

COVID-19: The legislative framework for the security and use of electronic signatures in Singapore

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For most of us working from home and actively telecommuting to help stem the tide of local transmissions of COVID-19 during this crucial period of time, technological advancements in the medium of digital communication and remote access have been a boon.

It is thus timely to restate the guiding principles of “electronic signatures” and its use in electronic records and transactions that have become increasingly commonplace.

Legislative Framework

The starting point is the Electronic Transactions Act (Chapter 88) (“the Act”) which sets out the legislative framework for the security and use of electronic transactions in Singapore. Among the lofty aims of the Act is to give effect to the following purpose:

... to foster the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium. [Section 3(f) of the Act]

What is an Electronic Signature?

Although there is no definition of the term “electronic signature” under the Act as such, the terms “electronic” and “signature” have been defined in section 2(1) of the Act as follows:

“electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.

“signed” or “signature” and its grammatical variations means a method (electronic or otherwise) used to identify a person and to indicate the intention of that person in respect of the information contained in a record.

An “electronic signature” or e-signature is then understood to be the functional equivalent of an old-fashioned hand-written signature in an electronic form applied to electronic communication. It can no less be used to prove the authenticity of the electronic record as it can be used to identify the signatory party involved and make legal commitments, provided it meets with the requirements of the Act.

Requirement for Electronic Signatures

For an electronic signature to satisfy a rule of law requiring a signature or which provides for certain consequences if a document or a record is not signed, the following conditions under section 8 of the Act must be fulfilled:

- 1) There must be a method used to identify the person and to indicate that person's intention in respect of the information contained in the electronic record; and
- 2) The method used must be either –
 - (a) as reliable as appropriate for the purpose for which the electronic record was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (b) proven in fact to have fulfilled the functions described in paragraph (1), by itself or together with further evidence.

The substance of the method used to identify the person and authenticate the document takes precedence over the form of signature. Under the right set of conditions, an electronic signature can be as simple as electronic mail sent from a verifiable source by a sender whose name is typewritten or with a signature block placed at the end of the e-mail. Such e-mail correspondence may be taken to be signed with the intent to authenticate the information contained therein as his act.

While an electronic signature can be as simple as a name entered in an electronic document, it can be enhanced and further made secure by following the prescription set out in section 18 of the Act:

- (1) If, through the application of a specified security procedure, or a commercially reasonable security procedure agreed to by the parties involved, it can be verified that an electronic signature was, at the time it was made –
 - (a) unique to the person using it;
 - (b) capable of identifying such person;
 - (c) created in a manner or using a means under the sole control of the person using it; and
 - (d) linked to the electronic record to which it relates in a manner such that if the record was changed the electronic signature would be invalidated, such signature shall be treated as a secure electronic signature.

A secure electronic signature is statutorily safeguarded by being presumed to be the signature of the person to whom it correlates and presumed to be affixed by that person with the intention of signing or approving the electronic record, unless evidence to the contrary is shown (section 19(2) of the Act).

Use of Electronic Signatures

Recognising that there are inherent risks in the use of electronic signatures in electronic records and transactions, not least of all the risk of being altered or tampered with or hacked into and raising questions as to the identity of the parties involved, parties are free to agree to exclude the use of electronic signatures and electronic communications and insist on a written agreement, or to use electronic signatures only with additional forms of security in place, such as a two-factor security authentication process. However, certain matters are specifically excluded from the operation of the Act and cannot be concluded or signed electronically and they are:

1. The creation or execution of a will.
2. Negotiable instruments, documents of title, bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money.
3. The creation, performance or enforcement of an indenture, declaration of trust or power of attorney, with the exception of implied, constructive and resulting trusts.
4. Any contract for the sale or other disposition of immovable property, or any interest in such property.
5. The conveyance of immovable property or the transfer of any interest in immovable property.

Can a contract for the sale and purchase of immovable property be concluded electronically with the use of electronic signatures? If you are holding on to a sale and purchase agreement from a developer at this time and need to return the physical signed agreement before the exercise deadline, what can you do? For now, with the state of the law as it is at present, such a sale and purchase agreement clearly falls within the exclusion list and would require the execution to be by the age-old way of the wet ink signatures. It is unlikely that lawyers acting for developers will accept anything other than the physical signed sale and purchase agreement for a valid exercise of the option granted and potential purchasers ought to bear that in mind before putting down their booking fee during this period of time. The same goes for the Option to Purchase an immovable property and the exercise thereof.

Perhaps the time has come for a change in the law with the advancements in technology allowing for more secure and inviolable electronic signatures.

For More Information

If you have any questions about this *Alert*, please contact Zabrina Hamid, any of the attorneys in our Singapore office or the attorney in the firm with whom you are in regular contact.

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