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August 21, 2008

Electronic Contracting in China

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Available at: https://works.bepress.com/debra_reed/3/
QUESTION PRESENTED

Whether an electronically signed business contract between a Chinese and foreign party is legally valid under the 2005 Electronic Signature Law of the People’s Republic of China and is enforceable in China’s courts?

BRIEF ANSWER

An electronically signed business contract between a Chinese and foreign party is legally valid under the 2005 Electronic Signature Law of the People’s Republic of China, PRC. Statutorily, Chinese law enables electronic contracting by giving the same legal force to electronic signatures and data messages, as to traditional ink signatures and paper documents. Lack of payment systems, high costs to businesses of adopting new technology, imperfect technology, and lack of interoperability hinder the speedy adoption of electronic transactions in China. In addition, electronic evidence is suspect in Chinese courts and is not always admitted. However, the trend of ecommerce adoption in China is positive.

DISCUSSION

China transitioned to a market economy at an astonishing pace in the last three decades.\(^1\) As of 2004, 94 million Chinese used the Internet, and users with access to broadband totaled 42.8 million.\(^2\) Internet transactions in 2004 totaled 440 billion Yuan ($64 billion), with over 4,000 ecommerce web sites in China in 2005.

Adoption of electronic signature by China’s government is robust. There are over 10,000 government websites registered under the gov.cn. In 2004, there were over 100 third party Certification Authorities, CA, that issued between 1,000 and 600,000 certificates each. Eighty percent of those were used in online government transactions. By 2006, there were 140 CA. Only fifteen percent were properly licensed by the Ministry of Information Industry, MII. The licensed CA issued 2,600,000 certificates.

Obstacles to the growth of ecommerce include the lack of an ecommerce law prior to 2005, which inhibited a comprehensive electronic payment system from developing. Other barriers are a lack of specialized third-party technology, weakness in payment systems, and unreliable, underdeveloped, private credit reporting systems. The costs of acquiring hardware and software also slow the adoption of electronic commerce by Chinese businesses. The additional expense to ensure the security of information is prohibitive for thousands of small and mid-sized Chinese firms. In addition, interoperability and lack of consistent technological standards are obstacles. Moreover, security flaws in digital signature/PKI technology are a problem. The new law could be a catalyst for the development of ecommerce services in China.

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3 Keynan 116.
10 20 Colum. J. Asian L. 415.
11 20 Colum. J. Asian L 444.
12 20 Colum. J. Asian L 444.
13 7 Chi-Kent J. Intell Prop 3.
In an effort to promote electronic commerce, China enacted a statute recognizing electronic signature, the Electronic Signature Law, ESL, of the People’s Republic of China, PRC. The PRC legislation is based on model law by the United Nations Commission on International Trade Law, UNCITRAL. UNCITRAL developed the model law to assist legislators in trading nations to harmonize their national commercial laws and to eliminate barriers to international trade.\textsuperscript{14} The Chinese ESL regulates not only electronic commerce but also the electronic government related market.\textsuperscript{15}

Passed on August 28, 2004, China’s ESL went into effect on April 1, 2005. The law provides that a party who agrees to use electronic signature may not deny the legal validity of the documents solely because an electronic signature or data message was used.\textsuperscript{16} Consistent with other countries, such as the United States, China does not accept electronic signature for marriage, wills or adoption.\textsuperscript{17} The PRC law excludes electronic signature for the transfer of land and termination of public utility services.\textsuperscript{18} The law grants a data message the same legal effect of a written document as long as the data message can be displayed in tangible form, is retrievable on demand, and its integrity of content can be maintained unchanged.\textsuperscript{19} The ESL requires that the document have an identifiable sender, recipient, time of transmission and receipt.\textsuperscript{20}

\textsuperscript{14} 20 Colum. J. Asian L 444.
\textsuperscript{16} Electronic Signature Law of the People’s Republic of China, Article 3, 2005.
\textsuperscript{17} Electronic Signature Law of the People’s Republic of China, Article 3 (1).
\textsuperscript{18} Electronic Signature Law of the People’s Republic of China, Article 3(2)-(3).
\textsuperscript{19} Electronic Signature Law of the People’s Republic of China, Articles 4 and 5(1)-(2).
\textsuperscript{20} Electronic Signature Law of the People’s Republic of China, Article 7.
Statutorily, a data message can be introduced as evidence similar to paper documents. Of course, electronic documents must be authenticated. The authenticity of the message must be shown by the reliability of the method of its creation, the method of maintaining the integrity of its contents, and the reliability of the method of identifying its sender.

A sending occurs when (1) the sender authorized the transmission; (2) the message was transmitted automatically by the sender’s information system; and (3) the results conform after the recipient has verified the data message using a method approved by the sender. This can be varied by agreement including the requirement of a confirmation from the recipient by the sender. The time of the sending, unless otherwise agreed, is when the message enters a system outside the control of the sender. The place of sending and receipt are the principal place of business of sender and recipient unless otherwise agreed. If no principal place of business exists, then the place of sending is the usual place of residence.

To be reliable, an electronic signature must (1) be proprietary to the signatory; (2) be controlled solely by the signatory at time of signing; (3) make noticeable any change to the electronic signature after signing; and (4) make noticeable any change to the content and form of the data message after signing. A reliable electronic signature has the same legal effect as a handwritten signature or an affixed seal.

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22 Electronic Signature Law of the People’s Republic of China, Article 8.
23 Electronic Signature Law of the People’s Republic of China, Article 8.
24 Electronic Signature Law of the People’s Republic of China, Article 9(1)-(3).
26 Electronic Signature Law of the People’s Republic of China, Article 11.
27 Electronic Signature Law of the People’s Republic of China, Article 12.
28 Electronic Signature Law of the People’s Republic of China, Article 12.
Unlike United States law, which is technology neutral, China’s ESL is more detailed around technology requirements. China grants a degree of privileged status to the digital signature. It requires two underlying technologies and a third party: asymmetric cryptology, public key infrastructure and a Certification Authority CA, respectively.

The PRC licenses and regulates third-party electronic signature Certification Providers, through the state Ministry of Information Industry (MII). A third party provider of electronic signature services must apply to the State for an electronic certification permit. The law imposes strict standards on third party certification providers. In addition, the law imposes a duty on the CA to safeguard its electronic signature creation data, to notify relevant parties and cease using electronic signature data if it is lost.

Each valid certification must contain the name of the provider, the name of the certificate holder, the serial number of the certificate, the signature, the term of validity of the certificate, and the signature of the third party provider. The electronic service provider must preserve the information on a certificate for five years. Foreign CA enjoy the same legal recognition as domestic CA provided that the MII approves the recognition, and a reciprocity agreement exists between China and the foreign country in question, or the recognition is justified because of reciprocity principles.

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34 Electronic Signature Law of the People’s Republic of China, Articles 18.
36 Electronic Signature Law of the People’s Republic of China, Article 15.
38 Electronic Signature Law of the People’s Republic of China, Article 24.
China’s ESL assigns legal liability to a party who does not timely inform relevant parties when the security of its electronic signature creation data is compromised.\(^{40}\) Third party service providers are liable for their errors to parties that rely on them to their detriment.\(^{41}\) Moreover, there is a presumption of liability against a third party certificate provider if he cannot show that he was not at fault.\(^{42}\) Criminal penalties may be imposed against those who misappropriate electronic signature data and against state workers who do not carry out their responsibilities lawfully.\(^{43}\)

The MII enacted the Administrative Measure on Electronic Certification Service, AMECS on April 1, 2005, that expands on the Electronic Signature Law.\(^{44}\) This detailed legislation includes requirements that the CA have over 30 employees, capital in excess of thirty million Yuan ($4.4 million), be an autonomous legal entity, maintain an appropriate business site, possess technology and equipment exceeding national safety standards, be compliant with laws, and gain approval from the state’s encryption management agency to allow it to use passwords.\(^{45}\)

Once these criteria are met and proper affidavits are submitted to the MII, then, after an inspection, the MII can issue a license to the CA within 45 days and valid for five years.\(^{46}\) The CA must (1) create, issue and manage e signature certificates; (2) confirm the authenticity of electronic signature certificates it has issued; and (3) provide an online information search service pertaining to the current status of electronic signature certificates it has issued.\(^{47}\) CA are mandated by law to protect the confidentiality of the information of subscribers and third

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\(^{40}\) Electronic Signature Law of the People’s Republic of China, Article 27.  
\(^{41}\) Electronic Signature Law of the People’s Republic of China, Article 27.  
\(^{42}\) Electronic Signature Law of the People’s Republic of China, Article 28.  
\(^{43}\) Electronic Signature Law of the People’s Republic of China, Articles 32-33.  
\(^{44}\) 7 Chi-Kent J. Intell. Prop 22.  
\(^{45}\) 7 Chi-Kent J. Intell. Prop 23.  
\(^{47}\) 7 Chi-Kent J. Intell. Prop 25.
parties. China’s MII directly supervises and manages the CA, which includes conducting annual onsite inspections. Existing CA were given a six-month grace period until October 2006 to become licensed.

Inefficiencies in the court system in China mean inconsistent outcomes in enforcing electronic contracts. China’s decentralized court system abounds with inconsistency in both education and sophistication of judges. Provinces develop and adopt new regulations enacted by the central government at different speeds creating variability in decisions. The uneven adoption of new law throughout the Chinese court system affects case outcomes. Because many Chinese judges lack legal training, they make mistakes, such as incorrect application of the law, and giving incorrect sentences. In addition, Chinese judges lack experience presiding over ecommerce cases. Since entrance into the World Trade Organization, WTO, training of judges on WTO rules is pressing. The National Judges’ College provides training. Hence, legal scholarship in China is on the rise.

Ecommerce law is not evolving swiftly in the Chinese court system the way it is in the United States because judicial decisions are not official sources of law in China. Because of China’s civil law tradition, case law is not binding law. While not binding precedent for lower courts, the Supreme People’s Court decisions influence decisions of the lower courts.

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49 7 Chi-Kent J. Intell. Prop 27.
52 Ibid.
53 Keynan 153.
55 Keynan 155.
57 Zhang xii.
58 Zhang xiii.
Evidence rules regarding electronic signatures and documents are undeveloped. China’s ESL allows electronic evidence. Admission of electronic materials as evidence in Chinese courts is inconsistent. Authentication is often difficult because Chinese judges are skeptical of electronic media.\textsuperscript{59} Electronic records and signatures are not presumed valid. Efforts are underway in China to draft a modern law of evidence.\textsuperscript{60}

Case law on electronic contracting is scarce. Emails were rejected as evidence due to doubts of their authenticity. \textit{Shanghai ‘Rong-Shu-Xia’ Computer Ltd. V. China Society Publisher}, Beijing, The First Intermediary Peoples Court, 2000. Yet when authenticity was sufficiently shown by an expert, emails were accepted as evidence, despite the sender’s denial that he sent them. \textit{Yang v. Han}, Beijing, Haidian District’s Court, 2005. Coupled with the emails, a mobile text message was also regarded as a writing, and legally valid evidence. \textit{Yang}, Beijing, Haidian District’s Court, 2005. In addition, a click wrap contract was upheld in a Chinese court because assent was shown electronically by clicking.\textsuperscript{61}

\textbf{CONCLUSION}

The Electronic Signature Law of the People’s Republic of China allows ecommerce. Lack of payment systems, high costs to business for new technology, and lack of interoperability all hinder the swift adoption of electronic contracting. In addition, electronic evidence is not yet trusted in China. The ESL is a good beginning to adoption of electronic contracting in China.\textsuperscript{62}

\textsuperscript{59} 20 Colum. J. Asian L. 415.
\textsuperscript{60} 20 Colum. J. Asian L. 415.
\textsuperscript{61} 20 Colum. J. Asian L. 415.
\textsuperscript{62} 20 Colum. J. Asian L. 415.