council of Justice issued recommendations to the courts on access to justice in the context of the pandemic COVID-19, which recommended, in particular, to the courts:

- to continuously conduct proceedings in urgent cases, which are determined by procedural codes and courts (judges), ensuring a balance between the right to a safe environment for judges, parties to cases, and the right of access to justice;
- if possible, to hold court hearings in real-time via the Internet;
- for the duration of the quarantine, to organise a flexible work schedule of judges and court staff;
- to recommend to meetings of judges to resolve the issue of rotation of judges to resolve urgent procedural issues and urgent cases in special types of proceedings;
- to restrict access to court hearings to persons who are not participants in the proceedings;
- to hold court hearings with the use of personal protective equipment by judges and parties;
- to recommend that courts switch over to the processing of electronic correspondence;
- to provide court staff with the opportunity to perform their official duties remotely, if technically possible;
- to inform the participants of court proceedings of the possibility to postpone the consideration of cases in connection with quarantine measures.

It is worth noting that the spread of COVID-19 has given impetus to the introduction of long-awaited remote litigation. And while there have been many reasons not to do so for a decade – technical and mental unpreparedness, identification problems, and so on – these obstacles now appear to be less serious amid threats to the health of nations.

It is important that the judiciaries of democracies while showing openness to these changes, take due care to ensure that trials are public, even if they take place remotely. Due to these changes, e-litigation is rapidly becoming a practice in many countries.

5 ANALYSIS OF JUDICIAL PRACTICE IN THE STUDY OF ELECTRONIC EVIDENCE IN THE CONDITIONS OF THE COVID-19 PANDEMIC

Part 1 of Art. 2 of the Law of Ukraine 'On Access to Judicial Decisions' provides that a court decision shall be pronounced in public, except in cases where the case was heard in closed session. Everyone shall have the right of access to judicial decisions in the manner prescribed

¹⁸ Ibid.

by this Law. The provisions of Part 1 of Art. 3 of the above law stipulate that, for access to court decisions of courts of general jurisdiction, the State Judicial Administration of Ukraine shall ensure keeping the Unified State Register of Court Decisions.¹⁹

After analysing the existing summary of court rulings in the Unified State Register of Court Decisions ruled in the context of the COVID-19 pandemic on the examination and acceptance of electronic evidence, ambiguity was found in the attribution of a certain type of evidence to the electronic category. That is, while courts in Ukraine do accept electronic evidence for consideration, each court, or even each judge, interprets electronic evidence differently.

Thus, in case no. 923/566/19, which was considered by the Supreme Court on 17 March 2021, commercial courts accepted screenshots of e-mail correspondence as appropriate and admissible evidence.²⁰

The Supreme Court ruling of 14 May 2020 in case no. 820/10538/15 provides an example of an assessment by a court of a screenshot of an enterprise's specialised software in a dispute with a supervisory authority over tax invoices.²¹

This suggests that courts are increasingly dealing with electronic evidence.

Even though courts accept evidence in electronic form, the attitude of courts toward their assessment is quite meticulous. In particular, courts pay special attention to confirming the authenticity of electronic documents that a party submits as evidence in the case.

Thus, for example, in case no. 910/1162/19, the Supreme Court agreed with the assessment of the courts of previous instances that there was no evidence that copies of the contract, invoice, and e-mails, screenshots of which were available in the case file and had been signed by the authorised person's QES. Such circumstances, in the opinion of courts, make it impossible to identify the sender of the notice, and the content of such a document is not protected from amendments (Supreme Court Order of 16 March 2020).²²

In case no. 753/10840/19, the Supreme Court agreed with the court of first instance and the court of appeal, where the latter considered screenshots of telephone and tablet messages and Viber printouts provided by a party to the case appropriate and admissible evidence, which was examined by the courts as a whole and which was properly assessed (Supreme Court ruling of 13 July 2020).²³

The Commercial Court of Odesa Oblast in the decision of 2 December 2020 in case no. 916/2323/20, given the failure of a party in the case to prove the signing of a contract of carriage with a qualified electronic signature, concluded that the contract of carriage of goods by road in international traffic no. 21/02/2020 of 21 February 2020 was not concluded between the parties.

For these reasons, the Commercial Court rejected the plaintiff's application no. LD-038 of 21 February 2020, as evidence of the signing of the latter with a qualified electronic signature by the authorised representative of the plaintiff, was missing in the case file.

19 Law of Ukraine 'On Access to Judicial Decisions' of 22 December 2005 <<https://zakon.rada.gov.ua/laws/show/3262-15#Text>> accessed 5 September 2021.

20 Ruling in case no 923/566/19 [2021] The Supreme Court. United state register of court decisions <<https://reyestr.court.gov.ua/Review/88244923>> accessed 5 September 2021.

21 Ruling in case no 820/10538/15 [2020] The Supreme Court. United state register of court decisions <<https://reyestr.court.gov.ua/Review/89217590>> accessed 5 September 2021.

22 Ruling in case no 910/1162/19 [2020] The Supreme Court. United state register of court decisions <<https://reyestr.court.gov.ua/Review/88244984>> accessed 5 September 2021.

23 Ruling in case no 753/10840/19 [2020] The Supreme Court. United state register of court decisions <<https://reyestr.court.gov.ua/Review/90385050>> accessed 5 September 2021.

The Commercial Court also rejected the plaintiff's arguments about the specifics of conducting business activities concerning transportation and concluding contracts with customers by sending them to the counterparty's e-mail, as these arguments do not refute the Court's findings that the plaintiff had an obligation to prove to the court the circumstances relevant to the resolution of the dispute, namely the conclusion of a contract in compliance with current legislation.

In addition, the Commercial Court rejected the arguments of the plaintiff, who in the course of the case emphasised that the fact of providing the defendant with transportation services was confirmed by electronic correspondence, screenshots of correspondence between the director of the company and the driver on Viber, since the said evidence is neither written nor electronic evidence, i.e., it does not belong to the list of means of proof.²⁴

In the Supreme Court's ruling of 17 February 2021, in case no. 9901/977/18, the Court noted that the information on a decision taken, posted on the official website of the High Council of Justice, was appropriate and admissible evidence.²⁵

Also, the Supreme Court, in its decision of 29 January 2021 in case no. 922/51/20 indicates that if the original electronic evidence is not submitted, and the party or the court questions the conformity of the submitted copy (paper copy) to the original, such evidence is not taken by the court to note. Given that the electronic correspondence attached to the claim had not been sealed with an electronic digital signature, such correspondence was not admissible evidence in the case (as written evidence).

However, in violation of the above procedural law provisions, the local commercial court had not demanded from the plaintiff the original electronic evidence, in connection with which it was premature for the court to disregard the evidence in its paper copy and to conclude that the plaintiff had not proven the circumstances (facts) of the conclusion of a loan agreement.²⁶

The Northern Commercial Court of Appeal in the decision of 29 March 2021, in case no. 910/7151/20, rejected the plaintiff's application for demanding from the defendant the originals of electronic evidence because the plaintiff, in accordance with Part 11 of Art. 80 of the Code of Commercial Procedure of Ukraine, did not provide any substantiated confirmation that the evidence provided together with the appeal was unreliable or forged.

In addition, the Court of Appeal noted that the defendant provided paper copies of electronic evidence certified by the defendant in accordance with the requirements of clause 5.27 of National Standard NSU 4163-2003, and therefore, the panel of judges concluded that there were no grounds to demand the plaintiff's original electronic evidence.²⁷

In case 911/2498/18 (911/2822/20), the Northern Commercial Court of Appeal, in its decision of 9 March 2021, stated that a bank statement received in the form of an electronic document with the relevant electronic digital signatures of bank officials and its seal (if any) has the same legal force as a bank statement drawn up in paper form.²⁸

24 Decision in case no 916/2323/20 [2020] The Commercial Court of Odesa Oblast. United state register of court decisions <<https://reyestr.court.gov.ua/Review/93436978>> accessed 5 September 2021.

25 Ruling in case no 9901/977/18 [2021] The Supreme Court. United state register of court decisions <<https://reyestr.court.gov.ua/Review/95382820>> accessed 5 September 2021.

26 Ruling in case no 922/51/20 [2021] The Supreme Court. United state register of court decisions <<https://reyestr.court.gov.ua/Review/94517830>> accessed 5 September 2021.

27 Ruling in case no 910/7151/20 [2021] The Northern Commercial Court of Appeal. United state register of court decisions <<https://reyestr.court.gov.ua/Review/95902020>> accessed 5 September 2021.

28 Ruling in case no 911/2498/18 (911/2822/20) [2021] The Northern Commercial Court of Appeal. United state register of court decisions <<https://reyestr.court.gov.ua/Review/95467663>> accessed 5 September 2021.

The decision of the Commercial Court of Odesa Oblast of 9 November 2020, in case no. 916/1890/20 states that during the trial, the examination of electronic evidence established the circumstances of concluding a contract or an application and of signing acts of providing services by the parties by e-mail. In this case, all the above documents have prints of the seal and signature of the defendant. In this case, the court, by reviewing the electronic evidence in the courtroom, found that on 23 March 2020, from the e-mail address of the plaintiff to the e-mail address of the defendant, scanned copies of the constituent documents of the plaintiff had been sent. On the same day, from the e-mail address of the defendant to the e-mail address of the plaintiff, a sample contract for the provision of services for the carriage of goods by road had been sent with accompanying documents, which had been sealed with the signatures of the director and the seal of the company.²⁹

In its decision of 25 March 2020, in case no. 414/317/20, Kreminna Raion Court of Luhansk Oblast concluded that a video disc provided by a subject of authority at the request of the court was electronic evidence, and therefore, the said evidence was proper and admissible. The court examined the video, which completely refuted the plaintiff's allegations about the circumstances of drawing up a report. The video showed that the driver admitted that he had violated traffic rules in an interview with a police officer and tried to put pressure on the inspector using his certificate of membership in a public organisation to avoid responsibility. The video showed that his guilt was obvious.³⁰

As for Cherkasy District Administrative Court, it, in the decision of 28 September 2020, in case no. 580/4136/20, noted that to confirm the circumstances of the defendant's rejection of the application of 24 September 2020, a CD-media with an electronic version of the autobiography and a photo of the plaintiff, an electronic media with two files in video format, had been added to the statement of claim. Since the above electronic evidence is not certified by an electronic digital signature of the plaintiff, the court concluded that it does not meet the criteria of admissibility of evidence.³¹

Also, the Putyvl Raion Court of Sumy Oblast, in the decision of 1 October 2020, in case no. 584/991/20, indicates that the court reviewed the contents of a DVD and found that the video did not have a digital signature of both its author and the person authorised to make a copy of the video. Thus, the video provided to the court was not admissible evidence within the meaning of Art. 74 of the Code of Administrative Legal Proceedings of Ukraine.³²

In the decision of the Kherson City Court of Kherson Oblast of 12 February 2021, in case no. 766/19559/20, the court noted that there are no grounds to claim that a video is an electronic document to which the provisions of the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' apply. Based on the above, the court concluded that a video recording of a TruCAM device was proper and admissible evidence of an offence by the plaintiff within the meaning of Arts. 73, 74 of the Code of Administrative Legal Proceedings of Ukraine.³³

The decision of the Seventh Administrative Court of Appeal of 1 February 2021, in case no. 127/19854/20, established that an electronic document – a video from the body camera of

29 Decision in case no 916/1890/20 [2020] The Commercial Court of Odesa Oblast. United state register of court decisions <<https://reyestr.court.gov.ua/Review/92886943>> accessed 5 September 2021.

30 Decision in case no 414/317/20 [2020] The Kreminna Raion Court of Luhansk Oblast. United state register of court decisions <<https://reyestr.court.gov.ua/Review/88440254>> accessed 5 September 2021.

31 Decision in case no 580/4136/20 [2020] The Cherkasy District Administrative Court. United state register of court decisions <<https://reyestr.court.gov.ua/Review/91845219>> accessed 5 September 2021.

32 Decision in case no 584/991/20 [2020] The Putyvl Raion Court of Sumy Oblast. United state register of court decisions <<https://reyestr.court.gov.ua/Review/91965468>> accessed 5 September 2021.

33 Decision in case no 766/19559/20 [2021] The Kherson City Court of Kherson Oblast. United state register of court decisions <<https://reyestr.court.gov.ua/Review/94853426>> accessed 5 September 2021.

a patrol police inspector – was a document that, in accordance with Art. 251 of the Code of Ukraine on Administrative Offenses, could contain factual data established by such a document, and therefore was appropriate evidence in the case.³⁴

The Commercial Court of Kharkiv Oblast in the decision of 19 May 2020, in case no. 922/49/20, did not accept as proper and admissible electronic evidence a printout of the relevant text messages from the messenger Viber because a printout of electronic correspondence without an EDS cannot be used as evidence in a case since it does not meet the requirements of the Law of Ukraine ‘On Electronic Documents and Electronic Document Circulation.’ It does not contain an electronic signature, which is a mandatory element of an electronic document and prevents the identification of the sender. The content of such a document is not protected from editing and distortion (a similar legal position was expressed by the Supreme Court in decisions of 28 December 2019 in case no. 922/788/19 and of 24 September 2019 in case no. 922/1151/18).³⁵

In the decision of the Commercial Court of Zaporizhzhya Oblast of 2 December 2020, in case no. 908/1639/20, the court did not accept electronic evidence because when submitting screenshots of e-mails on paper, the defendant had not followed the procedure for submitting electronic evidence established by Art. 96 of the Code of Commercial Procedure of Ukraine, namely, he had not submitted either electronic evidence proper or its electronic copy, or a paper copy of an electronic document certified by an electronic digital signature. The court also stated that the defendant had not proved that the e-mail addresses using which the correspondence was carried out belonged to the plaintiff.³⁶

The Central Commercial Court of Appeal is of the same opinion: in the decision of 23 October 2020, in case no. 904/5656/19, it noted that, when submitting screenshots of e-mails on paper, the plaintiff had not followed the procedure for submitting electronic evidence established by Art. 96 of the Code of Commercial Procedure of Ukraine, namely, he had not submitted either electronic evidence proper or its electronic copy, or a paper copy of an electronic document certified by an electronic digital signature.³⁷

The Commercial Court of Zaporizhzhya Oblast, in the decision of 26 October 2020, in case no. 908/1296/20, taking into account the aforementioned rules of law and the circumstances of the case, given that an electronic digital signature by legal status is equated to a handwritten signature (seal), concluded that paper copies of electronic evidence submitted to the court indicate that the parties, by applying on 2 November 2018 EDSs (seals) of the plaintiff and his client on the document ‘Application for Services “Credit Limit on the Current Account of the Natural Person–Entrepreneur “Entrepreneur”’, had concluded in writing a loan agreement dated 2 November 2018 no. B/N.³⁸

The Supreme Court, in its decision of 16 March 2020, in case no. 910/1162/19, found that the courts of previous instances, having assessed all the evidence in the case file, had concluded that the printouts of electronic correspondence provided by the plaintiff could not be considered electronic documents (copies of electronic documents), as they did not

34 Ruling in case no 127/19854/20 [2021] The Seventh Administrative Court of Appeal. United state register of court decisions <<https://reyestr.court.gov.ua/Review/94601364>> accessed 5 September 2021.

35 Decision in case no 922/49/20 [2020] The Commercial Court of Kharkiv Oblast. United state register of court decisions <<https://reyestr.court.gov.ua/Review/89429009>> accessed 5 September 2021.

36 Decision in case no 908/1639/20 [2020] The Commercial Court of Zaporizhzhya Oblast. United state register of court decisions <<https://reyestr.court.gov.ua/Review/93532917>> accessed 5 September 2021.

37 Ruling in case no 904/5656/19 [2020] The Central Commercial Court of Appeal. United state register of court decisions <<https://reyestr.court.gov.ua/Review/92383245>> accessed 5 September 2021.

38 Decision in case no 908/1296/20 [2020] The Commercial Court of Zaporizhzhya Oblast. United state register of court decisions <<https://reyestr.court.gov.ua/Review/92526133>> accessed 5 September 2021.

meet the requirements of Arts. 5 and 7 of the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' and were not appropriate evidence in the case. In this case, the courts found no evidence that the copies of the contract and the invoice and the e-mails, screenshots of which were available in the case file, had been created in the manner prescribed by the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' and that they had been signed by the electronic digital signature of an authorised person (with the ability to identify the signatories of the contract), which is a mandatory element of an electronic document. Such circumstances make it impossible to identify the sender of the message, and the content of such a document is not protected from making changes and distortions. Therefore, since the contract of 10 September 2018 no. 10/09/18 did not have the features of an electronic document and was not signed by electronic digital signatures of the parties, the courts of previous instances came to a reasonable conclusion, with which the Supreme Court agreed, that such a transaction could enter into force only after its physical signing by the parties and affixing seals in paper form.³⁹

After analysing the summary of court rulings in Ukraine in the context of the COVID-19 pandemic, it was found that the courts pay attention to the authenticity of the person who is the author of such documents and is a party to the case.

It should be noted that a separate category of electronic evidence is those items that can be permanently removed. For example, a post on Facebook can be deleted by the author at any time, and messages on Messenger, Telegram, Viber, or WhatsApp can be deleted by one of the interlocutors, which will result in their deletion for all chat participants. In this case, recovering deleted messages will be impossible or extremely difficult. For example, the messenger Telegram permanently deletes both the content of messages and the traces of their sending; WhatsApp deletes only the content, but also permanently. A similar technology is used by Viber, and the technical support of the service can provide information only about the fact of sending messages or making calls with the date and time, but not their content.

In addition, such a service will be provided only after the account owner verification procedure.

Since the Law stipulates that in case of doubt on the part of another party to the case or the court about the authenticity of electronic evidence, the court must demand the original evidence and, in its absence, refuse to accept the evidence, the removal of messages as originals will mean their complete destruction as evidence. For these reasons, courts often, at the request of one of the parties, take steps to provide such evidence by viewing them in court using interested parties' portable devices (for example, viewing evidence by the court via an Internet link; viewing user posts on Facebook and LinkedIn; or viewing messages in Viber Messenger).

To avoid any doubt on the part of the court of originality, to prevent interference with the content of electronic documents, and to protect electronic files from unwanted changes, one needs to use EDS, which will act as an additional guarantee of personalisation of the author of an electronic document.

In resolving a dispute, the court must thoroughly, fully, and directly examine the evidence presented. The judge, in the process of evaluating the evidence, including an electronic one, carries out mental activity, which determines the relevance and admissibility of the evidence, its reliability, sufficiency, and interconnection in general. This activity is carried out in accordance with the laws of logic and in the conditions established by legal norms.

39 Ruling in case no 910/1162/19 [2020] The Supreme Court. United state register of court decisions <<https://reyestr.court.gov.ua/Review/88244984>> accessed 5 September 2021.

In the third part of Art. 2 of the Code, one of the main principles of commercial litigation is the principle of adversarial proceedings, the essence of which is explained in Art. 13 of this Code. In accordance with parts three and four of Art. 13 of the Code, each party must prove the circumstances that are relevant to the case and to which it refers as the basis of its claims or objections, except as provided by law; each party shall bear the risk of consequences related to the commission or non-commission of procedural actions.⁴⁰

The Supreme Court has repeatedly stressed the need to apply the categories of standards of evidence and noted that the adversarial principle ensures the completeness of the investigation of the circumstances of a case. In particular, this principle provides for the burden of proof to be placed on the parties.

At the same time, this principle does not imply the obligation of the court to consider a circumstance alleged by a party as proven and established. Such a circumstance must be proved in such a way as to satisfy, as a rule, the standard of precedence of more compelling evidence, i.e., when the conclusion of the existence of an alleged circumstance in the light of the evidence submitted appears more plausible than the opposite (the Supreme Court rulings of 2 October 2018 in case no. 910/18036/17, of 23 October 2019 in case no. 917/1307/18, of 18 November 2019 in case no. 902/761/18, of 4 December 2019 in case no. 917/2101/17).

A similar standard of proof was expressed by the Grand Chamber of the Supreme Court in its decision of 18 March 2020 in case no. 129/1033/13-ts (proceedings no. 14-400ts19).

The implementation of the principle of adversarial proceedings in a process and proving before the court the validity of one's claims is a constitutional guarantee provided for in Art. 129 of the Constitution of Ukraine.

The fairness of a trial must be realised, including in the administration of justice by the court, without a formal approach to the consideration of each particular case.

Adherence to the principle of a fair trial is extremely important in resolving court cases, as its implementation ensures that a party, regardless of its level of professional training and understanding of certain requirements of civil proceedings, is able to protect his/her interests.

In addition, the Supreme Court emphasises that on 17 October 2019, the Law of Ukraine of 20 September 2019 no. 132-IX 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Promotion of Investment Activity in Ukraine' entered into force. The Law, in particular, amended the Code of Commercial Procedure of Ukraine and changed the title of Art. 79 of the Code of Commercial Procedure of Ukraine from 'Sufficiency of Evidence' to a new one – 'Probability of Evidence' – and set it out in a new wording with the actual introduction of the standard of proof 'probability of evidence' in the commercial process. The standard of proof, 'probability of evidence', as opposed to 'sufficiency of evidence', emphasises the need for the court to compare the evidence provided by the plaintiff and the defendant.

The difficulties that currently exist in the examination of electronic evidence due to the specificity of individual acts of judicial examination give us reason to believe that the evaluation of evidence will be carried out for a long time by the inner conviction of the judge. This is confirmed by the conducted analysis of court decisions on different requirements and interpretations by courts of the same type of evidence.

In addition, the study of the summary of court rulings of Ukraine in the context of the COVID-19 pandemic did not reveal any electronic evidence received by the court by e-mail or through the electronic office of the subsystem 'Electronic Court'. In our opinion,

⁴⁰ Ibid.

this is because the subsystem 'Electronic court' currently operates in a test mode, and the participants in the process do not have all the opportunities provided by this system to exercise their rights to submit electronic evidence in electronic form.

6 CONCLUSIONS

In court proceedings, the necessary conditions for the correct assessment of evidence by the court are establishing the connection of evidence with the circumstances of the case, submitting evidence, and collecting and seizing evidence.

To use electronic data as evidence in court, it must be obtained in accordance with the procedural rules of evidence collection. However, procedural codes do not contain procedural rules for the collection and seizure of electronic evidence, such that the latter could be declared admissible and used as evidence. The lack of legal regulation on the collection, seizure, and submission of electronic evidence should not be a barrier to the protection of legal rights and legally protected interests of citizens and businesses. On the contrary, this regulation should correspond to the relations that it is designed to regulate.

Currently, the legal practice for deciding which electronic evidence, in what form, and on what media are admissible means of proof is ambiguous. The legislators have not specified how to distinguish genuine electronic evidence from forgery. The presence of an electronic signature on electronic evidence is provided for in the procedural codes only if the document is submitted as an electronic copy. At the same time, the relevant law states that an EDS is mandatory on the original electronic document. Due to this, there are different applications of the same rules of law.

It should be noted that the legislators have not defined the procedure for certifying paper copies of electronic evidence. In addition, there are no criteria for which electronic evidence is the original and which one is a copy (this is especially important for electronic evidence such as websites, multimedia, etc.).

Another issue is that, by the time the court considers the case, such information can easily be deleted, which significantly reduces the chances of proving its existence. The information may also be changed by the author, custodian, or user.

The legislators have not defined the criteria for which electronic evidence is the original and which one is a copy because the originals of such evidence, as well as copies, will often be placed on external devices such as memory cards, disks, floppy disks, etc. There are some difficulties in proving the date and time of creation of the original electronic evidence. As the original electronic evidence is the original source, and this is what differentiates it from a copy that is created later, it must contain the date and time of its creation.

The legislators also need to make it clear that the originals of electronic evidence are seized only in exceptional cases. It is equally important to provide a detailed procedure and form of attachment, registration, and storage of evidence in the case file with the definition of the range of responsible persons.

Another significant problem that needs to be addressed by the legislators is the lack of a unified form of digital evidence and proper technical support. When examining electronic evidence, judges sometimes face the problem of not being able to view certain files during a trial due to lack of technical means, or when the files have a format that cannot be reproduced without having special keys or involving a specialist, which, in turn, delays the proceedings.

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