

## Insights

# HK AND PRC - COVID-19: E-SIGNATURE FAQ – AN OVERVIEW OF HOW COMPANIES MAY EXECUTE DOCUMENTS USING E-SIGNATURES DURING COVID-19

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## SUMMARY

During the COVID-19 outbreak, in order to reduce potential transmission of the virus, many companies, either voluntarily or in compliance with relevant governmental regulations, adopt a work-from-home policy and cancel physical meetings as far as possible. Facing this unprecedented situation where you yourself and your contractual counterparty are both working remotely at home, how do you execute documents to keep the business running? As explained in this FAQ, the use of e-signatures may be the answer.

## Introduction

During the COVID-19 outbreak, in order to reduce potential transmission of the virus, many companies, either voluntarily or in compliance with relevant governmental regulations, adopt a work-from-home policy and cancel physical meetings as far as possible. Facing this unprecedented situation where you yourself and your contractual counterparty are both working remotely at home, how do you execute documents to keep the business running? As explained in this FAQ, the use of e-signatures may be the answer.

## Generally speaking, can i sign contract with electronic signatures?

### Hong Kong

In Hong Kong, under the Electronic Transactions Ordinance (Cap. 553) (“**ETO**”), electronic signatures and digital signatures have the same legal status as wet-ink signatures. For electronic signatures, there are no express requirements for the form or format. On the other hand, digital signatures are coded with a unique message securely associated with the signatory and are presumed to be accurate and authentic if they are supported by a certificate issued by a recognised certification authority.

For transactions where all parties are non-governmental entities, parties may agree to use electronic signatures or digital signatures. For transactions that involve government entities, signatories must use digital signatures.

## **PRC**

In PRC, the Electronic Signature Law (“**ESL**”), which was recently amended in April 2019, provides that “reliable electronic signatures” are recognised and have the same legal effect as handwritten signatures and seals (Article 4). An electronic signature refers to the data included and attached in a data message in electronic form, for the use of identifying the identity of the signatory and showing that the signatory has recognised the contents therein (Articles 2 and 3). The data message refers to the information created, sent, received or stored by such means as electron, optics, magnetism or the similar means. Contracts with eligible electronic signatures recognised by the law are enforceable in the PRC courts.

### **How do you know if the electronic signature is valid?**

#### **Hong Kong**

Pursuant to section 6(1), ETO, an electronic signature is valid where:-

- (a) the signatory attaches or associates the electronic signature with an electronic record for the purpose of identification and indicating the authentication or approval of the information in the electronic record (for example, by placing the signatory’s electronic signature at the bottom of a completed online form);
- (b) any method used by the signatory is reliable, and is appropriate, for the purpose for which the information contained in the document is communicated; and
- (c) the person to whom the signature is given consents to the use of such method (including implied consent that can be reasonably inferred from a person’s conduct).

If an electronic signature does not strictly comply with the requirements under the ETO, it does not necessarily mean that this sole ground would render the document inadmissible in court, however, extra supporting evidence will be required to ascertain the formation of a contract by means of electronic records.

Pursuant to section 6(1A), ETO, digital signature is valid where it is:-

- (a) supported by a digital certificate issued by a recognised certification authority;
- (b) generated within the validity of the recognised certificate; and
- (c) used in accordance with the terms of the recognised certificate.

Note that there are currently two recognised certification authorities in Hong Kong: Postmaster General and Digi-Sign Certification Services Limited.

The application of the ETO is expressly subject to the common law rules of contract. Therefore:-

- (a) the use of electronic signatures or digital signatures is but one way of demonstrating offer, acceptance and parties' intention to be legally bound. In fact, despite the usual preference of commercial parties to have contracts to be signed, a contract does not necessarily need to be signed (by hand or electronically) to become valid;
- (b) parties should pay attention to any specific signing requirement raised by the other party, for example, where the offering party clearly states that only handwritten signature is accepted, that should be followed by the accepting party.

## **PRC**

Under the ESL, a reliable electronic signature is one which complies with all of the following statutory conditions or which complies with reliable conditions as agreed by the parties (Article 13):-

- (a) when any data made by electronic signature is used for an electronic signature, and is owned exclusively by the electronic signatory;
- (b) the data made by the electronic signature is controlled only by the electronic signatory when signing;
- (c) any alteration on an electronic signature after signing can be tracked; and
- (d) any alteration on the contents and form of any data message can be tracked after signing.

Any electronic signature which needs third-party certification should be certified by a duly established electronic certification service provider licensed by the competent PRC authorities.

The legal effect of any document using an electronic signature and data message as stipulated by the parties will not be denied only because it takes the form of an electronic signature and data message which satisfy the requirements under the ESL. However, note that a mere electronic image of a physical signature or a company stamp does not comply with the requirements under Article 13 and is therefore not a valid electronic signature under the ESL.

## **Is there any statutory limitation of the use of e-signatures?**

### **Hong Kong**

Certain types of contracts must be executed with handwritten signatures and must not be stored in electronic form (Schedule 1, ETO), including but not limited to: a will, codicil or any other testamentary document; an oath and affidavit; a statutory declaration; a trust (other than resulting, implied or constructive trusts); a power of attorney; Government conditions of grant and Government leases; any deed, conveyancing or other document or instrument in writing referred to in the Land Registration Ordinance (Cap. 128) ("**LRO**") relating to any land; any assignment, mortgage or legal charge within the meaning of the Conveyancing and Property Ordinance (Cap. 219) or any other contract relating to or effecting the disposition of immovable property or an

interest in immovable property; a document effecting a floating charge referred to in section 2A of the LRO; and negotiable instruments (but excluding cheques that bear the words “not negotiable”).

It is also recommended always to obtain the consent of the other parties and/or the authorities (where applicable) when signing any documents that are required under any laws or regulations.

## **PRC**

The following documents, amongst other things, are not permitted to be signed by electronic signatures: documents concerning personal relations such as marriage, adoption and succession, cessation of supply of water, heat, gas or other public utility services; and other circumstances under which the electronic documents are not applicable as prescribed by laws and administrative regulations.

## **Practical tips**

### **General**

- Commercial contracts can generally be signed electronically unless the parties made clear that their intentions are the contrary.
- Parties should exercise reasonable care when using electronic signatures. Relevant contracts should expressly state that signing will be conducted with electronic signatures and will bind the parties. Parties should also work with established service providers or certification authorities to develop the electronic signature process.
- When a legal opinion is provided on the due execution of a document, extra attention may need to be given on the qualifications on the laws in this regard when the signature is made electronically.

### **Hong Kong**

- It is best practice that a signatory attaches his/ her electronic signature to a document by himself/ herself.
- Electronic signatures may not be recognised by a notary public – so do not opt for using electronic signatures if a document is expected to be notarised.
- When the execution of a document is required to be witnessed, using an electronic signature may prompt arguments as to whether the moment of signing has been properly witnessed. It is therefore not recommended until the law is settled that witnessing by way of video-conferencing or other means is also valid.

- When a company seal is required to be used in any document, the procedures under a company's articles of association should also be followed. It is recommended to avoid using an electronic signature to prevent a challenge on the formalities.
- For deeds other than relating to a land under the LRO, although there are no explicit provisions that these cannot be executed by way of electronic signatures, it is strongly recommended to insist execution by wet-ink signatures given the binding effect of a deed even without consideration.

## **PRC**

- If documents are scanned copies containing the wet ink signed originals, upon exchange of the scanned copies by email, the parties should request for the originals of such signed documents to be delivered as soon as possible, as the signatures on such scanned copies do not satisfy the requirements under the PRC law as electronic signatures.
- Evaluate the existing or proposed electronic signature process and consider whether such electronic signatures satisfy the relevant legal requirements.
- Given the technical aspects involved in establishing the electronic signature process, work with a duly PRC licensed electronic certification service provider (certification authority) to develop the electronic signature process.
- Consider and comply with local regulations for application and approval for electronic signatures. Consult legal counsel if in doubt.
- If the parties want a contract to be executed by electronic signatures, expressly specify in the relevant contract that the signing will be conducted with electronic signatures and will bind the parties once such electronic signatures are included.

## **RELATED PRACTICE AREAS**

- Corporate
- M&A & Corporate Finance
- Business & Commercial Disputes

## MEET THE TEAM



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