

Can you write a cheque on the side of a cow? And why the answer to this is relevant to online transactions



Cows

Many lawyers studying the law of cheques will recall hearing about the famous case of Albert Haddock who in the 19th Century felt better after writing a cheque for his disputed tax bill on the side of a cow and leading it to the tax collector's office. As there is no law that requires a cheque to be written on paper, this would have worked. But in fact this never happened – the writer A.P. Herbert invented this story after finding that being a writer was a lot more fun than being a barrister.

Lawyers

Lawyers these days continue to tie themselves in knots over what amounts to signing or writing in the digital era. For example, is an email "writing" and is it "signed" by the sender? What about clicking a button on a website?

In the Hong Kong law context, the first source of law often considered is the Electronic Transactions Ordinance (Cap. 553) (the "**ETO**"). It is true that the ETO can plug gaps in the law in some situations, but usually it is not needed. This is because of the wonderful flexibility and general common sense of the common law, which continues to be a part of Hong Kong law.

Contracts

The starting point is that a contract in respect of which there are no specific execution formalities can be entered into orally. So a contract without such formalities can exist even if there is no writing, signing, sealing, witnessing or other such formality. This covers the vast majority of contracts that people enter into every day and certainly most transactions entered into online. Even without the ETO, an electronic signing platform such as Docusign can therefore work in relation to such a contract, because there does not need to be anything in writing or any signing. All that is needed is proof of some sort that the parties to the contract have contracted with each other.

But Hong Kong law sometimes requires writing, signing or even the archaic act of sealing.

Writing

Where writing is required by law, section 5 of the ETO can be helpful because it provides that an electronic record suffices. But the common law is flexible – a message sent between banks by the SWIFT electronic messaging system is considered to be in writing, irrespective of the ETO.

Signing

On signing, this has always been easy to achieve. At common law, it essentially means some evidence that the person who needs to sign has indicated his assent. So, in the days of illiteracy, a person merely needed to mark a cross on the document. And, since then, common law courts have held that the following non-electronic forms amount to valid signatures: signing with initials only; using a stamp of a handwritten signature; printing of a name; signing with a mark, even where the party executing the mark can write; and a description of the signatory, if sufficiently unambiguous, such as "Your loving mother" or "Servant to Mr Sperling".

In the digital era, common law courts have held that the following electronic acts amount to valid signatures: a person sending an email that has his/her name at the bottom to indicate who is sending it (but not where the sender's name is only in the "from" field at the top); a bank issuing a guarantee by SWIFT without any obvious evidence of signing at the end; and a person who clicks an "I agree" button on a website.

There is also common law authority, though not from specific court decisions, that a person who personally applies a typed version of their signature, uses a stylus pen to sign, applies an embedded "image" of their signature to a document or takes any other step to indicate their authentication of something is considered to be signing it, irrespective of the existence of the provisions of the ETO.

It may therefore even be the case that, as a matter of common law, the use of DocuSign or a similar platform for digitally-applied signatures would also be treated as signing, irrespective of the ETO.

ETO

Section 6(1) of the ETO expressly recognizes electronic signatures as effective signing. If the ETO cures any doubt as to whether a particular type of digital act amounts to signing, then why worry about what the common law says? Two answers:-

- Arguably, not every type of electronic signature falls within the ETO.
- The ETO applies only if certain conditions are met, eg the electronic method is reliable, appropriate and consented to by the person to whom the signature is given. These conditions, in particular the consent requirement, may not always be easy to satisfy in an online situation.

Note also that, for a document involving a government entity, section 6(1) of the ETO does not apply and instead, if reliance on the ETO (instead of the common law) is needed, it is necessary to follow the requirements for a "digital" signature set out in section 6(2) of the ETO, involving (for example) a digital certificate issued by one of the competent issuing authorities in Hong Kong.

Sealing

Unfortunately, until Hong Kong law on the archaic form of document called a deed is brought into the digital era, an online solution where a deed is required is tricky. The main problems are Hong Kong law's fixation with the need for a deed to be sealed, which has been relaxed only for execution by Hong Kong companies, and the very old common law rule that a deed must be executed on paper, parchment or vellum, which the ETO failed to abolish.

But deeds are legally required in only very few situations, despite documents so often being prepared for execution as deeds when they don't need to be. So it's important to know when a deed is needed and when it's not.

How we can help

We have applied the above rules, in particular the common law ones, to help our fintech clients achieve the formation of contracts for transactions on their sites and apps with the minimum of fuss.

Get in touch

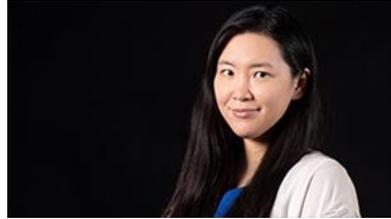


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