

CIVIL PROCEDURE

THE DIGITAL EVOLUTION OF PAPERLESS DOCUMENTS IN COURT - THE AMENDMENT TO COURTS OF JUDICATURE ACT 1964

Dated 13th October 2022

INTRODUCTION

On 25 July 2022, the Malaysian Parliament passed the Courts of Judicature (Amendment) Bill 2022 ('**the Bill**'), which was subsequently granted the Royal Assent by the Yang di-Pertuan Agong on 31 August 2022. On 5 September 2022, the Bill was then gazetted into law as the Courts of Judicature (Amendment) Act 2022 and came into operation on 1 October 2022.

The amendments to the Courts of Judicature Act 1964 ("**the Act**"), among others, is to sections 28 and 68. A party can no longer appeal to the Court of Appeal against decisions of subordinate courts in certain interlocutory applications namely summary judgement, striking out application and the setting aside of a judgement in default. However, there is an interesting amendment to the Act, which is the new insertion of section 52A relating to notice or documents to be sent by electronic means.

This article will only discuss the amendment of the new section 52A of the Act.

THE AMENDMENT

The Act was amended by, *inter alia*, adding Section 52A which provides as follows:

"Section 52A: Notice or document etc., sent by electronic means

Any notices or documents which are sent by **electronic means** referred to in **sections 51 and 52** shall be deemed to have been served and delivered upon sending the notices or documents to the appellant's or his advocate's electronic address."

Section 52A only makes reference to Section 51 and Section 52 of the Act which only concerns notices and documents for appeals. Section 51 provides that every notice of appeal shall include the postal address or electronic address that may be referred to upon sending any notices or documents related to the appeal to the appellant or the appellant's solicitors.

Further to the above, Section 52 states that upon the notice of appeal being filed within the Registrar of the Court, and pursuant to the relevant Judge writing his records of proceedings, the Registrar shall notify that the record of proceedings are available to be purchased or send

a copy of the record of proceedings to the appellant or the appellant's solicitor at the postal address or electronic address as specified under Section 51.

OBJECTIVE

Section 52A aims to facilitate the transition to paperless submission of appeal documents and records in appeal proceedings, which is as below:

- (a) For the appellant to submit records and documents related to appeal proceedings online;
- (b) In the case of criminal proceedings, for the Court to deliver a signed copy of the records of proceedings by sending the copy to the electronic address of the appellant or the appellant's solicitor; and
- (c) In the case of civil proceedings, for the Court to deliver a notice to the appellant or the appellant's solicitor to state that a copy of the record of proceedings is available to be purchased

It must be noted that by virtue of Section 52A, the submission of appeal documents by electronic means only acts as an **alternative** to the existing practice and does not extinguish the right of submitting the appeal documents by hand.

IS THE DEFINITION OF “ELECTRONIC MEANS” CONCLUSIVE?

Previously, the traditional means of serving notices or documents are by way of personal service, AR Registered Post, Fax or any other method agreed between parties or other methods as Court may direct. However, with the new Section 52A of the Act, the Court is now able to effect service of notices or documents by way of electronic means.

As to the definition of “electronic means”, it was not defined in the recent amendment. However, we have not seen any legislation and case laws at present to define comprehensively the platforms legally allowed to effect service of Court documents by way of electronic means. As such, the definition of “electronic means” and what it encompasses remains unclear.

Throughout the years, Parliament is slowly beginning to depart from the old fashioned involvement of physical papers and is becoming mindful of the evolution of digital electronics. This has been reflected in the Electronic Commerce Act 2006 (“**ECA**”) which states that any information that is wholly or partly in electronic form shall not be denied legal effect, validity or enforceability (Section 6 of ECA). Further, where any law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electronic message that is accessible and intelligible so as to be usable for subsequent reference (Section 8 of ECA). We have also seen case laws stating that Short Message Service (SMS) has all the attributes of section 8 of the ECA as it is accessible, intelligible and extractable for subsequent reference, therefore such an electronic message is as good as in writing (**Yam Kong Seng & Anor v Yee Weng Kai [2014] MLJU 476**).

The Rules of Court (Amendment) 2020, which came to force on 15 December 2020, introduced service of Court documents by means of electronic communication which shall be in accordance with any practice direction issued for that purpose. As of the date of writing, no such practice direction has been issued yet. Be that as it may, we saw a great attempt by

case laws to include email and Whatsapp messenger for service of Court Documents. This is seen in the case of **30 Maple Sdn Bhd v Noor Farah Kamila Binti Che Ibrahim (Kuala Lumpur High Court Suit No: WA-22IP-50-12/2017)**, where the Intellectual Property High Court granted an application to serve a Writ and Statement of Claim via email and WhatsApp messenger after it could not locate the Defendant at her last known address.

Whether or not the term “electronic means” referred to in Section 52A may include services via instant messaging applications such as WhatsApp or Telegram or perhaps personal messaging on social media platforms such as Facebook, Instagram, Snapchat, Twitter or Tik Tok remains to be seen. It may eventually be up to the Courts to determine in future cases as to the actual scope of the term “electronic means” as electronic means is ever evolving.

COMMENTS

Although the amendment to the Act by inserting Section 52A only concerns appeal documents and records in appeal proceedings, the inclusion of “electronic means” still raises some questions as how exactly court documents can be served on parties largely due to the fast evolution and development of applications online which that would allow service to be effected. The restrictions imposed by the pandemic have accelerated the digital evolution considerably, and it is certainly worth watching case laws to see how the issue evolves, given the importance of this new practice and its consequences.

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