

ARTICLE:

# E-MAIL EVIDENCE AND THE HEARSAY RULE – COMMENTARY ON A RECENT MALAYSIAN CASE

By **Gita Radhakrishna**

## Introduction

In Malaysia, the rule against hearsay is contained in section 60 of the Evidence Act 1950 (EA 1950). As is well known amongst lawyers practicing in a common law jurisdiction, hearsay is basically evidence that is not direct. Such evidence is normally inadmissible. As such the hearsay rule operates to prohibit a witness from reporting a statement made by another person where the truth of any fact asserted in that statement is incapable of being tested in court. The rationale was that if the original was not produced, there was a significant chance of error or fraud in relying on a copy. However, the rule against hearsay has evolved to give credence to relevancy of facts to be balanced by the weight to be attached to it by the trier of fact.<sup>1</sup> The EA 1950 recognises certain exceptions, which are contained in sections 32 and 73A in respect of civil proceedings. Section 32 provides for the admissibility of statements, written or verbal, made by a person who had personal knowledge of relevant facts, who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable.<sup>2</sup> Section 73A EA1950 permits the admissibility of a statement even where its maker did not have personal knowledge of its contents, although the supplier of such information may have had personal knowledge of the facts.<sup>3</sup> These include business records, public records (e.g., birth, death, or marriage certificates), official records, private records and *res gestae* statements. Recently, the hearsay rule came to be tested in the context of e-mail evidence in the Malaysian case of *Avnet Azure Sdn. Bhd v Eact Technologies Sdn Bhd and*

*Sapura Research Sdn. Bhd.*<sup>4</sup>

## Facts

A claim for the sum of \$109,614.40 arose from a tripartite ‘goods sold and delivered’ contract for software licences. Avnet purchased certain ‘Telelogic’ software licences from IBM Singapore, at the order of Eact Technologies Sdn. Bhd. (ETSB), allegedly based on a requisition note from Sapura Research Sdn. Bhd. (Sapura) the third party. The software licence was delivered directly by IBM Singapore to the end user Sapura by way of a server-generated e-mail message with an attachment described as a ‘Proof of Entitlement’ for the licence. A key was supplied in the Proof of Entitlement, which had to be activated by logging into the internet to obtain the licence. There was no physical delivery of any product. From the internet, the customer would obtain the licence key to download and install the Telelogic software in its computer. Without the information contained in the Proof of Entitlement, the customer would not be able to complete the log-in process to successfully download the software.

As Avnet had paid IBM Singapore, it sought payment from ETSB, who in turn sought payment from Sapura. The crux of the problem was that Sapura denied having placed a firm purchase order for the IBM licence from ETSB, and further denied receipt of the Proof of Entitlement from IBM Singapore. On the contractual issue, the court found privity of contract between Avnet and ETSB and as between ETSB and Sapura. However, ETSB would only be liable to pay Avnet if delivery of the Proof of Entitlement to Sapura had been made. That Sapura had chosen not to activate the key, or the software licences had since expired, was not material to liability. Avnet based its claim

<sup>1</sup> See sections 5-16 of the Malaysian Evidence Act 1950.

<sup>2</sup> *Borneo Co (M) Sdn Bhd v Penang Port Commission* [1975] 2MLJ 204 FC.

<sup>3</sup> *Augustine Paul, Evidence Practice and Procedure* (4th edn, LexisNexis, 2010) p 681.

<sup>4</sup> *KL HC Com. Div. D-22NCC439-2011*, available at [kl.kehakiman.gov.my](http://kl.kehakiman.gov.my).

on the server generated e-mail message with the Proof of Entitlement as attachment sent by IBM Singapore to Avnet on 31 March 2009, marked exhibit 'P4'. To admit this 'computer' evidence, Avnet tendered a certificate under section 90A(2) EA 1950 to establish that once this computer evidence was admitted upon production of the certificate, the truth of the contents must be held proven. However the court inquired into the statutory wording of section 90A(2) EA 1950, which requires a document to be 'produced by a computer in the course of its ordinary use'.

The court was referred to section 88A of the Indian Evidence Act 1872 which carries a presumption as to electronic messages:

88A. Presumption as to electronic messages.- The Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person by whom such message was sent.

#### Explanation

For the purposes of this section, the expressions 'addressee' and 'originator' shall have the same meanings respectively assigned to them in clauses (b) and (za) of sub-section (1) of section 2 of the Information Technology Act, 2000.

The court found that the provision related to a presumption as to the contents of the message and the fact of sending, but not a presumption as to its receipt by the addressee.

The court was also referred to section 35 of the Evidence Act of Singapore<sup>5</sup>, which previously provided that:

s. 35 (1) computer output is admissible in court as primary evidence provided that it is:-

(a) expressly agreed between the parties to the proceedings at any time that neither its authenticity nor the accuracy of its contents are disputed;

(b) produced in an approved process; or

(c) shown by the party tendering such output that —

(i) there is no reasonable ground for believing that the output is inaccurate because of improper use of the computer and that no reason exists to doubt or suspect the truth or reliability of the output; and

(ii) there is reasonable ground to believe that at all material times the computer was operating properly, or if not, that in any respect in which it was not operating properly or out of operation, the accuracy of the output was not affected by such circumstances.

However, in respect to the Singapore provisions, the court was of the opinion that the specific statutory wording was dissimilar – 'computer output', was not upon the same matter or subject with the Malaysian document 'produced' by a computer.

The court instead expressed its agreement with the view taken in *Bank Pembangunan Malaysia Bhd. v Owners of the Ship or Vessel 'Sasacom'*,<sup>6</sup> that 'reliance on an e-mail without the maker being called is highly undesirable and is hearsay'. Thus, if the purpose is to establish that Sapura received the Proof of Entitlement, a section 90A(2) certificate cannot be read as overcoming such an objection. Exhibits P3 and P4 could only prove receipt by Avenet of these electronic documents. It cannot be extended to prove receipt of the Proof of Entitlement by Sapura. The weight to be attached to these two documents has therefore to be regarded as insufficient for this evidential purpose. The court also accepted the reference by ETSB's counsel to the American case of *Armstrong v Executive Office of the President*,<sup>7</sup> to the effect that generally the production of a physical copy of an electronic record is insufficient since it omits fundamental pieces of information which will be an integral part of the original electronic record. Thus the court found that, in the case of e-mails, it was important to call the maker unless the case falls within the purview of section 90A of the Evidence Act. The court also referred to the commentary in Mason:<sup>8</sup>

'A digital document may be authenticated by direct or circumstantial evidence, and circumstantial evidence includes a range of factors, including, but not limited

5 Sections 35 and 36 of the Singapore Evidence Act were repealed by section 7 of the Evidence (Amendment) Act 202 (No 4 of 2012).

6 [2010]1 LNS 1423; [2011] 10 CLJ 51.

7 303 US App Dc 107, 1 F 3d 1274, 877 F. Supp. 690, 705-06 (D.D.C. 1995). Further reading: David Bearman, *Implications of Armstrong v The Executive of the President for the Archival Management of Electronic Records*

(Fall 1993) 56 *The American Archivist* Volume 56, No 4, 674.

8 Stephen Mason, gen ed, *Electronic Evidence* (2nd edn, LexisNexis Butterworths, 2010), 4.15.

to, appearance and the contents of the document, the subject matter and any distinctive features that indicate nexus. Where the content demonstrates knowledge of the circumstances of the facts such that only very few people in the world will be aware of them, the inference as to authenticity must be overwhelming in most cases’.

Applying the same principles, the court held that exhibit ID12, which included a copy of a screen shot of a system status at IBM, Singapore sent by e-mail by IBM Malaysia to Avnet, produced in an attempt to prove that the automatically generated e-mail and Proof of Entitlement were received by Sapura would be hearsay and inadmissible unless the maker was called. The data in the e-mail, such as ‘message was mailed to: wanzil@Sapura.com.mv’ user-type U’ could only be determined by calling the makers of the e-mail and the screenshot from IBM Singapore. As such, the court found that on the evidence, Avnet had failed to prove delivery of the licence to either Sapura Research or ETSB, and that Avnet should seek recovery from IBM Singapore.

The case raises several interesting evidentiary issues which are discussed below. The discussion is, however, limited to the specific information available in the reported judgment.

#### **‘Document was produced by a computer in the course of its ordinary use’**

Section 90A(2) EA 1950 provides a rebuttable presumption of fact that a document was produced by a computer ‘in the course of its ordinary use’, as follows:

‘For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.’

The section does not define ‘produce’ or ‘in the course of its ordinary use’. However, on the effect of the certificate in section 90A, the Court of Appeal in *Gnanasegaran Pararajasingam v PP*,<sup>9</sup> went to great lengths to examine and clarify the provisions. Shaik Daud Ismail JCA clarified

that under section 90A(1) there were two ways of proving ‘in the course of its ordinary use’ in order to admit computer generated documents into evidence:

(i) it *may* be proved by the production of the certificate as required by subsection (2). – This is permissive and not mandatory. Once tendered subsection (3) states that it shall be sufficient and be prima facie proof of all matters stated in it. This can also be seen in subsection (4) which begins with the words ‘Where’ a certificate is given under sub-section (2) ...

or

(ii) by calling the maker of the document which is the usual method to admit and prove any form of documentary evidence. Therefore a certificate is not required to be produced in every case.

Once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to produce a certificate under sub-section (2). As for the certificate, it shall be sufficient under section 90A(3) for a matter to be stated to the best of the knowledge and belief of the person stating it. It shall then be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate. The court further clarified that the effect of section 90A(1) was that it was no longer necessary to call the actual teller or bank clerk who keyed in the data to testify, provided he did so in the ‘course of the ordinary use of the computer’. This was a relaxation of the direct evidence rule in section 60 EA 1950, following the provisions in section 32(b) EA 1950 in the case of documents made in the ordinary course of business. A situation could thus arise under section 90A(1) where the particular person who keyed in the information may not be individually identifiable, but the document would nevertheless be admissible. This was confirmed by the Federal Court in *PP v Hanafi Mat Hassan* [2003] 6 CLJ 459.

Therefore it is submitted that the reverse should also apply. Section 4(2) EA 1950 provides the necessary clarification:

‘Whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved’.

<sup>9</sup> [1997] 4 CLJ 6 at 12.

Here ‘shall’ indicates that the court has no discretion in the operation of the presumption which can only be rebutted by evidence to the contrary. Once a section 90A(2) certificate is submitted, it is no longer necessary to call the maker to prove that the ‘document was produced by a computer in the course of its ordinary use’, and under subsection (3) the certificate ‘shall’ be proof of the authenticity and reliability of its contents. It therefore operates as a statutory exception to the hearsay rule.

If the contents of the certificate were to be challenged, the evidential burden of disproving it would be on the party challenging its credibility. In this respect, section 4(2) EA 1950 states that ‘whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved’. In this respect, the section 90A(2) certificate was successfully challenged in *Navi & Map Sdn. Bhd. v Twincie Sdn. Bhd. & Ors.*<sup>10</sup> Here, the plaintiff produced a certificate pursuant to s 90A EA 1950 for admission of the print-out of a communication by way of a Skype chat, duly signed by a digital evidence specialist from the Digital Forensic Department in Cyber Security. However, the certificate under s 90A(2) certified that the specialist was not the officer responsible for the management and analysis of the computer that produced the Skype chat. Furthermore, the certificate did not certify that the document was produced in the course of its ordinary use or that it was in good working order, and in fact portions of the Skype chat were missing. Thus the print-out of the Skype chat was ruled inadmissible on the basis of the clear statement in the certificate itself, unlike in *Avnet*.

### Difference in statutory wordings ‘computer output’ and document ‘produced’

Plaintiff’s counsel referred to section 35 of the Singapore Evidence Act to show ‘computer output’ to be admissible in court as primary evidence provided that it was produced by an ‘approved process’; there was no reasonable grounds for suspecting the inaccuracy of the ‘output’ or its truth and reliability; and that there were reasonable grounds for believing that the computer was operating properly. However the court could not reconcile the statutory wordings ‘computer output’ in the Singapore provision with the Malaysian provision of document ‘produced’ by a computer.

The author respectfully disagrees, because ‘computer output’ in the Singapore Evidence Act was previously

defined as:

‘a statement or representation (whether in audio, visual, graphical, multi-media, printed, pictorial, written or any other form) –

(a) produced by a computer, or

(b) accurately translated from a statement or representation so produced’.

The Malaysian Evidence Act does not define ‘produced’. However, ‘document’ is defined in section 3 EA 1950 in the broadest possible terms to include letters, figures, marks, symbols, signals, signs, or other forms of expression, description, or representation in various media such as visual, sound, electronic magnetic, mechanical, and by means of a recording, or transmission, over a distance of any matter by any, or any combination, of these means. Under the illustration to the word ‘document’, it is given that: ‘A matter recorded, stored, processed, retrieved or produced by a computer is a document’.

‘Computer’ was defined 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.<sup>11</sup>

In view of the above, it is respectfully submitted that the statutory wordings are upon the same matter or subject. The terms ‘computer output’ would have the same meaning as a ‘document produced by a computer’. The provisions in section 35 of the Singapore Evidence Act would in fact reflect the presumption in section 90A(3) as to the accuracy and reliability of the document and section 90A(4) as to the proper working of the computer. By that token it should be taken to establish that the computer was satisfactorily performing its functions.

However it should be noted that sections 35 and 36 have now been repealed and replaced with section 116A, which introduces three presumptions as to accuracy, reliability and authenticity, set out in full below for completeness:

Presumptions in relation to electronic records

116A. — (1) Unless evidence sufficient to raise doubt

<sup>10</sup> [2011] 7 CLJ 764.

<sup>11</sup> This definition has since been amended by the Evidence (Amendment) (No. 2) Act 2012 bringing it in line with the definition in the Computer Crimes Act 1997.

about the presumption is adduced, where a device or process is one that, or is of a kind that, if properly used, ordinarily produces or accurately communicates an electronic record, the court shall presume that in producing or communicating that electronic record on the occasion in question, the device or process produced or accurately communicated the electronic record.

#### *Illustration*

A seeks to adduce evidence in the form of an electronic record or document produced by an electronic device or process. A proves that the electronic device or process in question is one that, or is of a kind that, if properly used, ordinarily produces that electronic record or document. This is a relevant fact for the court to presume that in producing the electronic record or document on the occasion in question, the electronic device or process produced the electronic record or document which A seeks to adduce.

(2) Unless evidence to the contrary is adduced, the court shall presume that any electronic record generated, recorded or stored is authentic if it is established that the electronic record was generated, recorded or stored in the usual and ordinary course of business by a person who was not a party to the proceedings on the occasion in question and who did not generate, record or store it under the control of the party seeking to introduce the electronic record.

#### *Illustration*

A seeks to adduce evidence against B in the form of an electronic record. The fact that the electronic record was generated, recorded or stored in the usual and ordinary course of business by C, a neutral third party, is a relevant fact for the court to presume that the electronic record is authentic.

(3) Unless evidence to the contrary is adduced, where an electronic record was generated, recorded or stored by a party who is adverse in interest to the party seeking to adduce the evidence, the court shall presume that the electronic record is authentic in relation to the authentication issues arising from the generation, recording or storage of that electronic record.

#### *Illustration*

A seeks to adduce evidence against B in the form of an electronic record. The fact that the electronic record was generated, recorded or stored by B, who opposes the relevance of the evidence, is a relevant fact for the court to presume that the electronic record is authentic.

Under section 116A(1), there is a presumption that the device accurately communicated the record. This is an important presumption and is a logical provision based on the ‘proper working’ of the device.

#### **Proof of receipt of e-mail and attachment**

Plaintiff’s counsel also referred to section 88A of the Indian Evidence Act for assistance. However, the section does not carry a presumption that the message was successfully transmitted and received by the addressee. However the new section 116A(1) of the Singapore Evidence Act carries a presumption that the electronic device accurately communicated the record. In the absence of a similar presumption as to electronic communication in the Malaysian EA 1950, it is possible to refer to an analogous presumption in section 16 EA 1950 in respect of the proper dispatch and receipt of a postal communication, namely section 16 EA 1950.

#### **The existence of a course of business when relevant**

When there is a question whether a particular act was done, the existence of ‘any course of business’, according to which it naturally would have been done, is a relevant fact. The illustration below is provided in the statute under section 16 EA 1950:

(a) The question is whether a particular letter was dispatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place, are relevant.

(b) The question is whether a particular letter reached A.

For instance, the Privy Council in *Harihar Banerji v Ramsashi Roy*<sup>12</sup> held that if a letter, properly directed, was put into the post office, it is presumed that the letter reached its proper destination according to the regular

<sup>12</sup> [1918]AIR 102 at 112.

course of business of the post office and was received by the person to whom it was addressed. The Indian court in *Jugal Kishore v Bombay Revenue Tribunal* followed this.<sup>13</sup> Similarly, in *Amanah Merchant Bank Bhd. v Lim Tow Choon*<sup>14</sup> it was held that in order to prove the service of a letter, it is sufficient for a party to show that it was correctly addressed, prepaid, delivered to the post office and acknowledged for service by the postal authority. Furthermore, section 12 of the Interpretation Act 1948 provides for a presumption that when the law provides or authorises a document to be served by post then until the contrary is proved, service shall be presumed to have been effected by the proper addressing, prepaying and posting by registered post. This presumption could be extended by analogy to e-mails sent by computers. This may be read together with section 114 EA 1950, which gives the court discretion to presume certain facts:

‘The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case’.

In *Avnet*, the plaintiffs led oral evidence that the Proof of Entitlement was sent by e-mail directly to Sapura, but Sapura did not produce the document. The real issue in *Avnet* was that exhibit P4 relied on by the plaintiff was an e-mail message with the Proof of Entitlement attached, and sent by IBM Singapore to Avnet – and not to Sapura – although in evidence, it was stated that IBM Singapore sent the Proof of Entitlement directly to Sapura. As such, exhibit P4 was correctly rejected on this basis. In support of exhibit P4, the plaintiff attempted to tender ID12, which was a screen shot of a ‘system status’ from IBM Singapore stating that ‘message was mailed to: wanzil@Sapura.com.mv’ user-type U’. This document ID13 was sent by e-mail by IBM Malaysia to Avnet at their request. The e-mail also contained an explanation that because the electronic Proof of Entitlement to Sapura was ‘auto generated’, it was not stored. However the system showed ‘green’, indicating that it had been successfully sent to the addressee, ‘wanzil@Sapura.com.mv’ user-type U’. This document was rejected on two grounds, first, that it came from IBM Malaysia although it originated from IBM Singapore, and secondly it was hearsay because the makers were not called. In this context, the decision

of the court in the case of *Ng Yiu Kwok And Ors V Public Prosecutor*,<sup>15</sup> is of relevance:

‘In a situation like this where the documents were prepared in the course of business and the makers were outside the jurisdiction who refused or were unwilling to come to this country, all the court should need to satisfy the requirement of section 32(b) EA 1950 was that there was some evidence to show that the makers’ attendance could not be procured without delay or expense which the court considered unreasonable under the circumstances.’

It is further suggested that if the plaintiff had tendered sufficient oral evidence of a ‘course of business’ between Avnet, IBM Malaysia and IBM Singapore in relation to the contract with ETSB and Sapura, the objection to hearsay would have been overcome under the ‘relevancy of the facts’ as set out in section 16 EA 1950. The court could then have exercised its inherent discretion under section 114 illustration (f) EA 1950, that ‘the common sense of business has been followed’, to admit the evidence of ID12 and 13 as corroborating exhibit P4. Once a presumption is activated, the evidential burden of proof is shifted to the party denying the existence of the facts.<sup>16</sup> The court must consider whether the evidence adduced is sufficient to rebut the presumption on a balance of probabilities.<sup>17</sup> As the facts stand, the judgment does not refer to any rebutting evidence from Sapura or ETSB. In the absence of rebutting evidence, a bare denial would not be sufficient, although how much evidence is to be adduced would depend on the nature of the requirement.<sup>18</sup>

### E-mail evidence and hearsay

The court took the view as expressed in *Bank Pembangunan Malaysia Bhd. v Owners of the Ship or Vessel ‘Sasacom’*,<sup>19</sup> that ‘reliance on an e-mail without the maker being called is highly undesirable and is hearsay’. With respect, the facts of the case are different, and bear distinguishing. Here, the plaintiff Bank Pembangunan Malaysia Berhad (BPMB), took over the rights and interests of Bank Industri & Teknologi Malaysia Berhad (BITKM) pursuant to a vesting order. One of such rights was the liability of the defendant, Sasacom Sdn Bhd (Sasacom), an owner and builder of ships. BITKM had granted a RM9m term loan to Sasacom secured amongst

13 [1959] AIR Bom 81 at 85.

14 [1994] 1 MLJ 413

15 [1989] 3 MLJ 166 at 169

16 *Nagappan A/L Kuppusamy v Public*

*Prosecutor* [1988] 2 MLJ 53.

17 *R v Carr Briant* [1943] KB 607; *Public*

*Prosecutor v Yuvaraj* [1969] 2 MLJ 89.

18 *Nagappan A/L Kuppusamy v Public*

*Prosecutor* [1988] 2 MLJ 53.

19 [2010] 1 LNS 1423; [2011] 10 CLJ 51.

other things by a first preferred mortgage over one of the latter's vessels 'Sasacom I' (the vessel). On Sasacom's failure to remedy its default in repayments under the loan, the bank filed an admiralty action to seize and sell the vessel. The vessel was arrested, but sank before it could be sold. While the plaintiff claimed the balance of payment due, the defendant disputed the accounts and counter claimed an amount as overpayment. As proof of the overpayment, the defendant exhibited an e-mail dated 26 November 2008 from one Abdullah Bahjat Hasan, who bore the designation of Director-General of Heavy Engineering Equipment Co, Ministry of Industry & Minerals, Baghdad/Iraq and addressed to one Mr Kiu Chiong Ming, in which he said they have a letter from Jordan National Bank dated 29 November 2002 which shows that the defendant had received '2,172,460\$'. In this case, there were multiple layers of hearsay which did not qualify under any of the recognised exceptions to the rule. The contents of the e-mail were also not authenticated either directly, or through circumstantial evidence establishing a nexus, as indicated in Mason (previously referred to). Further, at no time prior to the action had the accounts been disputed. It was in the light of the totality of the evidence that the e-mail was held to be inadmissible for hearsay.

Next, counsel for ETSB referred to the American case of *Armstrong v Executive Office of the President* contending that the production of a physical copy of an electronic record is insufficient, since it might omit fundamental pieces of information which will be an integral part of the original electronic record. While it is acknowledged that a print-out does not show metadata that may be contained in the e-mail, it is a fact that except for audio and video recordings, other forms of 'computer' documents are not tendered in their native format in Malaysian courts. This is the reason for the introduction of the statutory presumption in section 90A(2). A party wishing to challenge its authenticity will have to bear the evidential burden of rebutting it. Mere conjecture and speculation would not suffice to discharge the burden. *Armstrong* sought to prohibit the erasing of electronic records in the last few days of the Reagan Administration in 1989. The District Circuit Court ruled that electronic mail and word processing files must be managed as government records, and it sent the case back to the District Court to determine whether the government's removal of the records at the end of the Bush Administration warranted

sanctions for contempt of court. Shortly after the court's decision, the National Archives adopted new regulations on the preservation of electronic records. This case was commenced prior to the transition to e-government when there was an absence of awareness and rules on recording, and archiving. So the factual matrix in *Armstrong* was entirely different.

In *United States v Safavian*,<sup>20</sup> the court admitted e-mails based on the e-mail addresses contained in the 'to' and 'from' fields, and because other identifiable matters such as the work involved, signatures, and other personal and professional references pointed to their authenticity. The court permitted other e-mails to be authenticated under the Federal Rules of Evidence (FRE) 901(b)(3) by allowing the comparison of e-mail addresses and formats to permit related e-mails into evidence.

The basic issue regarding the admissibility of electronically stored information (ESI) which includes e-mails, came to be tested in *Lorraine v Markel American Ins. Co.*<sup>21</sup> The plaintiff sought to recover under his insurance policy, the damage to his boat that had been struck by lightning. The defendants paid out the initial claim. However, there was a second claim when it was discovered that there was damage to the hull of the boat. The issue of whether the damage to the hull was caused by lightning was referred for arbitration. An application was filed for summary judgment, and various e-mails were relied upon. Grimm J scrutinised and analysed the 'evidentiary hurdles' before ESI could be admitted into evidence. The relevant provisions of the Federal Rules of Evidence (FRE) for consideration were Rules 104, 401, 403, 901 and 902, 801 and 1001-1008. The first rule for admissibility is that evidence should be relevant.<sup>22</sup> Then he went on to consider the foundation for authenticity,<sup>23</sup> and the available methods for authentication ranging from oral testimony of a witness, comparison of previous specimens, circumstantial evidence, public records, as well evidence from an accurate process or system.<sup>24</sup> The FRE also provides for self authentication through official publication, inscriptions, and regularly conducted business.<sup>25</sup> Once evidence is relevant and authentic it must also overcome any hearsay objections.<sup>26</sup>

Thus to ensure that e-mail evidence will be admitted into evidence, a proper foundation for its authenticity must be laid. This could be done by either direct or circumstantial evidence, which may be gained from the content of the e-mail itself. 'Computer' data that is offered

<sup>20</sup> 2006 U.S. Dist. LEXIS 32284 (D.D.C. May 23, 2006).

<sup>21</sup> 241 F.R.D. 534 (D.Md. 2007).

<sup>22</sup> Rule 401.

<sup>23</sup> Rule 104.

<sup>24</sup> Rule 901.

<sup>25</sup> Rule 902.

<sup>26</sup> Rule 801 and the exceptions to hearsay as contained in Rules 803, 804 and 807.

for the truth of the matter asserted would generally fail as hearsay and thus be inadmissible under evidentiary rules. To admit the e-mails as direct evidence, a party would have to satisfy any of the statutory exceptions to the hearsay rule.

### Conclusion

This case reflects the continuing challenges faced in admitting and authenticating documents produced by a 'computer'. There is an urgent need for all parties to the litigation process to be educated on the nature of 'computer' evidence and the necessary foundation for its admission and authentication. Many of these issues could well be addressed during the pretrial case management stage. Under the Rules of Court 2012 Order 24 rule 3 it would be open to the plaintiff to apply for discovery and:

'the court may at any time order any party to a cause or matter (whether begun by writ or ...) to give discovery by making and serving on any other party a list of documents which are or have been in his possession, custody or power ...'

Further, under Order 24 rule 4 a party may be ordered to discover:

- (a) Documents on which the party relies or will rely; and
- (b) The documents which could –
  - (i) Adversely affect his own case

(ii) Adversely affect another party's case; or

(iii) Support another party's case

It would therefore have been open to the plaintiff to seek discovery of the e-mails in Sapura's server log pertaining to the Proof of Entitlement. Should Sapura have failed to obey such an order, then it would have been open to the court under Order 24 rule 16 to make such order as it thinks just, including an order to dismiss the claim or that the defense be struck out and judgment be entered accordingly. Electronic evidence is upon us whether we like it or not. It is recommended that with the increasing volume of 'computer' evidence, there is a clear need for lawyers to understand the technical rules relating to electronic evidence and hearsay, and, incidentally, for lawyers to more fully understand their responsibilities to educate their clients in the preservation of ESI, which ultimately leads the need to collect, preserve and disclose evidence in electronic format.

© Gita Radhakrishna, 2013

**Gita Radhakrishna**, is a lecturer at the Faculty of Business & Law, Multimedia University (Melaka campus), Malaysia. She is currently undertaking her PhD research on 'The admissibility of electronic evidence in the Malaysian courts'.

[gita@mmu.edu.my](mailto:gita@mmu.edu.my)