

Validity Of Electronic Signature On Documents Signing In Hong Kong



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Difference between Electronic Signature and Digital Signature

Electronic signature (電子簽署) means any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted for the purpose of authenticating or approving the electronic record¹

Digital signature (數碼簽署) in relation to an electronic record, means an electronic signature of the signer generated by the transformation of the electronic record using an asymmetric cryptosystem and a hash function such that a person having the initial untransformed electronic record and the signer's public key can determine a) whether the transformation was generated using the private key that corresponds to the singer's public key and b) whether the initial electronic record has been altered since the transformation was generated²

Applicability of e signing / digital signing on documents

Any document requires a signature of a person in writing therein, an electronic signature satisfies the such requirement stipulated by law with the same effect³ Provided that such kind of documents are not expressly excluded in law.

Those exclusion includes but not limit to Will; Trust; Power of Attorney listed in schedule 1 of Electronic Transactions Ordinance.

Furthermore, neither the e signature issuer nor the recipient is or is acting on behalf of a government entity.

¹ Section 2, Electronic Transactions Ordinance

² Section 2, Electronic Transactions Ordinance

³ Section 6, Electronic Transactions Ordinance

Core elements which lead to a valid e signature on documents

a) The signer uses a method to attach the electronic signature to or logically associate the electronic signature with an electronic record for the purpose of identifying himself and indicating his authentication or approval of the information contained in the document in the form of the electronic record. ⁴

b) Having regard to all the relevant circumstances, the method used is reliable, and is appropriate, for the purpose for which the information contained in the document is communicated

c) Both the e-signature issuer and the recipient consent to the usage of the such mean.

Practically how can the signer identify himself to the recipient that such e signature is issued by him and with an intention that such e signature is binding on him as if he has physically signed on the document. One pragmatic method is sending out an email with the attached e signed documents from his personal email which logically only can be accessed by the issuer with password protection.

To mitigate the risk of fraud, the recipient shall communicate with the signer by other means such as telephone call / WhatsApp / WeChat they normally used, upon receiving such electronic signed documents.

Minutes or written resolution signed by directors or members

Unless the tailor-made company Article of Association expressly prohibit the usage of e-signature, under the Electronic Transactions Ordinance (“ETO”), e-signature is allowed to be used in order to effect a document as if it physical signed.

If a rule of law requires information to be in writing, an electronic record satisfies such requirement provided that such electronic record is accessible for subsequent reference.⁵

⁴ Section 6(1) (c) (d) (e), Electronic Transactions Ordinance

⁵ Section 5(2) Electronic Transactions Ordinance

In light of the sample Article of Association, section 7(1), a decision made by Board of Directors become effective when all eligible directors indicate to each other either directly or indirectly by any means what share a common view on a matter. Such decision can be expressed by resolution in writing or to which each eligible director have otherwise indicated agreement in writing. ETD has expounded that e-signature satisfies the requirement of “**in writing**”.

Companies Ordinance empower a company the flexibility on the form on passing a members’ resolution. In order to signifies an agreement to a proposed written resolution, a member can indicate his agreement to the resolution by sending the signed resolution to the company in hard copy form **or in electronic form** which is authenticated by the member⁶

Signing audit report by e-signature

Audit report is a not matter excluded on schedule 1 of Electronic Transactions Ordinance. It’s the autonomy for the company and auditor themselves to decide whether e-signature is an appropriate mean for signing of audit report.

As an auditor, before consent to the adoption of e-signature as the signing method, below issues shall be contemplated. Under the surrounding fact, such e-signature is genuine and reliably issued by the directors themselves. Despite the statement of financial position (balance sheet) shall be signed by two directors, the auditor shall alert that such financial statements have been approved by the Board of Directors properly, but not only approved by those two signers.

Upon receipt the electronic signed audit report by directors, it’s good practice to verify the validity of the e-signature by other means directly to the signer, such as making a telephone call or WhatsApp message to whom.

⁶ Section 556, Companies Ordinance

Other considerations by the company whether e-signing of audit report is adopted

The popular usage of auditor report is for tax reporting in Inland Revenue.

Currently, electronic filing of Profit Tax Return (BIR51) is not acceptable. By submission of Profit Tax Return, an original set of copy or certify copy of audit report is required. In other words, if an audit report only signed electronically without further certifying by director or auditor, it cannot be accepted by IRD.

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