

CASES OF ELECTRONIC EVIDENCE IN MALAYSIAN COURTS: THE CIVIL AND SYARIAH PERSPECTIVE

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Abstract

Islamic law emphasises on justice and fairness in solving disputes. In order to achieve this objective the legal fraternity has developed a procedural law to successfully executing the fairness. Since Islamic law is comprehensive and applicable at anytime the fairness is to be exercised regardless of new development in law and technology. In Islamic law, evidences in electronic formats or cyber evidences are acceptable in certain cases if they are authentic and reliable. Although these evidences carry different name from conventional evidence but their characteristics are similar. They are also very fragile and could easily be altered. Therefore the issues of authenticities are paramount for electronic evidences. This paper will discuss cases that accept electronic evidences in both Islamic and Malaysian law. The discussion will also include the procedure to accept electronic evidence in Malaysian courts and few challenges in establishing the admissibility of electronic evidence.

Keywords: *Electronic evidence, Authentic, Civil, Islamic law, Courts*

Introduction

Cases of electronic evidence have been decided in many courts in various countries. These cases emerged when technology develops and people started using the technology to store information or data electronically. Computer is one of the technologies used to store data or information. This data may later be retrieved for certain specified purpose. The data in the printed copy is considered as evidence and it is admissible in the Malaysian courts. While in Syariah or Islamic law, computer printout is also acceptable as evidence but it is confined to civil cases since the burden of proving such evidence is less strict. This paper will discuss on electronic or computer evidence which is admissible by the civil courts and Syariah court, cases using computer evidence in both courts, the relevant laws and the challenges in proving the admissibility of computer evidence.

2. Electronic evidence and its meaning

Electronic evidence is sometimes referred to as 'digital evidence', 'computer evidence', 'computer related evidence' and 'computer generated evidence'. An example can be taken from various writings and various authors who sometimes referred to the term that they preferred to use. But their aim is the same i.e. to discuss on evidence produced by electronic means. (Gahtan, 1999; Casey, 2011) There is no specific definition for this word in the Malaysian statutes except for the word 'electronic', 'computer' and 'computer output'. According to section 5 of the Electronic Commerce Act 2006 the word 'electronic' refers to 'the technology of utilizing electrical, optical, magnetic, electromagnetic, biometric, photonic or other similar technology'. This definition focuses on technological term while digital system is wider than the electronic evidence. This means digital evidence is confined to evidence produced by digital technology, but its application is wider than electronic evidence since it extends to cell phones and digital audio and video. (Mason, 2010) While 'computer' is defined by two different statutes namely, the Evidence Act 1950 (EA) and the Computer Crimes Act 1997 (CCA).

The EA defines 'computer' as 'any device for recording, storing, processing, retrieving or producing any information or other matter, or for performing any one or more of those functions, by whatever name or description such device is called; and where two or more computers carry out any one or more of those functions in combination or in succession or otherwise howsoever conjointly, they shall be treated as a single computer.' This definition extends the scope of the computer by looking at the ability of the device. Any device is regarded as a computer if it is capable of recording, storing, processing, retrieving or producing information. Any networking or combination of functions between two or more computers is considered as a single computer. However, section 2(1) of the CCA 1997 defines 'computer' as 'An electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, storage and display functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, or a portable hand held calculator or other similar device which is non-programmable or which does not contain any data storage facility.'

From the above definition it is submitted that the CCA 1997 focuses on the function of the device and divides them into four namely, performing logical, arithmetic, storage and display functions. The definition also limits the scope by excluding automated typewriter or typesetter, a hand calculator and non-programmable device from being a computer.

For 'computer output', section 2(1) of the CCA 1997 defines it as 'a statement or a representation whether in written, printed, pictorial, film, graphical, acoustic or other form-(a) produced by a computer; (b) displayed on the screen of a computer; or (c) accurately translated from a statement or representation so produced;' The definition is so wide since it covers all types of statement or representation including translation that is produced by a computer and displayed on the screen. But 'computer output' is not defined by the EA although it is used in certain sections in the Act. Nevertheless, there has been no dispute on the meaning and interpretation of the word 'computer' in the Malaysian courts.

2.1 Position of computer evidence

Computer evidence is regarded as documentary evidence and this can be seen from the definition of 'document' in illustration to section 29 of the Penal Code. According to the illustration, 'document' includes matters 'recorded, stored, processed, retrieved or produced by a computer.' Further, explanation

3 to section 62 EA also emphasised that a document produced by the computer is primary evidence. The word 'document' is also defined by the EA 1950 (section 3).

In Malaysia, the admissibility of electronic evidence or computer evidence is provided by both civil law statutes and Syariah law statutes. For civil courts, the relevant laws include the Evidence Act 1950, the Criminal Procedure Code, the Rules of Court 2012 and the Penal Code. While at Syariah courts, the governing laws include the Administration of Islamic Law Act, Syariah Court Evidence Act, Syariah Court Civil Procedure Act, Syariah Criminal Procedure Act and Syariah Criminal Offences Act.

3. Electronic evidence and its admissibility

As mentioned above computer evidence, computer output and computer printout are accepted and being applied in determining the admissibility of electronic evidence in the Malaysian courts. There are several sections affirming this point namely sections 3, Explanation 3 to s62, section 63 and sections 90A, 90B and 90C of the EA 1950. Since admissibility of evidence is a question of law and it is determined by the court the evidence adduced must be relevant to the case in question. Thus, even if the evidence was illegally obtained it is admissible if it is relevant (*Public Prosecutor v Gan Ah Bee* [1975] 2 MLJ 106, 108 (HC)). Apart from that, the court will also consider the authenticity of such evidence. This is one of the most important requirements for admissibility of any evidences including the electronic evidence. This issue can be disputed and argued by counsels or the prosecutors during the submission of evidence. Once there is a doubt, the evidence in criminal case will be rejected since it requires a proof beyond any reasonable doubt. In other words, the court has a discretionary power in deciding on the admissibility and relevancy of any evidence (section 136 EA). This power was emphasised in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (no 3)* [1999] 2 MLJ 1, 170 (HC). Further, sections 6 to 55 of the EA 1950 also mention about the facts declared to be relevant. However, there are exceptions to this rule. In *R v Turner* [1975] 1 All ER 60, at 74 (CA), Lawton LJ stated as follows, 'Relevance, however does not result in evidence being admissible: it is a condition precedent to admissibility'.

For electronic or computer evidence, relevancy and reliability are two important criteria for admission. They are sometimes very difficult to determine due to the fact that the evidence in a computer may be connected to various computer networks and may be tampered. Furthermore, the reliability of computer evidence starts with a combination of two elements namely, trustworthiness of the content of a piece of computer derived evidence and trustworthiness of the process by which it was produced. (Chissick & Kelman, 2000; Jack, 1987; Brenner, 2005). The admissibility of evidence could be challenged by attacking the weight or reliability of the evidence. In this circumstance, the court is under a duty to disallow all inadmissible evidence or to readmit evidence after having rejected it or may reverse its ruling on admissibility. (Paul, 2004) In short, the relevancy and reliability of electronic evidence to a fact at issue is very crucial because they determine the admissibility of computer evidence in the court of law.

In civil court, the need to produce a certificate to prove the reliability of the computer printout depends very much on the facts of the case. The court in *Public Prosecutor v Ong Cheng Heong* (1998 6 MLJ 678; [1998] 4 CLJ 209) has rejected the evidence by a witness who claimed no responsibility to the computer printout produced by him.

3.1 Cases on electronic evidence in civil and criminal courts

Cases on electronic evidence can be of civil and criminal in nature. In Malaysia, the courts admit three different terms that imply the meaning of computer evidence. These can be seen in cases such as *PP v Lee Kim Seng* (computer printout)(2013 7 MLJ 844), *PP v Ong Cheng Heong* (computer out put)(1998 6 MLJ 678) and *Ahmad Najib v PP* (computer evidence)(2007 2 MLJ 505). In these three cases computer evidence are admissible under sections 90A of the EA and the Court of Appeal case of *Ahmad Najib* has not been challenged so far. In this case a chemist report produced by a computer was admissible as evidence by the Court of Appeal. According to the court decision, 'the contents of the chemist report (P83) have the direct effect of linking the appellant to the commission of the offence of murder and rape by him of the deceased.' However, a CCTV tape which was considered as a document produced by a computer had failed to satisfy the requirements of section 90A of the EA and they were inadmissible as evidence. The appellant (Ahmad Najib) was sentenced to death for the offence under section 302 of the Penal Code and was sentenced to twenty years imprisonment and ordered to be given 20 strokes of the rotan for the offence under section 376 of the Penal Code. His appeal was dismissed by the Court of Appeal.

For civil cases such as internet defamation, breach of online contract or succession (will and probate) the process of collecting evidence and filing a civil suit are based on the court rule, Practice Direction and relevant statutes. In *RHB Bank Berhad v Lee Kai Shin & Anor* (High Court of Sabah & Sarawak at Kuching, July 2008) the plaintiff (RHB) claimed against the defendants the balance outstanding under the Hire Purchase agreement, which was at RM162,186.06 with interest at 8% per annum from 13th January, 2006 until full settlement and cost. The learned Session Court Judge decided that the account statement tendered by the plaintiff was documentary evidence and had complied with s90A of the EA. Although there was no certificate produced by the plaintiff the oral evidence by the plaintiff's witness was sufficient to consider the reliability and admissibility of such document. In other words the amount claimed by the plaintiff was a valid amount. The court decided that the plaintiff's claim was reasonable and ordered the defendant to pay the amount claimed. When the defendant appealed to the High Court, the appeal was also dismissed on the grounds that the grounds raised by counsel for the Appellants were without merits. While on evidential matters, the civil cases require proof on the balance of probabilities and the defendant has to raise sufficient evidence to defence his case. Section 102 of the EA 1950 (burden of introducing evidence) will be applied if one of the parties fails to provide sufficient evidence. This burden will shift constantly as evidence is introduced by one side or the other.

As regard to criminal cases (whether conventional crime or cybercrimes) the procedures of collecting evidence is governed either by the Criminal Procedure Code or the relevant statute such as the Computer Crimes Act 1997 (CCA) and the Penal Code. The prosecutor or the Attorney General must prove the crime beyond any reasonable doubt and he must also be able to prove that the suspect or the accused has intended (*mens rea*) to commit the crime. However, the court may also apply the principles of strict liability whereby the offender's state of mind is irrelevant to a finding of guilt. The expert opinion rule will also apply when the evidence gathered requires a computer forensic expert to prove it. (section 45 EA). But there are two classes of facts which need not be proved namely, facts judicially noticed and facts admitted. (see *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 at 31, and sections 56, 57 and 58 of the EA 195)

The common issue raised on computer output is on whether the plaintiff or defendant has complied with the requirement of s90A(2) of the EA 1950. This section requires the production of certificate from the person responsible for the work of the computer. However, the certificate is not needed if the said person is present during the hearing of the case. This principle was adopted and affirmed in several cases namely, *Standard Chartered Bank v Mukah Singh* (1996 3 MLJ 240(HC)); *Gnanasegaran a/l Pararajasingam v Public Prosecutor* (1997 3 MLJ 1(CA)); *Hanafi bin Mat Hassan v Public Prosecutor* (2006 4 MLJ 134.) and *Ahmad Najib b Aris v Public Prosecutor* (2007 2 MLJ 505).

Further, if there is no challenge made to the evidence adduced by the witnesses and the evidence was produced in the ordinary course of business it is not necessary for the plaintiff to comply with the requirement of s90A(2). In other words, the certificate does not need to be produced unless the evidence is disputed at the time it was adduced. But, if the computer output is a record of human assertions, depending on human perception and the supply of such information to the computer, it would be hearsay and therefore inadmissible unless it falls within the hearsay exception. (Munir, 1999)

4. Electronic evidence in Islam

The Syariah law accepts any form of electronic evidence or digital evidence because all these evidence constitute 'documentary evidence' and come under the definition of evidence as provided under section 3 of the SCEA 1997 which states:

"evidence" includes-

(a) *bayyinah* and *syahadah*;

(b) all statements which the Court permits or requires to be made before it by a witness in relation to matters of fact under inquiry: such statements are called oral evidence;

(c) all documents produced for the inspection of the Court: such documents are called documentary evidence;

Explanation 3 to section 49 of the SCEA 1997 further states that 'A document produced by a computer is primary evidence.' What is the meaning of 'document' then? According to section 3 of SCEA 1997;

"document" means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of-

(a) letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation whatsoever;

(b) any visual recording (whether of still or moving images);

(c) any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or other data whatsoever;

(d) a recording, or transmission, over a distance of any matter by any, or any combination, of the means mentioned in paragraph (a), (b) or (c),

or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or howsoever representing, that matter."

The illustration of section 3 provides that, "A matter recorded, stored, processed, retrieved or produced by a computer is a document;"

From the above provisions, it is clear that electronic evidences are acceptable and recognized in Islam. These evidences include computer evidence, computer printout or computer generated document which are available in documentary formats. These documentary evidences are admissible and majority of Muslims jurists have agreed on this matter. Further, there are few Quranic verses and *hadiths* of the prophet p.b.u.h. affirming the admissibility issue. (Ibrahim Bek, 2003, 91). The Muslims jurists have also agreed that such documentary evidence or electronic evidence can be used to prove all civil cases such as properties and not matters that involve Hudud offences and Qisas. (Arbouna,1999,14-116) . In relation to admissibility of electronic evidence, the same premise of argument is used (Fattah, 2011, 172). The Muslim jurists are more concern on the issue as to whether it could be forged. Next question is on how to authenticate it? Then the same question is asked on whether it could be used to prove any of hudud offences. In short, admissibility issue is not really disputed but there are disputes on proving authenticity of documents produced by either conventional means or by electronic means. (Al-Zuhaili, 1994, 422).

4.1 The Governing law

Evidence in Syariah court is governed by the Syariah Court Evidence Act 1997 (SCEA 1997) that clearly provides as follows; “This Act shall apply to all judicial proceedings in or before any Syariah Court”. But since administration of Islamic law is a state matters, each state in Malaysia has its own statutory provisions. (Sufian, Ahmad Bustami & Mohd. Kamal 2010)

The onus of proof in syariah evidence is usually on the claimant or prosecution and failure to bring evidence in support of the claim will result in rejection of such claim. (SCEA) This onus of proof can also be shifted from one party to the other party during the trial and the evidence given must first reach the standard of certainty (*al-yaqin*).

4.2 Cases of Electronic evidence in Syariah Court

The admissibility is confined to cases involving family or personal matter such as marriage, divorce and maintenance of wife and children. In all these cases documentary evidence are acceptable as evidence while there is no single case which directly discusses on electronic document so far. However, the admissibility of electronic document was discussed indirectly in the case of *Ajmawati Atan v Moriazi Mohamad* (2004, JH, 235) in which the Plaintiff made a claim against her former husband for certain amount of money. A part of the ancillary claims was the alleged loan that amounted to SD 46,000.00. The defendant denied the existence of the said loan but contended it was meant as a gift. Both parties could not support their claim but the plaintiff was able to show the payment of SD 20,000.00 made by the defendant by using several cheques credited to her bank account. The Syariah High Court agreed with the submission of the plaintiff's counsel that these banking transactions had proved the existence of loan. On appeal (2005, JH, 105), the appellant's counsel argued that the trial judge was erred in law by accepting such transaction without direct evidence. The counsel referred to the section 22 of SCEA which provides:

“Entries in books of accounts regularly kept in the course of business are *qarinah* whenever they refer to a matter into which the Court has to inquire, but the entries shall not alone be sufficient evidence to charge any person with liability.”

The appellant's counsel by relying on the plain language of the section argued that in order to admit the payment of money by the husband to his wife account, it needs to be corroborated by evidence such as evidence by a witness. Interestingly the Syariah Court of Appeal agreed with this submission and of the view that the creation of the alleged loan was therefore, not proven.

It is submitted that the reliance on that provision alone is a misleading. Section 22 of the SCEA 1997 is nothing to do with modern banking transaction. It is intended to accept any fact about the existence of the fact in issue that is any entry on the book of account will be relevant. It is unfortunate because the court's attention was not drawn to section 49 of the SCEA 1997 especially on explanation 3 mentioned above and section 3 of the SCE (FT).

6. Challenges in establishing the admissibility of electronic evidence

It is quite challenging to establish the relevancy and reliability of electronic evidence in courts. Hence certain security measures should be adopted to protect the evidence from being destroyed or altered in order to maintain its authenticity. The above mentioned cases show that anyone who produced electronic or computer evidence has to either produce a certificate certifying its authenticity or to call a witness to give oral testimony on the evidence or document tendered in court. Other than that, determining the jurisdiction of the court to prosecute and charge the case, development in new technology, emergence of new crimes online, various location of evidence or data and out dated laws are also among the challenges in establishing the admissibility of electronic or computer evidence. (Mohamed, 2011).

7. Conclusion

In summary, computer evidence is admissible as primary evidence as long as it is relevant, reliable and authentic. It is considered as one of the exceptions to hearsay rule that does not require direct oral evidence from a witness. Thus, the most important elements that need to be fulfilled are the printout from the computer should be produced in the course of its ordinary use and the person who makes or tenders the document is the person responsible to that output. There is no need for a certificate as his oral testimony is sufficient and shall be admissible as evidence. Since ss90A, 90B and 90C of the EA 1950 clearly establish that they are exceptions to hearsay evidence it seems that there is unlikely that in Malaysia the position of computer printout in the EA will be challenged. However, the admissibility of such evidence can still be challenged on the issue of its relevancy, reliability and weight. Other challenges must also be taken into consideration. As regard to Syariah evidence, since Syariah courts in Malaysia have limited powers and jurisdictions to hear and try the cases discussions pertaining to admissibility of electronic evidence are confined to matrimonial matters and certain criminal offences only. However, when the Syariah courts are given the power to dispose of matters related to financial issues, the application of e-evidence will be very useful. As mentioned earlier, the SCEA 1997 has generally allowed the application of e-evidence and therefore, it is hoped that the Syariah court judges are ready to admit the electronic evidence. Nevertheless, there shall be a review on the existing SCEA. It is suggested that the SCEA should adopt certain provisions from the EA especially sections 90A and 90B as to avoid any future disputes in proving computer generated document or electronic evidence.

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