

Analysis of the New Electronic Signature Law

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The *PRC, Electronic Signature Law* (“**E-Signature Law**”) was approved by the Standing Committee of the 10th National People’s Congress on 28 August 2004, and will become effective on 1 April 2005. While electronic contracts have been valid in China since the enactment of the *PRC, Contract Law*,¹ their use has been undermined by the absence of a law governing electronic signatures. The adoption of the E-Signature Law, which grants electronic signatures the same legal effect as handwritten signatures and/or seals in business transactions and aims to set up a secure market access system for online certification providers, is likely to result in the more widespread use of electronic contracting and, in turn, an increase in the volume of online transactions and e-commerce in China.

Electronic Signature and Electronic Transcript

The E-Signature Law defines an “electronic signature” as data in an electronic form that can be used to identify the signatory to an electronic transcript and to demonstrate the signatory’s approval of the information contained therein.² The law further defines an “electronic transcript” as information created, transmitted, received or retained by electronic, optical, magnetic or similar means.³ The law expressly stipulates that where parties have agreed to use an electronic signature or an electronic transcript, the document cannot be deemed to be legally invalid solely because of the use of such electronic formatting.⁴

The E-Signature Law grants a reliable electronic signature the same legal effect as a handwritten signature or an affixed seal.⁵ Unless otherwise agreed by the parties, an electronic signature is deemed to be “reliable” if: (1) the data for creating the electronic signature belongs exclusively to, and is in the sole control of, the signatory; and (2) any change to the electronic signature or to the content and form of the electronic transcript, that takes place after the document has been electronically signed, can be detected.⁶

An electronic transcript is valid if it: (1) tangibly represents its contents and can be readily produced for reference at any time thereafter; (2) is retained in its original format, or in a different format that accurately reflects the contents at the time of their creation, transmission or receipt; and (3) identifies both the dispatcher and the recipient of the electronic transcript and the time at which the information was transmitted and received.⁷

Of note, the E-Signature Law provides that certain documents cannot be consummated electronically, namely, those relating to a personal relationship such as marriage, adoption and inheritance, the transfer of an interest in real property, the termination of a public utility service, or other situations prohibited by law or regulations.⁸

Unless the parties agree otherwise, an electronic transcript is deemed to have been sent by the dispatcher if: (1) the transmission was authorized by the dispatcher; (2) the transmission was done automatically by the dispatcher's information system; or (3) the recipient has verified that the electronic transcript was sent by the dispatcher in accordance with a method previously agreed to by the parties.⁹

The E-Signature Law stipulates that an electronic transcript is deemed to have been transmitted at the time it leaves the control of the dispatcher's information system, and is deemed to have been received at the time it enters the recipient's system.¹⁰ If, however, the recipient designates a specific information system to receive the electronic transcript, the transcript is deemed to have been received at the time it enters that designated system.¹¹ The E-Signature Law also provides that when a recipient is required by law or by a prior agreement between the parties to confirm the receipt of the electronic transcript, the transcript is deemed to have been received at the time the dispatcher receives such confirmation.¹²

“An electronic signature can be certified only by a legally established electronic certification service provider.”

With respect to the place of transmission and reception (which may be important in determining the place of contract and possible jurisdiction disputes), the E-Signature Law provides that, unless the parties agree otherwise, the place of transmission shall be the dispatcher's principal place of business and the place of reception shall be the recipient's principal place of business.¹³ Where no such principal place of business exists, the place of transmission or reception (as the case may be) shall be the place where the designated party usually resides.¹⁴

Under the E-Signature Law, electronic transcripts cannot be denied admission into evidence solely because they were created, transmitted, received or retained by electronic, optical, magnetic or similar means.¹⁵ Admissibility into evidence of electronic transcripts depends on a number of factors including, whether or not the means of creating, retaining and transmitting the electronic data is reliable.¹⁶

Electronic Certification Service Providers

The E-Signature Law provides that an electronic signature can be certified only by a legally established electronic certification service provider ("**ECS Provider**").¹⁷ To obtain an electronic certification licence, an applicant must demonstrate to the information industry administrative authority under the State Council ("**IIAA**") that it has adequate qualified personnel, capital, technology and equipment and a fixed place of business to provide such services.¹⁸ A decision will be made within 45 days from the date of receipt of the application. Upon being granted a licence, the applicant is required to comply with various registration formalities, to post certain information on the internet, and to draft, publicize and file electronic certification business rules with the IIAA.¹⁹ If an ECS Provider functions without an electronic certification licence, any income generated through such illegal operations will be confiscated and it will be subject to a fine.²⁰

Upon receipt of an application for certification of an electronic signature, an ECS Provider will verify the identity of the signatory and examine other relevant materials.²¹ An electronic signature certificate issued

by an ECS Provider must include the names of the ECS Provider and the certificate holder, the number of the certificate, the term of the certificate, data regarding verification of the signatory's electronic signature, and any other information required by the IIAA.²²

“The ECS Provider must also allow parties acting in reliance upon the certificate to access any relevant materials so that they can verify the accuracy of the certificate's contents.”

The E-Signature Law stipulates that the ECS Provider is responsible for ensuring the accuracy of the contents of the electronic signature certificate during its term.²³ The ECS Provider must also allow parties acting in reliance upon the certificate to access any relevant materials so that they can verify the accuracy of the certificate's contents.²⁴ In addition, the ECS Provider is required to retain all relevant information relating to an electronic signature certificate for a minimum of five years after the certificate has expired.²⁵

The E-Signature Law provides also that upon examination and approval of the IIAA, and in accordance with a relevant agreement or under the principle of reciprocity, an electronic signature certificate issued by a foreign ECS Provider is valid.²⁶

Legal Liability

The E-Signature Law stipulates that the signatory of an electronic signature shall be liable for damages to parties that rely upon the electronic signature and/or the ECS Provider, if: (1) the signatory is aware that the confidentiality of the data used to create the electronic signature is, or may be, lost and he fails to provide timely notice and to terminate the use of such data; or (2) the signatory fails to provide authentic, complete and accurate information to the ECS Provider.²⁷ In addition, an ECS Provider will be held liable for damages to the signatory or to parties that rely upon an electronic signature, unless it can prove it is not at fault.²⁸


Civil and/or criminal sanctions may be imposed on any person who forges, misuses or steals another person's electronic signature.²⁹

Conclusion

The promulgation of the E-Signature Law represents a significant step in the development of a comprehensive legal framework governing online transactions and e-commerce in China. To summarize, the new law provides authoritative definitions for “electronic signature” and “electronic transcript”, grants legal effect to reliable electronic signatures, establishes conditions regarding the validity, transmission and reception of electronic transcripts, implements important safeguards for the provision of electronic certification services, and stipulates legal sanctions for breaching the law.

Yet, some clauses of the E-Signature Law are ambiguous and may be questioned under the general principles of contract law. Article 11 stipulates when an electronic transcript is transmitted and received. The Article

does not, however, explain what happens when a party fails to designate an email address as a point of dispatch or receipt. If a party normally communicates from his business email address, would this be the designated address? If the same party uses a personal email address for business communications when he is traveling (which is often practical), could this email address also be relied upon to transmit and receive electronic transcripts? People often do not regularly check their personal email addresses when they are not travelling. Consequently, materials sent to that email address might not be reviewed in a timely manner, which could have detrimental consequences. Article 9, sub-clause (ii) provides that an electronic transcript can be automatically transmitted by the dispatcher's information system. If, however, the automatic transmission was caused by a malfunction of the dispatcher's system, the dispatcher's intent to contract may be lacking. Basic contract law would dictate, contrary to the substance of Article 9 of the E-Signature Law, that no contract had been formed in these circumstances.

Despite these concerns, by generally clarifying the scope and enforceability of electronic contracts, the E-Signature Law is likely to promote online transactions and e-commerce in China. 

Endnotes:

- 1 *PRC, Contract Law*, promulgated on 15 March 1999, Article 11.
- 2 E-Signature Law, Article 2.
- 3 *Id.*
- 4 E-Signature Law, Article 3.
- 5 *Ibid*, Article 14.
- 6 *Ibid*, Article 13.
- 7 *Ibid*, Articles 4-6.
- 8 *Id.*
- 9 E-Signature Law, Article 9.
- 10 *Ibid*, Article 11.
- 11 *Id.*
- 12 E-Signature Law, Article 10.
- 13 *Ibid*, Article 12.
- 14 *Id.*
- 15 E-Signature Law, Article 7.
- 16 *Ibid*, Article 8.
- 17 *Ibid*, Article 16.
- 18 *Ibid*, Articles 16 and 18.
- 19 *Ibid*, Articles 18-19.
- 20 *Ibid*, Article 29.
- 21 *Ibid*, Article 20.
- 22 *Ibid*, Article 21.
- 23 *Ibid*, Article 22.
- 24 *Id.*
- 25 E-Signature Law, Article 24.
- 26 *Ibid*, Article 26.
- 27 *Ibid*, Article 27.
- 28 *Ibid*, Article 28.
- 29 *Ibid*, Article 32.