
COVID-19 AND THE VALIDITY OF ELECTRONIC SIGNATURES: A COMPARATIVE ANALYSIS OF LAWS IN INDONESIA AND SINGAPORE

Introduction

On 11 March 2020, the World Health Organization officially announced that COVID-19 had become a global pandemic.¹ In response to this, most countries have implemented lock-down measures and temporary bans on domestic and international air travels to prevent the further spread of the virus. These measures have severely disrupted local and international business transactions. However, the silver lining is the use of technology for transactions has substantially increased, especially the use of electronic signatures (“**e-signatures**”). Although this is a secure solution, businesses and individuals still have doubts regarding the implementation of e-signatures. We discuss below possible answers to frequent questions asked about the use of e-signatures in both a civil law jurisdiction, being **Indonesia** and a common law jurisdiction, being **Singapore**.

Law that governs e-signatures

Indonesia

In Indonesia, the validity and acceptability of e-signatures is governed by Law No.11 of 2008 as amended by Law No.19 of 2016 on Electronic Information and Transactions (“**Indonesian EIT Law**”). The Indonesian EIT Law applies to all individuals and legal entities (both Indonesian and foreign)² conducting all legal actions regulated under this law, whether in the territory of Indonesia or outside the territory of Indonesia.³ Similar to other laws in Indonesia, the Indonesian EIT Law also stipulates civil and criminal remedies.

Additionally, the implementation of e-signatures is regulated by Government Regulation No.71 of 2019 on the Implementation of Electronic Systems and Transactions (“**GR 71/2019**”) (which revokes and replaces Government Regulation No.82 of 2012 on the same subject).

Singapore

In Singapore, the use of e-signatures is governed by the Electronic Transactions Act, Cap 88 (“**ETA**”) and its subsidiary legislation, including the Electronic Transactions (Certification Authority) Regulations 2010. Strictly speaking, the ETA is a facilitative statute that gives force of law to transactions performed using electronic and non-traditional media or channels of communication, though like most statutes in Singapore, there are provisions for criminal liability and penalties. Additionally, the Personal Data Protection Act 2012 regulates the personal information used in secure e-signatures.

Definition of e-signatures in each jurisdiction

Indonesia

An e-signature is a signature that comprises electronic information attached to, associated with, or related to other electronic information that is used as a tool for verification and validation purposes.⁴ Article 11 of

¹ Accessible at: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

² Article 1(21), Law No.19 of 2016 on Electronic Information and Transactions (“**Indonesian EIT Law**”).

³ Article 2, Indonesian EIT Law.

⁴ Article 1(2), Indonesian EIT Law.

the Indonesian EIT Law provides that an e-signature is considered to have legal force if it satisfies the following requirements:

- (a) The e-signature source data must be associated merely with the signatory;
- (b) At the time of the electronic signing, the e-signature source data must be in the signatory's possession;
- (c) Any alterations to the e-signature that occurs after the signing must be traceable;
- (d) The signatory must be identifiable based on certain methods; and
- (e) It can be shown that the signatory has consented to the relevant electronic information.

Additionally, GR 71/2019 mandates two types of e-signatures, being: (i) certified e-signature and (ii) uncertified e-signature. A certified e-signature is the creation of a unique code that is designed for a specific legal subject, issued by an Indonesian certified e-signature provider. An uncertified e-signature is one which is issued **without** using the services of an Indonesian certified e-signature provider and may include a digitised version of an individual's signatures signed by hand (which we will refer to as "**wet-ink signatures**").⁵ An example of an uncertified e-signature is agreeing to the terms and conditions of a newly downloaded application on your phone.

The most substantial difference between the two is that it is easier to prove the authenticity and validity of a certified e-signature than an uncertified e-signature in court. A certified e-signature has stronger evidentiary value in comparison to an uncertified e-signature, where the parties seeking to rely on the e-signature must provide electronic records which are admissible as evidence to support the authenticity of the document.

Singapore

There exists in the ETA a legal framework for (1) e-signatures and (2) secure e-signatures (both having different meanings and implications).

E-signatures

The ETA does not provide a single definition of an e-signature. In general, it is considered as an acknowledgement provided in an electronic format which indicates the intention (e.g., acceptance) of a party to a specific document. Additionally, the court determines whether something amounts to a signature by assessing the method of signature used to fulfill the authenticating function of the signature instead of the form of signature used.⁶ No discussion about the use of electronic signatures or non-wet ink signatures will be complete without reference to the seminal case of *SM Integrated Transware Pte Ltd v. Schenker Singapore (Pte) Ltd*.⁷

Judit Prakash J (as she then was) cited "Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition" (Butterworths Asia, 1998) by Professor (now Judge of Appeal) Andrew Phang which stated that the word "signature" has been very loosely interpreted: it need not be at the foot of the memorandum and it need not be a signature in the popular sense of the word, a printed slip may suffice if it contains the name of the defendant.

⁵ Article 1(20), Government Regulation No.71 of 2019 on the Implementation of Electronic Systems and Transactions ("**GR 71/2019**").

⁶ Accessible at: <https://www.imda.gov.sg/-/media/Imda/Files/Regulation-Licensing-and-Consultations/Consultations/Consultation-Papers/Public-Consultation-on-the-Review-of-the-Electronic-Transactions-Act/Public-Consultation-Paper-on-the-Review-of-the-Electronic-Transactions-Act-27-Jun-2019.pdf?la=en>

⁷ [2005] SGHC 58

The honourable judge also noted that she was “satisfied that the common law does not require handwritten signatures for the purpose of satisfying the signature requirements of s 6(d) of the [Civil Law Act]. A typewritten or printed form is sufficient. In [her] view, no real distinction can be drawn between a typewritten form and a signature that has been typed onto an e-mail and forwarded with the e-mail to the intended recipient of that message.”: at [92]. This case turned on the fact that there was no dispute as that the maker of the electronic signature was the one who had sent the email from his own email address.

Bearing these principles in mind, it is clear that the factual matrix and actual circumstances in which the electronic signature was made will determine if the signature will be recognised for the purposes of the ETA. Examples of e-signatures include: a person accessing a contract through a web-based signature platform and clicking to have their name inserted into the contract or a person typing their name into a contract of e-mail concerning the terms of the contract.

Secure e-signatures

With regard to secure e-signatures, section 18 of the ETA provides that an e-signature shall be treated as a secure e-signature if, through the application of a specified security procedure, or a commercially reasonable security procedure agreed to by the parties involved, if at the time it was made, it can be verified that it was:

- (a) unique to the person using it;
- (b) capable of identifying such person;
- (c) created in a manner or using a means under the sole control of the person using it; and
- (d) linked to the electronic record to which it related in a manner such that if the record was changed the electronic signature would be invalidated.

Section 17(2) of the ETA provides some guidance on what would be a commercially reasonable procedure. It has to take into account the purposes of the procedure, and the commercial circumstances including:

- (a) the nature of the transaction;
- (b) the sophistication of the parties;
- (c) the volume of similar transactions engaged in by either or all parties;
- (d) the availability of alternatives offered to but rejected by any party;
- (e) the cost of alternative procedures; and
- (f) the procedures in general use for similar types of transactions.

It is beyond the scope of this article, and in fact, quite impossible, to set out what would be commercially reasonable in the context of individual transactions. Qualified legal counsel should be consulted on the specific circumstances applicable to the parties and the relevant transactions.

Documents that are not permitted to be signed electronically

Indonesia

Even though e-signatures are legally recognized and regulated in Indonesia, in practice, most courts and government institutions still only accept original documents consisting of wet-ink signatures. The documents that are required to be executed by a wet-ink signature (in practice), include:

- (a) Corporate documents such as a deed of establishment, articles of association, and shares/assets transfer documents;
- (b) Intellectual property rights transfer documents;
- (c) Documents signed in a notarial deed form (e.g. shareholders resolutions); and
- (d) Real property transfer agreements and deeds.

However, some government institutions have started to recognize and permit the use of e-signatures. For instance, since 2016, the Financial Services Authority (*Otoritas Jasa Keuangan* or “**OJK**”) has recognized the use of e-signatures in fintech loan agreements.⁸

Singapore

Although Singapore has recognized e-signatures since 1998 and there exists a widespread use of e-signatures, some documents still require the use of a wet-ink signature. The First Schedule of the ETA set out certain matters and transactions that are excluded from the ETA:

- (a) The creation or execution of wills;
- (b) 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;
- (c) The creation, performance or enforcement of an indenture, declaration of trust or power of attorney, with the exception of implied, constructive and resulting trust;
- (d) Any agreement for the sale or other disposition of immovable property, or any interest in such property; and
- (e) The conveyance of immovable property or the transfer of any interest in immovable property

(the “**Excluded Matters**”).

However, on 27 June 2019, the Infocomm Media Development Authority (“**IMDA**”) issued a consultation paper in order to seek the views and comments from members of the public and the industry on taking some of the documents and transactions out of the Excluded Matters listed in the First Schedule of the ETA. The IMDA proposes to:

- Remove wills from the Excluded Matters, on the basis that the safeguards in the Wills Act will be maintained;
- Remove certain documents, i.e., bills of lading, warehouse receipts, dock warrants or negotiable instruments such as bills of exchange, promissory notes or cheques from the Excluded Matters;
- Remove a Power of Attorney (“**POA**”) for the enforcement of security interests and lasting powers of attorney, yet still maintain all the other types of POAs (True Agency POAs), given the potential scope for abuse of power;
- Remove indentures;

⁸ Accessible at: <https://www.ojk.go.id/en/berita-dan-kegiatan/siaran-pers/Pages/Press-Release-OJK-Drafts-Regulations-on-Fintech-Development1.aspx>

- Remove testamentary trusts on the basis that safeguards in the Wills Act will be maintained;
- Maintain declarations of trust relating to immovable property and dispositions of equitable interest;
- Remove agreements for the sale or disposition of immovable property, provided that a requirement will be placed that only secure e-signatures or digital signatures be accepted for property transactions conducted electronically, in order to ensure greater certainty, mitigate concerns of fraud and safeguard the vulnerable; and
- Remove the conveyance of immovable property or the transfer of any interest in immovable property.

The IMDA proposes to remove the documents and transactions related to most business-related transactions from the Excluded Matters. The consultation period of this consultation paper ended on 27 August 2019, and IMDA's response is yet to be published.

Do e-signatures have the same legal status as wet-ink signatures?

Indonesia

There exists no provision within the Indonesian EIT Law and GR 71/2019 which mandates that wet-ink signatures holds greater legal weight compared to e-signatures. E-signatures and wet-ink signatures serve the same purpose and are viewed as the same tool. Parties are not required to sign an additional version of the document with a wet-ink signature to render the agreement valid. Furthermore, similar to that of a wet-ink signature, the authenticity and other aspects of e-signatures can be disputed in court.

However, as previously mentioned, some documents and transactions still require a physical, wet-ink signature to be rendered valid.

Singapore

It is important to clarify what "legal status" means. Like a wet-ink signature, even a secure e-signature can be disputed. What the ETA does is to confer on a secure e-signature a presumption that it is the signature of the person purporting to sign the document and that it had been affixed by that person with the intention of signing or approving electronic record. There is nothing to prevent an opposing party from adducing evidence in court to challenge the authenticity and other aspects of the secure e-signature.

Furthermore, as mentioned in the previous section, some documents and transactions which are Excluded Matters still require a physical, wet-ink signature to be rendered valid.

Certified e-signature providers within each jurisdiction

Indonesia

Article 6 of GR 71/2019 provides that an e-signature with certification can only be produced by an Indonesian certified e-signature provider registered with the Indonesian Ministry of Communications and Informatics (*Kementerian Komunikasi dan Informatika Republik Indonesia* or "**Indonesian MOCI**"). The Indonesian MOCI has legally certified six (6) private Indonesian e-signature providers, being;

- (a) The Electronic Certification Centre of the national Cyber and Code Agency (*Balai Sertifikasi Elektronik Badan Siber dan Sandi*);
- (b) The National Mint (*Perusahaan Umum Percetakan Uang Republik Indonesia*);

- (c) The Technology Assessment and Implementation Agency (*Badan Pengkajian dan Penerapan Teknologi*);
- (d) PT Indonesia Digital Identity;
- (e) PT Privy Identitas Digital; and
- (f) PT Solusi Net Internusa.

The e-signature services provided on these platforms may be purchased through the website or application of the respective providers.

In the event the parties need to use a foreign e-signature provider, they may only do so if the foreign e-signature provider is registered with the Indonesian MOCI. However, e-signatures by foreign providers fall under the category of uncertified e-signatures (definition as provided above). In practice, Indonesian parties choose to limit the use of foreign providers to merely documents of commercial agreements between corporate entities (e.g. Non-Disclosure Agreements), consumer agreements or lease agreements.

Singapore

The ETA allows for secure e-signatures to be created either through a “specified security procedure” (which is prescribed in the Second Schedule, read with the Third Schedule to the ETA) or a commercially reasonable security procedure agreed to by the parties involved.

The Electronic Transactions (Certification Authority) Regulations 2010 sets out, *inter alia*, the criteria for an accredited certification authority who can provide the specified security procedure. A certification authority must apply to be and be accredited under these Regulations in order to provide the secure e-signature services. To date, the only certification authority that has been accredited is Netrust Pte Ltd.

Methods of signing an agreement in each jurisdiction

Indonesia

In Indonesia, as long as the cumulative elements of an agreement (i.e., consent, capacity, certain subject matter and permissible cause) regulated in Article 1320 of the Indonesian Civil Code are satisfied, a valid and binding agreement is created. This is usually in writing, signed electronically or even said verbally.

- (a) wet-ink signatures – this is a physical method of signing using a wet-ink on a hard-copy document signed by parties present at the same signing meeting.
- (b) e-signatures – a signature comprising electronic information that is attached to, associated with, or related to other electronic information that is used as a tool for verification and validation purposes.
- (c) verbal signatures – this is an oral method of “signing” between parties present at the same meeting.

Singapore

In Singapore, there are three methods that may be used when signing agreements. These include:

- (a) wet-ink signatures – this is a physical method of signing using a wet-ink on a hard-copy document signed by parties present at the same signing meeting.
- (b) virtual signatures – the hard copy document is signed by parties who are not physically present in the same location. The hard copy document which is physically signed in wet-ink is converted into an electronic form (usually by scanning or increasingly, with the advancement of smart phone camera features, simply photographed) and sent by e-mail or other mutually accepted messaging platform to the other party.

(c) E-signatures – e-signatures may take many forms as explained above. It may as well involve a web-based e-signing platform. Some of the common e-signing platforms used in Singapore include Docusign, AdobeSign and PandaDoc

Do all the parties to the document have to sign electronically or is merely one party allowed to sign electronically?

Indonesia

No, not all parties to the document have to sign electronically. It is possible for one party to sign using e-signature while the other party signs using wet-ink signature.

Singapore

No, not all parties to the document have to sign electronically. It is possible for one party to sign using e-signature while the other party signs using wet-ink signature.

Can a party residing in another country execute an Indonesian Law or Singapore Law agreement using e-signatures?

Indonesia

As long as the laws of the country the party is residing in allow the execution of agreements using e-signatures, this may be permitted. Indonesian law does not stipulate any differences between Indonesia-incorporated companies and foreign-incorporated companies. Even if an e-signature is generated by a foreign certified e-signature provider, it will nevertheless be recognized in Indonesia as an uncertified e-signature (as defined above).

Singapore

As long as the laws of the country the party is residing in allow the execution of agreements using e-signatures, this may be permitted.

Counter-part clauses when signing documents remotely

Indonesia

Counter-part clauses are permitted within Indonesian agreements or deeds.

Singapore

Counter-part clauses are permitted in Singapore agreements or deeds. It is important to note that even if the agreement or deed does not include a counter-part clause, they may still be executed in counterparts as long as the agreed terms and the text of each signed version is exactly the same.

Are the witnesses to the e-signature of the signatory allowed to be present remotely and not physically?

Indonesia

In Indonesia, deeds are not allowed to be signed electronically. A regulation permitting the virtual witnessing of a deed is yet to be enacted. Thus, up to today, witnesses must be in the physical presence of the signatory.

Singapore

There has been no official guidance on the remote witnessing of deeds in Singapore.

Part 41B of the Singapore Companies Act provides that an individual must sign a deed in the presence of a witness who confirms the signature. The deed must be signed by a director and the secretary of the company, two directors of a company or a director of the company in the presence of a witness who confirms the signature. Although the ETA does not explicitly prohibit the e-signing of deeds, it is not clear whether a witness is permitted to witness the e-signing of a deed virtually. However, e-signatures cannot be used to execute the Excluded Matters, which include deeds relating to some matters.

For this reason, it is not recommended to execute deeds where the witness is not in the physical presence of the signatory.



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