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**LEGAL ASPECTS OF ELECTRONIC COMMUNICATION
INVOLVING THE MALAYSIAN COURTS**

Ani Munirah Mohamad (a)*

*Corresponding author

(a) School of Law, Universiti Utara Malaysia, 06010 Sintok, Kedah, Malaysia. E-mail: animunirah@uum.edu.my

Abstract

As government agencies increasingly adapt to the electronic medium in line with the Malaysian ICT agenda and policies, communications involving government agencies have also shifted from paper-based to paper-less. Being part of the government system, the courts have also begun resorting to electronic communication with third parties. However, scarce resources were found on the context of such electronic communication by the courts, particularly on the compliance of such communication with the legal rules. Hence, this paper deliberates on the legal aspects of electronic communication by the Malaysian courts in light of the Electronic Government Activities Act 2007 (“2007 Act”) and various practice directions of the courts. Engaging in full qualitative research, this study involved the collection of primary data in the form of interviews from four case studies conducted at multiple courts in Malaysia. The interviews were triangulated with secondary data in the form of written rules, court cases, journal articles, reports and other literary works. The study found that there are various means of online messages made by the courts, such as via electronic mail, websites, advocates portal and the case management system. Such messages are communicated to various parties, such as the Prison Department, Police Department, the Bar Council, lawyers representing the litigants, and members of the public. In essence, the electronic communication by the courts conforms to the legal provisions of the 2007 Act. Hopefully this paper would contribute to the body of knowledge on the subject matter of electronic government and electronic messages.

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Keywords: Electronic communication, electronic messages, electronic government, Malaysian courts.



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1. Introduction

In line with the Malaysian ICT agenda and policy, government services begin to shift their service delivery from paper-based to paper-less. Over the years, a lot of information and communication technologies (ICT) are adopted in various means and for various purposes, such as the education field, health services, finance and business. Particularly for the purpose of this study, ICT has proven to penetrate into the judicial business as well (Mohamad, 2017).

1.1. Conceptualising ICT Adoption in the Courts

Since quite some time ago, the judicial offices in various jurisdictions, such as courts in the United Kingdom, Italy, United States of America, Brazil, Singapore and Australia have begun to embark on the adoption of ICT in their daily work routines. Malaysia is no exception. As early as 2003 with the launching of the website for the Sabah Courts, the Malaysian courts increasingly adopted ICT in its work process, both in West Malaysia and in East Malaysia.

Over the years, the ICT adoption at the Malaysian courts becomes intensified with more applications are being introduced and implemented. Numerous past literature had discussed the overview of the ICT applications in the courts (Zakaria, 2013). Nevertheless, such literature has provided descriptions of the technical aspects of the ICT at the courts. For instance, Hassan and Mokhtar (2011) outlines the various types of ICT applications available at the Malaysian courts system without delving into the implications of such applications. Additionally, Saman and Haider (2013) examined the ICT applications at the courts from the information management perspective. Meanwhile, Hamin, Othman and Mohamed (2012) provides an overview of the development of the electronic court system in Malaysia. Such ICT applications which are adopted at the Malaysian courts include the case management system (CMS), queue management system (QMS), court recording and transcription (CRT), audio and video conference systems (AVS), advocates' portal and the electronic communication involving the courts and other parties (Hamin et al., 2013).

1.2. Electronic Means of Communication by the Courts

Often times, communications by or with the Courts would involve dealing with parties outside of the Courts complex. These parties would include the solicitors handling the litigation cases at the Courts, the officers from the Prison Department, the Attorney General's Chambers, the Royal Police, and not forgetting the general public who might be unrepresented by solicitors, those who appears before the Court on their own behalf. Courts are moving from paper-based to paper-less.

For a lot of matters, Courts are seen to be engaging in ICT as their means of communication. Such ICT tools and applications include notification and messages, using various mediums such as electronic mails, and for various purposes. It is within this line of thought that this research was initially carried out.

2. Problem Statement

Proper regulation is pertinent so as to ensure consistent compliance by the parties and to avoid sporadic implementation (Abdul Ghani, 2006). At this juncture, the cyber law provision in Malaysian in relation to electronic communication of the government services is provided in the Electronic

Government Activities Act 2007 (hereinafter EGAA). EGAA contains two main parts: the legal recognition of electronic messages and its communication with other parties. From the outset, it seems that the electronic communication by and for the government services is properly provided by EGAA.

However, the implementation of EGAA focusing particularly on the context of the judicial business is extremely scarce. There has been no too little literature examining the regulation of electronic communication involving the Malaysian Courts by EGAA. Based on this premise, it is therefore pertinent to carry out this research with the view to examine the application of the EGAA in regulating the electronic communication involving the Malaysian Courts.

3. Research Questions

This study aims to address the research question of: How does EGAA regulate the electronic communication involving the Malaysian courts?

4. Purpose of the Study

Bearing in mind the research question of the study, therefore, the study purpose and objective is: To examine the various legal aspects of electronic communication involving the Malaysian courts in light of the EGAA.

5. Research Methods

The methodology undertaken for the present research is qualitative, given that it enables the researcher to explore deeper into the phenomenon of online communication involving the Malaysian Courts, and not simply categorising the findings generated from the data of the study.

Essentially, the study involved two stages, collection and analysis of secondary data using the library-based approach, and the collection and analysis of primary data using the fieldwork approach. The purpose of dividing the research works into two stages is so that the data could be triangulated in the researcher's effort to enhance the validity and reliability of the findings.

5.1. Library-based research

First and fore more, the researcher engaged in library-based research, or sometimes known as armchair research to do paper analysis of the secondary data relating to the study. The data sources at this stage is the written rules, practice direction by the Courts and the bar committees, law textbooks, journal articles, government reports and other readily available data on this subject matter. The purpose of the library-based research is to examine what has been laid down under the law and by other past researchers on the issue of electronic government, ICT adoption in the Courts, electronic Courts and electronic justice.

5.2. Fieldwork research

The second stage of the research involved data collection by using the fieldwork approach. For the purpose of this study, four Courts the entire of Malaysia have been chosen to become case studies on this subject matter (Yin, 2013). The Courts are Penang, Kuala Lumpur, Kota Kinabalu and Kuching. Field

visits to these Courts enabled the researcher to grasp better understanding and knowledge on how the Courts run their judicial business by engaging in ICT tools and applications at the Courts. No doubt that the researcher focused primarily on the means of online communication by and to the Courts.

The research instrument adopted by the researcher at this stage is the semi-structured interviews, which was convenient for the purpose of the study as it allowed for flexibility on the part of the researcher as well as the interview participants. In total, 16 people were interviewed, comprising of judges, court administrative officers, ICT officers at the respective Courts as well as the solicitors. The different occupational roles of the interview participants were specified and chosen based on purposive sampling, particularly to facilitate the 'within-case' and 'cross-case' analysis of the data.

Later, the interview data generated from the fieldwork was digitally recorded, and transcribed for the purpose of loading it into the qualitative data analysis software ATLAS.ti for analysis (Mohamad, 2014). The coding structure of the data was developed by using both the deductive and inductive approaches, driven by the main themes of the research (Fereday and Muir-Cochrane, 2008).

6. Findings

There are two major findings which could be derived from the analysis, following the research aims and objectives. The findings which are discussed below primarily relate to: (1) the means of online messaged involving the Malaysian Courts, and (2) the application of EGAA in regulating the electronic messaged involving the Malaysian Courts.

6.1. Various means of online messages involving the Courts

First, the study found that there are various means of online messages created by the Courts, or sent to the Court officials. Such means of online messages include electronic mail by the Court officials as well as the website of the Courts (www.kehakimangov.my) and the Malaysian Bar (www.malaysianbar.org). Apart from that, solicitors and the Courts also make their presences to communicate useful information relating to the Courts by social media, interaction in the advocates' portal ad well as notifications via the CMS maintained by the Courts.

Another interesting finding is that the online messages are between the Court officials and various other parties, such as the Prison Department, Police Department, Bar Council, and State Bar Committee, solicitors as well as the general public. Essentially, the online messages are revolving around various matters inherent to the judicial business of the Courts, such as notifications, request for updates as well as reminders sent by the Courts to the solicitors by using online means.

6.2. Application of the EGAA in the electronic messages involving the Courts

It is significant to note that EGAA applies to communication activities by or on behalf of government services in Malaysia. Courts, being part of the government services, are therefore governed by EGAA. The following findings are derived from the legal provisions of EGAA as well as the interviews conducted for the case studies at the Courts.

6.2.1. Legal recognition of electronic messages

First and foremost, EGAA provides statutory legal recognition of electronic message by the Courts. It is expressly provided in Section 10 of EGAA that an electronic message “shall not be denied legal effect, validity or enforceability on the ground that it is electronic”. Therefore, if a law in Malaysia requires that a statement or document be made in writing by or for the government offices, then the general rule is that an electronic version of that statement or document be as effective as the physical version of it. It is rightful to claim as such because such online statement or document carries the same legal effect, validity and enforceability as a hardcopy statement or document.

6.2.2. Legal recognition of formation and validity of contract

Second, EGAA accords legal recognition to electronic message in terms of its formation and validity of contract, by virtue of Section 11 of EGAA. If the law requires that a specific condition be met for the purpose of formation and creation of contracts, then an electronic transaction by or on behalf of the government offices is equally effective, formed and valid. Within the context of the judicial business, numerous contractual transactions such as payment systems and document submission take place. This is the specific case of electronic filing of court documents as provided under Order 63A of the Rules of Court 2012 (RC 2012). In essence, when a solicitor registers a court document with the e-filing system maintained by the Courts, contractual transactions such as payment of the prescribed fees for court filing, and online filing of the documents to the Court registries, notification of successful filing and the issuance of electronic seal by the Court registries. All these transactions would all involve the online and virtual communication between the Courts and the solicitors who are engaging in the electronic filing of the documents. Of course, certain security measures are already in place, such as the digital signature mechanism observed by both the Courts and the registered solicitors (Hamin et al., 2015).

In line with the development of e-filing, the relevant offices of the courts and lawyers have issued their respective circulars informing the judicial members and lawyers of the implementation of the EFS in total. For example, the Registrar’s Office of the Courts of Sabah and Sarawak issued Circular No. (29) dlm.JUD/134/Jld.5 on 31st of July 2012 that beginning 15th of August 2012, the court would adopt the EFS entirely, and would no longer accept physical filing of documents at the Court’s Registry. Similarly, the Malaysian Bar and the Kuala Lumpur Bar also issued numerous circulars informing members of the EFS, such as the Malaysian Bar’s Circular No 096/2011 on Update to the E-Filing System and the Kuala Lumpur Bar’s various circulars issued in 2011 until 2013 (Kuala Lumpur Bar, 2011).

Another aspect of online communication observed by the Malaysian courts is the audio and video conference systems (AVS). Communication between the judges, solicitors and the litigating parties could be well possible with the adoption of AVS by the Courts. In essence, these parties afore-mentioned could well be at different parts of the world, so long they are connected to the same meeting room using ICT applications such as Voice over Internet Protocol (VoIP) systems, or other applications provided at the Courts complex (Mohamad, 2017). The relevant legal provision for AVS involving civil cases is Order 1 Rule 4 of RC 2012 that: “Attendance at the court includes the appearance by any person using electronic, mechanical or other means permitted by the Court”. It essentially means that a solicitor and litigant may appear in court using the AVS system. Meanwhile, for criminal cases, it is provided in Section 272B of

the CPC that evidence generated through live video or live television links are regarded as part of evidence. Essentially, this provision allows for the holding of criminal proceedings by using the AVS medium. In both situations, although the parties are not present at the same court location, the written rules recognise the parties' appearance as a proper court attendance provided it is allowed by the presiding judge.

6.2.3. Fulfillment of legal requirements by electronic means

The legal requirements of electronic means of communication are provided under Part IV of EGAA. Prescribed matters include writing of the documents, electronic signature, seals, original copies and certified copies are provided in EGAA. In essence, the legal position for means of communication particularly include the means of writing such documents, so as to meet the requirements of 'writing' under the Act. Apart from that, it is also significant to note that the signing the documents or transactions with electronic signatures should be captured within the meaning of the Digital Signature Act 1997.

However, it is worthy to be cautious that for every general rules, there are exceptions. Particularly for the case of judicial business, on the issue of electronic service and delivery, this provision does not apply to notices of default, demand and show cause, repossession, and the like prior or pursuant to legal proceedings at the Courts. On top of that, this provision also does NOT apply to originating summons, pleading or affidavit to be served pursuant to a legal proceeding. For the avoidance of doubt, documents specified in this Part IV of EGAA are explicitly excluded from the purview of fulfillment of legal requirements by electronic means. Specific laws should therefore govern these documents, particularly Rules of Court 2012 for civil matters, and Criminal procedure Code for Criminal matters.

7. Conclusion

The study aimed to examine the various legal aspects of electronic communication involving the Malaysian courts in light of the EGAA. Accordingly, the study found two major findings, first, there are various means of online messages involving the Courts, including those made by the Court to various other parties, or those received by the Courts, and involving various matters. Along the same line of discussion, the second finding of the study is that the electronic communication by the courts conforms to the legal provisions of EGAA 2007 – in terms of legal recognition as well as the communication of such electronic messages. Due to the fact that this study focuses solely on the examination of EGAA to the Malaysian courts, this study could be expanded further. Future research should be directed to examination of scattered written rules in Malaysia relating to electronic communication. For instance, the application of other written rules in contract law, company law, business law, in the context of the judicial business, or any other contexts.

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