

ELECTRONIC EVIDENCE IN CHINA

By Dr. Minyan Wang

This article introduces electronic evidence in relation to civil proceedings in China, and how electronic evidence is recognized in theory and in practice. Electronic evidence, due to its characteristics, which are different from traditional forms of evidence, has caused some debate on whether electronic evidence should be admitted into court and how much evidential weight it should be given in theory and in practice. This article will discuss these issues in theory and in practice.

Before the discussion, it is necessary to define the term electronic evidence as used in this paper. In China, there are a number of different definitions of what is meant by electronic evidence. Some scholars call electronic evidence ‘digital evidence’, which means electronic data or information that was formulated during the processing of a computer or network, is based on digital technique, and can reflect the status of computer, network activity and the content.¹ Some define it as ‘all kinds of materials or ramification which are in electronic form and can be used as evidence’ or ‘all kinds of evidence which rely on electronic techniques or electronic devices.’² Others define electronic evidence as ‘all kinds of evidence that are stored, transmitted, and the output by electronic techniques and devices’.³ When compared, the second definition is broader than the other two. In practice, most items of electronic evidence are those as defined in the first and third one. However, considering the fast development of technology, the second definition will be adopted

in this paper.

The general law of evidence

In China, evidence is usually defined as ‘the fact or material which can prove the disputed fact at issue.’⁴ In fact, different scholars define evidence in various ways. For example, some define ‘evidence’ as ‘a fact and certification way to prove the true thing in the case’.⁵ Others define evidence as ‘the basis that could prove the fact in the case.’⁶

To be adopted by the court, evidence must fulfill the requirements set out in law. In general, all evidence must have three characteristics.⁷ First, objectivity, which means an item of evidence shall be the fact that occurred and existed during the process of the incident that took place that lead to the litigation, and will not change according to human subjective volition.⁸ Second, relevancy, which means an item of evidence must be related to the disputed fact at issue.⁹ Third, legitimacy, which means an item of evidence must be legitimate in respect of its methodology of proof and on procedure.¹⁰

The China Civil Procedure Law provides for seven kinds of evidence, which include documentary evidence; material evidence; audiovisual material;¹¹ testimony of witnesses; statements of the parties; expert conclusions, and records of inspection.¹² The parties may provide evidence in any format of these seven. On the other hand, the collection and use of evidence should be in such a way that the law permits. For example, evidence should be collected by the person lawfully allowed to obtain the evidence, by lawful procedure, and its content should be lawful.¹³ Where

¹ Chen Haoran, ‘The Theory of Evidence’ 《证据学原理》(2002), p 67.

² He Jiahong, Liu Pinxin, editor, ‘The Research of Electronic Evidence Law’ 《电子证据法研究》(2002), p 4.

³ Pi Yong, ‘The Research of Electronic Evidence in Criminal Proceedings’ 《刑事诉讼中的电子证据研究》(2005), p 4.

⁴ Bi Yuqia, ‘Civil Evidence Law and its Proceeding Function’ 《民事证据法及其程序功能》, (1997), p 11; Liu Jinyou, editor, ‘Evidence Theory and Practice’ 《证据理论与实务》, (1992), p 57.

⁵ Cui Min, Zhang Wenqing, editors, ‘Criminal Evidence Theory and Practice’ 《刑事证据的理论与实践》, (1992), p 10.

⁶ He Jiahong, ‘Let Evidence Step Off the Artificial

Altar’ 《让证据走下人造的神坛》, available at: http://www.law-lib.com/lw/lw_view.asp?no=339.

⁷ Article 50 of Several Provisions of the Supreme People’s Court on the Evidence for Civil Actions.

⁸ Article 65(1), (4) Several Provisions of the Supreme People’s Court on the Evidence for Civil Actions Fan Congyi, editor, ‘The Evidence Law’ 《证据法学》, (2004) p.132.

⁹ Article 64, 65(2), 66 of Several Provisions of the Supreme People’s Court on the Evidence for Civil Actions.

¹⁰ Article 63 of CPL; article 65(3) of Several Provisions of the Supreme People’s Court on the Evidence for Civil Actions; Chen Haoran, ‘The Theory of Evidence’ 《证据学原理》, 2002 p.118.

¹¹ Audi visual materials, including video and audio

materials are forms of analogue evidence, for a discussion on the definition of electronic evidence, analogue and digital evidence, see Stephen Mason, general editor, *Electronic Evidence: Disclosure, Discovery & Admissibility*, (LexisNexis Butterworths, 2007), 2.02 – 2.03.

¹² Article 63. English versions of the Civil Procedure Law are available at <http://www.civillaw.com.cn/english/article.asp?id=1034>.

¹³ This is more related to criminal proceedings. A related provision to civil proceedings is article 3, 11, 65(3), 65(5) of Several Provisions of the Supreme People’s Court on the Evidence for Civil Actions.

evidence is unlawfully collected or used, it will not be admissible.¹⁴ The evidential value of an item of evidence is related to many factors. These include, amongst others, the reliability of the evidence, and the relationship between the evidence and fact in issue, which has to be decided on a case by case basis.¹⁵

Theoretical debates on recognizing electronic evidence in law

Due to the characteristics of electronic evidence, there are debates on which category of evidence electronic evidence belongs to. In general, there are four views. First, it was thought that electronic evidence should be 'audiovisual materials', because the content of electronic evidence has to be displayed on a computer device in the form of a graph, figure, letter or emblem; and the storage medium, carrier and the way it is shown have the same characteristics as audiovisual materials.¹⁶ Therefore, audiovisual materials could be broadly interpreted to cover electronic evidence.

Secondly, it was considered that electronic evidence belongs to documentary evidence.¹⁷ Article 11 of the Contract Law provides that 'a written form means a memorandum of contract, letter or data message (including telegram, telex, facsimile, digital data exchange and digital mail), etc. which is capable of presenting its contents in a tangible form.' This article recognizes a data message as a form of writing in law, and therefore electronic evidence is seen as a form of documentary evidence. If electronic evidence was regarded as 'audiovisual materials', it will directly affect the efficiency of digital transactions and trust in electronic evidence.

Third, some scholars consider that electronic evidence is neither documentary evidence, nor audiovisual materials; it is a new form of evidence.¹⁸ It is argued that electronic evidence is greatly different from documentary evidence. The letter, graph or figure could be directly demonstrated on the visible carrier; while electronic evidence is generated, stored and transmitted by converting the information into digital or binary codes, and demonstrated and thus readable through

special devices and software. The way the information is stored and displayed is completely different between them. On the other hand, the revision of an electronic document cannot be detected on the document itself, unlike that of the paper document where the revision will leave some trace. In this sense, documentary evidence can have greater evidential weight, and can be used as original and direct evidence; while the evidential value of electronic evidence can be considered to be weak,¹⁹ and can be regarded as indirect evidence.

It is argued that the definition of electronic evidence and audiovisual materials are different. Audiovisual materials are viewed by a video or audio device, and the information is perceived by vision or hearing or both. The sound is given out by a single medium, while video can be by single or multiple mediums. Electronic evidence, on the other hand, is demonstrated by multiple mediums, which is not stored in the same way as audiovisual materials. In this regard, audiovisual materials are not able to cover electronic evidence; while electronic evidence could cover audiovisual materials.

It is thus suggested that electronic evidence should replace audiovisual materials and be included in the evidence category as a counterpart of documentary evidence, material evidence, testimony of witnesses, statement by the parties, conclusion of expert corroborations and records of inspection. It was thought that due to the limitation of knowledge and the insufficient understanding of electronic evidence, the Civil Procedure Law thus divides evidence into seven categories and includes audiovisual materials as a counterpart to other categories, without considering electronic evidence. However, with the development of information technologies and a greater understanding of electronic evidence, electronic evidence has its unique characteristics from other kinds of evidence and should be regarded as one category of evidence to meet the development of new technology and modern law as a science, which can also promote the collection and use of electronic evidence.

Fourthly, other scholars do not put electronic evidence

¹⁴ Article 68 of *Several Provisions of the Supreme People's Court on the Evidence for Civil Actions*.

¹⁵ Article 65, 66, 69 of *Several Provisions of the Supreme People's Court on the Evidence for Civil Actions*.

¹⁶ Liu Lixia, 'On the Judgment of the Reality of Electric Evidence', *Yunan Law*, (2003), Vol. 2; See also, article 3 of *The Provisions of the Beijing Higher People's Court on the Problems of Evidence in Dealing with cases of various kinds (for Trial Implementation)* (2001); Article 22 of *Several*

Provisions of the Supreme People's Court on the Evidence for Civil Actions.

¹⁷ Chen Jun, 'The Evidential Value and Evidence Types of Emails', "论电子邮件的证据效力和证据类型", available at: http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=2194; Zhang Xi'an, 'Several Problems of Computer Evidence' "论计算机证据的几个问题", *People's Court Daily*, 7 November 2001.

¹⁸ Liu Pinxin, 'The Admissible Criteria of Electronic Evidence', available at: <http://www.civillaw.com>.

[cn/article/default.asp?id=14462](http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=2194); Chen Jun, 'The Evidential Value and Evidence Types of Emails', available at: http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=2194.

¹⁹ However, an electronic document can be authenticated by direct or circumstantial evidence, see Stephen Mason, general editor, *Electronic Evidence: Disclosure, Discovery & Admissibility*, 4.24 - 4.26.

in to any of the seven categories, because they consider electronic evidence is only a way of displaying evidence, and each of the seven kinds of evidence can be demonstrated in digital format.²⁰ For example, a digital document, digital contract, digital materials (such as the traces to demonstrate that a computer was hacked) and digital notes can all be seen as documentary and materials evidence that are in digital format.

Legislation relating to electronic evidence

Prior to the passing of the Electronic Signatures Law of the People's Republic of China of 2004,²¹ there was no special law relating to electronic evidence. However, there are some references relating to electronic evidence contained among some laws and regulations. For instance, article 11 of the Contract Law recognizes the data message (including telegram, telex, facsimile, digital data exchange and e-mail) as a form of writing.

Other laws prescribe the methods on how to decide the evidential value of copies and audiovisual materials. For instance, the Provisions of the Supreme People's Court on Evidence for Civil Actions requires the parties to provide the original as evidence to the court.²² If a party finds it difficult to provide the original for some reason, a copy is acceptable if the copy has been checked with the original by the court.²³ Originals (materials and documentary evidence), or copies having been checked with originals, have evidential value if the other party disputes the evidence, but cannot provide enough evidence to refute it.²⁴ On the other hand, the value of a copy that is not checked against the original can only be considered with other evidence in the case.²⁵ A copy cannot be taken as a basis to ascertain the facts without the original, other relevant evidence, and it is denied by the other party.²⁶

Analogue evidence in the form of audiovisual material or copies will have evidential value where they are checked with the original, and if the evidence is supported by other evidence and obtained in a lawful way.²⁷ On the other hand, disputed audiovisual

materials have to be associated with other evidence to ascertain the fact in issue.²⁸ Article 69 of Civil Procedure Law also provides that the court should distinguish the authenticity of audiovisual materials and combine other evidence to decide whether they could be taken as a basis for ascertaining the facts.

At the provincial level,²⁹ some local governments have released rules to govern digital transactions, especially in relation to electronic certification services. For example, Hainan is the first government that enacted the Hainan Administrative Measures on Electronic Certification in 2001.³⁰ Shanghai also issued the Shanghai Administrative Measure on Electronic Certificates on 18 November 2002.³¹ On 6 December 2002, Guangdong province passed the Electronic Transactions Regulations, which became effective as of 1 February 2003.³² However, these rules diverge between provinces.

As e-commerce plays a more important role in economic development, the State Council's Informatization Office decided to enact the Digital Signatures Ordinance of People's Republic of China, an administrative regulation, in 2002, to clarify the legal validity of electronic records and electronic documents, and to standardize the practice of Certification Authorities. However, when the Informatization Office submitted the Ordinance to the State Council's Legislative Affairs Office in 2003, the Legislative Affairs Office, taking into account the importance of digital documents and records in e-commerce and the fast development of e-commerce, decided to enact an Electronic Signatures Law, instead of an ordinance.³³ As a result, the draft Electronic Signatures Law was submitted to the State Council on 25 March 2004. The Electronic Signatures Law (ESL) was passed by No. 11 meeting of the No. 10 Standard Committee of the National People's Congress on 28 August 2004, and came into force on 1 April 2005.³⁴ To supplement this law, the Ministry of Information Industry (MII) enacted the Administrative Measure on Electronic Certification

²⁰ Lan Shaojiang, 'Summarizing of Electronic Evidence', "电子证据概述", available at http://www.law-lib.com/Lw/lw_view.asp?no=5350.

²¹ Adopted at the 11th Meeting of the Standing Committee of the Tenth National People's Congress on August 28, 2004.

²² Article 10 of Several Provisions of the Supreme People's Court on the Evidence for Civil Actions.

²³ Article 10 of Several Provisions of the Supreme People's Court on the Evidence for Civil Actions.

²⁴ Article 70 of Several Provisions of the Supreme People's Court on the Evidence for Civil Actions.

²⁵ Article 69 of Several Provisions of the Supreme People's Court on the Evidence for Civil Actions.

²⁶ Article 78 of Opinions of the Supreme People's Court on Some Issues Concerning the Application

of the Civil Procedure Law of the People's Republic of China.

²⁷ Article 70 of Several Provisions of the Supreme People's Court on the Evidence for Civil Actions.

²⁸ Article 69 of Several Provisions of the Supreme People's Court on the Evidence for Civil Actions.

²⁹ In China, the rules enacted at the provincial level are only effective within its own jurisdiction, and must not be contrary to the constitution, law and administrative regulation at the state level. (The term 'law' here means the law issued by the National People's Congress or the Standard Committee of the National People's Congress).

³⁰ Available at http://www.infosec.org.cn/fanv/02_04.htm, in Chinese.

³¹ Available at <http://www.infosec.org.cn/fanv>

/02_03.htm, in Chinese.

³² Available at http://www.sol.net.cn/law/law_show.asp?ArticleID=20344, in Chinese.

³³ In China, an Ordinance (Tiao Li) is usually issued by the State Council or a local government. The ordinance issued by the State Council is inferior to the law, which is issued by the National People's Congress or the Standard Committee of the National People's Congress.

³⁴ A English version can be found at Minyang Wang and Minju Wang, 'Introduction to the Electronic Signatures Law of People's Republic of China' Digital Evidence and Digital Signature Law Review, (previously the e-Signature Law Journal), 2 (2005) 79 - 85.

Service (AMECS), which came into force on 1 April 2005.³⁵

The ESL was said to be the first item of legislation relating to electronic evidence. It provides that documents using an electronic signature and data message cannot be denied legal effect only because they use an electronic signature and data message.³⁶ It further prescribes that reliable electronic signatures have the same legal effect as the hand-written signature. It also offers some criteria, in article 8, as to what the court shall consider when deciding the evidential value of electronic evidence in each case.

Recognizing electronic evidence in practice

Before the ESL, many courts recognized electronic evidence in the form of audiovisual materials, because it was thought that electronic evidence has similar characteristics to audiovisual materials. For example, they are both easily changed without leaving a trace. Therefore, they usually require other evidence to prove that they are authentic. Secondly, they are both stored in electronic devices and have to be displayed through a machine. In an explanation by the Beijing People's High Court, it was stated that audiovisual materials include electronic data interchange, electronic mail and electronic data, which is stored in a computer,³⁷ although this refers to the two different forms of electronic evidence: analogue and digital. Article 22 of Several Provisions of the Supreme People's Court on the Evidence for Civil Actions by the Supreme Court also states that an investigator can investigate and collect audiovisual materials, including computer data. Therefore, it was thought that electronic evidence must be proved in association with other evidence in each case.

As a result, in most cases where electronic evidence is provided, the court requires the parties to provide other evidence to prove the authenticity of the electronic evidence, its originality, reliability or other characteristics. Otherwise, electronic evidence will be denied evidential value.

In practice, there are ways to resolve the challenges imposed above. One way to prove the probity of the evidence is by way of asking a notary to notarize the evidence. There are two methods of notarizing the evidence. One is that the notary witnesses the process of the transaction, the download of the digital documents, and produces a notarial deed. In the case of

Shanghai Zide Technology and Development Co. Ltd v Beijing Zhufeng Waiwei Trade Co. Ltd,³⁸ the plaintiff, Zide Co. Ltd, downloaded the digital order form and e-mails from the internet under the supervision of the notary to prove the existence of the transaction between the parties. The court thus ascertained the authenticity of the digital order form and e-mails.

The other possibility is on-line notarization. On-line notarization is where the parties transfer the information relating to the transactions to the notary authority, then the notary assesses the information, and if they are considered to be real and effective, the notary will produce a digital notarial deed, which is signed by the notary. This requires two aspects, technology and law. The Ministry of Justice has carried out research into this since 2000, although this system is still under construction at the time of writing. The on-line notarization system is concerned with the certification authority that provides the notarization, the data message or on-line transaction that is free from damage, and on-line escrow.

Another way is to obtain the services of a digital evidence specialist to report on the digital data, which is often used in criminal investigations. The Ministry of Public Security Material Evidence Corroborating Center started research on digital document corroboration in 1999, and accepted cases from 2001. Currently, it accepts cases relating to the corroboration of digital data, comparative corroboration of mass data in computer databases, the corroboration of the function of computer software, the data resume of deleted data, the corroboration of digital devices, and the corroboration of on-line electronic evidence. There are some digital data resume centers in other localities, such as Shanghai, Shenzhen, Tianjing and Kunming. The first special electronic evidence corroborative center was set up in 2005 in Beijing, providing service on corroborating the authenticity of electronic evidence. These include judgments of whether a digital document has been changed, and the recovery of digital information.

The third way is comparative. It is to compare the e-mail address with a previous e-mail address sent by the party, and to prove the time and location that only the party could have sent the e-mail. In the case of *Shao Dali vs. Zhang Ershen*,³⁹ the plaintiff Shao Dali proved to the court that the e-mails in issue were sent by the defendant Zhang Ershen. First, the plaintiff compared

³⁵ Available at <http://www.mii.gov.cn/zcfg/bl35.htm>, in Chinese.

³⁶ Article 7, *Electronic Signatures Law*.

³⁷ Article 3 of *Provisions of Beijing People's High*

Court on Dealing With the Problems on Evidence in All Cases (2001).

³⁸ *Shanghai first Intermediate People's Court, (2002)*

Huyizhongminshizhongzi No.364.

³⁹ *Beijing First Intermediate People's Court, January 2001*.

In practice, judges still require other evidence to support electronic evidence before it is used to prove or disprove the facts.

the e-mail address used to send these e-mails and the e-mail address that the defendant previously used to send to others and their accounts, and proved that they were the same. Secondly, the plaintiff provided the records including the dates and time, IP address and telephone number used to log on the account, and that the telephone number was the defendant's office number. Compared with the computer code when the defendant's received e-mails from the defendant, it was the same as the computer code used in the disputed e-mails, and the code was the defendant's lap top computer. Thirdly, a colleague of the defendant proved that the defendant was in the office when the e-mails were sent. The combination of this evidence proved that it was the defendant who sent the e-mails, a proposition the court adopted.

There are a few cases in relation to e-mails. For many judges, there is uncertainty about the evidential value of digital documents. In the case of *Shanghai "Rong-Shu-Xia" Computer Ltd. v China Society Publisher*,⁴⁰ the court held the view that an e-mail could act as evidence in accordance with the provisions of article 11 of China Contract Law. However the e-mails presented to the court were rejected because the authenticity of the e-mails were in doubt. However, in the case of *Beijing Han-Hua-Kai-Jie Technology development Ltd. v Chen*,⁴¹ e-mails were adopted as sufficient evidence and their authenticity was confirmed, because the party, Chen, was a software engineer who had the necessary skills to keep the e-mail safe. In both cases, the sender denied sending the e-mails in question.

Even if the ESL recognizes the legal effect and evidential value of digital documents, there is still uncertainty as to how the parties prove such documents in legal proceedings. Article 7 of the ESL prescribes that a data message cannot be denied evidential value because it is generated, sent, received, or stored by

digital, optical, magnetic or similar means. In addition, article 8 of the ESL provides the factors to be taken into account when assessing evidential weight:

In assessing the evidential weight of a data message, the following factors shall be taken into account:

- (1) The reliability of the manner in which the data message was generated, stored or transmitted;
- (2) The reliability of the manner in which the integrity of the information therein was maintained;
- (3) The reliability of the manner in which its originator was identified;
- (4) Any other relevant factors.

Therefore, it is uncertain whether electronic evidence could be regarded as independent evidence to ascertain the facts. In practice, judges still require other evidence to support electronic evidence before it is used to prove or disprove the facts.

In the case *Yang v. Han*,⁴² which was thought to be the first case on electronic evidence after the ESL, a text message sent by a mobile telephone was regarded as a legally valid item of evidence associated with other evidence. In the verdict, the judges held that a mobile text message is a form of data message as defined in the ESL. It could present the information contained effectively and was accessible momentarily for use and investigation; it could also identify the originator and recipient of a data message and the date and time of its dispatch and receipt. The court also assessed the reliability of generating, transmitting and storing the text message, the reliability of the integrity of the text message, and the reliability of the originator, and thus confirmed the authenticity of the text message. However, the judges also held that according to the regulation on the rule of evidence, audiovisual materials

⁴⁰ *Beijing The First Intermediary People's Court*, December 2000, available at http://www.rongshuxia.com/channels/gymt/6_xn_1.htm in Chinese.

⁴¹ Information available from <http://telecom.chinabyte.com/276/1842776.shtml>, in Chinese.

⁴² *Beijing Haidian District's Court*, 14 July, 2005, at <http://bjgy.chinacourt.org/public/detail.php?id=20>

369&k_title=电子签名 & k_content= 电子签名 & k_author= 作者: 张咏华, in Chinese; a translation appears in this issue of the Review on pages 103 – 105.

and data messages could be admitted as evidence. However, if a data message is regarded as direct evidence to prove the facts, other evidence must be provided. Therefore, even if the ESL recognizes electronic evidence, the court still requires other evidence to support electronic evidence before it can be regarded as a basis to ascertain the facts in practice.

Concluding comments

In China, although electronic evidence is admitted as evidence in legal proceedings, its evidential value is not certain and has to be supported by other evidence. There are debates as to which category that electronic evidence belongs to. Even if the ESL admits electronic evidence, there is still some uncertainty about the evidential value of electronic evidence in each case. In practice, the court still requires other evidence to support electronic evidence before taking electronic evidence as a basis for ascertaining the facts.

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