



Evidentiary value of electronic document in domestic and international regulations

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Abstract

Electronic document is an electronic data that can be cited to prove. This document divides to two type according to its evidentiary value; simple and secure E- document and official and ordinary E-document. . Secure E-document according to its signature is as an official document but has not the rest effects of an official document. This subject due to the characteristics of the secure electronic signature and its issuing by certification service providers -that are official government agencies- is in accordance with the legal principles. In this article we Review the General principles of law governing to evidentiary value E-document and its Legal validity in domestic and international regulations.

Keywords: electronic document, secure e- document, official e- document, evidentiary value

1. Introduction

One of the major issues in relation to each legal subject is its evidential weight. In other words, the capability to rely before the courts in case of any lawsuit in the court is the main reason for dealing with legal aspects of common issues. Data saved in electronic forms may be stored and recovered due to many reasons. One of these reasons refers to lawsuits. In the event that a businessman who has conducted a transaction in an electronic form is forced to appear before a court regarding a lawsuit as plaintiff or respondent, surely, electronic documents play a prominent role as evidence (Winn, 2002, p 20.2) [25].

Upon ratification of Iran's E-commerce Law in 2003, there remains no doubt about admissibility of an electronic document. This document is divided into the two groups of simple and safe on the one hand and official and unofficial on the other hand. Study of the evidential weight of an electronic document is among the issues that are of great interest. The question which we are seeking to find a reply for is "Do different types of electronic documents have equal evidential weight"? The hypothesis presented in this regard implies that a safe electronic document (only in terms of its signature) enjoys as equal evidential weight as that of an official electronic document.

In this paper, we give a definition of an electronic document. Then, we study different types and evidential weight of such document accordingly.

1.1 Definition of an electronic document

Defining an electronic document, legislators and lawmen provide different interpretations. Each of them has considered a certain aspect of such document. Some of them have paid attention to technical issues and some others have considered its legal aspects. Here, first we provide some definitions of an electronic document. Then studying each of the said definition, we shall provide our intended definition accordingly.

According to Article 3-15 of Law on Model Notary Act (2001),

it has been stipulated: "An electronic document refers to data for generate, create, email, telecommunicate, receive and save by electronic tools". This definition had been given in the previous versions of the aforesaid Law as well.

Relying on the aforesaid definition, we come up with this conclusion that the legislator has paid no attention to legal aspects of an electronic deed and has presented only a technical definition of the said document.

Clause 7 of Uniform Electronic Transactions Act of the USA (1999) stipulates: "An electronic record refers to the record of generate, create, email, telecommunicate, receive or save by electronic tools". Although the word "record" has been used in the said definition, considering the statement of the legislator of the Law on Model Notary Act, the word "Document" enjoys an equal function as that of the word "record" stipulated under Uniform Electronic Transactions ACT (2000, State of Utah) (Model Notary Act, 2010 page 90).

According to Clause 2 of Article 13 of Uniform Electronic Transactions Act (2000, State of Utah", it has been stipulated: "An electronic record means the record of generate, create, email, telecommunicate, receive and save by electronic tools".

According to the said definition, it is found that the two words of "generate" and "create" have been used together. In order to designate the difference between the two items, it may be said that it is likely that the word "generate" refers to the items where an electronic document is developed from the beginning on an electronic base and the original copy is innately electronic and it is written in an internet environment like a computer and emailed. However, the word "create" refers to the cases where the original copy of an electronic document is drawn up in paper and then by using electronic tools like scan, it is changed to an electronic form.

According to Clause B of Article of 1 of Uniform Electronic Evidence Act of Canada (1998), it is stipulated: "An electronic document means that data is recorded or saved on any tool by a computer system or any other similar tools that is read or

viewed by a person or computer or other similar tools". Record refers to display, printed copy or other outputs of data".

Considering the said definition and comparing it with that of the Model Notary Act of America, we found that the Canadian Act has introduced an electronic document as "data. Thus, it is more precise as compared to other definitions because data of message is the main and pivotal element of all electronic communications (Habibzadeh, 2014- page 12) ^[6].

Some others have defined an electronic document as follows:

"According to the Iran E-commercial Law ratified in 2003 and further to the Model Uncitral E-commerce Act, an electronic document refers to a collection of electronic signature and message data that is generated, emailed, saved or processed by electronic and optical devices or modern information technologies" (Saeed and Babakhani, 2012- page 162) ^[12]. Meanwhile, considering the definition of message data in Iran E-commerce Law and Model Uncitral E-commerce Act it has been specified that data message is a concept including an electronic document and audio data (Shakouri Moghddam, 2005- page 74) ^[16].

Considering all definitions mentioned earlier, the following points may be stated and taken into consideration in defining the electronic document:

1. Considering its nature, an electronic document is a message data.
2. Presenting a comprehensive definition implies the legal aspect of an electronic document.
3. Defining the electronic document, one may point out that the electronic document is written so that the area of definition of such item is limited so that it will be differentiated from other similar concepts such as message data and electronic evidence.

Relying on above statements, an electronic document may be defined as follows:

An electronic document is a message data in writing that is prepared by using electronic tools and used as evidence".

2. Different types of electronic document

Through a classification based on the evidential weight and level of safety, electronic documents are divided into two groups of safe and simple and official and unofficial.

2.1 Safe and simple electronic document

An electronic document is divided into the two types of safe and simple considering level of safety that is studied as follows:

2.1.1 Safe electronic document

A safe electronic document refers to the document that is generated, saved or processed by using a safe information system and bears a safe electronic signature. Level of safety of technology used in this type of document is in such a manner that it guarantees that the said document can be attributed to the issuer, its identity and entirety (Abdollahi, 2012- page 53).

On the strength of Clause C of Article 2 of E-commerce Law, a safe information system refers to the system that saves information in such a way that it can be accessed as it is needed and it is organized in such a manner that the entirety and confidentiality of information are guaranteed by preventing any misuse (Shahbazi Nia and Abdollahi- 2010- page 198).

Thus, a safe electronic signature is regarded as a main part of a safe electronic document (Mazaheri and Nazem, 2009- page

45). A safe electronic signature is a digital signature generated by using encoding through general and private keys (Sarvari, 2011, page 186).

2.1.2 Simple Electronic Document

This document is a message data that is generated, emailed, received, saved or processed through an unsafe information system and it bears an unsafe signature in such a manner that one cannot become sure about attributing the document to the issuer, its identity or entirety of document. Thus, such unsafe information system and simple electronic signature are the parts of a simple electronic document (Abdollahi- 2012- page 52).

2.2 Official and Unofficial Electronic Document

An electronic document is divided into official and unofficial groups according to the classification accepted by the Civil Code regarding paper documents.

2.2.1 An official electronic document

By virtue of Article 1287 of Civil Code stipulating the required conditions for official documents, it may be said that an official electronic document refers to the document that has been drawn up before a competent officer in compliance with respective regulations within the limits of eligibility of the said officer (Saeed and Babakhani- 2012- page 168) ^[12].

It should be noted that upon startup of "Prompt Registration System" at notaries public and "State Real Estate System" at State Organization for Registration of Deeds and Properties, the concept of an official electronic document has entered into the Iran legal system "Alavi, 2013- page 5).

2.2.2 An unofficial electronic document

According to Article 1289 of Civil Code, all documents that are drawn up without performing legal formalities for issuance of such documents are regarded as unofficial documents. It may be stated that all documents that are not described as official electronic documents should be considered as unofficial electronic documents. For example, all documents that are registered at notaries public by not using the "Prompt Registration System" are regarded as unofficial documents.

3. Legal validity of an electronic document

At this section, we study the case whether or not an electronic document is citable by judicial or administrative authorities from legal aspect. If so, to what extent the said document enjoys an evidential weight. Is there any difference between different kinds of electronic documents? Do all official and safe electronic documents have equal legal value in the view of evidential weight?

In order to enter into this chapter, first, it is necessary to study governing legal principles of evidential aspects of an electronic document and then the details shall be put forth.

3.1 Governing legal principles of evidential aspects of an electronic document

3.1.1 The Principle of Admissibility

Article 12 of E-commerce Law stipulates: "Corresponding documents and evidence that prove a claim may be in form of message data and no court or governmental office can reject the evidential weight of message data in accordance with existing evidential rules only due to its form". This principle is

binding and effective with respect to admissibility of electronic documents by judicial authorities. It means that a judge should admit an electronic document as evidence and study the said document. Although upon investigation of the case, the owner of the electronic document is not able to prove his/her claim, under any condition, an electronic document cannot be rejected only due to its electronic form. This rule has been stipulated under Articles 5 and 9 of Model E-commerce Law (1996). According to Article 9, Admissibility and evidential weight of data messages (1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:(a) on the sole ground that it is a data message;

Art 50 «Information shall not be denied legal effect, validity or enforce- ability solely on the grounds that it is in the form of a data message».

Clause 1 of Article 8 of 2005 Convention: “Validity or effectiveness of a communication or contract should be denied only because of the form of the electronic communication”.

Moreover, in most cases, e-commercial laws of other nations and the directive of the European Union have been admitted as a general principle of admissibility (Alberts and Van Der Hof, 1999 page 5).

3.1.2 Principle of Functional Equivalents (paper and electronic document)

Relying on uniformity of evidence of Article 7 of Iran E-commerce Law, it is stipulated: “At any case where the law requires a signature, an electronic signature is enough”. It is understood that according to the said principle, there is no difference between the contents of paper documents and electronic documents in terms of legal effects.

This principle can understood from Clause 1 of Article 6 of Model Electronic Signature Law (2001) and Clause 1 of Article 7 of Model E-commerce Law (1996) and Clause 2 of Article 5 of the Directive of the European Union)Dumortier, 2008, page 33) as well.

3.1.3 Principle of Non-Discrimination

There is another principle with respect to an electronic document in E-commerce Law. It refers to the Principle of Non-discrimination between simple and safe electronic documents that are admitted by courts in terms of evidential weight and admissibility. It is quite clear that the evidential weight of the said two types of documents is different from each other. In other words, as it will be explained, the evidential weight of a simple electronic document is less than that of a safe electronic document. However, it does not mean that the former has no value (Todd, 2005, page 116). Although this principle has not explicitly stipulated in local and international rules and regulations, it may be understood from implication of Article 7 of E-commerce Law, and Clause 1 of Article 6 of Model Electronic Signature Act (2001) and Clause 1 of Article 7 of Model E-commerce Law (1996) in connection with an electronic signature that has been mentioned without any limitation.

3.1.4 Principle of “Considered as Written” of an electronic document

Article 6 of E-commerce Law: Where the law requires information to be in writing, the data will be considered as a written message. Moreover, according to Article 6 of Model

Uncitral Law (1996), the aforesaid Principle has been given stating “Information containing message data should be accessed for further references”. Furthermore, according to Clause 2 of Article 9 of 2005 Convention, it has been stipulated” “In such cases as it is required by the law, a communication or contract should be given in writing or the effects of lack writing require, the respective condition shall be realized by an electronic communication...”.

This principle has been legislated because the legislator intends to put an equal evidential weight on the electronic document as that of the written document in current rules (Akbari- 2005- page 82). In other words, according to the said principle, in the event that in current rules or judicial procedure, corresponding information should be given in writing – in form of written paper documents- an electronic document must be citable (Guide to MLEC, 1996, page 35).

According to the judicial procedures of the USA, this principle is given as follows:

1. Regarding the case of Carlos Samper Pasada v. Jaine Tapias, the judge rendered an order according to which when corresponding regulations require that information should be given in writing, an email is enough provided that the two sides are able to access the said email after it is sent (Mason, 2006, page 10).
2. Regarding the case of Rudder v. Microsoft, the court stated: “corresponding electronic documents that are concluded by clicking are given equal validity the same as those of written contracts” (Mason, 2007- page 2).

3.1.5 Principle of Authenticity of electronic documents

The question that raises here is “in the event that a plaintiff or respondent cites to an electronic document as evidence and the said document is denied or refuted by another party (plaintiff or respondent), is the said petition cancelled or excluded from corresponding evidences in case no original copy of the document is submitted according to Civil Procedure Code? In other words, is there an original or minor electronic document in such environment”?^[1].

It is possible that information is available in form of message data if the following conditions are met:

- A. Corresponding information is accessible and can be referred to in the future.
- B. Message data is kept in the same format as it is generated, emailed or received or any other formats that exactly display the information that has been generated, emailed or received.
- C. Corresponding information designating the origin, destination, time of email and receipt of message data should be also kept.
- D. Other conditions that are put forth by any governmental organization or ministry with respect to keeping corresponding message data to its area of responsibility”

Moreover, according to Article 8 of Model E-commerce Law (1996), it is stipulated: “If it has been required by the law,

¹. Article 96 of Civil Procedure Code: “A plaintiff should present the original copies of the documents of which certified copies are attached to the petition. The respondent should present the original and certified copies of documents that are cited in the court hearing session... otherwise, in case that the said document is an unofficial one and it is denied or refuted and if he is the respondent, the said documents are excluded from his evidences and if he is a respondent and his petition is not cited by another evidence, it will be cancelled in this regard”.

corresponding information should be presented or kept in their original form, it is regarded as original document provided that ...”^[1].

Moreover, Clause 4 of Article 9 of 2005 Convention implies the said principle as well.

Considering the above statements, it may be concluded that there is no difference between an original or minor copy of an electronic document and all copies of the said document enjoy equal validity. Corresponding document that is cited in a lawsuit is regarded as original copy. Thus, Iran E-commerce Law and Model Uncitral E-commerce Law and 2005 Convention are willing to remove corresponding obstacles that may be put forth during citation process of electronic documents stating that the said documents are not original” (Guide to MLEC, 1996, page 37).

3.2 Evidential Weight of Electronic Documents

As it has been stated earlier, one of the divisions of an electronic document that has been indicated in corresponding rules and regulations is that an electronic document is divided into simple and safe and official and unofficial documents. The base for such division refers to the evidential weight of an electronic document. The evidential weight refers to the legal effect of a document to create assurance for the judge based on authenticity of the claim brought by the person who cites to the said document (Shams, 2005- page 148).

Here, the evidential weight of any of electronic documents is studied according to the aforesaid division.

3.2.1 Safe Electronic Document

Regarding the evidential weight of a safe electronic document, it may be said that according to Article 13 E-commerce Law, the general principle implies: “The evidential weight of message data is determined in terms of safe elements such as appropriateness of safety methods used considering the subject and purpose of exchange of message data”.

Considering the phrases of Article 13, it may be understood that the legislator has assigned investigation of the evidential weight of a safe electronic document to the judge. However, immediately it determines the evidential weight of this type of electronic document as per articles 14 and 15. At first glance it seems that there is a certain kind of contradiction among these cases. Because according to Article 14 of E-commerce Law: “All message data are generated and kept in a safe way in terms of concepts and signature given under the said data, obligations of the party/parties who has/have accepted the said obligations and all persons who are considered as their legal substitute, enactment of its contents and other effects are regarded as the same as valid and citable documents at judicial and legal authorities”^[2].

According to Article 15 of E-commerce Law, it has been stipulated: “No denial or refutation will be heard with respect to safe message data, safe electronic records and safe electronic signature. The claim of forgery is substantiated with respect to the said message data or it may be proved that the said message data holds no validity due to any of legal aspects”. Comparing this Article to Article 1292 of Civil Code that stipulates: “No

denial or refutation will be heard with respect to official documents or those documents that hold valid the same as official documents and the party may bring a claim of forgery with respect to the said documents or proves that the said documents hold no validity in terms of any of legal aspects”. It is understood that the legislator intends to consider a safe electronic document as valid as official documents in terms of evidential weight although this point has not been explicitly mentioned and only the phrase “with the same validity as that of valid and citable documents” have been used for this group of electronic documents. It should be noted that using the said phrase can be objected since it is ambiguous (Mazaheri and Nazem, 2008- page 83)^[10].

Apparently, the legislator did not intend to consider safe electronic documents as official documents in terms of all effects. Thus, the draft text of the legislator indicates that the phrase “as valid as official documents” has explicitly been changed as if the legislator intended only to admit the value of citation of these electronic documents at courts. Thus, it has been explicitly stated that the said documents cannot be denied or refuted.

Thus, considering the preliminary contradiction between article 13 and Articles 14 and 15 of E-commerce Law, on the one hand and comparing articles 14 and 15 of the aforesaid Law and Article 1292 of Civil Code on the other hand, two questions are raised: 1st: If the legislator assigns the evidential weight of an electronic document to “safe elements” in general and reliability of safe methods used in Article 13, and in other words, he assigns determination of the evidential weight of an electronic deed as evidence to the judge, why has he immediately determined the evidential weight of a safe electronic document precisely in articles 14 and 15? 2nd, how and relying on which legal evidence, has the legislator considered the evidential weight of the official documents for safe data message? In other word, how has the legislator considered the said two types of documents equal in terms of citation discarding the provisions stipulated under Article 1287 of Civil Code with respect to official documents? The answer is “no objection can be made against the two aforesaid problems with the said statements. Because comparing Article 13 of E-commerce Law and Articles 14 and 15 of E-commerce Law, it may be said that Article 13 of E-commerce Law has been taken from Clause 2 of Article 9 of Model E-commerce Law (1996). Regarding value and evidential weight of the message data, the said law stipulates: “Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor. According to the said Article, Model E-commerce Law has not precisely determined the evidential weight of an electronic document and it has assigns this duty to the judge considering all corresponding conditions to the case. Thus, it seems that in order to remove the preliminary problem, it may be said: “Concerning the fact that the evidential weight of a safe electronic deed has been determined according to Articles 14 and 15 of E-commerce Law, but, no legal article has designated the evidential weight of a simple (unsafe) electronic document. Article 13 of E-commerce Law discards a safe electronic

2. According to Article 1287 of Civil Code, “corresponding documents that have been drawn up at registration department for deeds and properties or notaries public or before officials within the area of their eligibility according to the respective rules and regulations are regarded as official documents”.

document and designates the evidential weight of a simple electronic document. In fact, essentially, it assigns certain decree stipulated under Articles 14 and 15 of E-commerce Law as public order of Article 13 of E-commerce Law. It means that in case corresponding conditions stipulated under Article 10 of E-commerce Law for safety of an electronic signature is substantiated, the judge is obligated to render his order according to articles 14 and 15 of E-commerce Law (Mazaheri and Nazem, 2014- page 76). However, regarding the difference or equalization of a safe electronic document and an official document in terms of the evidential weight, it is exaggerating to grant such weight to a safe electronic document. However, considering the characteristics of a safe electronic document that has been stipulated under Article 10 of E-commerce Law, it is justifiable to identify such weight for this type of signature (Zarkalam, 2004, page 49) because a safe electronic signature is unique and uniqueness with respect to the signing party means that firstly no other person can create similar signature and secondly, the signing party cannot deny attribution of the said signature to himself (Shakouri Moghaddam, 2005- page 76) [16].

Thus, relying on the above items, articles 14 and 15 of E-commerce Law are compatible with legal logic since they have regarded a safe electronic document and appertaining data thereof as valid as an official document in terms of some of effects. Moreover, if we consider a safe electronic document as valid as an official document only in terms of its citation not in terms of its enactment by notaries public and registration organizations, this policy will prevent that such documents could easily be denied or refuted. Consequently, the citing party to the electronic documents has to prove its authenticity and validity each time. This decreases the range of electronic commerce and transactions and also it causes cancellation of proceeding and waste of time and spending too much cost (Zarkalam, 2003- page 299). Moreover, concerning the fact that notaries public for issuance of an electronic certificate according to Article 31 and By-law of Article 32 of E-commerce Law, are official governmental officers (Zarkalam, 2011- page 194). Consequently, an electronic signature and certificate issued by the said notaries public are regarded as notarized and attested signature and cannot be denied or refuted [3]. Only the claim of forgery can be put forth in this regard.

It is quite clear that a safe electronic deed enjoys such validity only in terms of signature given under the said document. Thus, it does not enjoy other effects of an official document. Article 15 of E-commerce Law confirms the aforesaid statements.

3.2.2 A simple electronic document (an unofficial electronic document)

Regarding the evidential weight of this type of document, contrary to a safe electronic document, there is no article that explicitly designates this case in Iran E-commerce Law.

As it has been mentioned before, Article 13 of E-commerce Law implies that the evidential weight of this type of document depends on reliability of safe methods used with respect to the

importance of subject and purpose of exchange of an electronic document. In other words, in order to determine the evidential weight of a simple electronic document, typically, interference of the judge is regarded as a determining factor considering corresponding terms and conditions of each case. Regarding the principle of equalization of the effects of paper and electronic documents and the principle of "Considered as Written" of an electronic document it may be understood that a simple electronic document is regarded as an ordinary paper document. It means that as unofficial documents can be denied and refuted and can be cited before a court with the equal validity as that of an official document after their authenticity is confirmed (Article 1291 of Civil Code). A simple electronic document can be denied and refuted. In case that the authenticity of the said document is proved before a court, it finds equal validity as that of a safe electronic document. The contrary concept of Articles 14 and 15 of E-commerce Law confirms the aforesaid statements. According to Article 14 of E-commerce Law, in any case where there is an ambiguity in corresponding law, one can refer to statutory rules. Comparing unofficial paper documents and simple electronic documents with respect to effects and orders leads us to this conclusion.

3.2.3 An official electronic document

According to Article 1287 of Civil Code, an official electronic document refers to the document that is drawn up by an official officer in compliance with regulations and within the area of his eligibility. Regarding the evidential weight, there is no difference between official electronic documents and paper official documents. It means that all effects that have been stipulated under different rules for the said official documents are true with respect to official electronic documents:

Validity of all contents and signatures of official documents (contents include phrases, signatures, fingerprints and seals) (Article 70 of Law).

Validity of the entire contents of official documents (contents refer to the contents of the phrases of official documents (Articles 70 of Law and Article 1292 of Civil Code)

The claim contrary to the contents of official documents cannot be proved by judicial evidences and testimony unless through a testimony given in accordance with religious evidences (Articles 1309 and 1324 of Civil Code)

Validity for third parties and parties and their substitutes (Articles 71 and 72 of Law and Article 1305 of Civil Code)

Binding effectiveness of official documents (Article 92 of Law)

No need for probable damage deposit for security of subject of claim regarding the claims cited to official documents (Article 225 of Civil Procedure Code)

Exclusion of lapse of time regarding official documents and the possibility for issuance of an executive order at any expedient time

Cancellation of the arbitrator's order regarding contrary cases to official documents (Clause 5 of Article 489 of Civil Procedure Code) (Shahri- 2002- page 165)

Presently, after startup of "prompt registration system" at notaries public, the concept of an official electronic document has been entered into legal system of Iran. Since maintaining safety is the fundamental principle of official documents and registration regulations mechanisms cannot be enacted for this purpose with respect to electronic documents, it is necessary to fully observe supervising regulations of safe electronic

³. It should be mentioned notaries public can issue an official document and to attest the signature of certain unofficial documents that are known as "signature attestation document" and these documents enjoy as equal validity as those of official documents (in terms of signature".

documents in E-commerce Law with respect to official electronic documents so that people can be sure about these types of documents.

4. Conclusion

Considering the above statements, it may be concluded that regarding evidential weight, electronic documents are divided into three types:

- A. Unofficial electronic documents (simple) that are drawn up in an unsafe and unofficial manner and denial and refutation are heard with respect to the said documents. The evidential weight of such documents is the same as that of paper unofficial documents.
- B. Safe electronic documents that are generated bearing an electronic signature and they enjoy equal evidential weight (only in terms of signature) as that of official documents. It means that no denial or refutation can be heard with respect to the said documents. One can bring the claim of forgery only.
- C. Official electronic documents that must be generated according to Article 1287 of Civil Code and Article 10 of E-commerce Law and enjoy equal validity as the same as official documents regarding all of their effects.

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