

PAPER:

CHINESE DIGITAL EVIDENCE LAW OVERVIEW AND SUGGESTIONS FOR MULTINATIONAL ENTERPRISES

By **Chen Jihong**

Challenges faced by multinational enterprises

Consider the following scenario: corporation A is a subsidiary of an American enterprise in China, it has been confronted with a difficult case recently. Two years ago, Corporation A retained Jeff, who is a researcher with a doctor's degree, with high salary to entice him to assume the position of manager of the research project. Six months ago, Jeff resigned, and Corporation A agreed to Jeff's resignation after attempting to persuade him to remain. However, Corporation A found that Corporation B, Jeff's new employer, was a direct competitor in Asian markets. Besides this, through the process of clearing up Jeff's computer, Corporation A found that Jeff had sent a number of Corporation A's trade secrets to managerial staff of Corporation B by way of his company e-mail box and personal e-mail box before he formally left Corporation A. At the same time, members of the managerial staff of Corporation B had also sent many e-mails to Jeff's company e-mail box to allure him to join in Corporation B.

Corporation A is preparing to bring litigation against Corporation B and Jeff, and the causes of action include theft of business secrets and unfair competition. Almost all of the evidence is in electronic form, which raises the issue of the effectiveness and the probative force of digital evidence in Chinese courts, and the e-mail server of Corporation A is located in the USA and managed by its American headquarters, which leads to the need to make a formal request for digital evidence stored in another jurisdiction.

This is a typical case in relation to digital evidence for a multinational enterprise. Such matters are not easy to deal with, partly because of the characteristics of digital

evidence, partly because the legislation on digital evidence in China is far from mature, and because the judges lack relevant experience on digital evidence in judicial judgments.

Certainly, the example above is only one aspect of the problems caused by digital evidence, because Chinese enterprises are increasingly using technology to run their business affairs and trades, relying on electronic data interchange (EDI), e-mail and electronic commerce websites. In the event of a dispute, many enterprises have to face much bigger problems than faced by Corporation A in the illustration above.

Legislation and judicial interpretation on digital evidence in China

The present Civil Procedure Law of The People's Republic of China was passed in 1991, and digital evidence was not separately listed as a form of evidence in this law. Article 63 of the Civil Procedure Law of The People's Republic of China provides that evidence shall be classified into 7 types: documentary evidence; material evidence; audio-visual reference material; testimony of witnesses; statements of the parties; expert conclusions, and records of inquests. However, with the speed of take-up of information technology, digital evidence has begun to play an increasing important role in case judgments, and it is absolutely necessary for trial and judgment. For the purpose of remedying the lacunae in the legislation, article 22 of Provisions on Evidence in Civil Procedures enacted by the Supreme People's Court in 2001, provides that 'Investigators should request investigated targets to provide original carriers of relevant information when they investigate and collect audio-visual reference materials such as computer data, audio records or

visual records'. Manifestly, computer data has been classified as audio-visual evidence.

The Contract Law of The People's Republic of China, which was enacted in 1999, has taken full consideration of the development of electronic business and has given data message a status of written form. Article 11 of Contract Law prescribes written form as follows: 'the written forms mean the forms which can show the described contents visibly, such as a written contractual agreement, letters, and data message (including telegram, telex, fax, EDI and e-mails)'. The Contract Law has also made specific regulations on the effective date of a contract reached by way of data-telex and on the effective venue of an electronic contract.

The Electronic Signature Law of the People's Republic of China, which was enacted in 2004,¹ has strengthened the legal status of data message and electronic signature. Article 2 provides as follows:

"Electronic signature" in this law means data in electronic form in or affixed to a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.

"Data message" means information generated, sent, received or stored by electronic, optical, magnetic or similar means.

Article 3 prohibits discrimination against data-telex in legal form:

The parties may stipulate whether or not to use an electronic signature or a data message in contracts or other documents in the context of civil activities.

Where the parties stipulate the use of an electronic signature or a data message in a document, that document shall not be denied legal effect on the sole ground that it is in the form of an electronic signature or a data message.

Finally, article 7 provides data-telex a status of statutory evidence:

A data message shall not be denied being admitted as evidence on the sole ground that it is generated, sent, received, stored by electronic, optical, magnetic or similar means.

Case law in China

The first case on digital evidence in China was *Xue Yan' ge v Zhang Nan*, which was accepted on July 1996 by Beijing Hai Dian District People's Court. This is the first case in which digital evidence was adduced to judge an e-mail infringement in China, and it is called 'The first case on digital evidence in China'. The plaintiff and defendant were both female graduate students of Peking University. On 9 April 1996, the plaintiff received an e-mail from Michigan university in the USA, and the content of the e-mail indicated that the university was to provide her with a study opportunity with a scholarship. However, she did not receive a formal notice in respect of the opportunity. She entrusted one of her friends, who was in America, to physically visit the university to investigate, and she found that at 10:16AM on 12 April 1996, the university had received an e-mail with the name of the plaintiff added, refusing the offer provided by the university. As a result, the scholarship was given to other person by the university. The plaintiff doubted that the e-mail was sent by the defendant, and initiated legal action, adducing the following evidence:

At 10:12AM on 12 April 1996, an e-mail in the name of 'Nannan' (which is the nickname of defendant) was sent to Mr. Liu from the '204' computer in a laboratory of Peking University.

At 10:16AM on 12 April 1996, an e-mail in the name of the plaintiff was sent to Michigan University from the same computer.

The receiving and sending logs in relation to the e-mails of '204' computer in the computer center of Peking University on 12 April 1996 show that the second e-mail was sent 4 minutes after the first e-mail from the same computer in the laboratory. The defendant was using this computer at the material time. The technical evidence demonstrated that no other person used the computer during the time the defendant was using it.

On the basis of this evidence, the plaintiff alleged that the e-mail, which was sent in her name, was sent by the defendant. The defendant argued that she did not send the e-mail in name of the plaintiff, and therefore she was not liable. After an adjournment, on 5 October 1996, the defendant finally acknowledged that the e-mail was sent by her, and she apologized to the plaintiff

¹ For an unofficial translation of the law into English, see Minyan Wang and Minju Wang, 'Translation

and Introduction to the Electronic Signatures Law of China', *Digital Evidence and Electronic*

Signature Law Review, 2 (2005) 79 – 85.

and voluntarily compensated the accrued spiritual and physical losses amounted to RMB12,000 suffered by the plaintiff. The case was settled.

In this case, to prove the e-mail was sent by the defendant, the plaintiff obtained digital evidence from the computer, but the other circumstantial evidence was also relevant. The evidence collected in the laboratory proved that the defendant was using the '204' computer at the time the e-mail was sent. The evidence collected in the computer center proved that two e-mails were sent during time period: one in the name of the defendant, and the other e-mail impersonating the plaintiff. Faced with this evidence, the defendant acknowledged she sent the e-mail in question.

The first electronic signature case was that of *Yang v Han* (Case Number: Hai Min Chu Zi 4670), which was judged on 14 July 2005 by Beijing Hai Dian District People's Court. Yang met Han in 2004. In the August, Han sent a message to Yang to his mobile telephone. The content of this message was: 'I need REM 5,000. I have undergone an eye operation in Beijing recently, I couldn't go out of the door. Please remit the money to my card'. Yang remitted RMB 5,000 to Han. After a week, Yang received another message from Han, according to which, he lent a further RMB 6,000 to Han. Han failed to repay the money to Yang after the latter's request. Yang subsequently took legal action to recover the money.

During the court hearing, besides the remittance bills, Yang also physically submitted his mobile telephone to the court, the number of which is '1391166xxx', which contained the messages. The learned judge accepted that a number of the messages stored on the telephone were sent by Han.

In accordance with the provisions of the Electronic Signature Law of the People's Republic of China, the examination of the methods to test the reliability of generating, storing and transmitting the data messages, and the reliability of the methods used to maintain the completeness of the contents and the reliability of the methods for distinguishing the addressees of the messages provide by Yang, the court concluded that the contents of the messages were true as evidence. The contents of the messages sent from Han to Yang and submitted by Yang into evidence were conformed to the amount and time recorded in the remittance bills from Yang to Han, and the contents of the messages also illustrated Han's intention to pay the load back, so the fact that Han has borrowed money from Yan was

confirmed. The messages provided by Yang were thus confirmed as valid evidence, and the court sustained Yang's claims

This is the first case that was judged by Chinese judges based on the Electronic Signature Law of the Peoples Republic of China. The Electronic Signature Law has given corresponding legal status for data-telex data and electronic signatures. In accordance with article 8 of Electronic Signature Law, the following factors shall be taken into consideration when the truthfulness of data messages to be used as evidence is examined:

- (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.

In this case, the judges Zhang Yonghua, Wang Shi and Li Chunrong examined the truthfulness of the main evidence (namely the text messages) based on article 8 of Electronic Signature Law. Under the condition that the reliability of sources of the messages, the time for sending the messages and the transfer system can be confirmed, and there is no other adverse evidence that denies the probative force of the messages, the probative force of the messages can be confirmed.

Suggestions for enterprises having a business presence in China

The verification of the probative force of digital evidence is at the core of verification of such evidence. The judges in China will consider a number of issues relating to digital evidence as discussed by Chinese scholars, such as opinions of Liu Pinxin in 'Study on Creating Chinese Digital Evidence Rules'.² Three considerations are paramount: the probative force of an item of notarized digital evidence is more powerful than that of digital evidence that is not notarized; the probative force of digital evidence which is collected in normal business process is more powerful than digital evidence that is especially made for legal proceedings, and the probative force of digital evidence preserved by the adverse party is most powerful, the probative force of digital evidence preserved by a third party (such as an ISP or EDI Service Center) is less powerful, and the

² Liu Pinxin (刘品新), 'Study on Creating Chinese Digital Evidence Rules' (中国电子证据立法研究), (China Renmin University Press, May 2005), Chapter 2 Section 3 and Chapter 6 Section 3.

probative force of digital evidence preserved by the advantaged party is less powerful.

In conclusion, for the purpose of coping with any possible legal disputes that include digital evidence, the following suggestions are offered for those enterprises engaging in business in China:

1. For the purpose of guaranteeing the safety of corporate information and preserving evidence, the corporation should reserve back-up tapes of the information sent and received through the corporate mailbox in its server for a reasonable period of time, and to take appropriate measures, including technical measures to guarantee the truthfulness of the content of the back-up tapes, and to ensure the tapes are free from being tampered with to improve the probative force of the evidence.
2. The corporation should consider having digital documents notarized if where exists a potential for a legal dispute. The contents of the notarization should include: the formation time of the digital information, the name of the person producing and sending the data, how the document is

communicated, and details of the specific contents of the data.

3. If the e-mail server is entrusted to a third party, the testimony of the truthfulness of an e-mail by the third party will require the acceptance of the digital evidence by the court.
4. For important external documents, they can be signed by using a digital signature with a certificate issued by a third party, and you should request your business partners to consider this method. This measure will make your digital business more reliable.

© Chen Jihong, 2008

Mr. Chen Jihong is a partner with Zhong Lun Law Firm (Beijing office) and secretary general of the IT/High-tech Commission under ACLA. His main practice is in telecom law, e-commerce and intellectual property law.

**<http://www.zhonglun.com>
chenjihong@zhonglun.com**