

WHAT YOU SHOULD KNOW ABOUT ELECTRONIC CONTRACTS

9 APRIL 2021



CLIENT ALERT: WHAT YOU SHOULD KNOW ABOUT ELECTRONIC CONTRACTS



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Contracts are agreements entered into between two or more parties, but not all agreements are valid and enforceable in the eyes of the law. The Contracts Act 1950, is the primary legislation referred to for contractual relations in Malaysia. Under the Contracts Act, an agreement can generally be formed between two or more parties if there exists a valid offer and acceptance from parties with the necessary capacity, lawful consideration, certainty of terms as well as intention to create legal relations. These are the cornerstones in determining if an agreement is valid, binding and enforceable between the parties and as such can be relied on in the case of an arising dispute.


As the world moves into an era of technological advancement, more and more agreements are being made online through electronic communications or simply via acceptance of terms and conditions online especially in the case of electronic commerce and use of social media. The recent COVID-19 outbreak has further fueled this movement as the majority have been homebound, forcing many to explore the avenues of forming agreements electronically one way or another. A question therefore comes to light on the validity of these agreements.

1. Validity and Enforceability of Non-Conventional Contracts

Contrary to popular beliefs, the Contracts Act 1950 does not actually state that a contract needs to be in writing - while the act specifies requirements of a valid, binding and enforceable contract (as mentioned above), "written" or "in writing" is not part of such requirements. Similarly, there is also no requirement for a contract to be signed in order for it to be binding. This means that as long as the ingredients of a contract mentioned earlier are present, a contract will be considered as valid and binding, regardless of its form and whether or not it is signed. In other words, oral contracts and electronic contracts devoid of physical form can be considered valid contracts too as long as the essential ingredients are present.

Of course, traditionally reducing the terms of agreement down in writing used to be the most practical way (and perhaps the only way) for recording purposes and wet ink signing used to be the easiest way to demonstrate offer and acceptance. Which is why physically written (or typed) agreements and wet-ink signings have always been the default and the most common way for parties to enter into contracts. However, technological advancement has opened up more ways for parties to enter into contracts and there are now many different ways for parties to record their understanding, agreement, intention, offers as well as acceptance, such as clickwrap agreement, browse-wrap agreement, electronic and digital signing, etc. As the saying goes, all roads lead to Rome, so long as the routes taken are legal.





In summary, whether or not a contract is physically written down or whether or not it is affixed with wet-ink signatures generally does not affect its validity and enforceability. What matter are that parties agreed to the terms of the contract and there are clear offer and acceptance of the terms. Notwithstanding, certain formal documents (such as deeds, power of attorney, assignments, etc.) are required to be executed in certain manners for them to take effect. Under such circumstances, the requirements will then have to be adhered to before these documents can be legally binding.

2. Electronic Contracts

As explained above, electronic contracts are recognised as valid contracts in Malaysia. Its validity is further cemented by the Electronic Commerce Act 2006 (the “**ECA**”) in commercial context.

The act expressly recognises the validity of contracts formed electronically, except for (a) Power of Attorney, (b) wills and codicils, (c) trusts, as well as (d) negotiable instruments (promissory notes, IOU, etc.), which are usually required to be executed in certain manners. Further, where there is any legal requirement for a document to be in writing, signed, sealed and/or witnessed, it is provided under the ECA that these legal requirements are fulfilled as long as the document is generally written, signed, sealed and witnessed electronically in accordance with the ECA.

You may be wondering if there is actually any document (save for those excluded by the ECA) that is strictly required by law to be signed or in writing. One example of such document would be a deed to be executed by a company.

Pursuant to Section 67 of the Companies Act 2016, a document is validly executed by a company as a deed if it is duly executed by the company and delivered as a deed. Section 66 of the Companies Act in turn provides that a document is considered executed by a company if it is through the affixing of the company’s common seal; or in lieu of a common seal, if it is signed on behalf of the company by at least two (2) authorised officers, one of whom is to be a director; or in the case of a sole director, by that director in the presence of a witness who attests the signature.

The combined effect of Sections 66 and 67 of the Companies Act is such that where a company wishes to execute a document as a deed, it has to be executed via affixation of its common seal by default. Where there is no common seal, the provisions under Section 66 of the Companies Act apply and the deed will have to be signed by 2 directors; or 1 director and 1 authorised officer; or by 1 director in the case of sole director. Under such circumstances, the signatory(ies) will have to either sign the deed in wet-ink or electronically in accordance with the ECA. If the latter is opted, the following conditions under Section 9 of the ECA will then have to be complied with:

- (i) the electronic signature is to be attached to or is logically associated with the electronic message or document;
- (ii) the electronic signature adequately identifies the person and adequately indicates the person’s approval of the information to which the signature relates; and
- (iii) the electronic signature is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required.

For the purposes of item (iii) above, an electronic signature is as reliable as is appropriate if:

- (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.

According to the ECA, 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 can be considered as “electronic signature”. In this connection, it was decided in the case of *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478 that even a simple text message fulfils the requirements of an electronic signature under the ECA and the communication of which resulted in formation of contract.

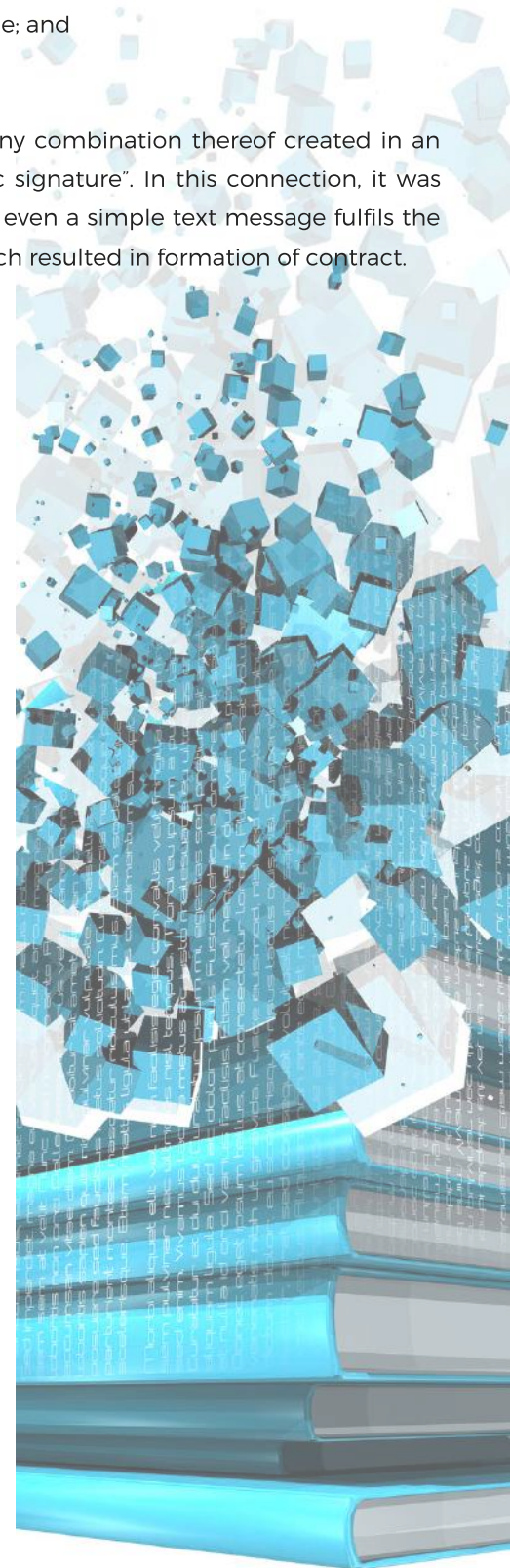
3. Digital Signatures

Apart from electronic signatures, digital signatures are also recognised in Malaysia.

Most will probably take electronic signature and digital signature as one and the same. Technically and legally however, they are two separate and distinct creatures altogether. While they can both be used to indicate the identity of signatories, a digital signature involves a more complex mechanism in terms of creation and identification. To explain it in layman terms, digital signatures are essentially messages encrypted using an asymmetric cryptosystem. A unique private key is used to generate an encrypted message (which is the signature) that can only be decrypted by the public key corresponding to the private key. It allows recipients of the documents so executed to verify and validate the identity of the signatory and whether or not the documents have been tampered with. As such, a higher level of security is usually associated with digital signatures.

The use of digital signatures in Malaysia is regulated and governed by the Digital Signature Act 1997. In order to utilise and affix digital signatures, one will have to first obtain or subscribe to a digital signature certificate from a licensed Certification Authority. As of the date of this article, there are four (4) such licensed Certification Authorities – Pos Digicert Sdn Bhd, MSC Trustgate.Com Sdn Bhd, Telekom Applied Business Sdn Bhd and Raffcomm Technologies Sdn Bhd.

An interested person may approach one of the licensed Certification Authorities to obtain a unique Digital ID which will comprise his own set of private and public key pairs. The recipient of a document digitally signed by the subscriber can verify the authenticity of the signature using the subscriber’s public key, which is made available in a repository maintained by the relevant licensed Certification Authorities.



Due to the higher level of security, digital signature would perhaps be a better alternative to a simple electronic signature where parties are looking to sign sensitive or high value documents.

Conclusion

We hope that this article managed to debunk myths surrounding validity and enforceability of electronic contracts or contracts executed electronically / digitally and will encourage adoption of non-conventional contracts in Malaysia.

Although the traditional bundles of contract signed in wet-ink are still adored by many today, there may be an imminent shift to adoption of electronic contracts in the future looking at how people are getting more accustomed to online dealings.

Other than the benefits of improved efficiency, the practice of creating paperless contract is also environmental-friendly. It is also in line with the MyDIGITAL initiative recently rolled out in Malaysia.



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