

PAPER:

AN OUTLINE OF THE FRENCH LAW ON DIGITAL EVIDENCE

By **Philippe Bazin**

Introduction

Before approaching digital evidence in French law, it is necessary to introduce the French legal position towards evidence in general. In French law, there is a clear distinction between two types of evidence: evidence concerning a legal fact and evidence concerning a legal transaction.

The legal fact can be defined as the behaviour of a person, in which responsibilities are created. A simple example would be where a person driving a vehicle hits a pedestrian. The act may be deliberate or an accident: depending on the liability, if the driver is held responsible it is for the driver to repair any damage caused. The law in France does not impose any binding conditions to prove the driver's responsibility. The pedestrian who was hit may prove the liability of the driver and that damage incurred, by any means: witness statements, photographs, correspondence between the driver and the insurance company. In French law, legal facts can be proved freely, demonstrating the principle of freedom of evidence.

The legal transaction can be defined as the demonstration of a person's will to create obligations. The most obvious example of a legal transaction is the formation of contract. In French law, the contract is defined as a mutual consent that creates obligations. When the amount in dispute is over €750, rules in French law are binding. For example, where a person enters a contract for a €10,000 loan with a bank, the person taking out the loan is required to sign a debt certificate. Should the loan be in default, the bank will be required to produce the debt certificate in order to prove that the person owes the money. To be valid, the certificate must follow various rules both in its form and in its content or both.

This is the legal evidence system, and this is the

system to be addressed when considering the subject of digital evidence in French law. The relevant in this context law is Loi no 2000-230 du 13 mars 2000 portant adaptation du droit de la preuve aux technologies de l'information et relative à la signature électronique,¹ (Electronic signature Act no 2000-230 adapting the rules of evidence to information technology and related to electronic signatures). This law has modified the French law on evidence in order to adapt it to the information technology age.

To understand the modifications, it is necessary to understand the system before 13 March 2000. The basic rule of legal evidence is what is called '*preuve parfaite*' (perfect evidence). The evidence is perfect because it meets the requirements of the law. Therefore, it has probative value, which has a higher value than other forms of evidence. Until the law of 13 March, 'perfect evidence' was written, original and hand signed.

The concept of written normally indicates the content is written on a paper carrier, and original, means that the contract, for instance, must be the one used by the parties originally. Thus a copy has a lower probative value than the original document. Hand signed usually means that the parties have to set their hands to the document with a personal graphic sign. However, there are some difficulties with these rules. The 'perfect evidence' system was created at a time when contracts were all on a paper carrier. Now the paper has disappeared, so practice must change when the screen becomes the medium through which commitment is made. We now accept that in physical terms, there is no original document anymore. At least, not in the way we understand it in the world of paper.

This original becomes understandable only when it is 'viewed' on screen or when printed on paper. However, from a technical and legal point of view, the screen or

¹ Entered into force on 13 March 2000, amending the Code civil (Civil Code) except, as always, the provisions that require specific regulations to enter into force. This text was completed by the following Decret n°2001-272, du 30 mars 2001, pris pour l'application de l'article 1316-4 du Code civil

et relatif à la signature électronique, modifié par décret n° 2002-535 du 18 avril 2002 (JO 31 mars 2001, p 5070 et JO 10 avril 2002 p 6944., Décret n° 2002-535 du 18 avril 2002 relatif à l'évaluation et à la certification de la sécurité offerte par les produits et les systèmes des technologies de

l'information, JO 19 avril 2002, p 6944. Arrêté du 31 mai 2002, relatif à la reconnaissance de la qualification des prestataires de certification électronique et à l'accréditation des organismes chargés de l'évaluation. JO 8 juin 2002, p 10223.

paper 'view' only represents a copy. It is impossible to sign on a screen. Even if a graphic tablet is used to sign a document, this signature is no more than a picture of a signature. In the physical world, the power of the signature is the physical link between the paper and the graphic sign put on the paper. Yet, from a legal point of view, the signature is the cornerstone of the legal evidence system. It is the preferred partner to identify the instrument, as it is linked to the 'hand' of each physical person. This means that the sudden arrival of the screen in business life has made three of the essential rules of the perfect evidence disappear: the rule of the writing - a paper medium; the rule of the original document - only one document, and the rule of the signature: only one hand-signed document.

A necessary adaptation

The changing use of technology has meant that the general Law on Evidence had to be adapted and new foundations for digital evidence in the French law had to be laid down. This is what the March 13th, 2000 law did, in three main areas: the definition of a writing; the definition of a signature, and principle of equal probative value between electronic-based writing and paper-based writing.

The French law of March 13th 2000 transposed the European Directive of December 13th 1999 concerning the electronic signature. Technically, this adaptation was only made possible by changing some articles in the French Civil code.²

In Article 1316 of the French Civil Code, a writing is defined as follows:

La preuve littérale, ou preuve par écrit, résulte d'une suite de lettres, de caractères, de chiffres ou de tous autres signes ou symboles dotés d'une signification intelligible, quels que soient leur support et leurs modalités de transmission.

Documentary evidence, or evidence in writing, results from a sequence of letters, characters, figures or of any other signs or symbols having an intelligible meaning, whatever their medium and the ways and means of their transmission may be.

This definition is interesting for three reasons. First, it defines the writing by its role - the writing is evidence; second it defines the written document by its content,

as a 'sequence of letters, or symbols having an intelligible meaning', and third, it dissociates the written document from the medium. The written document is not only a paper carrier any more. It is a message, whatever the medium, whatever the means of transmission.

Article 1316-4 provides a definition of a signature in general, defining the signature as follows:

La signature nécessaire à la perfection d'un acte juridique identifie celui qui l'appose. Elle manifeste le consentement des parties aux obligations qui découlent de cet acte. Quand elle est apposée par un officier public, elle confère l'authenticité à l'acte.

The signature necessary to the execution of a legal transaction identifies the person who apposes it. It makes clear the consent of the parties to the obligations which flow from that transaction. When it is apposed by a public officer, it confers authenticity to the document.

This definition is interesting for two reasons. It illustrates the three roles performed by the signature, and does not impose a particular technique to set one's hand to a document. A signature is an identification process of the parties. It comes from a person. The signature is the link between this person and the message. A signature also expresses the consent of the parties. Because it has been affixed to the document voluntarily, the signature expresses the will of the person to submit to the obligations.

Although the text deliberately provides a technically neutral definition of what a signature is, it nevertheless sets out the role of the signature. It defines the signature through its legal effects. As a result, it authorizes all types of signature processes, provided that the processes used fulfil the triple roles of the signature: formation of the contract, identity of the parties, and consent.

The second paragraph of Article 1316-4 defines the electronic signature in terms of the reliability of the process by which it is created, in the following terms:

Lorsqu'elle est électronique, elle consiste en l'usage d'un procédé fiable d'identification garantissant son lien avec l'acte auquel elle s'attache. La fiabilité de ce procédé est présumée, jusqu'à preuve contraire,

² Please refer to <http://www.legifrance.gouv.fr> for a general presentation of the French law in English, and the Codes, especially the Civil Code, translated into English.

lorsque la signature électronique est créée, l'identité du signataire assurée et l'intégrité de l'acte garantie, dans des conditions fixées par décret en Conseil d'Etat.

Where it is electronic, it consists in a reliable process of identifying which safeguards its link with the instrument to which it relates. The reliability of that process shall be presumed, until proof to the contrary, where an electronic signature is created, the identity of the signatory secured and the integrity of the instrument safeguarded, subject to the conditions laid down by decree in Conseil d'État.

For the electronic signature, this part of the text is an exception in the technology neutrality rule. The electronic signature is defined as a 'reliable process of identifying'. The process guarantees the 'link' with 'the instrument'. This link constitutes the basic mechanism of digital evidence. It is a question of connecting a message file to an identity file. This link must also be inseparable. Those two files linked together constitute the legal 'transaction' in the true sense of the term. This is what now constitutes the *la preuve parfaite électronique* (perfect electronic evidence).

Equal probative value between media

The March 13th 2000 law does not give a stronger legal value to the paper-based document. On the contrary, it lays down the principle of equal probative evidence between an electronic-based writing and a paper-based writing. However, the law imposes two conditions for the electronic-based writing for it to have the same value as a paper-based writing: evidence of the writer's identity and evidence of the integrity of the message.

A writing in electronic form is admissible as evidence in the same manner as a paper-based writing, provided that the person from whom it proceeds can be duly identified and that it has been established and stored in conditions calculated to secure its integrity. In practice, evidence of identity is often easy to ascertain, thanks to the context of the message. However, the main difficulty regarding digital evidence is to demonstrate the reliability of preservation of the message over time.

This legal requirement is used only in case of a dispute. If the identity of the writer of the message is not in dispute, it is not necessary to prove it in order to use the digital document. If the message integrity is not

in dispute, it is not necessary to prove it in order to use the digital document.

The solution found by the French Court of Cassation helps to understand what might happen in the event of a dispute. In a decision of December 2nd 1997, the French Court of Cassation had to adjudicate on the legal value of a facsimile transmission. The case concerned the assignment of a debt, which had been notified by a facsimile transmission, and the notification process was disputed, because the law required notification in writing. The court considered that a photocopy or a facsimile transmission did not provide written evidence, but only prima facie written evidence. The French Court of Cassation changed its jurisprudence with this decision. It validated notification by facsimile transmission in the following way:

L'écrit peut être établi et conservé sur tout support, y compris par télécopies, dès lors que son intégrité et l'imputabilité de son contenu à l'auteur désigné ont été vérifiées, ou ne sont pas contestées.³

A document can be written and kept on any medium, including facsimile, as long as its integrity and the attributability of its content to the writer designated have been checked or are not disputed.

The rules arising from this decision are simple and strong. Whatever the medium, a writing is a writing. This means that photocopies, facsimile transmissions and e-mail print outs are considered to be writings. If the integrity of the writing or the attribution of the source is disputed, the document must be authenticated. This, in practical terms, means that a judge will ask for a report from a suitably qualified expert. If the report shows that the message has not been forged, it will be accepted as valid evidence. So, just for once, the French do it in the same way as the British The approach is now very pragmatic: providing the document is not disputed, it is valid; providing a digital evidence specialist establishes the document is not forged, the writing is considered as valid.

Arguably, the best legal guarantees do not come from legal texts, but from use. With e-mail, for instance, 'answering' a message may, in itself, be sufficient evidence of the writer's identity and of the integrity of the message. This suggestion, based on common-sense, explains the current French jurisprudence

³ Cour de cassation, Chambre commerciale, 2 Décembre 1997, Rejet, N° 95-14.251 Société Descamps, Banque Scalbert Dupont, M. Bézard,

Président, M. Leclercq, Rapporteur, M. Raynaud, Avocat général, la SCP Monod, M. Spinosi, Avocat, <http://www.legifrance.gouv.fr/affichJuriludi.do?oldA>

[ction=rechJuriludi&idTexte=JURITEXT00007039668&fastReqlid=954216388&fastPos=1.](http://www.legifrance.gouv.fr/affichJuriludi.do?oldA)

regarding the validity of the digital evidence. However, there is, to date, no legal decision adjudicating a dispute on the probative value of a digital document. Courts frequently accept the paper copy of digital documents as valid evidence. For example, in business law and labour law, courts receive paper copies of e-mails as evidence to prove that employees have sent confidential information to third parties, or to prove harassment. Finally, the law requires digital documents to be archived in such a way as to be incapable of being corrupted, and from the technical point of view, archiving rules are defined by standards, which are issued by trade associations.

Conclusion

The integrity of the message and the identification of the writer are the two essential conditions required by French law to validate digital evidence. In business, it is not difficult to provide evidence of these requirements. In most cases, it comes from the context of the communication. Although e-mail has been used for some years now, it is not surprising to see that there is still no jurisprudence on this subject. The true problem regarding digital evidence is the question of the integrity of conservation over time. Today, we can read paper documents that are several hundred years old. But it is debatable whether we will be able to read digital files produced by computer systems which have

long disappeared. Today, archiving is the essential concern on the subject of digital evidence in French law. This problem is more technical than legal. In other words, this is a question for computer specialists before being a question for lawyers. Georges Clémenceau, a French politician of the nineteenth century, said: '*La guerre est une chose trop sérieuse pour être confiée à des militaires*' (War is too serious to be left to the military). This could be adapted to digital evidence: 'Evidence is too serious to be left to computer specialists'. So, lawyers must be extremely careful and be very involved when it comes to technical development.

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