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## Signing Off Electronically

Electronic signatures have been legally recognised in Malaysia since 1997, first with the introduction of the Digital Signature Act 1997 (**DSA**) and thereafter the enactment of the Electronic Commerce Act 2006 (**ECA**). They are widely and frequently used by businesses and corporations in commercial transactions and contracts.

In view of the Movement Control Order (**MCO**) and the possibility of it being further extended beyond 14 April 2020, most if not all corporate staff will have to continue working from home. Given this, electronic signatures and electronic contracting will likely become increasingly important and even more prevalent, thus allowing commercial transactions to take place and contracts to be executed, all away from the convenience and benefits of an office environment.

Below are some of the frequent questions and answers that may arise when discussing electronic signatures:

**Q1: Must a contract be signed for it to be treated as a concluded contract?**

A1: No. Under the Contracts Act 1950, there is no requirement for a contract to be in writing and to be signed for it to be valid and enforceable. Generally, a contract can come into existence if the basic elements such as offer and acceptance, intention to create legal relations, consideration and capacity to contract are made out.

**Q2: Is it possible for parties to form a contract through the exchange of e-mails?**

A2: Yes. The ECA allows for electronic communications in the formation of a contract.

**Q3: In contract negotiations conducted through e-mails, how can parties ensure that they are not bound by the**



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**negotiated terms pending the execution of a formal agreement, be it through a wet ink signature or an electronic signature?**

A3: For starters, parties could always include the phrase “subject to contract” as an endorsement in their e-mail correspondences during negotiations.

**Q4: How can parties signify their agreement to a contract negotiated over electronic means?**

A4: This is where electronic signatures, defined in the 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, become a welcomed solution.

Section 9(1) of the ECA stipulates that the electronic signature will only be recognised as the signature of a person on a document if the three conditions below are satisfied:

- (a) Association: The electronic signature is attached to or is logically associated with the electronic message;
- (b) Adequate identification: The electronic signature adequately identifies the person and adequately indicates the person’s approval of the information to which the signature relates; and
- (c) As reliable as is appropriate: The electronic signature is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required.

As to what amounts to “as reliable as if appropriate”, they are as follows:

- (a) the means of creating the electronic signature is linked to and under the control of that person only;
- (b) any alteration made to the electronic signature after the time of signing is detectable; and
- (c) any alteration made to that document after the time of signing is detectable.

**Q5: Can electronic signatures under the ECA be used for other contracts aside from commercial ones?**

A5: Not all documents can be signed electronically, as certain documents are expressly carved out under the ECA.

Before considering utilising electronic signatures, parties must be mindful that the documents to be signed are not those expressly excluded by the ECA, namely power of attorney, wills and codicils, trusts, and negotiable instruments<sup>1</sup>.

Furthermore, electronic signatures cannot be used in conveyancing transactions as the National Land Code 1965 requires that all signatures on the forms for the purposes of transfer or conveyance of alienated land shall be in manuscript form (i.e. conventional wet ink signing)<sup>2</sup>.

**Q6: Would it make any difference if the counterparty is from another jurisdiction?**

A6: Yes. It would be crucial to ensure that the law of the jurisdiction where the counterparty resides or is incorporated permits the use of electronic signatures. It is advisable to seek advice in that jurisdiction to confirm that the use of electronic signatures will not adversely impact the validity of the contract.

**Q7: Are there any other ways (besides electronic signature under the ECA) in which parties can signify their agreement to a contract via electronic means?**

A7: Yes. Parties may adopt a digital signature under the DSA as a way to signify their agreement to a contract. The DSA is a technologically specific legislation which regulates digital signatures created by way of public key infrastructure (**PKI**) technology.

Section 62(2) of the DSA provides that a document signed with a digital signature in accordance with the DSA is as legally binding as a document signed with a handwritten signature, an affixed thumb-print or any other mark, and is deemed to be a legally binding signature.

A digital signature will be recognised as a signature of a person on a document if<sup>3</sup>:

- (a) The digital signature was verified by reference to the public key listed in a valid certificate issued by a licensed certification authority;
- (b) The digital signature was affixed by the signer with the intention of signing the message; and
- (c) The recipient has no knowledge or notice that the signer has breached a duty as a subscriber or does

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<sup>1</sup> See the Schedule of the ECA

<sup>2</sup> See National Land Code 1965, s 436, read together with the Tenth and First Schedules

<sup>3</sup> DSA, s 62 (1)

not rightfully hold the private key used to affix the digital signature.

**Q8: How different is a digital signature from an electronic signature?**

A8: A digital signature that is recognised under the DSA is created by way of PKI technology. PKI involves two keys being generated, one private key and one public key. The private key is confidential and is kept by a subscriber, while the public key can be distributed openly to any person. The public key verifies the digital signature that the private key creates. This process of using a key pair ensures that the identity of the signer of the message is authentic and that the content of the message is secure and valid.

The identity of the subscriber is verified by a certification authority licensed by the Malaysian Communications and Multimedia Commission, who will store the subscriber's information and public key in a server.

An electronic signature under the ECA, on the other hand, is less complex and is not technologically specific. It can be any letter, character, number, sound or any other symbol or any combination thereof adopted by parties as signature.

**Q9: Are electronic messages admissible as evidence in court?**

A9: Yes, electronic messages are generally admissible as evidence in court.

Where the admissibility of electronic or digital messages is challenged in court, one way which parties can rely on to admit electronic or digital messages is by relying on Section 90A of the Evidence Act 1950, which provides that a document produced by a computer or the statement of facts contained therein shall be admissible as evidence of any fact stated therein, regardless of whether the person tendering the same is the maker of such document or statement, if the document was produced by the computer in the course of its ordinary use.

In closing, it should be noted that electronic signatures and the legal effect of the ECA were discussed by the Federal Court in the case of *Yam Kong Seng & Anor v Yee Weng Kwai*<sup>4</sup>. The Federal Court accepted an SMS as an admission of debt, notwithstanding section 27 of the Limitation Act 1953 providing that such an admission shall be in writing and signed by the

person making it. The Federal Court found that the legal requirements under section 9 of the ECA had been fulfilled when the sender of the electronic signature (i.e. SMS) was adequately identified.

All in all, with uncertainty looming over how long the MCO will remain in effect, it is worthwhile for businesses to consider looking into how they can prepare themselves to execute commercial contracts electronically.

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