

On the Application of Documentary Evidence Order System in Cases Involving E-commerce Platforms

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Abstract. In 2020 the Supreme People's Court of China issued new regulations on civil litigation. The regulations formalised a relatively well-developed system for the documentary evidence order system. This Article discusses the use of the system in tort and contract cases involving e-commerce platforms, dividing such cases into two categories: those where the platform is the direct counterparty and those where the third party is. This research is based on a large body of relevant academic literature and judicial cases, and leads to legislative proposals for further improvement of the order. It also proposes the idea of integrating and improving the system with the investigation order system, in view of the fact that the system cannot cover the situation where the evidence is under the control of a third party. In addition, the Article further compares the Chinese system of discovery orders with the common law systems of discovery, explains the reasons why the exchange of evidence system derived from discovery is not taken seriously in China, and proposes solutions.

1 Introduction

With the development of e-commerce in China, the number of cases involving e-commerce platforms in Chinese judicial practice has skyrocketed. Hangzhou Internet Court accepted 6,695 e-commerce cases and concluded 6,826 of them during the period 2018-2020 alone [1]. In order to adapt to such judicial realities, China enacted its E-commerce Law in 2019. After three years of development and refinement, the Supreme People's Court published the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Cases of Online Consumer Disputes (I) in March 2022, which addresses controversial issues reflected in e-commerce cases. However, in such cases, many of the essential evidence in litigation is in electronic form and not under the control of the consumers. In such cases, the consumers, who bear the burden of proof, need special rules to obtain documentary evidence under the control of the platform or the operator. For example, when certain network operators infringe on their users' privacy, it is often difficult for individual users to prove the infringement due to their lack of expertise in obtaining electronic evidence and inability to access the network platforms' database.

This article will discuss how to apply the documentary evidence order system under China's Civil Procedure Law to solve the problem of "biased evidence" in e-commerce cases. This Article will first introduce the current Chinese legislation in the specific context of e-commerce platform involved cases. And then it will compare the similarities and differences between the Chinese system and the common law system of discovery. Finally, this Article will conclude with recommendations for improving the current

Chinese evidence rules in e-commerce litigations. Although scholars have explored the topic after the promulgation of the new Evidence Regulations promulgated in 2020, this Article will contribute to the current literature by the refinement of the documentary evidence order system and the combination of investigation orders with it.

2 Overview of E-Commerce Cases

2.1 Definition of E-commerce Cases

According to the Electronic Commerce Law of the People's Republic of China, electronic commerce ("E-commerce") refers to the business activity of selling goods or providing services through information networks such as the Internet [2]. The subjects involved in e-commerce mainly include e-commerce operators, e-commerce platform operators, and consumers. This Article focuses on litigations with the causes of action of contract breach and right infringement disputes that occur through the medium of e-commerce platforms.

Evidence bias refers to an imbalance in a case where particular evidence is not held by the party with the burden of proof, but under the control of the opposing party or third parties [3]. This imbalance has been exacerbated as never before in the context of the Internet, and in particular the emergence of e-commerce platforms, which have given them a virtual monopoly on the holding of electronic evidence in relevant cases.

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2.2 The Particularities of Using Documentary Evidence Order System in E-commerce Cases

For E-commerce Cases related, the parties adduce evidence mainly using electronic evidence. Compared with other forms of evidence, electronic evidence is professional, hidden, and easy to tamper with [4]. Such evidence is digitized within the database and is difficult to understand or even access if not authorized or trained. On the flip side, as the party possessing the evidence, the defendant and online platform operators may choose to passively not present the evidence to avoid harm. Even they take measures to tamper with or destroy it. Although there are penalties for falsification and tampering with evidence under the Civil Procedure Code, there is no clear, uniform standard for fines. For example, in a case released by the Suzhou Industrial Park People's Court in Jiangsu Province, the agency was only fined RMB5,000 for tampering with thousands of square feet of the viewing area to increase the amount of the claim after the client skipped the order. With the low cost of tampering coupled with the fact that electronic data itself is more professional and less likely to be discovered, there will be platforms that choose to take the risk.

As a result, parties bearing the burden to prove may not be unable to access the relevant information. This does not comply with the principle of equality of arms in litigation law. The refusal of the party in control of the evidence to hand over the relevant evidence prevents both parties from playing on the same level playing field and is likely to affect the fairness of the case. This raises the issue of evidence bias and the need documentary evidence order system to balance the burden of proof of both parties.

For example, whether online or offline, usually when the parties agree on their intentions a contract is formed between the parties. There are precedents in judicial practice where the consumer as a plaintiff has filed an application for evidence order because he was unable to prove the loss of the contract and the court ruled that the defendant party should present that contract, such as the dispute over contracts of sale and purchase of houses of Liu Weihong, Ding Jun etc. v. Henan Guangxin Property Co.. In cases involving e-commerce platforms, there may also be situations where a party is unable to prove the loss of an electronic device storing transaction information. After the party with the burden of proof has met the initial burden, the court may apply the documentary evidence order system. Product descriptions, chat records in online shopping contracts, and personal information of customers in online infringement disputes are important objects for these orders.

2.3 Classification of E-commerce Cases

2.3.1. E-commerce Platforms as Direct Counterparties.

In this Article, e-commerce cases are divided into two categories: contractual or tort disputes where an e-commerce platform is the direct counterparty/infringing party and other disputes where an e-commerce platform is

not the direct counterparty/infringing party. For example, JD.com, a Jingdong Self-operated e-commerce platform, is both a trading platform party and a direct counterparty to the consumer providing goods or services. In privacy infringement cases, such as cases where the Didi platform infringes upon personal information, Didi is also involved in the proceedings as a direct infringer of the opposite party. These platforms are involved in litigation as defendants.

2.3.2. E-commerce Platforms as Regulatory Obligors.

In addition to self-operated businesses, in practice, there are a large number of e-commerce transactions that are carried out by merchants who conduct business on e-commerce platforms with consumers. According to the provisions of the E-Commerce Law, the e-commerce platform operator has different levels of duties to supervise the operator. Take the case of Liu Yuanzan v. Shanghai Lazhasi Information Science Technology Co., Ltd. as an example. Shanghai Lazhasi is not only the operator of the online ordering platform that undertakes the qualification audit but also collects service fees from every single order of the platform merchants. According to the principle of fairness, it should pay higher attention to the business conduct by registered merchants than ordinary platform operators [5]. In such cases, since the platform has a regulatory obligation, it has an interest in the outcome of the case and can participate in the proceedings as a third party without an independent claim.

3 Application of the Documentary Evidence Order System in the Context of Being a Defendant

3.1 Relevant legal provisions

The "duty to produce evidence" has already appeared in the Evidence Regulations of the Supreme People's Court in 2001, but the duty set out therein is too simple and crude. The obligation it creates does not limit either the type or the scope of the evidence. Article 112 of the 2015 Interpretation of the Civil Procedure Law further refined the qualifying conditions for them, and the procedure for presentation as well as the consequences of non-compliance. Finally, the new Evidence Regulations of 2020 formalized the documentary evidence order system. According to its provisions, in civil proceedings where documentary evidence is under the control of the opposing party, the party bearing the burden of proof may apply to the People's Court to order the opposing party to submit it before the expiry of the period for proof. If the opposing party refuses to submit it, the people's court may find that the content of the documentary evidence claimed by the applicant is authentic [6]. Article 62 of China's E-commerce Law further stipulates the obligation of e-commerce operators to provide original contracts and transaction records and the legal liability for refusal to provide the materials.

3.2 Problems with today's legislation

3.2.1. Unclear Criteria for Specifying the Object of Documentary Evidence.

In judicial practice, allowing applicants for documentary evidence to apply for evidence on a whim would lead to abuse of the system. Accordingly, under Rule 45 of the New Evidence Regulations, the application shall set out the name or content of the documentary evidence sought to be submitted, the facts to be proved and their importance, the basis on which the opposing party controls the documentary evidence and the reasons why it should be submitted. This process is to specify the documentary evidence.

This provision prevents, to a certain extent, unduly increasing the burden on the obligor due to the generalization of the object. However, due to the specialized and concealed nature of electronic data evidence in e-commerce cases, the law should provide further refinement as to the circumstances under which documentary evidence is deemed to be specific.

3.2.2. Lack of Specific Rules on the Application of the Documentary Evidence Order System to Electronic Data.

Since electronic data as a type of evidence only has a clear definition and independent status in the new Evidence Regulations in 2020, the legislation relating to such a new type of evidence regulation is actually imperfect, and there are no specific rules for the filing of orders.

First, the legal provisions for electronic data evidence scattered in different laws and regulations have not yet formed a system. This can lead to conflicts of law and difficulties for parties in finding provisions. Second, China's existing laws focus on guiding the judiciary on how to collect and preserve evidence. There is a lack of specific and detailed provisions on issues such as the determination of the validity of electronic evidence and the allocation of the burden of proof [7]. Although electronic evidence is essentially the same as the traditional documentary one in terms of content, it has unique features. How to distinguish the relationship between electronic data carriers and content, and how to make relevant provisions for electronic data carriers are the problems that China's legislation should focus on.

3.2.3. Inadequate Provisions on Deal with Applications Involving National Security, Trade Secrets, or Personal Privacy.

In the case of documentary evidence that presents an order that may involve state secrets, trade secrets, personal privacy, and other documentary evidence that needs to be kept confidential, the new evidence provision treats such evidence as closed for cross-examination. In other words, the right of refusal is not provided for in China's current civil procedure law, as it is in some civil law countries. Although this is conducive to ascertaining the facts of the case, the cross-examination will still result in the applicant

knowing the contents of the confidential documentary evidence, which constitutes breach of confidentiality duty born by e-commerce platforms. In summary, there is no system that can resolve this conflict under the current legal framework in China.

3.3 Suggestions for Improvements to Today's Documentary Evidence Order System

3.3.1. Appropriate Relaxation of the Conditions for Particularisation of Electronic Evidence.

Under China's current legislation, the conditions for the particularisation of documentary evidence have been specified to some extent but not yet refined. For example, to submit the name or content, the facts to be proved and their importance, the reasons why the opposing party controls it and why it should be submitted. To address the practical issue, a certain relaxation of standards should be set in cases involving e-commerce platforms and other identification difficulties. In this regard, Chinese policymakers may choose to refer to the relatively mature legislative practices of foreign countries. For example, under Japanese Civil Procedure Law, such as Article 222, which provides that when there are significant difficulties in specifying the labeling of the instrument and the main points of the instrument, the applicant only needs to specify "the matters that will enable the holder of the instrument to identify the instrument being applied for" when applying [8]. Accordingly, China may also consider relaxing the requirement of specificity of the instrument where the party making the application has reason to be unaware of the specific points of the particular instrument. For example, relaxing the standard to the point of being able to prove the general content of the evidence and that it is in the possession of the opposing party would be sufficient.

3.3.2. Develop an Electronic Evidence Law to Clarify the Specific Rules for Filing Orders for Electronic Evidence.

It is the most basic and most effective method to develop an independent electronic evidence law so as to further standardize and improve the specific rules for the documentary evidence order system in e-commerce cases. Particular attention needs to be paid to the choice of the reversal of the burden of proof and the documentary evidence order system. The most crucial difference between them lies in the fact that the former imposes a statutory duty of proof on the party through substantive law, whereas the latter is determined through the discretion of the judge. The use of the system is preferable to the use of a reversal of the burden of proof in e-commerce cases. Because the former may give most of the pressure of proof to the e-commerce platform, making the plaintiff's litigation costs low. If so, most consumers may not negotiate a settlement in the first place. This is because mediation implies a compromise and there may be greater benefits to be gained by prosecuting without the burden of proof. But it is not what the Chinese judicial system

advocates. This is why the documentary evidence order system can avoid abusive proceedings and a waste of judicial resources. Finally, the use of a reversal of the burden of proof would in fact make it difficult to avoid e-commerce platforms only presenting evidence in their favor. Therefore, it is better to use a paper-based order in such cases.

3.3.3. Adding a Right of Refusal for the Respondent to file a documentary evidence.

The policymakers shall also consider the legitimate interests of the requested party in under documentary evidence order relating to information that should be kept confidential. It is not in accordance with the principle of proportionality to require the respondent to produce documentary evidence so that, in some cases, the damage to the respondent may outweigh the benefit to the application. The respondent should also have the right to refuse to provide the entirety of the documentary evidence where only part of the documentary evidence can be provided to satisfy the need for proof. This is particularly the case where the part of the confidential document that needs to be proved does not relate to confidential information.

4 Solving the Problem of Evidence Bias as a third Party

The Chinese Civil Procedure Law system only provides for the situation where the documentary evidence is "under the control of the opposing party", but we cannot exclude the situation where the evidence in an e-commerce case is under the control of the e-commerce platform as a third party. Article 31 of the E-commerce Law stipulates that platform operators shall bear the obligation to record and keep information on goods and services and transactions posted on the platform. However, platform operators often avoid or neglect their obligation to provide evidence due to considerations such as commercial confidentiality and cooperative relationships.

In order to solve this problem, the system of investigation orders is now applied in our judicial practice. The system has been tried out in various parts of the country for more than 20 years, but it has only remained in the documents of the local courts and has not yet formed a uniform and complete legal system. An investigation order is a system whereby a lawyer with a court-issued investigation order collects evidence in a case where the client is unable to obtain evidence for objective reasons. Such a system does not limit the collection of evidence to the opposing party, thus making it possible to collect evidence from third parties.

There are some overlaps between the documentary evidence order system and investigation orders. In China's future legislative practice, consideration could be given to abolishing the not-yet-unified system of investigation orders and extending the scope of the effect of documentary filing orders to third parties, even those outside of litigation, to meet practical needs [9]. Consideration could also be given to respecting the

institutional basis of the existing system of investigation orders, unifying and standardizing it so that it can formally established in the legislation.

5 A Comparative Law Study of the Documentary Evidence Order System and the Common Law System of Discovery

5.1 the Common Law System of Discovery

The common law system of discovery began in England in the 19th century and has since been further developed and refined in the United States. Under the United States Federal Rules of Civil Procedure, discovery is a right to take evidence against parties and people related to the parties without the need for leave of the court. This system allows the lawyers for each party to investigate the evidence fully and place it before the judge in as convincing a manner as possible [10]. Under the discovery system, a judge is not responsible for getting at "the truth", but simply chooses between the contentions of law and the versions of facts laid before him by the parties [11]. The specific reason of this system exists is that it lays all the cards on the table and has the advantages of preventing evidentiary raids, safeguarding fair proceedings, and promoting pre-litigation settlements.

5.2 Pre-trial Exchange of Evidence

In the Chinese judicial system, there is a degree of similarity between the exchange of pre-litigation evidence and the discovery procedure under common law system. In practice, however, the system of exchange of evidence is effectively hollowed out. In a few selected courts in Beijing, for example, only about 20% of cases in urban courts apply the exchange of evidence procedure, and even less in rural areas. And almost all were initiated ex officio by the courts, not the parties [12].

The reason for the low priority given to the exchange of evidence system in China can be traced back to the Chinese judicial system. China adopts a judge-centered inquisitorial approach to litigation, whereas the common law system of discovery is based on a party-based litigation model. In other words, compared to judges in common law countries, Chinese judges are more willing to trust their own authority than the parties and are more inclined to use their power to investigate facts. This has led to a slightly weaker strength of the evidence exchange system in Chinese litigation practice, and it has not been given much attention in past jurisdictions.

In e-commerce cases, evidence are mainly in electronic form and are highly specialized. There is a significant gap between the ability to adduce and discern evidence on the side of consumers, who lack the authority or even the expertise to access and understand the e-commerce controlled data and most e-commerce platforms and e-commerce operators with established technical and knowledge base. In particular, as mentioned above, the penalties for tampering with evidence in the civil

procedure law are not so clear, and the low level of fines for such acts in practice lacks warning. In addition, electronic evidence itself is hidden, easy to tamper with the characteristics of the current state of legislation, and has not yet formed a unified Electronic Evidence Law. Under such circumstances, it is difficult to require parties or judges to trust the opposing party to collect evidence. In the Chinese judicial system, however, the judge is a neutral actor. Giving judges the authority to make documentary evidence order and the power to check the authenticity and legality of evidence would make applicants more convincing and reassuring.

5.3 Apply the Discovery System Effectively

Although the system of discovery is not entirely appropriate for the Chinese judicial system, we should still see the significance of the system in promoting fair proceedings and preventing theft of evidence. This is the illegal act of not giving evidence or not giving full evidence during the period of proof, but suddenly producing evidence during the trial to catch the other side off guard. Although Article 68 of China's Civil Procedure Law already provides for the legal consequences of late proof, cases of evidence theft are still commonplace. For example, in the case of a restaurant management company in Hangzhou v. Sun, a shareholder, in a dispute over liability for damage to the interests of the company this year, the plaintiff submitted a total of thousands of pages of additional evidence to the court three times after the deadline for proof had expired [13].

This is of even more critical importance for cases involving e-commerce platforms. Electronic evidence, due to its specialised and covert nature, may cause greater injustice if stolen by evidence. If the corresponding evidence is tampered with, it is also difficult to detect or check in the extremely limited time available. To effectively draw on the system of discovery and make the exchange of evidence work as it should, there should be stricter regulation of late proof. The most important thing is to establish a mechanism of liability based on forfeiture of rights, supplemented by sanctions, so that a "all-cards-laid" litigation environment can be established. It is because it is under the threat of non-admission of evidence in court that parties and lawyers are more inclined to submit the material facts of the case to the court and the opposing party at the exchange of evidence stage. In this context, the system of exchange of evidence, in conjunction with the documentary evidence order system, can build a better and fairer system of proof.

6 Conclusion

Due to the specific nature of the evidence in cases involving e-commerce platforms, the application of documentary evidence order system in such cases should be of interest to policy makers. This Article classifies the use of writ of certiorari in e-commerce breach of contract and tort cases. It was divided into two types of cases, those in which the platform is the defendant, and those in which there is no independent third party claim. The former is

covered by the existing system but still needs further improvement. The latter can be regulated by drawing on the investigation order system. In contrast to the "discovery system", which was born out of the common law system of the "adversary litigation system", the use of the "documentary evidence order" in mainland China is more in line with the foundation of our system. But we can also absorb the essence of the discovery system so that the unappreciated evidence exchange procedures take on a new life. This initiative is also important for dealing with e-commerce cases.

However, due to the short period of time since the promulgation of the new civil litigation provisions and the Electronic Commerce Law and its related interpretations, the current research on the documentary evidence order system is mostly academic, and there is still a lack of a large number of case practice. In the future, when the system has a certain practical basis, it can be further empirically analyzed on the basis of cases, so as to improve and refine it.

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