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22 JUNE 2021

The Age of Digital Documents: Understanding Electronic Signatures

The practice of signing contracts electronically has become part of our “new normal” in view of the COVID-19 pandemic and the rapid growth in the IT and e-commerce sector. It is therefore imperative for businesses and individuals to be cognizant of the proper use and application of electronic signatures (or e-signatures) in electronic documents.

This alert highlights: (i) the important distinctions between electronic signatures in general and digital signature (which is a specific type of electronic signature); and (ii) the practical considerations of these signatures.

Categories

Electronic signatures

Governed by the Electronic Commerce Act 2006 (**ECA**), electronic signatures are broadly defined 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*”.¹ Electronic signatures come in various forms, such as a digital image of a person’s handwritten signature, a short-message service (SMS) or a Digital Signature (*explained further below*).

Section 9 of the ECA² stipulates that an electronic signature is valid and legally enforceable if:

- (a) it is attached to or logically associated with the electronic message;
- (b) it provides adequate identification of the person, and indicates the person’s approval of the information to which the signature relates;

¹ Electronic Commerce Act 2006, s 5
² Electronic Commerce Act 2006, s 9

(c) it is “as reliable as it is appropriate” for the purposes and circumstances in which the signature is needed, in the sense that:

- (i) The means of creating the electronic signature is linked to and under the control of that person only;
- (ii) After signing the document, changes to the electronic signature and/or the document, as a whole, are detectable.

Digital signatures

A digital signature is a specific type of electronic signature which is more secure, reliable and advanced. It is governed by the Digital Signatures Act 1997 (**DSA**).

Digital signature is based on an asymmetric cryptosystem (i.e. a system which uses a series of algorithms to generate a customised digital “key-pair” mechanism). This mechanism is used to create and verify digital signatures. The signatory uses a private key to create a digital signature, which can then be verified via a public key found in a digital certificate issued by the relevant certification authorities licensed by the Malaysian Communications and Multimedia Commission (MCMC). To date, there are four Certification Authorities licensed by the MCMC: Pos Digicert Sdn Bhd, MSC Trustgate.Com Sdn Bhd, Telekom Applied Business Sdn Bhd and Raffcomm Technologies Sdn Bhd.³

Pursuant to s 62 of the DSA, a digital signature will be valid if:⁴

- (a) the digital signature is verified by reference to the public key noted in a valid certificate issued by a licensed certification authority;
- (b) the signatory affixed the digital signature with the intention of signing the message; and
- (c) the recipient has no knowledge or notice that the signatory has breached a duty as a subscriber; or does not rightfully hold the private key used to affix the digital signature.

Practical considerations

Parties resorting to electronic signatures ought to be aware of certain legal and practical considerations. In general, while electronic signatures are generally simple, user-friendly and versatile, digital signatures tend to be more sophisticated, but

³ <https://www.mcmc.gov.my/en/sectors/digital-signature/list-of-licensees>
⁴ Digital Signatures Act 1997, s 62

they provide for greater security and reliability, due to the various mechanisms for check and balance, as noted above.

Commercial contracts

Electronic signatures can be used in various commercial agreements, as they have the same legal effect as a handwritten signature. Documents which may be signed electronically — unless stated otherwise — include loan agreements, tenancy agreements, employment documents and company documents. In practice, however, parties to a contract should always conduct the necessary due diligence by: (i) checking the authenticity of the individual's electronic signature; and (ii) maintaining the security of electronic channels to avoid any unauthorised third parties from accessing and signing the documents.

Witnesses

The ECA allows a witness to an electronic document to sign the document via an electronic signature.⁵

Affixing seals

However, where the law requires a seal to be affixed to an electronic document, the electronic document can only be signed using a digital signature within the meaning of the DSA. Other forms of electronic signatures will not be valid.⁶

'Wet-ink' signatures only

The Schedule of the ECA⁷ also expressly precludes certain documents from being signed or executed electronically:

- (a) Powers of attorney;
- (b) The creation of wills and codicils;
- (c) The creation of trusts;
- (d) Negotiable instruments, such as a document promising the bearer a sum of payment at a specified date, or on-demand.

Likewise, documents requiring attestation or formal notarisaton cannot be signed electronically. Common examples include affidavits used in court proceedings, and instruments effecting transactions involving real property within the scope of the Malaysian National Land Code 1965.

Conclusion

Given the frequency with which e-signatures are being adopted in commercial transactions, it is important for businesses and

⁵ Electronic Commerce Act 2006, s 11

⁶ Electronic Commerce Act 2006, s 10

⁷ Electronic Commerce Act 2006, Schedule 2, s 2

individuals to have a good understanding of the scope and application of e-signatures. Since this area of law is relatively new, interested parties ought to proactively seek legal advice should any doubts arise on this matter.

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Published by the Technology, Media & Telecommunications Practice

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