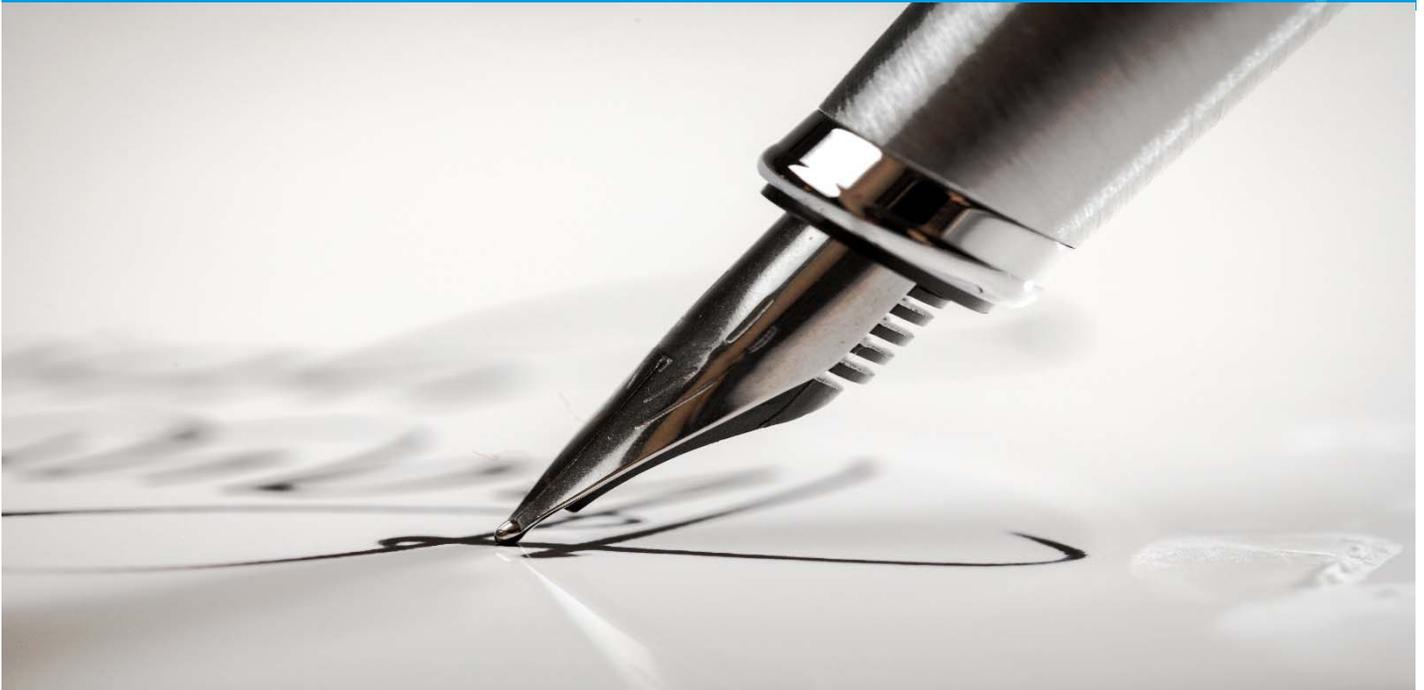


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## COVID-19 series: Singapore updates

### Use of electronic signatures



As the COVID-19 situation continues to develop in Singapore, the laws and regulations governing businesses and their activities are constantly being updated to address business continuity and conduct issues. Businesses will need to stay abreast of these updates and be mindful of ancillary issues that may arise from new measures being put in place.

This article is part of a series of updates aimed at providing a snapshot of issues that businesses should actively consider in the current climate. In the wake of the COVID-19 situation, disruption to businesses is inevitable due to the safe distancing measures implemented by the Multi-Ministry Task Force ("**Circuit Breaker Measures**") which, *inter alia*, require the closure of all non-residential premises, save for operations at the permitted premises of an "essential service provider". This means that the execution of documents by way of traditional "wet-ink" signatures would most likely become inexpedient and complicated, resulting in a paradigm shift in the way businesses obtain signatures. Hence, the use of electronic signatures has become a very real solution for businesses in today's context. In this article, we will discuss the use of electronic signatures in Singapore in light of the COVID-19 situation.

#### Electronic signatures

At the outset, the Electronic Transactions Act, Chapter 88 of Singapore (the "**ETA**"), which came into force on 1 July 2010, is instructive in this situation. Under the ETA, information in electronic form is given legal effect, validity and enforceability. An electronic record can

satisfy the requirement for information to be in writing if the information contained in the electronic record is accessible so as to be usable for subsequent reference. An electronic signature can satisfy the requirement of a signature if it satisfies the legal requirements for electronic signatures as expounded in the ETA. Under

the ETA, electronic signatures may be recognised as the functional equivalent of "wet-ink" signatures if:

- (a) a method is used to identify the signatory and to indicate his/her intention in respect of the information contained in the electronic record; and
- (b) that method used is either:-
  - (i) as reliable as appropriate for the purpose for which the electronic record was generated or communicated, taking into account all relevant circumstances; or
  - (ii) proven in fact to have fulfilled the functions described in sub-paragraph (a), by itself or together with further evidence.

While the ETA does not expressly define the term "electronic signature", it is generally understood as an acknowledgement provided by way of technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities. This, however, is differentiated from a "digital signature" under the ETA – there are further requirements under the ETA for an electronic signature to constitute a digital signature. In determining whether something amounts to a signature, the Infocomm Media Development Authority Singapore ("**IMDA**") understands that the court will generally look at whether the method of signature used satisfies the authenticating function of a signature, instead of whether the form of signature used is one which is frequently recognised.

Without a specific definition of "electronic signatures", they can possibly take different forms, subject to the legal requirements in the ETA being satisfied. Some examples of electronic signatures may include:

- (a) a person typing his/her name into a contract or email containing the terms of the contract;
- (b) a person electronically pasting his/her signature (e.g. in the form of an image) into an electronic version of the contract within his/her signature block;
- (c) a person accessing a contract through a web-based signature platform such as PandaDoc and DocuSign, and clicking to have his/her name inserted into the contract in the appropriate place; and
- (d) a person using a finger, light pen or touchscreen to sign his/her signature in the appropriate place in a contract.

Examples of documents where electronic signatures may be recognised pursuant to the ETA include the minutes of board/shareholders' meetings, written resolutions and resignation letters.

### Excluded Matters

Section 4 read with the First Schedule of the ETA expressly excludes certain matters (the "**Excluded Matters**") from Part II of the ETA:

- (a) the creation or execution of a will;
- (b) 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;
- (c) the creation, performance or enforcement of an indenture, a declaration of trust or power of attorney, with the exception of implied, constructive and resulting trusts;
- (d) any contract for the sale or other disposition of immovable property, or any interest in such property; and
- (e) the conveyance of immovable property or the transfer of any interest in immovable property.

These exclusions mean that, among other things, parties cannot rely on the ETA to satisfy the legal requirements of writing or signatures in relation to the Excluded Matters. However, this does not mean that parties are prevented from conducting the Excluded Matters electronically. It may be possible for electronic records or signatures to satisfy the requirements for writing or signature without reliance on the provisions of the ETA, and it would be a matter for legal interpretation whether an electronic form satisfies a particular legal requirement for writing or signature.

For example, case law has recognised the use of electronic communications in agreements for the conveyance of immovable property. Similarly, the exclusion of the Excluded Matters does not invalidate the use of their electronic versions if they are deemed valid under other rules of law such as the Rules of Court for the e-filing of Court documents.

Notwithstanding the foregoing, to err on the side of caution, it is recommended that any document or transaction that falls within the scope of Excluded Matters should be signed using a "wet-ink" signature. In practice, documents relating to the Excluded Matters should be executed by way of "wet-ink" signatures and

then scanned and circulated to the relevant parties with originals to follow. It should be noted that deeds and powers of attorney, which are commonly used by business, runs the risk of unenforceability if executed by way of electronic signatures. We would thus strongly recommend that businesses avoid the use of electronic signatures in this context.

Nevertheless, the IMDA is constantly seeking to revise the ETA, including the removal of most business-related transactions while retaining personal or familial transactions in the list of Excluded Matters. It would be interesting to see how the ETA will be revised to support the IMDA's vision to create a thriving digital economy for Singapore.

### Electronic risks

Technological advancement can be a double-edged sword. While electronic signatures and records can facilitate transactions for businesses, they can be more amenable to being tampered, modified or forged due to its very nature. For instance, an electronically scanned signature used legitimately in a transaction can be easily copied and used by a fraudster for a different document. The fact that electronic signatures and electronic records can be tampered, modified, copied or forged demonstrates the intrinsic challenges that are inherent in them. The pertinent challenges that businesses generally face include, without limitation:

- (a) whether an electronic record/contract has been altered, modified or tampered with;
- (b) whether there are adequate security measures put in place to protect the electronic signatures and electronic records;
- (c) whether the identity of the parties involved can be ascertained;
- (d) whether the parties involved in the transaction can trust each other due to the lack of a face-to-face meeting;
- (e) if applicable, whether both parties have access to the third-party e-signature platforms, whether such platforms are secure, and whether such platforms are willing or able to provide evidence should a dispute arise; and
- (f) if applicable, whether the corporate representatives of the parties involved have the relevant authorities to transact on behalf of their principals.

With these potential challenges looming, the use of electronic signatures should be evaluated with caution, especially with high value transactions, transactions that require large payments to be advanced or transactions that are concluded entirely online without sufficient verification and authentication.

Ultimately, one should perform a cost-benefit analysis to determine whether the use of electronic signatures should be adopted in specific transactions. There are some practical measures, though not fool proof, that may alleviate the risks of using electronic signatures, including:

- (a) performing extensive "know-your-client" checks to assess the risk profiles of the counterparty;
- (b) adopting technical security measures such as encrypted passwords and two-factor authentication, including the use of "digital signatures" as expounded under the ETA;
- (c) adopting the use of "secure electronic records" and "secure electronic signatures" as expounded under the ETA; and
- (d) engaging a Certification Authority who acts like trusted electronic notaries, certifying the electronic identities of users and organisations by verifying and vouching for the identity of the subscribers and providing certificate management services to support trusted and secure transactions.

### A flourishing digital economy?

The use of electronic signature is not in its infancy anymore and should be welcomed especially during the COVID-19 situation, though caution ought to be exercised. This is a timely reminder that businesses should start considering and evaluating the use of electronic signatures as Singapore is driving towards a flourishing digital economy.

New legislative and regulatory developments arise continually, resulting in further implications for businesses. This article has identified and addressed some of the pertinent issues relating to the use of electronic signatures in light of the COVID-19 situation.

This article was written by Virtus Law LLP (a member of the Stephenson Harwood (Singapore) Alliance). For more information, please do not hesitate to contact any of the team at Stephenson Harwood (Singapore) Alliance. We remain committed to assisting our clients during this challenging period.

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