

# COVID-19: GOVERNANCE: SIGNING DOCUMENTS USING ELECTRONIC SIGNATURES (HONG KONG)

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Legal Briefings - By **Gareth Thomas, William Hallatt, Matt Emsley, Alexander Aitken, Dominic Geiser, Hannah Cassidy and Jojo Fan**

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Given the current restrictions on social interaction put in place to combat the spread of COVID-19, working from home is becoming the new normal. As a result, it is not always easy to sign paper copies of documents while working from home, and businesses across the world are exploring the increased use of e-signatures. This e-bulletin considers the position of e-signatures under Hong Kong law and provides practical insights.

## E-SIGNATURES UNDER HONG KONG LAW

### REQUIREMENTS FOR E-SIGNATURES

The major legislation regulating e-signatures in Hong Kong is the Electronic Transactions Ordinance (**ETO**).

For transactions not involving any government entity, e-signatures are valid and enforceable provided they comply with the requirements under the ETO. In particular:

- the e-signature must be attached to, or logically associated with, the electronic message;
- the e-signature process must be reliable as is appropriate given the purpose for which the signature is required; and

- the recipient must consent to the signatory using an e-signature.

There are no express requirements for the e-signature to be in a certain form or format. For example, parties to a transaction can use a stylus on a touchscreen device to sign a document or adopt a bespoke e-signature online tool which assigns the parties' secure login details and gives them access to the document to be signed.

If the contract involves any government entity, digital signatures supported by a recognised digital certificate issued by a recognised Certification Authority will be required.

## **WHERE E-SIGNATURES CAN BE USED**

**Simple contracts:** provided there are no specific restrictions or requirements for a particular contract and it is not excluded from the application of the ETO, simple contracts can be signed using e-signatures or digital signatures.

**Deeds executed by Hong Kong-incorporated companies:** It is not market practice in Hong Kong for deeds to be executed using e-signatures. Given the relative importance of deeds, parties will generally insist on wet ink signatures, although virtual signings where parties exchange PDF scans of the wet ink signatures are commonplace to avoid the need for parties to be physically present in the same place. For Hong Kong-incorporated companies, the Companies Ordinance permits a company to execute a deed by having it signed on behalf of the company by two directors or one director and the company secretary (or one director where it is a sole director company). In our view, whilst this has yet to be tested in the Hong Kong courts, these signatures could be in electronic form where the ETO requirements are complied with. However, whilst the position remains untested, a degree of uncertainty remains until case law develops or legislation is amended to confirm the position.

**Minutes and resolutions:** subject to the articles of association of a company, board minutes and written resolutions signed using e-signatures will generally be accepted. The Companies Ordinance of Hong Kong specifically provides for company records to be kept electronically. For written shareholders' resolutions, the statutory framework permits resolutions to be circulated and returned in electronic form. In authenticating the electronic approval of a resolution, the identity of a relevant person (eg, an individual shareholder) can be confirmed in a manner specified by the company or, where not specified, by a statement of the person as to their identity where the company has no reason to doubt its truth.

## **LIMITATIONS ON USING E-SIGNATURES**

The ETO sets out documents that are not suitable to be signed electronically, including powers of attorney, documents concerning land and property transactions, oaths and affidavits, statutory declarations, and testamentary documents such as wills.

Notably, the ETO excludes the application of e-signing to court proceedings in Hong Kong. Provisions permitting information or documents to be served, presented, retained or signed electronically do not apply to court or tribunal proceedings unless any rule provides otherwise. However, Hong Kong courts are moving a step closer to facilitating the electronic filing with the Court Proceedings (Electronic Technology) Bill under review (see our [blog](#) dated 23 January 2020 for more information).

E-signatures should also be avoided where any documents need to be registered or filed with a regulator that requires an original wet ink signature or where the document needs to be notarized.

## USE OF E-SIGNATURES IN A LITIGATION CONTEXT

### ADMISSIBILITY OF ELECTRONIC RECORDS AS EVIDENCE

Under Hong Kong law, an electronic record shall not be denied admissibility in evidence for any legal proceeding on the sole ground that it is an electronic record. In other words, e-signed documents can be admissible as evidence provided that they comply with the rules of evidence.

### PRACTICAL CONSIDERATIONS

Although e-signatures are generally binding in Hong Kong, their use is not without risk. There are issues to consider before using e-signatures for important legal documents. The following checklist will help you navigate these issues:

- **Think about whether any restrictions would apply to the document.** Check whether it is one that is permitted under the ETO to be signed electronically and consider any other circumstance that may impact the use of e-signatures such as registration or filing requirements and the requirements of the counterparty.
- **Consider whether the documents will be used in a jurisdiction which affords less evidentiary credibility to electronic documents.** Although a contract concluded by e-signature is generally recognised as valid and can be used as evidence in Hong Kong, in some jurisdictions, it may carry less evidentiary weight in a court than a traditional hard copy. For example, in Indonesia, the submission of any document concluded by electronic means may need to be supported by additional witness or expert evidence.
- **Authentication of identity and agreement to terms.** As e-signatures must be attached to, or logically associated with, the electronic message, parties should satisfy themselves that the signature adequately identifies the signatory and gives sufficient indication of the signatory's approval of the agreement or information to which it relates.
- **Security.** Signing parties should ensure that their e-signature systems are sufficiently

reliable and secure. Where possible, they should use a system that employs public key or private key technology, which effectively turns a paper-based signature into an electronic “fingerprint”. The “fingerprint” or coded message should not be capable of being copied, tampered with or altered, thereby ensuring its authenticity.

- **Agree on procedures in advance.** When using an e-signing system, consider which party will coordinate signing and issue invitations to the other signatories.
- **Post signing steps.** It is important to consider the steps to be taken after a document is executed, for example maintaining a printed or soft copy version of the document.

[More on COVID-19](#)

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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