



HONG KONG BRIEFING: SIGNING DOCUMENTS FROM HOME

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With many working from home, more deals will be signed remotely. Signatories working away from the office often prefer to avoid printing off pages and using wet-ink signatures. This Hong Kong briefing gives practical advice on entering into contracts remotely.

Hong Kong is a common law jurisdiction. The form which a contract takes is therefore largely irrelevant to the question of its validity and enforceability. With some exceptions, it is the substance and not the form that defines a contract.

Whilst the Electronic Transactions Ordinance (Cap. 553) (**ET Ordinance**) sets out provisions in relation to electronic transactions, the development of electronic contracting can largely be accommodated within the existing contract law framework.

1. Can I agree a simple contract without using a pen?

Most contracts can be agreed without a wet-ink signature, although there are a number of exceptions (described below). Indeed, many contracts are not signed. They are valid if they satisfy the elements of offer, acceptance, consideration and an intention to create legal relations.

Acceptance may be evidenced by various actions (including signatures). These include for example an email from the party confirming agreement of terms, or the use of an electronic 'signature image' which is returned as an attachment to an email sent by

the party, or clicking an 'I accept' box on an internet form.

2. How will the other party know that I am authorised to sign?

From a practical perspective, parties are concerned to ensure that the person who sends the email (or (if different) who inserts the signature image) confirming acceptance is indeed a party to the contract (and, if relevant, duly authorised by a party). The steps taken to evidence this depend upon the type of contract and the credit risk undertaken by the parties. Nearly all of the usual authentication steps taken may be carried out remotely.

If the other party is not taking credit risk (such as where you pay first before receiving the goods or services provided by the other party), then the other party may well have little concern over authorisation.

Similarly, the other party may well take a light touch over authorisation if you are personally known to the other party.

In other cases, the other party will want to ensure that the contract is not being signed by an impersonator (whether impersonating another individual or impersonating due authorisation to sign on behalf of a company). In an impersonator case, the innocent individual or company is unlikely to be bound by the actions taken by the impersonator. The consequences are less clear cut, and depend on the particular facts, when the signatory is associated with the company but not authorised to sign.

Common ways to authenticate identity and authority, are:

- (A) requiring sight of an identity card;
- (B) for a person signing as a signatory of a company, the other party requesting sight of board resolutions (and, where there is no obvious benefit to the company, shareholders' resolutions) and constitutional documents;
- (C) for companies using company secretary teams to arrange signing, the other party requesting a member of the company secretary team to confirm that the signatory is duly authorised and that the document has been duly executed by that company; and
- (D) two-factor authentications.

For certain ongoing commercial relationships (particularly those involving accounts, investments or borrowings), parties will already have set up specific authentication steps, such as sending a code to your mobile phone. This briefing however concentrates on transactions entered into between parties who have not previously set up such authentication arrangements.

3. What if I receive a contract that has a signature block? Must I sign it with a pen?

From a practical perspective, if a party sends you a contract with a signature block the party will expect to receive a signature. The best way to sign would be to print off the signature page, sign it, scan it in and email it (together with the rest of the word file/pdf document) to the other party with the following statement (or similar words) made in the cover email:

“I approve the attached execution version of the agreement. My attached signature page relates to and forms part of that agreement. [I release the signed agreement.]”

4. What if I just insert my ‘signature image’ into the signature block of a simple contract?

There is a growing tendency for authorised signatories to complete signature blocks by inserting a ‘signature image’ into the signature block and then sending the document (with the signature image) to all parties.

In most cases, there will be no rule of law requiring that contract to be ‘signed’ in order to be valid. The insertion by you of a ‘signature image’ would likely be conduct by you that evidences your acceptance of the terms.

As before, the other party will want to ensure that the ‘signature image’ was inserted by you. The degree of verification will depend on the type of contract and credit risk undertaken by the other party.

Diligence steps may include checking that the email attaching the signature image originated from the usual work email account used by you and/or calling you on your usual work telephone number to confirm acceptance of terms.

Obviously, one of the usual diligence steps of checking the signature against a previously-received specimen signature will not provide much comfort for signature images.

5. Signature images - Do’s and Don’ts

- **Do not** use signature images to sign deeds¹. Certain types of deeds (powers of attorneys land-related security) are

¹ For background information, since March 2014 Hong Kong companies may sign a deed without using a seal. Where a company has two or more directors, the company may execute a deed by it being signed by two directors and certain other steps being taken. If the two directors were to sign a deed (where that document is not excluded from the ET Ordinance, such as a

power of attorney) by way of signature images, the other parties to the deed must consent to this method of signing and the use of the signature image must be reliable and appropriate for the purpose for which the information contained in the deed is communicated. See section 6 ET Ordinance.

excluded from the ET Ordinance and so cannot be signed via electronic signatures. Although signature images may be permitted from a black-letter law stance for other types of deeds, it is likely that in any event the other parties will not accept signature images for such deeds. Such other parties may well insist on wet-ink signatures rather than them instructing legal counsel to issue a legal opinion on the matter

- Do not use signature images for powers of attorney
- Do not use signature images for trusts
- Do not use signature images for real property, stamp duty instruments, wills, oaths, affidavits, statutory declarations
- Do not use signature images for agreements where one of the parties is a Hong Kong government entity, public body or public officer.

Broadly, the categories in the second to fifth bullet points fall outside of the enabling provisions in the ET Ordinance as set out in Schedule 2 thereof. The above over-simplifies the legal position but if you fall within any of the above bullets, you should not use a signature image without receiving legal advice.

- Do - in the unusual case that a rule of law requires a document to be signed² - check the other parties consent to your use of a signature image. There is also a requirement that the method is ‘reliable, and is appropriate, for the purpose’ (section 6 ET Ordinance). Note that most contracts between commercial (non-

governmental) parties are not required by a rule of law to be signed

- Do not use signature images for documents upon which a law firm will issue a legal opinion.

The law firm will likely include further assumptions in the legal opinion, such as an assumption that the signature image was inserted by you to the electronic record, and may include a reservation that the contract has not been ‘signed’ (albeit that the contract is still valid by reason of satisfying the contractual elements of offer, acceptance, consideration and an intention to create legal relations). When faced with such assumptions and reservations, the other party will typically require a wet-ink signature (or alternatively will require further consents and confirmations in respect of the use of the signature image)

- Do not use signature images for documents that are to be notarised. As a practical point, notaries public in Hong Kong are not accustomed to notarising electronic contracts.

6. What about eSignature websites?

The above pitfalls also apply to eSignature websites such as DocuSign. A particular problem is when parties seek to use an eSignature website to sign powers of attorney or other deeds. In most cases, powers of attorney will not be validly signed and other deeds will not be validly signed as deeds. If the documents are the subject of a legal opinion a law firm will not be able to issue the required legal opinion.

² Certain rules of law requiring signatures are contained in for example the Securities and Futures Ordinance (Cap. 571), the Companies Ordinance (Cap. 622), the

Employment Ordinance (Cap. 57), the Money Lenders Ordinance (Cap. 163).

7. What about other jurisdictions?

This briefing is on Hong Kong legal matters. Foreign law will have a part to play where there are foreign signatories or where contracts are governed by foreign laws or are to be registered or enforced in foreign jurisdictions.

In some circumstances, contracts may need to be notarised and authenticated by apostille in order to be accepted or enforced in the foreign jurisdiction. These issues are usually flagged well in advance and plans to deal with such processes should be in place before signatories are approached to sign documents.

8. Why am I being asked to provide information about directors and shareholders?

Separate from the above, certain regulated entities (including banks, licensed corporations, insurance companies, trust company service providers) are required to collect from their clients 'know your customer' documentation under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615). This is a process, required by law, involving the collection of evidence to identify and verify persons. It is separate from (although may overlap to some extent with) the evidence of authorisation referred to above.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.



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