Legal Opinion

The Rule of Evidence/The Law of Evidence

In Cambodia, there is no law on the rule of evidence or any codification on the rule of evidence. There are some separately laws stated on the rule of evidence. Based on article 158 of constitution, we will use all the old laws in the absence of new laws provided they are not contrary to the constitution and in conformity of the national interest.

What is evidence?

Any matter of fact that a party to a lawsuit offers to prove or disprove an issue in the case. Evidence can be classified as:

- Testimonial Evidence: consists of oral testimony of witnesses made under oath in open court.
- Documentary Evidence: consists of such evidence as written contracts, business records, correspondence, wills, and deeds.
- Real Evidence. E.g. actual objects that have a bearing on a case such as clothing, weapon at the scene of the crime.

Evidence can be direct evidence or indirect evidence.

- Direct Evidence. For example: when the testimony directly relates to the fact in issue. a witness testifies as to something he or she observed such as "I saw that man shoot the gun".
- Indirect/circumstance Evidence. E.g. when the testimony relates to some other fact rather than the fact in issue (surrounding circumstances from which the principal fact may be inferred) such as "I heard a sound of a gun being fired and then saw that man run past me"

The admissibility of the evidences

The conditions to determine whether to be allowed evidence to be observed by the judge making factual conclusions in a trail (subject to the discretionary power of the judge).

There are two systems of the admissibility of the evidence.
- Admissibility of evidence determined by law;
- Free admissibility of evidence.

Cambodia adopts both of the two above for the admissibility of evidence.

*** Note:** Evidence must be obtained in good faith and respect all the good value of human.

For admissibility of the evidence, it must:

- Exist and material (not spiritual).
  The evidence exists for itself without the creation of the human; it is only collected by person. Evidence can be intangible but not spiritual.

For example, someone died because of witch, something intangible just like witch, spell, magic power, superstition cannot be the evidence in the court of law.

- Relevance or probative value.

  Evidence must be relevant to the issue at hand. Relevancy must be shown at two levels before evidence is admitted: the evidence must be LOGICALLY relevant and LEGALLY relevant.

  Evidence is logically relevant if it relates to the issues being argued in the trial and tends to prove the contentions of the party offering the evidence.

  Probative value is a tendency to make the existence of any material fact more or less probable.

  For instance, evidence that a murder defendant ate spaghetti on the day of the murder would normally be irrelevant because people who eat spaghetti are not more or less likely to commit murder compared with other people. However, if spaghetti sauce was found at the murder scene, the fact that the defendant ate spaghetti that day would have probative value and would thus be relevant evidence.

- Legal & authentication.

  The evidence must be collected, searched, maintained in accordance with procedure of the existing law.

  In criminal case, the evidence must be obtained as stated in the law and legal procedure. For example, searching for the evidence by the prosecutor not in conformity with the hour stated by law, thus evidence is not acceptable (Article 20 of UNTAC law). However, in civil case, we don't care where the evidence comes from, just only be authenticated or reliability of the evidence. For instance, the defendant went to the office of the plaintiff to steal the secret document to prove the case. In criminal it is not admissible, however, in civil case, it is acceptable.

  Authentication: some evidentiary items are self-authenticating and need no additional authentication before being admitted. Documents containing the official seal of the government unit and certified copies of public records such as birth certificates are self-authenticating.

Evidence must be logical and reflect to the fact. All evidences must be in Khmer language.

Anyone who benefits from the suit must raise the evidence. The burden of proof rests on the plaintiff and the defendant must prove the contrary evidence.

Article 38 of constitution: Any case of doubt, it shall be resolved in favor of the accused.

Method of evidence

Evidence can be:

- Written documents;
- Witness testimony;

- Presumption;
- Confession;
- Oath/swear;
- Assessment or examination by expert.

- **Written documents**

- Civil code 1920 article from 939 – 989.
- Decree-law no. 38 of 1988 – contract that has value more than 5,000 Riels must be made in writing.
- Writing is the validity of the contract, not the admissibility of the evidence. The land law 2001 suggests that the contract must be in form of authentication formula.

- The other law suggest in the form of general writing. Thus, meaning that no all the documents are made in authentication formula.

There are two documents:

- Authenticated documents;
- Private documents;
- Other documents such as business records, correspondence note, letter, digital documents, etc.

- **Authenticated documents**
  (Article 944-968 of civil code 1920)

Authenticated document is a kind of documents that is made by public authority in front of parties who chop the seal and sign. This includes certified documents and notary documents. They can be birth certificate, marriage certificate, or title deed on the real estate.

The conditions for the authenticate documents are made by public authority who is in competence both for the function and territory. For example, birth certificate must be made by civil status official as stated by civil status law: chief of commune or chief of district (Sangkat), not by notary, and in the place of the parent's resident, not in any other place.

The authenticated documents are stronger weight than the private documents which are made between the private parties without the knowledge of the public authority.

The judge will accept the authenticate documents until there is a claim on the falsity/forgery of the public documents stated by article 49 of UNTAC law 1992. If found that there is no falsity of the documents, the plaintiff will be penalized by article 965 of civil code of 1920 which refer to 514 of criminal code.

There is always a case because the public official always alters the age to work longer on the birth certificate.

- **Private documents**
  (Article 969-987 of civil code 1920)

Private document is a document made by private party and there is no acknowledgement of the public authority (Article. 969 of old civil code), there is only signature of the party to the document. For example, Mr. A made contract with Mr. B on the sale of car. The private documents can be admissible evidence in the two cases:

- The party is literate – made by signature (showing the will of the contract) and copies to all the party. The private document has weaker effect than the authenticate documents. It will have the effect if the other party does not rebut or contradict against their signature or handwriting. If it is found false, it will be penalized on the falsity/forgery of private documents stated in article 50 of UNTAC law. The same case applies as the above if it is not found false.

- The party is illiterate – made by thumbprint and there must be two witnesses in competent legal capacity.

- **Other documents**
  (Article 936 of civil code 1920, Article 24 of UNTAC Law 1992)

Nowadays both plaintiff and defendant submit all as much as possible the evidences to the court of law for the consideration. They can be correspondence, letter, or copies of the documents.

They can be business records, minute of the police and other documents such as correspondence letter, other letter, the copies, etc.

Business Records
(Article 983 of civil code 1920)

Business records can be accounting records, which does not have the definite meaning, but it can be understood that every record touch the asset flow of the businessman. In the old civil code and commercial code the business records can be used as evidence against the businessman but not against the non-businessman. The business records have the same effect as the private documents if it is maintained properly in conformity to law required.

Minute/record of police
(Article 39, Law on Criminal Procedure 08 March 1993 and article 24 of UNTAC law)

The report of the police can be evidence in the court of law.

Other correspondence, letter, copies
(Article 940 of civil code 1920, article 24 of UNTAC Law)

- Correspondence is a document that is sent to the other for information. The weight of this kind of evidence can vary dependant on the case. It can have the same effect as the private document in case there is a signature of the party. The correspondence can be used against the author of letter only. It is secondary evidence and it needs more other evidence to support it.

- Other letter such as invoices, simple letter, and daily book... are all secondary evidence and they can be against the author of those. The judge will decide based on other evidences to support it.

- The copies
  There are two cases. The original document exist, the copies will not be valid provided that there is an accuracy of the copies to the original. In case the original is lost, destroyed, not obtainable by force major or whatever cause, the copies or any other simple documents that created by one person intended other purpose rather than evidence, but it reflect and parallel to issue in question can be regarded as evidence.

For example, the debtor sent notice/sms to the creditor that "Regarding the money I owe you I will pay back to you in five day". Even there is no contract on the money lending, but it reflects the fact of agreement of the parties on the money borrowing.

The risk of inaccuracy from these types of duplicates is almost nonexistence. When the original evidence is lost, destroyed, not obtainable, or in the possession of the opponent, the court will not require a party to produce the original (Best-evidence rule).

- The digital documents and voice recording
  All the digital documents can be evidence such as documents imaging, email, sms, voice recording provided must be produced in written form when it is wished to present in the court of law and these are subject to the further investigation of the judge whether it is parallel and be logical to the fact such as person who make it or date of making it.

  Digital evidence/electronic evidence (digital documents/documents imaging – microfilm, scanning, facsimile, photocopy) can be evidence provided that it has establishes the comprehensive foundation:

  - ❖ reliability of the computer equipment
  - ❖ the manner in which basic data was initially entered
  - ❖ the measures of taken to insure the accuracy of the data as entered
  - ❖ the method of storing the data and the precautions taken to prevent its loss
  - ❖ the reliability of the computer programs used to process the data
  - ❖ the measures taken to verify the accuracy of the program.
  - ❖ circumstance of the fact, date, author of the documents...

The court hold the computer data compilation should be treated as any other record.

N.B: The listening to the voice of someone can be made by prosecutor only.

- **Witness**

There are provisions in:

- UNTAC law
- Old civil code 1920
- Old commercial code
- Criminal procedure law 1993
- Decree-law no. 38
- The aggravated circumstance of criminal offence law 2002.

The witness must be competence as read by article 989 of old civil code and witness must be under the oath (article 991 of the civil code 1920).There are some exclusion on the witness such as the relationship between the defendant/plaintiff and the witness such as relationship of the family, creditor and debtor, etc. Their given information cannot be evidence, but regarded as information only and cannot be under perjury in the case there is a falsity of the statement.

Witness must be free from any violence threatening, intimidates. If he is in violence pressure, the person commits the violence on the witness in the coercion of witness (Article 55 of UNTAC law).

To be allowed to testify, the witness generally must take an oath, must be personally present at the trial, and must be subjected to cross-examination.

The oath or affirmation serves as a ground for perjury (Article 56 of UNTAC law) if the witness does not testify truthfully. Leading questions are not allowed under direct examination but do under cross-examination.

To testify, a witness must swear or affirm that she or he will testify trustfully; possess personal knowledge of the subject-matter of the testimony; have the physical and mental capacity to a accurately perceive, record, and recollect fact impression; and possess the capacity to understand questions and communicate understandably, with an interpreter if necessary.

There are three kinds of witness:

- Plaintiff witness;
- Defendant witness;
- Witness by the discretionary power of the judge.

Witness can be lay witness – must not express the opinion on the matter and expert witness (technical questions such as physician) – may state an opinion.

Competency of the witness:

- must not mentally ill or incompetent
- Minor can be witness in civil case but not in criminal case, but his words can be regarded as basic information subject to examination of intelligence and understanding until there is a contrary evidence.

Grounds for incompetence such as mental incapacity, immaturity, religious beliefs and criminal convictions (the witness was in jail).

Privileges
(Article of 992, 993 civil code 1920, Civil code 2007)

Some evidence must be excluded because the information it presents is privileged. Privileged information is that which is considered so private that it is inappropriate to allow it to be generally released. Examples of privileged information include private communications between spouses, doctor-patient communications (including psychiatrists), attorney-client communications, trade secrets, states secrets and the identity of informant.

To encourage clients to communicate freely with their lawyers and to fully disclose any information that may enable their lawyers to provide appropriate legal advice, court allow clients to refuse to disclose and to prevent any another person from disclosing confidential communication made with seeking legal service. This privilege applies to clients communications with their attorney and with the attorney office staff. It protects only confidential communication, not communication made to friends or acquaintances in addition to an attorney.

The lawyer-client privilege applies to the clients, not the lawyer. Thus, the clients, but not the lawyer, have the right to waive the privilege and to testify regarding protected communication. The lawyer clients does not terminate even when the lawyer client relationship does. The privilege does not apply to the clients allegations of a breach of duty by the lawyer.

Hearsay
(Article 24 of UNTAC Law 1992)

Testimony concerning a statement made out of court by a person not now before the court – usually are excluded on the grounds that the person who made the statement is not available for cross-

examination or for evaluation by the judge. Only when the circumstances of the statement afford a high probability of its truth may be admitted.

Hearsay is a statement, made out of court, offered in a court to prove the truth of the matter asserted. Hearsay is not admissible evidence.

There are exceptions to the hearsay:

- Dying declaration exception exists at least in part because of the belief that person would not waste their last breathes to utter the falsehood.
- Excited utterance
- Statement of medical diagnosis, birth and marriage certificate, business record, and statement regarding a person's character or reputation.

▪ **Presumption**
(Judgment of supreme court 03 June 1997)

A logical conclusion made as to the existence or nonexistence of a fact that must be drawn from other evidence that is admitted and proven to be true.

There are two Presumptions:

- ❖ Presumption by law (the child was born in the time of legal marriage, is the child of that spouse); and
- ❖ Presumption by judge (the judge makes the presumption) E.g. Mr. A and Mr. B have the agreement on the sale of goods transported to Mr. C. As a matter of fact, Mr. B has transported the goods to Mr. C three times consecutively. When there is a dispute over the payment between A and B, the judge makes a presumption that B received the payment already for the previous transaction otherwise he will not make any further transportation to C.

  The mark of the brake by the car on the street that cause the accident can be estimated on the speed of the car cause the accident.

The judge will make the presumption based on the weight of the evidences.

▪ **Confession**
- Article 998 to 1002 of old civil code
- Article 24 – Evidence of UNTAC Law
- Article 125 of Law on Criminal Procedure 1993

Confession can be made in the open court or out of court. The confession in the court is stronger than the confession out of court. The confession of the accused will not be basis for the prosecution if it does not parallel to the fact or be logical to the fact or corroborated by other evidence.

A confession obtained under duress, of whatever form, shall be considered null and void.

▪ **Oath/Swear**
(Article 1003 to 1009 of old civil code 1920)

It is the last method of the evidence. If one party dares not to swear, he will lose the case.

▪ **Assessment or examination by expert**
- Article 1008- 1016 of civil code 1920

- Article 88 of Law on Criminal Procedure 1993

Examination can be made by judge (got to the place directly) or by expert. The Assessment or examination can be made on the request of the party to lawsuit or by the judge himself when he deems necessary to do so.

Evidence & EDI

What is EDI?

Electronic **D**ata **I**nterchange is the exchange of information from one company to another using a computer network, such as the Internet. Electronic data interchange involves computer-to-computer exchanges of invoices, orders, and other business documents and therefore effects cost savings and improves efficiency because it minimizes the errors that can occur if the same information has to be typed into computers more than once.

At the same time, EDI provides an easily accessible mechanism for companies to buy, sell, and trade information. In the business-to-business market, major corporations have embraced EDI systems, and in order to reduce costs and improve efficiency and competitiveness, many corporate giants are now demanding that their suppliers convert their sales and purchasing operations into EDI systems as well. In the retail market, the use of EDI systems allows the retailer to implement quick response strategies that can reduce the time they must hold merchandise in inventory, which can result in substantial cost savings for the retailer.

In short, EDI is an electronic communication of business transactions, such as orders, confirmations and invoices, between organizations.

Is agreement made via EDI valid contract before law?

First of all, we have to look at the essential elements for the formation of a valid contract. According to article 3 of Decree-Law no.38 1988, a contract is valid provided that it:

- arises out of a real and free agreement - **offer and acceptance**
- is made by parties who have capacity to enter into a contract – **capacity to contract**
- has a subject matter that is certain, possible to perform, lawful, and consistent with public order and good customs.

As for the English law, there are two more essentials element for the formation of a valid contract:

- there must be **consideration**;
- there must be the **intention to create legal relations**.

Contracts can be made orally or in writing. The law shall set up precise formalities in making a contract. Every contract not consistent with the formalities fixed by law shall be deemed void. Except where there is any provision to the contrary, contracts involving money, or item(s) worth **more than five thousand Riels** must be in writing, read article 4 of the Decree-Law no.38.

Agreement made through EDI is a valid agreement like the other contract provided it has all the elements of a valid contract.

For instance, Mr. A, age 24, needs to buy auto insurance for his vehicle and he emails to insurance company XYZ to issue him a quotation on his vehicle. Insurance company issue quotation based on

his vehicle's condition and email it to him seeking the approval (Offer). Upon the receipt, he emails back the approval (acceptance).

From this a valid contract is legally formed mainly due to article 3 of Decree-Law no. 38:

- There is an offer and acceptance met arising out of free will;
- The parties have the legal capacity to enter into contract;
- The subject-matter of the contract, vehicle, is legal and performable;

Further, both parties have the intention to create a legal relationship whereby the consideration is Mr. A pays the premium to insurance company and insurance company provides cover on his vehicle.

Based on article 4 of Decree-law no. 38, the contract worth than 5,000 Riels (US$ 1.25) must be made in writing. The question is whether this contract is made in writing?

This contract, at a quick look, is not made in physical written form it is made via the electronic/digital document. However, it is actually made in written form but on a writeable and readable electronic system.

Note that the signature is not a required element of the contract; it is a sign of willful agreement and identity mark of the parties.

Can EDI be admissible evidence?

As a rule of evidence discussed above, we realize that EDI falls under the Private Document or other documents which depends on the form of communication of EDI. If it is a contract between private party, it is regarded as private documents. However, if it is just a simple information sending, it would be a correspondence note or simple letter. It varies dependant on the case itself.

Most remarkably, it would in no way be an authenticated document which is made by the public official.

To sum up, EDI can play a crucial role to be admissible evidence in the court of law in this Hi-tech 21st century.

Here again, to obtain the admissibility of the evidence, EDI should provide the following criteria:

- **Exist and material (not spiritual).**
  The EDI evidence exists for itself without the creation, alteration by the author or anyone; it is only collected by person.

  When it wishes to be presented as evidence in the court it must be produced on readable form of paper subject to the further investigation of the judge whether it is parallel and be logical to the fact such as author or date of making it. Also, it must be in translated into Khmer language.

- **Relevance or probative value.**

  EDI Evidence must be relevant to the issue at hand. Relevancy must be shown at two levels before evidence is admitted: the evidence must be LOGICALLY relevant and LEGALLY relevant.

It is logically relevant if it relates to the issues being argued in the trial and tends to prove the contentions of the party offering the evidence.

- **Legal & authentication.**

  The evidence must be collected, searched, maintained in accordance with procedure of the existing law. It must be true copies of the document and there is no falsity or forgery of the EDI.

The EDI has to have a basis foundation to prove to the court as follows:

- reliability of the computer equipment
- the manner in which basic data was initially entered
- the measures of taken to insure the accuracy of the data as entered
- the method of storing the data and the precautions taken to prevent its loss
- the reliability of the computer programs used to process the data
- the measures taken to verify the accuracy of the program.
- circumstance of the fact, date, author of the documents...

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