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Executing Documents in New Normal: Key Considerations When Using Electronic Signatures

Introduction

The COVID-19 pandemic is expected to change how we operate business moving forward. With a majority of the global workforce currently telecommuting amid the elevated border control and safe distancing measures, there is an increased need to assess what would be the most efficient way of executing contracts and documents in the new normal. There is therefore more demand for the use of electronic signatures in commercial transactions.

In this Update, we highlight some key requirements or considerations that you should take note of to ensure that a document or contract that has been executed by electronic signatures is valid.

How to Execute Contracts and Documents When All Parties Cannot be Physically Present in Same Location

The Singapore courts have long recognised that an agreement or document may be executed by electronic means. However, this general rule is subject to any formalities relating to the execution of that document. The formalities may be stipulated in the relevant legislation, constitution of a company or other contractual arrangements governing the parties to the contract.

Traditionally, when all parties cannot be physically present in the same location to execute a document or contract, a lawyer may arrange to sign the document or contract virtually where signature pages are sent by email. This may be done by the parties signing a document in wet ink, scanning the signed document as a PDF document or an image and circulating it to the counterparties.

Under Singapore law, "sign" or "signature" is defined widely in legislation and by the courts. It refers to any method (electronic or otherwise) used to identify a person and to indicate the intention of that person to authenticate the document. Therefore, a valid document may be signed by electronic means as long as the signatory intends to authenticate the document. This may include:

- typing one's name directly in a soft copy document;
- sending a soft copy document to the recipient with the inscription of the sender's name next to his or her email address at the top of the email with an indication that the document is approved;

Contribution Note: This Client Update was prepared with the assistance of Janessa Sit, Associate, Corporate & Commercial.



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- ticking an "I agree" checkbox on an electronic terms and conditions contract;
- pasting one's signature (for example in the form of an image) in a soft copy document;
- signing on a touchscreen in a soft copy document; or
- using an electronic signature program (e.g. DocuSign, Adobe Sign, PandaDoc) to insert one's signature in a soft copy document pursuant to the secured mechanism in the program.

Parties may determine the methods for imprinting their electronic signatures with reference to the level of security that they or the laws require with regard to the authenticity of the signature.

Is There Any Legislation that Governs the Use of Electronic Signatures

In Singapore, the Electronic Transactions Act ("**ETA**") provides for the legal recognition and use of electronic signatures and electronic records. The ETA clarifies that offer and acceptance may be expressed by electronic communications, and contracts shall not be denied validity or enforceability solely on the grounds that electronic communications were used for that purpose.

Part II of the ETA provides, among other things, that an electronic record or signature satisfies any rule of law requiring information to be written or be in writing, or requiring a document or record to be signed. However, certain documents and transactions are excluded from the operation of Part II of the ETA ("**Excluded Matters**"). When the policy decision was made to exclude these matters, e-commerce was at its infancy and it was then thought that these matters were not ready for the transition into the electronic medium. The Singapore government has initiated a consultation process in 2019 to review whether all of these matters should continue to be excluded from the scope of the ETA in view of the proliferation of electronic transactions and expansion of e-commerce in Singapore and Southeast Asia.

Are There Any Documents That Should Not be Executed via Electronic Signature

Any document or transaction that relates to Excluded Matters under the ETA may not rely on the provisions in Part II of the ETA that accords legal recognition to the electronic records and electronic signatures relating to these documents. The Excluded Matters are:

- the creation or execution of a will;
- 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;
- the creation, performance or enforcement of an indenture, declaration of trust or power of attorney, with the exception of implied, constructive and resulting trusts;

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- any contract for the sale or other disposition of immovable property, or any interest in such property; and
- the conveyance of immovable property or the transfer of any interest in immovable property.

However, the mere fact that a document or transaction falls within the Excluded Matters does not strictly prevent such a document and transaction from being executed validly by electronic means if common law has recognised that the electronic records or signature of the document and transaction satisfy the "in writing" and "signed" formalities requirements. Nevertheless, due to the legal uncertainties concerning the legal validity of the electronic versions of the documents and transactions related to the Excluded Matters, these documents are typically executed in hard copies with wet-ink signatures.

Practical Pointers: You should examine whether a document would fall within the ambit of any of the Excluded Matters before signing a document electronically. For example, powers of attorney and declarations of trust can sometimes take the form of provisions within sale and purchase agreements or loan agreements. Such documents would therefore fall within the scope of Excluded Matters.

Should Deeds be Executed via Electronic Signature

In Singapore, the formalities for executing a deed are dictated by the requirements prescribed in the legislation governing the subject matter of the deed. Where the legislation is silent, a deed must be executed in accordance with the principles established at common law, namely it must be "signed, sealed and delivered". Whether a document has been validly executed as a deed will depend on the circumstances and who is executing the deed.

A deed that is executed in respect of an Excluded Matter should not be executed via electronic signature. A party should assess and ascertain carefully whether a deed in respect of a document or transaction which does not concern an Excluded Matter may be executed validly via electronic signature on a case-by-case basis as there are certain uncertainties as to the extent to which a deed executed between two or more parties may be regarded as an indenture (which falls within the scope of an Excluded Matter). Some other issues for consideration are highlighted below.

Execution by individuals

At common law, a deed may be signed electronically and need not be delivered physically (as long as a party has expressed his/her intention to be bound by the deed). However, it has yet to be tested in Singapore courts how sealing may validly be done via electronic means.

Execution by Singapore incorporated companies

The Singapore Companies Act provides that a company may execute a deed without affixing a seal by signature on behalf of the company by:

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- a) A director and a secretary of the company;
- b) At least two directors of the company; or
- c) A director of the company in the presence of a witness who attests the signature.

Witnessing or attesting

Where deeds are required to be attested or witnessed (like the manner set out in (c) above), there are evidentiary risks as to whether a person who was not physically present when the signatory signed the deed could be considered to have satisfied the requirement of "witnessing" where he/she had to have sight of the act of signing and was able to verify that the signature that he or she was attesting was the one that he or she witnessed. Without further clarification in the Singapore legislation or courts, it would be prudent to take the position that a witness should be physically present when the signatory signs a deed or document and not to arrange for witnessing via a video conferencing tool.

Given the foregoing, it would be prudent to avoid the use of electronic signature for the execution of deeds until there is further clarity on this position.

Should Company Documents be Executed via Electronic Signature

Given that the requirement for signatures can be fulfilled by electronic signatures, and that company documents are not part of the Excluded Matters, it is arguable that such documents may be electronically signed. Examples would include:

- commercial contracts;
- employment contracts;
- directors' resolutions;
- shareholders' resolutions; and
- meeting minutes, etc.

Practical Pointers: For directors' or shareholders' resolutions and meeting minutes, you should ensure that the company's constitution does not prohibit such documents from being executed electronically. If the company's constitution sets out requirements for authenticating the identity of the person signing the documents, this should be adhered to.

Are There Other Practical Considerations in Determining Whether to Execute a Document via Electronic Signature

Filing with regulators / registry

If a document has to be filed with a regulator or registry, a party has to consider whether the regulator or registry accepts a document that has been electronically signed. Singapore regulators generally allow

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documents that have been executed electronically to be filed, including the Accounting and Corporate Regulatory Authority ("ACRA") which is the national regulator of business entities, and the Intellectual Property Office of Singapore ("IPOS") which administers intellectual property law in Singapore, etc.

Cross-border transactions

If you are dealing with cross-border transactions, please note the requirements in the relevant foreign countries on the recognition, registration or enforcement of a document. This is important if a document needs to be notarised for use in a foreign country.

While a commissioner for oaths may administer oaths (for, among other things, taking any affidavits or affirmation) or take and receive statutory declarations via video conferencing link provided that certain requirements are adhered to, notarisation still has to be done physically in Singapore.

Are There Any Requirements on How Secure an Electronic Signature Should Be

The ETA does not dictate any requirements on the security features of an electronic signature method. A party may determine on a case-by-case basis the level of security that he or she would apply to ensure the authenticity and integrity of an electronic signature with reference to relevant factors, such as the value of the transaction governed by the contract and the importance of safeguarding the confidentiality of the transaction, etc.

There are electronic signature service providers offering electronic signature programs (e.g. DocuSign, Adobe Sign, PandaDoc) that incorporate additional levels of security to protect the veracity of electronic signatures. Electronic signatures generated under such programs that meet the criteria stated below, are likely to be deemed "secure electronic signatures" under the ETA.

An electronic signature will be considered a "secure electronic signature" as defined in the ETA if it has been affixed onto the document through the application of a specified or commercially reasonable security procedure agreed to by the parties involved. The security procedure must ensure the signature generated is (i) unique to the signatory; (ii) capable of identifying the signatory; (ii) created in a way under the sole control of the signatory; and (iii) linked to the electronic record to which the electronic signature relates in a manner such that if the record was changed the signature would be invalidated.

The benefit to using a "secure electronic signature" is that the ETA gives different legal treatment to a secure electronic signature as opposed to a usual electronic signature. A "secure electronic signature" will be entitled to additional presumptions under the ETA. These are: (i) a presumption of authenticity and integrity of the electronic signature, (ii) a presumption that the signature is that of the person with whom it is associated, and (iii) a presumption that the user affixed the signature with the intent of signing or approving the document. A "secure electronic signature" will therefore be harder to challenge in the event of a dispute over the validity of the signature.

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Concluding Remarks

Parties to a contract or transaction should determine whether to use an electronic signature on a case-by-case basis with reference to the considerations set out above. These considerations are particularly relevant in the current world where there is an accelerated adoption of digital solutions to deal with our day-to-day business dealings amid varying states of movement and meeting restrictions imposed by the governments in the region to deal with the COVID-19 pandemic.

If you have any queries on the above and how they apply to your documents and transactions, please do not hesitate to get in touch with our team set out below.

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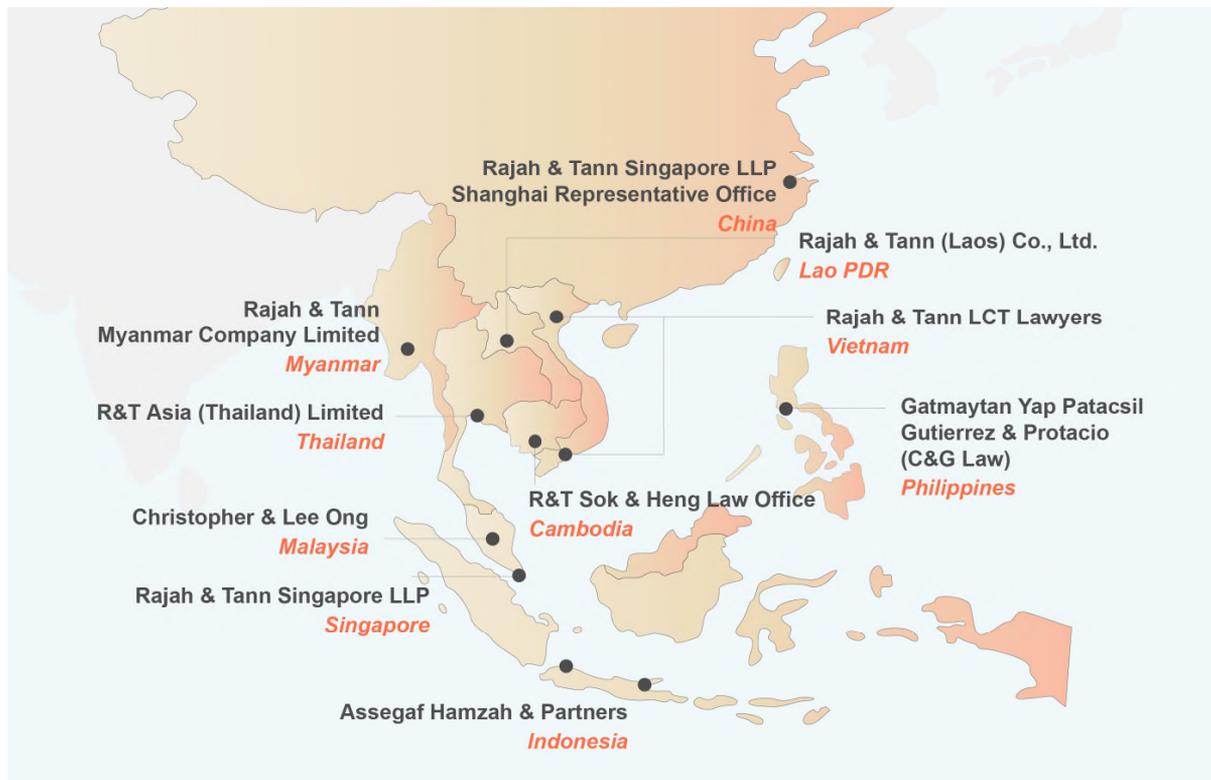
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