



Messenger Chats as Evidence in Civil and Arbitration Proceedings — Russian Judicial Practice¹

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Abstract. *The development of production and distribution relations, which are forms of interaction among society and individuals, and social groups presupposes the adequate development of procedural legal means for ensuring (implementing and protecting) the constitutional rights of participants in these relations. As is well known, the socioeconomic conditions of human society development provide new sources and means of judicial evidence. The task of justice is to provide participants in a judicial dispute with a legal opportunity to use acceptable judicial evidence in accordance with the procedures established by law. This study analyzes the judicial practice of using information from the messenger chat in court proceedings and formulates rules for using the messenger chat and screenshots as an acceptable judicial proof. Among these rules, the following should be noted: mandatory identification of the message recipient, identification of the true will of the message sender, coordination of the order of sending messages via messenger chat, etc.*

The article discusses the opinion of scientists about the attribution of a screenshot to written or electronic evidence. Considerable attention is paid to the problem of using correspondence in the messenger chats as a source of judicial evidence in resolving labor disputes.

The authors made a final conclusion about the positive attitude of Russian courts to the use of information from the messenger chats as a legal source of judicial evidence. The rules of their application warrant attention.

Keywords: *correspondence in the messenger chats, screenshots, and valid proof of identification of the addressee of the message.*

Civil and arbitration proceedings must comply with the law, the property, and the personal non-property interests of the judicial conflict parties. Courts can fully use electronic evidence, including information obtained through the messaging apps, as correspondence between participants in a civil transaction [1]. Audio messages or video files in Messenger should also be considered as independent evidence types. According to Part 1 of Article 55 of the Civil Procedure Code of the Russian Federation, the evidence in the case is obtained in accordance with

the evidence law, on the basis of which the court determines the presence or absence of circumstances justifying the claims and objections of the parties and other circumstances of importance for proper consideration and case resolution. The information necessary for the court may be contained in the explanations of the parties and third parties, witness statements, written and material evidence, audio and video recordings, and expert opinions. The question of the electronic evidence admissibility in a court case remains debatable.

In this paper, the Messenger is proposed to be understood as any instant messaging program (WhatsApp, Telegram, etc.) that is installed on smartphones, laptops, and other technical devices. A screenshot should be understood as a screenshot taken by software to save information displayed on the screen at a certain point in time.

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Court practice

In Russian judicial practice, there are civil and arbitration cases in which the information obtained in the Messengers ch acts as judicial evidence. The analysis of judicial practice shows that the use of electronic evidence by the court has been growing recently. This conclusion is confirmed by the decisions of the general jurisdiction courts, arbitration courts, and the practice of the Supreme Court of the Russian Federation [2].

According to one of the investigated cases, it turned out that the court assessed the correspondence of the parties under the contract for the provision of paid tourist services as one piece of the presented judicial evidence. According to this correspondence, the plaintiff stated her intention to purchase a tourist tour with the payment of a certain amount of money. At the same time, she was notified that in case of refusal 21 or fewer days before the start of the trip, a fine would be assessed comprising 100 % of the tourist product cost².

In another case studied, it was found that, taking as evidence the correspondence in the WhatsApp Messenger (screenshot), the court found that the defendant's representative in correspondence and conversation with the plaintiff reported the testator's death and the presence of a will in favor of the plaintiff, and also sent a photocopy of the certificate of inheritance³. In another case, with the help of correspondence and photos in the Messenger, in the absence of objections from other participants in the process, the court established the fact of kinship between the applicant and the deceased citizen⁴.

Courts often use the correspondence of the disputing parties via the Messenger to prove proper notification of the parties about the trial date and place. Thus, in one of the cases studied, the court of appeals came to a reasonable conclusion that the arguments of the party about the alleged failure of the first instance court to inform it about the case time and place were untenable, since there was evidence in the form of a screenshot (correspondence via Messenger), refuting the arguments of the complainant. This correspondence contained the text of the notice about the court session time and place, as well as the telephone number of the complainant⁵.

² See, for example: Ruling of the Moscow City Court of 06.09.2019 N 4g-11187/2019 // SPS ConsultantPlus.

³ See, for example: The appeal ruling of the Saratov Regional Court of 29.05.2019 in case N 33-4092/2019 // SPS ConsultantPlus.

⁴ See, for example: Ruling of the St. Petersburg City Court of 23.05.2019 N 33-8035/2019 in case N 2-6972/2018 // SPS ConsultantPlus.

⁵ See, for example: Resolution of the Saratov Regional Court of 09.01.2018 N 4A-3/2018 // SPS ConsultantPlus.

The Messenger is of great importance for labor disputes in Russia and a number of other countries. For example, in 2017, in Italy, Mario Fiorentino, the Judge of the District Court of Catania, considering the case about the dismissal of an employee to whom a notice about termination of an employment contract was sent by a message in the WhatsApp Messenger, recognized this notice as admissible evidence. The court proceeded from the fact that the employer's will was communicated in writing and did not have an ambiguous character, in connection with which the procedure for notifying the dismissal was followed, and the dismissal was a legitimate action of the employer's administration.⁶

Russian courts, when evaluating information taken from the Messenger as evidence, strive to comply with the requirements of the law on the relevance and admissibility of judicial evidence (Articles 59, 60 of the Civil Code of the Russian Federation). The application of these requirements in the consideration of labor disputes has some special features. Often, employees, being participants in a legal dispute, try to establish the fact of the occurrence of an employment relationship via correspondence in the Messenger. However, the courts do not attach any evidentiary value to such information, referring to the fact that correspondence in the Messenger does not meet the criteria of relevance, admissibility, and sufficiency of evidence, nor does it have proper registration, nor is it allowed to establish the sender's identity, i.e., to identify him.

It seems that this situation can be corrected by notarizing correspondence in accordance with Articles 102, 103 of the Legislation Fundamentals of the Russian Federation on Notaries⁷. In other words, if the correspondence in the Messenger is notarized, the court can accept this correspondence as a means of proof⁸. A number of scientists believe that a correspondence or a screenshot should be recognized as valid and reliable evidence in the presence of notarization [3, 4]. However, in practice, the courts reject this type of evidence, and this approach does not contradict the law: in this case, the notary confirms the fact and content of the

⁶ Lavoro: ora è possibile licenziare tramite WhatsApp, lo stabilisce il tribunale // QuiFinanza. URL: <http://quifinanza.it/lavoro/lavoro-ora-e-possibile-licenziare-tramite-whatsapp-lo-stabilisce-il-tribunale/129144/> (reference date: 10.09.2020).

⁷ Legislation Fundamentals of the Russian Federation on Notaries (approved by the Supreme Court of the Russian Federation 11.02.1993 No 4462-1) // Rossiyskaya Gazeta. 1993. March 13. No. 49. ed. from 08.12.2020.

⁸ See, for example: The appeal ruling of the Moscow Regional Court of 01.02.2017 in case No 33-3357/2017 // SPS ConsultantPlus; Decision of the Sovetsky District Court of Tula of 26.04.2016 in case N 2-505/2016 // SPS ConsultantPlus.

correspondence but does not confirm the addressees and the admissibility of the correspondence in the legal relations of the parties⁹.

For one of the cases studied, the court expressly stated that notification via the Messenger by the employer of the employee's need to appear for the workbook was not proper notice, as neither the law nor the local acts of the employer provided for this method of notification¹⁰. In another case, the employee sent a letter of resignation through the Messenger at his own request, and the employer issued an order for dismissal in accordance with paragraph 3 of Part 1 of Article 77 of the Labor Code of the Russian Federation. Sometime later, the former employee appealed to the court with a demand for reinstatement, citing the fact that he did not apply to the employer with a letter of dismissal and was not familiar with the order of dismissal. The court concluded that a copy of the dismissal order sent via Messenger cannot serve as proof of the employee's application to the employer for dismissal at his own request and cannot prove a voluntary expression of will for dismissal.

The analysis of judicial practice shows that the majority of courts consider information from the Messenger as admissible evidence [5].

One of the criteria that is of great importance for using information from the Messenger as evidence in court is the person's identification. The identification of the party can be confirmed by the uniformity of the messages received by using the methods of correspondence agreed and not agreed upon by the contract. This will allow the court to recognize the correspondence in the Messenger as admissible evidence¹¹. In support of this argument, you should consider the possibility of transferring the correspondence to paper.

In Russian judicial practice, there are many obstacles to the use of correspondence in the Messenger as a valid means of proof. In order for the correspondence in the Messenger to be recognized as a legal means of proof, the parties must include the appropriate conditions in the contract¹². If the contract contains a provision

that the parties must correspond by sending a notification letter, the court does not have the right to recognize the correspondence in the Messenger as a valid means of proof¹³.

The court may not recognize the correspondence from the Messenger as admissible evidence due to the fact that it is not possible to determine and identify the sender of the messages¹⁴. In order to obtain information from the correspondence, the parties often apply for a username and password, but the courts have refused to grant such a request, citing the fact that the correspondence contains personal data of third parties¹⁵.

The courts recognize the correspondence in the Messenger as admissible evidence, provided that it is recognized by both parties¹⁶. If neither of the parties objects to the inclusion of the correspondence from the Messenger in the case file, the court will recognize the correspondence as admissible evidence¹⁷.

Based on the analysis of judicial practice, we can draw a general conclusion that counterparties are obliged to carry out and verify:

- identification of the message recipient;
- validity of the message sender's will;
- compliance with the essential terms of the agreement;
- whether the addressee of the message has the authority to perform legally significant actions;
- coordination of the order of sending messages via the Messenger;
- correspondence of information from the Messenger to the actual circumstances of the case.

These rules are common in domestic judicial practice, but they are not unambiguous and exhaustive, since in the practice of courts there are cases of accepting correspondence in the Messenger as admissible evidence without considering the

⁹ See, for example: The Ruling of the West Siberian District Administrative Court of 26.07.2019 on the case No A75-5029/2018 // SPS ConsultantPlus.

¹⁰ See, for example: The Ruling of the Angarsk City Court of the Irkutsk region in case No. 2-1393 / 2017 of 25.04.2017 // SPS ConsultantPlus.

¹¹ See, for example: The Decision of the Seventh Arbitration Court of Appeal of April 7, 2016 in case No A67-8923/2015 // SPS ConsultantPlus.

¹² See, for example: The Decision of the Thirteenth Arbitration Court of Appeal of July 28, 2015 in case No A56-60477/2014 // SPS ConsultantPlus.

¹³ See, for example: The Ruling of the Moscow City Court of March 5, 2019 No 4g-0798/2019 in case N 2-1623/18 // SPS ConsultantPlus.

¹⁴ See, for example: The Decision of the Ninth Arbitration Court of Appeal of March 11, 2019 in case No A40-213949/18 // SPS ConsultantPlus.

¹⁵ See, for example: The Decision of the Arbitration Court of the North Caucasus District of August 16, 2019 in case No A53-23516/2017, of July 15, 2019 in case No A53-23514/2017 // SPS ConsultantPlus; The Appeal Ruling of the Moscow City Court of September 16, 2015 in case No 33-30344/2015 // SPS ConsultantPlus.

¹⁶ See, for example: The Ruling of the Judicial Board for Economic Disputes of the Supreme Court of the Russian Federation of January 17, 2019 in case No A84-130/2016 // SPS ConsultantPlus.

¹⁷ See, for example: The appeal ruling of the Moscow City Court of February 18, 2019 in case N 33-7640/2019 // SPS ConsultantPlus.

stated rules¹⁸. In our opinion, the disputing counterparties are obliged to take these rules into account in order to minimize possible risks and difficulties [6].

The authenticity of the correspondence can be confirmed by the testimony of witnesses¹⁹. Much attention in theory and judicial practice is paid to the reliability of electronic evidence [7], since the perception of facts investigated with the help of electronic evidence depends on many subjective and objective bases. The information contained in electronic documents in Messengers is not static, and is subject to private changes. There is an opinion that when applying to the expert examination in this case, there is an adversarial interpretation of the disputed facts regarding clarification of their essence, which in turn is devoid of the goal of finding material or abstract truth [8].

It is also necessary to recognize the possibility of concluding a contract via Messenger to the effect of: This contract can be accepted by the court as admissible evidence²⁰. Often, the courts do not appoint a computer-technical expert to verify the reliability of electronic evidence, nor do they involve a specialist in the examination of electronic evidence [9].

Screenshot

In the civil and arbitration proceedings of Russia, the screenshot is also widely used [10]. The screenshot is a valuable means of recording the necessary information (Part 1 of Article 71 of the Civil/Procedure Code of the Russian Federation and Part 1 of Article 75 of the Arbitration Procedure Code of the Russian Federation). There are no restrictions on the methods of proving the fact in the law²¹. The court has the right to take any means of proof that is not inconsistent with the requirements of the Civil Procedure Code and Arbitration Procedure Code of the Russian Federation. Moreover, the list of admissible evidence is not exhaustive. Screenshots should be subject to the rules that apply to correspondence in the Messenger.

¹⁸ See, for example: The Decision of the Seventh Arbitration Court of Appeal of January 9, 2019 in case No A03-3991/2018 // SPS ConsultantPlus.

¹⁹ See, for example: The Decision of the Sixteenth Arbitration Court of Appeal of September 5, 2018 in case No A63-3050/2018 // SPS ConsultantPlus.

²⁰ See, for example: The Decision of the Ninth Arbitration Court of Appeal of April 18, 2019 in case No A40-220968/18 // SPS ConsultantPlus.

²¹ See, for example: Resolution of the Plenum of the Supreme Court of the Russian Federation (hereinafter — the armed forces) from 15.06.2010 N 16 “On the practice of Law of the Russian Federation ‘On mass media’” by the courts// SPS ConsultantPlus.

A number of scientists do not consider it necessary to comply with the rules regarding correspondence in the Messenger or a screenshot when proving the admissibility of a particular piece of judicial evidence. As a justification, the thesis is put forward that the appearance of the discussed evidence type is associated with scientific and technical factors that do not require any other confirmation [11]. There is no consensus among scientists on whether the screenshot should be attributed to written or electronic evidence [12, 13]. There is a point of view that a screenshot from a mobile device or computer refers to the system of electronic evidence, and screenshots that are printed and presented on paper refer to written evidence [14]. We believe it is more expedient to classify correspondence and screenshots as written evidence (Article 71 of the Civil Procedure Code of the Russian Federation, Article 75 of the Arbitration Procedure Code of the Russian Federation).

The Rules for Identifying Mo-p[oiuhessenger Users, which came into force on May 5, 2019, are of great importance in discussing the issue raised. The purpose of these rules is to create a more comfortable and secure communication environment for citizens on the Internet. According to these rules, the user must provide the Messenger organizer with a subscriber number, and the organizer must make a request to the telecom operator within 20 minutes to confirm the information. If such information matches, the user gets access to the Messenger. If the organizer of the Messenger ignores the above procedure, the latter may be brought to administrative responsibility (Article 13.39 of the Administrative Code of the Russian Federation)²².

Thus, the Russian courts do not prevent the use of correspondence in the Messenger or a screenshot as an independent type of judicial evidence [15]. To date, there is a continuing debate in science about whether a screenshot should be classified as written or electronic evidence. It seems to us that the law should provide grounds for refusing to accept correspondence in the Messenger or a screenshot as acceptable evidence. An important element in this case is that the rules allow you to recognize information from the Messenger as valid evidence.

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²² <Information> Roskomnadzor of 07.05.2019 <On the entry into force of the new rules for identifying Messengers' users> // SPS ConsultantPlus.

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Мессенджер как доказательство в гражданском и арбитражном процессе: русская судебная практика¹

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Аннотация. Развитие производственных и распределительных отношений, форм взаимоотношения общества и личности, социальных групп предполагает адекватное развитие процессуальных юридических средств обеспечения (осуществления и защиты) конституционных прав участников этих отношений. Как известно, социально-экономические условия развития человеческого общества вызывают к жизни новые источники и средства судебного доказывания. Задачей правосудия является предоставление участникам судебного спора легальной возможности использовать допустимые средства судебного доказывания в установленном законом порядке. В статье анализируется судебная практика применения сведений из мессенджера в судебном процессе, сформулированы правила использования мессенджера и скриншота в качестве допустимого средства судебного доказывания. Среди таких правил следует, в первую очередь, отметить: обязательность

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идентификации адресата сообщения, выявление подлинной воли лица, направившего сообщение, согласование порядка отправки сообщений посредством мессенджера и т.д.

В статье анализируется мнение ученых об отнесении скриншота к письменным или электронным доказательствам.

Значительное внимание в статье уделяется проблеме использования переписки в мессенджере как источника судебного доказывания при разрешении трудовых споров.

Авторами сделан окончательный вывод о положительном отношении российских судов к принятию и рассмотрению сведений из мессенджера как легального источника судебного доказывания, рекомендуется обращать внимание на правила их применения.

Ключевые слова: переписка в мессенджере, скриншот, допустимое доказательство, идентификация адресата сообщения.

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