

## Client Alert

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## Practical Issues on Usage of E-Signatures in Financing Transactions

Since the COVID-19 outbreak was declared a pandemic by the World Health Organisation, the number of global COVID-19 cases has been rising at an alarming rate. On 25 March 2020, the Malaysian Prime Minister announced the extension of Movement Control Order ("**MCO**") until 14 April 2020 in an effort to curb the outbreak in Malaysia.

During this period of restricted movement, businesses and corporations have been forced to adapt to the immediate change of having their employees work from home, and with this comes a high reliance on the internet and technology as a whole. Among the many challenges this brings, where physical business contact is minimal to none, a pertinent issue lingers – how are we to execute documents? This alert focuses on electronic signatures which are more prevalent than digital signatures given that digital signatures are more process-based as further explained below. This alert also aims to highlight and address the issues surrounding the potential use of electronic signatures to execute agreements as well as its use in matters such as witnessing and notarisation.

### 1. What is an electronic signature or e-signature?

An electronic signature is defined in the Electronic Commerce Act 2006 ("**ECA**") as "any letter, character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature."

### 2. Is it different from a digital signature?

The Digital Signatures Act 1997 ("**DSA**") defines a "digital signature" as "a transformation of a message using an asymmetric cryptosystem ("an algorithm or series of algorithms which provide a secure key pair") such that a person having the initial message and the signer's public key can accurately determine (a) whether the transformation was created using the private key that corresponds to the signer's public key and (b) whether the message has been altered since the transformation was made."

Compared to e-signatures, digital signatures can be understood to be more complex and process-based. Rather than being a mere symbol affixed to an electronic document, a digital signature requires verification by way of a digital certificate (i.e. private key) that is known only by the persons allowed to access the document to sign it. This private key corresponds only to a public key held by the creator of the document, which allows them to determine the legitimacy of the digital signature and to track any changes made in the document.

### 3. What is the requirement for an e-signature to be valid?

According to the ECA, an electronic signature is legally enforceable if:

- (i) it satisfies the definition of an electronic signature as mentioned above;





- (ii) it is attached to (i.e. forms a part of) or can be logically associated with the electronic document;
- (iii) it adequately identifies the owner of the signature and indicates their approval of the information in the document to which they attach their electronic signature;
- (iv) the means of its creation is uniquely linked to and under the sole control of its owner; and
- (v) any changes made to the signature or the associated document after the time of signing is detectable.

#### 4. What documents can be executed via e-signature?

Below are some of the examples of documents that can be executed via e-signature.

Agreement / Document Type	Additional notes
Simple contract	<p>Please note that there are also other matters that may have an impact on the decision to conclude a contract by e-signature, for example:</p> <ul style="list-style-type: none"><li>• whether the document has to be filed/registered with any authority that requires a wet ink signature;</li><li>• whether the location of the signatory or the document has legal consequences, such as stamp duty liability; and</li><li>• whether the document will be litigated in a jurisdiction that does not recognise e-signatures.</li></ul> <p>Companies may wish to take these matters into consideration before deciding to execute a contract via e-signature.</p>
Real estate contracts	<p>While real estate contracts are generally executable via e-signatures, instruments effecting any dealings with real property under the National Land Code that requires authentication or notarisation will still need to be executed with physical wet-ink signatures.</p>
Corporate documents (such as board minutes and shareholder(s) resolutions)	<p>Generally, corporate documents can be electronically signed subject to the constitutional requirements of the company and statutory requirements.</p> <p>With regard to corporate filing, documents filed over-the-counter with the Companies Commission of Malaysia ("<b>CCM</b>") must carry physical wet-ink signatures. On the other hand, no signature is required for filings made by the company secretary via the CCM's online portal.</p>



Witnessing	Unless the form of execution by a witness is prescribed (such as for powers of attorneys, share transfer forms, National Land Code instruments, affidavits etc.), witnesses are generally permitted to use e-signatures.
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## 5. What documents cannot be executed via e-signature?

Below are some of the documents that cannot be executed via e-signature.

Agreement / Document Type	Additional notes
Annual accounts	Handwritten signatures are required as the physical financial statements have to be filed with the CCM and attested by a Commissioner for Oaths or notarised by a Notary Public.
Share transfer instrument	Instruments of transfer are required to be: <ul style="list-style-type: none"><li>signed under seal; or</li><li>if the company does not have a seal, signed on behalf of the Company, by at least two authorized officers (one of whom must be a director) <u>or</u> in the case of a sole director, by that director in a presence of a witness who attests the signature.</li></ul> As the documents are required to be signed under seal or the equivalent of one, e-signatures would not be permitted.
Power of attorney	Expressly prohibited under the ECA.
Creation of wills and codicils	Expressly prohibited under the ECA.
Creation of trusts	Expressly prohibited under the ECA.
Negotiable instruments	Expressly prohibited under the ECA. Examples of negotiable instruments include, amongst others, promissory notes and bills of exchange.
Court documents	To the extent that court documents require formal notarisation or attestation, e-signatures are unlikely to be permitted.
Documents required to have a seal affixed	Pursuant to the ECA, e-signatures will not suffice if Malaysian law requires a seal to be affixed to a document (i.e. share transfer form, land dealings).



The documents mentioned above cannot be executed via e-signature as there may be additional formalities under Malaysian law that have to be complied with, including but not limited to notarisation or attestation before a public notary or commissioner of oaths. In such circumstances, physical wet-ink signatures are required.

## **6. What are the practical implications of e-signature for commercial transactions?**

### **Stamping**

Notwithstanding that both electronically and digitally signed documents are legally enforceable under the ECA and DSA respectively, there may be issues in respect of the stamping of such documents. Documents have to be stamped for them to be admissible as evidence in court.

In practice, prior consent of the Malaysian Inland Revenue Board ("**IRB**") is required before an agreement (whether electronically/digitally signed by all parties or by one party) may be submitted for stamping. However, there are no formal directives or orders issued by the IRB in this regard as at publication time. As such, apart from the risk that such consent may not be given, the current practice may change in the foreseeable future.

This is especially pertinent for financing transactions as banks normally require the agreements involved to be stamped. Although electronic stamping (which reduces the need to submit physical documents to the stamp office for adjudication) is available as an alternative, all documents submitted online for stamping are still subject to an online assessment of stamp duty. The adjudication process under the electronic Stamp Duty Assessment and Payment System (STAMPS) is not an automatic process as the relevant stamp officer will review the documents submitted and then approve or reject the adjudication application or request for further information. As such, there is no guarantee that agreements that are executed via e-signature will be able to be stamped electronically.

### **Authentication**

In the event of any dispute, even if the electronically signed documents were stamped and admitted as evidence, the authenticity of the e-signatures may still be questioned in court. As the e-signature is merely a symbol affixed to an electronic document, there is no way to track any changes made to the document after the time of signing. There is also no verification process for electronic signatures that can confirm that the person who electronically signed the document is the owner of the signature, or whether circumstances of duress exist at the time the person signed the documents or even in the case where the witnessing of the execution of the documents was done via video conferencing, the right documents were executed. All these practical issues should be dealt with to mitigate the risk of authentication being raised.

## **7. Are there compliance requirements on retention of electronically signed contracts?**

Companies electing to sign documents electronically will need to have a procedure that prescribes the process flow for the affixation of the electronic signature, and the controls that are implemented to ensure that only persons who



have been authorised can affix the electronic signature, and controls on access to the records to prevent the contents and/or signature from being tampered with. These controls, and the implementation of the controls, should be subject to internal audit reviews.

The document retention of record requirements would similarly apply to contracts that are signed electronically. It is imperative that these contracts are stored in a manner that is accessible and intelligible as they must be available for subsequent reference or production as evidence in connection with legal proceedings and supervisory audits by regulators (if applicable). Similar to the controls procedure, an e-filing or e-storage of records must be subject to a robust controls to mitigate against tampering, loss of data and cybersecurity risks; and (if applicable) evaluated during a technology audit.

Companies will need to move away from their current process flow for the execution of, and subsequent filing of, wet-ink signature documents, and modulate these procedures given the shift towards electronically signed documents. As the business teams change their modus operandi, the compliance and internal audit teams within a company will also need to change in tandem with them.

## **8. What are the recommended courses of action?**

For prudence, all documents that are agreements are recommended to be executed via physical wet-ink signatures, given that IRB's prior consent is required for the stamping of electronic documents (as of the time of writing) and it may be difficult to obtain such consent during the MCO period. On the other hand, documents that are not agreements (i.e. board resolutions) may be executed via e-signatures.

According to the Evidence Act 1950, the burden on proof lies on the party who alleges to have signed a document. In respect of authentication issues, some best practice suggestions would be for companies to ensure that there is always evidence as to the signature's proper creation or creation of a standing operating procedure for the utilisation of electronic signatures. The signature should therefore be authentic, created in confidentiality and with consent and intent.

Companies may consider the use of strong passwords and 2-factor authentication to ensure that only authorised persons have access to the electronic document and their electronic / digital signature. Further, access to the electronic document should only be given to parties privy to the contract during and after the signing process. This increases the integrity and legitimacy of all signatures in the document, especially if there are multiple signatures.

## **Conclusion**

Electronic signatures may be an answer to many in this time of social distancing and remote working but it brings along with it a myriad of legal issues that will need to be dealt with to mitigate the risks involved.

In deciding whether e-signatures should be used, companies should consider, amongst other factors, the type of agreement they are executing and whether notarisation or attestation is required for the same. Companies may wish to balance the convenience of using an e-signature against the likelihood of (a) the



relevant document having to be stamped in order to be legally enforceable and (b) having to adduce such a document in court.

While most commercial agreements can be executed via e-signature, agreements involving high stakes or a large value consideration may arguably be signed on paper and stamped in order to circumvent any possible issues arising from the IRB's position in respect of e-signatures and in particular, all financing agreements should be executed via physical wet-ink signatures.

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