

Virtual execution of documents in Hong Kong

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The COVID-19 pandemic has lasted for more than a year now and is still ongoing. It has changed the landscape of how documents are executed. Due to social distancing policies and travel restrictions, working from home has become the new norm and there is increasing reliance on technology. This means that printers and scanners may not be readily accessible, and meetings are mostly held virtually. Signing on papers becomes harder and parties would have to consider the alternative - virtual execution.

The leading case in this respect is the UK case of *Mercury Tax Group Limited v HMRC* [2008] EWHC 2721. The facts of the Mercury case itself were not related to virtual signing, but there was an issue about whether documents involved were properly signed. In the case, clients were sent signature pages of draft versions, and subsequently such signature pages were stapled to the final versions of the documents. There were significant differences between the draft and final versions and that the blanks that were filled in in the final versions were important terms, so the court did not think that the parties who have signed the draft version could also be taken to have authorized and agreed with the final versions.

The court found in addition that for one of the documents involved (a trust deed), the document was not validly executed as a deed as signature and attestation should have been in the same physical document. This case led to discussions about under what circumstances virtual execution would be valid under the law.

There are various methods for virtually executing documents, including:

- JPEG signature - inserting the saved JPEG image of the signature to the document. This is generally allowed for simple contracts, subject to exceptions under the Electronic Transactions Ordinance (Cap. 553) ("ETO"), or where wet-ink signatures are required. An individual using this signing method on behalf of a company should also have been formally authorized by the company to do so.
- Email signing - printing out the whole document or at least the signature page, signing it, scanning it and returning that through email to the other party. This is generally allowed in Hong Kong, unless the document requires a wet-ink

signature like one that has to be filed with the Land Registry.

- E-signing platform - a system allowing signatories to open a link to the document sent by email and sign the document on the platform. Each signatory can take turns to sign the document and after all of them have done so, the platform will create a fully signed pdf version. This has yet to be widely adopted in Hong Kong, but if used it will not be applicable to any exclusions under the ETO and to deeds.

The ETO

The main provision governing virtual execution in Hong Kong is the ETO. An electronic signature is defined in s.2(1) of the ETO, and can be in the form of any letters, characters, numbers or other symbols in digital form. Although it may take any form, there must be an electronic signature attached to the document itself. For instance, in the recent case of *CRB v Mark Richard Charlton Sutherland* [2020] HKDC 624, the retainer agreement in question was considered not to be electronically signed by the court. This was because in the written retainer agreement attached to an email between the parties, the signature blocks were empty. The court did not accept that the signature block of the signatory in the email would constitute an electronic signature to the retainer under the ETO.

Digital signature on the other hand is one particular form of electronic signature, and is defined under s.2(1) of the ETO. A digital signature is more secure than an electronic signature, because the recipient can verify that the digital signature was indeed created and signed by the sender.

In terms of applicability, a digital signature is only mandatory if the transaction involves a

government entity, and this is defined to mean a public officer or public body in s.2(1) of the ETO. If no such party is involved in the transaction, parties would be free to agree on whether to use electronic or digital signatures, provided that certain conditions under the ETO are met.

Requirements of a valid electronic and digital signature

A valid electronic signature has 3 elements:

- First, it must be used for the purpose of identification and indicating the authentication or approval of the information in the electronic record.
- Second, any method used for the e-signing should be reliable and appropriate for the purpose for which the information is communicated.
- Third, there must be consent by the recipient to the use of such method of electronic signature.

On the other hand, a digital signature must be supported by a recognised certificate, issued by a certification authority to support the use of that digital signature. Currently there are 2 recognised certification authorities that would issue a recognised certificate - Hong Kong Post Certification Authority and Digi-Sign Certification Services Limited.

Exceptions from the use of electronic signatures

There are various types of documents excluded from the use of e-signatures set out under Schedule 1 of the ETO, including certain trust and testamentary documents, conveyancing documents relating to land, affidavits, judgments, statutory declarations, and powers of attorney.

Further, Schedule 2 lists out proceedings that would be excluded from the application of e-signatures, such as those in the Court of First Instance and Court of Appeal. Although court documents currently cannot be electronically signed, electronic records can be admissible as evidence in a legal proceeding pursuant to s.9 of the ETO.

Limitations to the ETO

(1) Common law rules of contract

According to s.17(3) of the ETO, the ETO is subject to common law rules of contract. The use of electronic signatures is just one way of demonstrating offer and acceptance, and an express intention of a particular method of acceptance can be conclusive. This means that if an agreement has expressly stated that only a handwritten signature is accepted, the permission under the ETO to use e-signatures cannot override the express intention to use a handwritten one.

(2) Witnessing requirements

Where witnessing is required for the execution of documents, the law is not settled whether witnessing by way of video-conferencing constitutes valid execution and the ETO does not specifically provide for this. However the categories of documents currently excluded such as wills and conveyancing documents have particular formalities, one of which is the requirement of witnesses, so it may be implied that the law seems to not yet allow witnessing to be done other than physically.

Practical considerations when deciding whether to use virtual execution

Virtual execution by way of using e-signatures is allowed in many situations, such as simple contracts or company resolutions

or minutes, so long as this is done in accordance with the ETO. The following considerations should be made when deciding whether to execute documents by electronic signatures.

(1) Is e-signing permitted to be used for the specific document?

This would include considering whether the document falls within the exceptions of the ETO and taking account of circumstances that may undermine the applicability of the signature, such as registration or filing requirements.

There should also be consideration as to whether there is a requirement to execute the document as a deed. Although the ETO does not particularly exclude deeds from the use of electronic signature, due to uncertainties as to the treatment of deeds and serious possible consequences of improper execution, i.e. not being able to sue on it, the common practice is to do it physically. It is best to print the entire document, sign with wet-ink signature and either exchange original copies or scanned fully executed copies by email with the counterparty. It is important to note that the entire document should be printed out and signed and returned to the counterparty when executing deeds, so as to prevent the *Mercury Tax* situation where there are multiple versions of deeds from happening again.

(2) Is there a witnessing requirement for the execution of the document?

If witnessing is required, it is recommended to avoid doing so using electronic means because it is not uncertain whether virtual witnessing will be accepted as valid. Further caselaw or legislation will be required to clarify on this point.

(3) Are any foreign signatories involved?

If documents are required to be signed by signatories in foreign countries, foreign law on e-signing should be considered. This is especially important for a jurisdiction that affords less credibility to electronic documents.

(4) Security issues

If parties want to e-sign through an e-signing platform, they should be careful when choosing an appropriate platform. This is because e-signing platforms are cloud-based and not all institutions have complete confidence in the security of cloud-based

technology. Parties must ensure that the platforms are sufficiently secure and reliable for their purposes.

(5) Is there a clause allowing documents to be executed in counterparts?

Virtual execution is only possible if parties may sign in counterparts and do not need to be physically present to sign at the same venue at the same time. Otherwise, even if the ETO allows for the use of electronic signatures, the document cannot be executed in electronic signatures unless in one entire agreement, which is the main restriction caused by the pandemic.

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