
Technology, Media and Telecommunications

Business As Usual During COVID-19: Legal Considerations of E-Signing Documents

Introduction

Following the Prime Minister's latest announcement that the Conditional Movement Control Order ("CMCO") has been extended until 9 June 2020 (but with further industries and businesses gradually opening up since the start of the CMCO on 4 May 2020), companies and organisations are increasingly compelled by circumstances to adopt new and innovative ways to resume business. Work from home arrangements have been widely implemented across industries to support the Government's call to practice social distancing in response to the COVID-19 outbreak in Malaysia.

Technology has made work from home arrangements possible, especially for companies and organisations that have made early investments to digitalise their business operations and internal administrative processes. In light of the present circumstances, companies and organisations (essential and non-essential services alike) have now turned towards "e-signing" to facilitate the signing and execution of documents in the commercial context.

However, this raises certain legal issues, for example, can documents be signed electronically? Are e-signatures legally recognised? Are e-signatures as valid as physical signatures? What form of e-signature should be adopted in order to minimise business risks?

In this Client Update, we analyse and address some of the issues related to the use of electronic signatures.

Legal Overview of E-Signatures

As a general rule, the use of e-signatures is legally permitted under Malaysian law. However, depending on the form of e-signature used, this may be subject to differing levels of application and legal recognition.

Briefly, the following are the different forms of recognised e-signatures in Malaysia:

(1) **"Electronic Signatures" under the Electronic Commerce Act 2006 ("ECA"):**

Electronic signatures are technologically neutral, comprising any combination of letters, characters, symbols, etc. in electronic form which is intended and adopted by a person to be his/her signature.

(2) **"Digital Signatures" under the Digital Signature Act 1997 ("DSA"):**

Digital signatures are technologically specific, utilising a specific key pairing technology (i.e. asymmetric cryptosystem) and a valid certificate issued by a licensed certification authority in Malaysia. There are, however, recommended reliance and liability limits imposed on digital signatures.

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Putting the above in simple terms, an “electronic signature” under the ECA broadly covers any form of signature in electronic form (e.g. scanned or PDF image of a person’s wet signature, e-signature generated by services such as DocuSign, and “I accept” button in click-wrap agreements), whereas a “digital signature” can only refer to the specific form of electronic signature provided by one of the licensed certification authorities in Malaysia and generated in accordance with the DSA.

Legal Recognition of “*Electronic Signature*” and “*Digital Signature*”

Understanding the differences between an “*electronic signature*” and a “*digital signature*” is crucial for businesses to determine the appropriate form of e-signature to be adopted. This generally depends on the type of transactions and documents, legal requirements and implications of each e-signature, as well as the operational needs of the business or organisation (e.g. system deployment and other administrative matters including costs).

We set out below the main differences between the two forms of e-signatures from the Malaysian legal perspective:

(A) Electronic Commerce Act 2006

The ECA provides for the use of electronic messages and electronic signatures in the formation of contracts, and facilitates commercial transactions through the use of electronic means. In general, the ECA:

- (a) confers legal recognition of contracts formed using electronic messages (i.e. e-contracts);
- (b) provides that where any law requires a signature on a document, an electronic signature which fulfills certain conditions (e.g. logically associated with the electronic document, adequate identification of the signor, etc) would satisfy the law; and
- (c) prescribes various conditions for matters related to the signing of contracts (e.g. witnesses, document required to be in writing, document required to be in a prescribed form, and time and place of dispatch).

(B) Digital Signature Act 1997

As stated earlier, the DSA provides for the use of digital signatures, i.e. a superior form of electronic signature as compared to electronic signatures under the ECA.

In general, the DSA legally recognises that digitally signed documents shall be as legally binding as a document signed with a handwritten signature, an affixed thumbprint or any other mark, and would be as valid, enforceable and effective as if it were written on paper.

Hence, from a legal perspective, the digital signature is “as good as” a physical signature in the context of commercial transactions.

Other Types of E-Signatures

Notwithstanding the ECA and the DSA, e-signatures or e-contracts which do not fall squarely within either statute may still be accorded legal recognition, provided they fulfill the necessary elements under contract law, and they may still be admissible in courts subject to relevant evidentiary procedures. The only difference is that such e-signature or e-contract would not benefit from the statutory recognition accorded by the ECA or the DSA.

Technology, Media and Telecommunications**Legal and Practical Issues of Using E-Signatures**

The use of e-signatures is not without legal impediment. Some of the legal as well as practical issues in adopting e-signatures include:

(1) Excluded Transactions and Documents

Not all transactions and documents can rely on the statutory recognition provided under the ECA. Certain transactions and documents (e.g. powers of attorney, negotiable instruments such as cheques, etc) have been expressly excluded from the ambit of the ECA. In these circumstances, only a digital signature under the DSA would suffice.

(2) Witness Signatures

While the ECA seeks to provide for the witnessing of signatures, the scenarios in which such witnessing is permitted has not been addressed adequately within the body of the ECA. The objective of having to physically “witness” and verify the signing or execution of a document will typically not be met, therefore making legal disputes between the contracting parties much more likely.

(3) Consent of Parties

The ECA expressly provides that it is not mandatory for a person to use, provide or accept any electronic form of a commercial transaction, and that a person’s consent is required (consent may also be inferred by conduct). As such, depending on the businesses’ willingness to accept electronic forms of commercial transactions, as well as readiness in terms of technology, it may take some time before business processes can be fully digitalised and for e-signatures to be the main form of execution of transactions and documents.

(4) Notarisation and Authentication of Documents

The ECA and DSA do not address issues relating to notarisation and authentication of documents (e.g. certification of true copies by Commissioners for Oath). Conventionally, the original physical copy of the document is required to be sighted in order to enable notarisation or authentication. There is currently no formal mechanism to allow for notarisation or authentication of documents electronically.

(5) Cross-Border Transactions and Documents

Where the transactions and documents have a cross-border element, the issue arises as to the legal validity of e-signatures. Would an e-signature issued under Malaysian law be valid for the purposes of such cross-border transactions and documents? Are e-signatures then subject to the governing laws of the particular contract or that of another jurisdiction? How would the jurisdiction, in which the e-signature is used/affixed, affect incidental obligations, e.g. tax or stamp duty obligations?

(6) Affixation of Seal

The ECA does not recognise the use of e-signatures where the law requires the affixation of a seal on a document; however, the ECA expressly provides that the requirement of the law would be fulfilled by the use of a digital signature under the DSA. Therefore, it should be noted that for

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documents which require the affixation of a seal, only a digital signature under the DSA would suffice.

(7) **Stamping**

Both the ECA and DSA do not address the legal position on stamping vis-à-vis e-contracts. For example, the Malaysian revenue authorities, based on our previous inquiries, had previously taken a more conservative approach and were not inclined to accept documents with e-signatures for the purpose of stamping. However, bearing in mind current circumstances where physical interactions are very limited, the revenue authorities (i.e. the Inland Revenue Board) may be more receptive to accepting and carrying out the stamping of documents bearing e-signatures.

Given that remote working will likely be the norm in the coming months (if not longer), these are some of the issues which will need to be addressed in the long term. Legislators will likely need to amend existing laws to cater for such situations, in the absence of which, companies and organisations will need to find practical and workable solutions.

We trust that the above provides you with a quick analysis on the use of electronic signatures from a Malaysian legal perspective. If you have any queries in relation to the above or other issues relating to technology, media, telecommunications and data protection, please get in touch with any of the individuals listed below.

Visit our [COVID-19 Resource Centre](#) for views from our lawyers across the region on common issues and legal implications brought about by COVID-19. For specific inquiries, please reach out to your relationship partner or send an email to our [COVID-19 Legal Team](#).

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