



ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW

World becomes smaller and closer because of rapidly developing telecommunication technologies. Day to day, people are using instant messaging (“IM”), an online chat tool that offers real-time text transmission over the Internet. Almost everyone living or working in China has a WeChat account. Apart from that, QQ, Skype and WhatsApp are popular in business deals. While benefitting from the tremendous facility brought by the IM tools, have you ever thought what you had said or texted on your computer or mobile would be a piece of evidence assisting or against you in a dispute before the court?

We had a case where our client as the buyer placed an order with a Chinese supplier through QQ and there was no written contract or purchase order further concluded between the parties. So, when the dispute regarding non-conforming goods supplied arose and our client intended to bring forth a claim in contract against the supplier, the primary issue would be whether the QQ records could be sufficient to establish the contractual relationship between the parties.

In judicial practice, is it possible to produce IM records or transcripts as evidence? The *Civil Procedure Law of the PRC* (“CPL”) expressly provides that electronic data is one type of the

legal evidence¹, and the judicial interpretation of the CPL further elaborates that the electronic data refers to the information formed or saved in the electronic medium such as emails, electronic data interchange (EDI), online chatting records, blogs, microblogs, SMS, electronic signature and domain name².

Let's take WeChat as an example. WeChat as a rising networking platform has many functions for messaging, chatting, blogging, transmitting pictures, online shopping and e-payment. The information exchanged on WeChat exists as electronic data obviously falling into the scope of evidence as provided by the CPL. In the wake of increasing use of WeChat in our daily life and business, it is more often to see WeChat records to be produced as evidence in the Chinese legal proceedings.

- If the WeChat records are to be used as evidence supporting your position in the legal action in China, the following two preconditions should be satisfied.

1. Users' identities of the WeChat accounts should be verified first.

It's not uncommon that nick names are shown on the WeChat. If it could not be proved that the users are just the parties concerning the case, the WeChat records would not be valid evidence for being irrelevant. In judicial practice, we have the following ways to verify the user's identity:

- (1) by the opposing party's self-admission;
- (2) by the WeChat photo profiles or the pictures exhibited in the "Moments";
- (3) by the mobile device owner's telecommunication real-name registration or the ID authentication; or
- (4) by additional investigation at the WeChat's provider/developer Tencent.

If necessary, we suggest preserving the above records and information in presence of the notary public officer before the opponents would delete the same from the WeChat.

¹ Civil Procedure Law of the PRC, Article 63.1 (5)

² Interpretation of the Supreme People's Court on Application of the Civil Procedure Law of the PRC, Article 116.2

2. The WeChat records should be complete.

The WeChat records produced may be a part of the dialogues, which could be deliberately utilised to misinterpret out of context and failed to reflect the true intention of the parties.

For defence, you are entitled to request the disclosing party to produce the full text, and also the court may order production of the exchanges up and down if the incomplete part produced is thought questionable.

- We speak over the WeChat as well. The question is whether the non-text verbal conversation could have any evidential effect? The answer is “YES” – WeChat voice input is also a type of evidence as provided by Article 63 of the CPL. In practice, WeChat voice inputs should be preserved for evidence purposes as follows.

1. Collect the voice inputs into “Favorites” clip and save the source records

The WeChat voice inputs are vulnerable, e.g. destroyed or deleted by accident, or your mobile phone lost or formatted, etc., all of which would result in loss of the sound data. Thus, please be sure to collect any voice inputs possibly useful in the future, particularly when they are monetary term or reputation related.

2. Keep the integrity and continuity of the WeChat voice inputs

They should be unprocessed, continuous and authentic. Many litigants will delete the source records after they copy or record the sound data in a CD or USB stick for convenience of storage and transfer, but this is quite risky because the authenticity of the evidence could not be identified in case the opposing party denied in the proceedings.

3. The contents of the WeChat voice inputs should be clear and precise. The court inclines to accept the evidence of the parties’ exchange of their opinions or thoughts on the subject matter in an explicit manner via the WeChat voice inputs. Argument or even quarrel usually would not be taken as decisive evidence.

4. Besides the voice inputs, we encourage collecting other auxiliary and supporting evidence as much as possible. Voice inputs are important but they may have inherent vice for being difficult to identify, or unfocused on the points. Therefore it would be more assured if you have some other evidence to corroborate the voice inputs at the same time.

- Not all WeChat records could be used as evidence.

According to Article 68 of the *Some Provisions of the Supreme People's Court on Evidence in Civil Procedures*, “*The evidence obtained by infringing upon the lawful rights and interests of other people or by those means prohibited by law may not be taken as the basis for affirming the facts of the case.*” This is about the legality of the evidence, which should be borne in mind while collecting the WeChat records. Any and all evidence on the WeChat obtained by unlawful detention, violence, deceit and threat, etc. should be absolutely forbidden, whilst those audio or video materials preserved stealthily could be used as evidence if the contents of which do not violate the provisions above or infringe upon other's privacy.

Overall, IM records play more important roles than ever before in the Chinese legal proceedings. That being said, you have the following tips while preparing the IM records for evidence purposes:

- Remark the real names of the individuals on the IM tools and keep their identity documents such as business cards
- Think twice in exchanging the messages, texted or voice inputs, in particular when such messages relate to payment terms or goodwill/reputation
- Save the messages in both source records and CD/USB drive if you consider the same will be used for evidence in future legal proceedings, preserve as early as possible and enlist the notary public officer's witness whenever appropriate
- Review the complete records and weigh the pros and cons if you will produce the IM records for evidence to support or defend a claim
- Gather other documentary evidence to solidify the evidential effect of the IM records if possible

As the Chinese old saying goes: the tongue cuts the throat. Anything you say can and will be used against you in a court of law. Bear this in mind BUT life is still beautiful – happy messaging and enjoy your chats!

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