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BY EMAIL / HELLOSIGN

Dear Sir / Madam,

## Advisory on HelloSign and its Legal Compatibility in Malaysia

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### 1.0 Introduction

1. HelloSign is an electronic signature solution provider. It allows the users to display, correspond, store and sign documents electronically.
2. In Malaysia, the legislation providing for the use of electronic means in commerce is the ***Electronic Commerce Act 2006*** (“***ECA 2006**Long Title and Preamble of the ECA 2006*** states as follows: -

*An Act to provide for legal recognition of electronic messages in commercial transactions, the use of the electronic messages to fulfill legal requirements and to enable and facilitate commercial transactions through the use of electronic means and other matters connected therewith.*

3. Unlike the ***Digital Signature Act 1997*** which regulates digital signature

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service providers by license,<sup>1</sup> the **ECA 2006** does not seek to regulate HelloSign and the likes.

4. The **ECA 2006** merely sets out the criteria and circumstances in which commercial transactions concluded electronically are legally binding.
5. For documents required to be signed, witnessed during signing, executed in original form, made in copies or served and delivered, how does HelloSign fare in view of **ECA 2006**?
6. In rendering this advisory, the materials referred to are as follows: -
  - (i) HelloSign Terms of Use (Posted as of: August 7, 2019; Effective as of" September 24, 2019) ("**HelloSign Terms of Use**");
  - (ii) Service Specific Terms (Posted: May 19, 2020; Effective as of: June 18, 2020) ("**HelloSign Service Specific Terms**");
  - (iii) HelloSign Legality Statement; and
  - (iv) Further clarifications with HelloSign's representatives by a conference call and emails.

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<sup>1</sup> *The Long Title and Preamble of the Digital Signature Act 1997 reads as follows: -*

*An Act to make provision for, and to regulate the use of, digital signatures and to provide for matters connected therewith.*

## 2.0 HelloSign and its extent of compatibility with ECA 2006

### 2.1 Consent as the cornerstone of legality

7. **Section 3(1) of the ECA 2006** states that the use of electronic means in commerce is not compulsory.<sup>2</sup>
8. In other words and as provided under HelloSign Service Specific Terms,<sup>3</sup> for HelloSign-concluded transactions to be binding between the parties, the use of HelloSign must be consensual.
9. **Section 3(2) of the ECA 2006** provides that the consent needs not be express and can be inferred from the person's conduct.<sup>4</sup>
10. In HelloSign, users need only to create an account and login with their respective email address and right away correspond with each other on the documents. The process is relatively easy and quick. The consent can be elicited or solicited from the parties with ease.

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<sup>2</sup> Section 3(1) of the ECA 2006 reads as follows: -

*(1) Nothing in this Act shall make it mandatory for a person to use, provide or accept any electronic message in any commercial transaction unless the person consents to the using, providing or accepting of the electronic message.*

<sup>3</sup> See HELLOSIGN API, Paragraph 8.

<sup>4</sup> Section 3(2) of the ECA 2006 reads as follows: -

*(2) A person's consent to use, provide or accept any electronic message in any commercial transaction may be inferred from the person's conduct.*

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## 2.2 The requirement on signature

11. The purpose of signature is always evidential. It signifies the identity of the person and his intention to be bound by the signed documents.<sup>5</sup>
12. Under **section 5 of the ECA 2006**, “any letter, character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature” would qualify as an electronic signature.
13. In this respect, HelloSign allows users to create signature flexibly by drawing, typing or uploading images.
14. While users are given a free rein to pen their signature electronically, **s.9(1) of the ECA 2006** provides that for the electronic signature to count, it must: -
  - (i) be “attached to or is logically associated with the electronic message”<sup>6</sup> i.e. the document in an electronic form; and
  - (ii) “adequately indicates the person’s approval of the information to which the signature relates”.<sup>7</sup>
15. As such, users are advised to exercise the usual circumspection with signing while affixing their signature electronically.

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<sup>5</sup> “The traditional function of a signature is evidential ie to give evidence of identity and having the intention to be bound by the signed document.”, per Suriyadi FCJ in paragraph 28 of *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478 (Federal Court).

<sup>6</sup> Section 9(1)(a) of the ECA 2006.

<sup>7</sup> Section 9(1)(b) of the ECA 2006.

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## Test of authenticity

16. What matter more, however, are HelloSign's safeguards on authenticity.
17. There are two important elements in this respect. **Section 9(1)(b) and (c) of the ECA 2006** states that the electronic signature is valid if it: -

*(b) adequately identifies the person ...; and*

*(c) is as reliable as is appropriate given the purpose for which, and the circumstances in which, the signature is required.*

18. On the element of reliability under **section 9(1)(c) of the ECA 2006**, **section 9(2)** provides three further requirements as follows: -

*(a) the means of creating the electronic signature is linked to and under the control of that person only;*

*(b) any alteration made to the electronic signature after the time of signing is detectable; and*

*(c) any alteration made to that document after the time of signing is detectable.*

## Identification of the signatory and its adequacy

19. As earlier mentioned, the users are required to login with the email address in order to correspond and conduct dealings via HelloSign. Presumably and in the ordinary course of dealing, the users would have

beforehand informed and authenticated with each other their requisite email address.<sup>8</sup>

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<sup>8</sup> Section 17 of the ECA 2006. It reads as follows: -

**Section 17. Attribution of electronic message**

(1) *An electronic message is that of the originator if it is sent by the originator himself.*

(2) *As between the originator and the addressee, an electronic message is deemed to be that of the originator if it is sent by -*

*(a) a person who has the authority to act on behalf of the originator in respect of that electronic message; or*

*(b) an information processing system programmed by, or on behalf of, the originator to operate automatically.*

(3) *As between the originator and the addressee, the addressee is entitled to regard an electronic message as being that of the originator, and to act on that presumption, if -*

*(a) the addressee properly applies an authentication method agreed between the originator and the addressee for ascertaining whether the electronic message was that of the originator; or*

*(b) the electronic message as received by the addressee resulted from the actions of a person whose relationship with the originator or any agent of the originator enabled that person to gain access to an authentication method used by the originator to identify electronic message as its own.*

(4) *Subsection (3) does not apply if -*

*(a) the addressee has received a notice from the originator that the electronic message is not that of the originator and has reasonable time to act accordingly; or*

*(b) the addressee knew or should have known that the electronic message was not that of the originator had he exercised reasonable care or used any authentication method agreed between the originator and the addressee.*

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20. Besides, before corresponding in HelloSign, the users are also required to set their name.
21. The users' respective email address and name would then appear on the correspondence.
22. These enable adequate identification between the users.

## Reliability of the electronic signature

23. The use of email address is private and discreet, much like the use of one's bank card or account.
24. With its use made compulsory in HelloSign which then necessitates prior exchanging and authentication of email address between the users, it is certain that the creation of electronic signature is linked to and under the control of the other user only.
25. Understandably and in fact, under HelloSign Terms of Use,<sup>9</sup> any unauthorized use of the user's account in HelloSign is the user's responsibility. To this, settings on auto logout due to inactivity are available for the users to safeguard the account with HelloSign.
26. Upon completion of the signing, the users would receive the duly signed document together with an audit trail, by way of email.
27. The audit trail specifies the origin and destination of the document, in the form of users' respective email address and Internet Protocol (IP)

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<sup>9</sup> HelloSign Terms of Use, Clause 3.1.

Address. It also timestamps the status of and the users' activity over the subject document i.e. sending, viewing, signing and completion.

28. Additionally, with the use of hashing technology, HelloSign is able to provide unique records of pre- and post-signed documents for comparison purposes, to show that other than the entry of the relevant information i.e. names, dates and signatures onto the document, no other unauthorized changes or tampering takes place between the processes of uploading and sending the document to and receiving the signed document from the counterparts.<sup>10</sup> The provision of such records, however, is only available upon request for court purposes.<sup>11</sup>
29. These measures ensure the integrity of both the document and signatures and render any alteration or tampering after completion detectable.
30. Overall, HelloSign satisfies the test of authenticity housed under **section 9 of the ECA 2006**.<sup>12</sup>

## **2.3 The requirement on retention of document**

31. In addition to emailing the signed document together with the audit trail to the users, HelloSign also automatically stores the same.
32. The users are able to retain and retrieve them, in the software itself, for subsequent reference.

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<sup>10</sup> *HelloSign Legality Statement on Contract Authenticity.*

<sup>11</sup> *Further clarifications with HelloSign's representatives by a conference call and emails.*

<sup>12</sup> *Section 9 of the ECA 2006.*



33. This fulfills the requirements under **section 13 of the ECA 2006** on retention of document, as the signed document and the audit trail, collectively known as “*electronic message*” under the Act: -

*(a) is retained in the format in which it is generated, sent or received, or in a format that does not materially change the information contained in the electronic message that was originally generated, sent or received;*

*(b) is accessible and intelligible so as to be usable for subsequent reference; and*

*(c) identifies the origin and destination of the electronic message and the date and time it is sent or received.*

34. Users can assuredly process documents, which are required to be stored and kept under the law, with HelloSign.

## **2.4 The requirement on witness**

35. HelloSign also permits signing by more than 2 users on the same document.

36. This feature, coupled with its safeguards on authenticity aforementioned (which comply with **section 9 of the ECA 2006**), qualify HelloSign as a platform to process documents required to also be signed by witnesses under **section 11 of the ECA 2006**. It reads as follows: -

### **Section 11. Witness**

*Where any law requires the signature of a witness on a document, the requirement of the law is fulfilled, if the document is in the form*

*of an electronic message, by an electronic signature of the witness that complies with the requirements of section 9.*

## 2.5 The requirement on service and delivery

37. HelloSign also qualifies as an electronic means to serve and deliver documents, owing to its ability “*to identify the origin, destination, time and date of service, sending or delivery*” and to fetch “*the acknowledgement of receipt*” of the document as required under **section 16 of the ECA 2006**.
38. To serve and deliver documents on the other parties, users can avail themselves with the “JUST ME” option in HelloSign.
39. Users would receive the important indicators such as origin, destination, time and date of the service and delivery.
40. Users would also be notified by email upon viewing by the recipient. This serves as an acknowledgment of receipt.
41. Alternatively, users could select the usual option of “ME & OTHERS” and solicit signature from the recipient on the document as a mark of acknowledgment of receipt.

## 2.6 The requirement on original form and copy

### Original

42. In respect of documents required to be processed in its original form, **section 12 of the ECA 2006** states that the requirement is fulfilled if: -

*(a) there exists a reliable assurance as to the integrity of the information contained in the electronic message from the time it is first generated in its final form; and*

*(b) the electronic message is accessible and intelligible so as to be usable for subsequent reference.*

43. For the purposes of **paragraph (a)**, HelloSign's safeguards on authenticity including its use of hashing technology aforementioned qualify as a "*reliable assurance*" of the integrity of the electronic message, from the time it is uploaded to HelloSign to the time of completion of signing.
44. Whereas, HelloSign's ability to retain and retrieve the electronic message for subsequent reference fulfills the criteria in **paragraph (b)**.

## Copy

45. Users can also extend copies of the signed documents via HelloSign as it is programmed to retain, serve, send or deliver the same copy of the document through and through.
46. This fulfills **section 14 of the ECA 2006**, which reads as follows: -

### **Section 14. Copy**

*Where any law requires any document to be retained, served, sent or delivered in more than one copy, the requirement of the law is fulfilled, if the document is in the form of an electronic message, by retention, service, sending or delivery of the document in one copy.*

## 3.0 The audit trail and its admissibility in court

47. While dealings conducted via HelloSign comply with the **ECA 2006** and are hence, accorded with legal recognition, it does not prohibit the parties to dispute the admissibility or acceptability of the signed document or the audit trail under the **Evidence Act 1950** (“**EA 1950**”) in court.
48. Both **ECA 2006** and **EA 1950** are two stand-alone legislations. The **ECA 2006** prescribes the manner in which transactions should be conducted electronically in order to be given the force of law. Whereas, the **EA 1950** governs how evidence should be adduced in court.
49. Under **section 90A of the EA 1950**, for the HelloSign-generated or processed documents to be admissible in court, the party who seeks to rely on the same must prove that they were produced or processed by HelloSign in the course of its ordinary use.<sup>13</sup>

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<sup>13</sup> Section 90A(1) of the EA 1950 states as follows: -

**Section 90A. Admissibility of documents produced by computers, and of statements contained therein.**

*(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.*

**Note:**

*Under section 3 of the EA 1950, the term “computer” is widely defined and this would necessarily include HelloSign. The definition reads as follows: -*

*“computer” means an electronic, magnetic, optical, electrochemical, or other data processing device, or a group of such interconnected or related devices, performing logical, arithmetic, storage and display functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include an automated typewriter or typesetter, or a portable hand*

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## Certificate

50. Under **section 90A(2)**,<sup>14</sup> this can be proven by tendering a certificate signed by a person who manages or maintains the operation of HelloSign.
51. The idea is that HelloSign is certified to be in good working order and was operating properly in all respects throughout the material period the transaction was processed.
52. To illustrate, the person could be a technician or system manager of HelloSign based in the United States who certifies to the best of his knowledge and belief that the state of affairs was as such.<sup>15</sup>
53. The certificate would then constitute a sufficient proof that HelloSign-generated or processed documents are fit to be admitted by the court. It is then up to the other party to show otherwise.

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*held calculator or other similar device which is non-programmable or which does not contain any data storage facility.*

<sup>14</sup> Section 90A(2) of the EA 1950 states as follows: -

*(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.*

<sup>15</sup> Section 90A(3) of the EA 1950 states as follows: -

*(3) (a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it.*

*(b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.*

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54. Currently, HelloSign does not provide such certificate.
55. Instead, HelloSign publicizes the status and condition concerning the software's operation for users' viewing at <https://status.hellosign.com/>.

## Oral evidence

56. Alternatively, the party can summon the person who is familiar with the operation of HelloSign as a witness to give oral evidence<sup>16</sup> with reference to and with the aid of the information at <https://status.hellosign.com/>.
57. The witness could be HelloSign's reseller or sales representative who knows how HelloSign should function and is in a better position (compared to the users) to say that it was functioning properly.<sup>17</sup>

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<sup>16</sup> "Ordinarily a certificate under s 90A(2) must be tendered in evidence in order to rely on the provisions of s 90A(3) and (4). However, the use of the words 'may be proved' in s 90A(2) indicates that the tendering of a certificate is not a mandatory requirement in all cases. In *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, a plethora of authorities was referred to in ruling that facts to be presumed can, instead, be proved by other admissible evidence which is available (at pp 722–723). Thus the use of the certificate can be substituted with oral evidence ...", per Zulkefli FCJ at page 635 of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613 (Federal Court).

<sup>17</sup> "... it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.", per Lord Griffiths at page 231 of *R v Shepherd* [1993] 1 ALL ER 225 (House of Lords).

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## 4.0 The limitations

58. Not all documents can be processed by HelloSign.
59. As stated in HelloSign Terms of Use,<sup>18</sup> it is the users' responsibility to ensure that the documents processed by HelloSign are appropriate for electronic signatures.
60. Generally, documents that are required to be notarized or attested before the Commissioner for Oaths such as affidavits are off limits to electronic processing.
61. Users are also advised to verify beforehand the viability of electronic processing for dealings involving third-party governmental agency or authority.
62. The ***Schedule of the ECA 2006*** itself also categorically states that the following documents or transactions cannot be electronically processed:-
1. *Power of attorney*
  2. *The creation of wills and codicils*
  3. *The creation of trusts*
  4. *Negotiable instruments*
63. On service and delivery, ***section 16(2) of the ECA 2006*** states that the following documents cannot be electronically processed: -

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<sup>18</sup> HelloSign Terms of Use, Clause 7.3.

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*(a) any notice of default, notice of demand, notice to show cause, notice of repossession or any similar notices which are required to be served prior to commencing a legal proceeding; and*

*(b) any originating process, pleading, affidavit or other documents which are required to be served pursuant to a legal proceeding.*

## 5.0 Recommendations

64. To ease tracking of the service and delivery of documents via the “JUST ME” option, it is suggested that HelloSign to also provide the users an audit trail in addition to the records by emails, similar to the one for documents executed by more than one party,

65. As the customer base of HelloSign grows and to ease the users and to obviate the hassles for HelloSign’s employees or representatives to testify in the court, it is recommended that HelloSign makes available, upon request with supporting documents, the certification on the good working order and proper operation of HelloSign for the purposes of **s. 90A of the EA 1950**.

## 6.0 Conclusion

66. HelloSign is compatible with the **ECA 2006** in every respect.

67. Barring the limitations as elaborated above, the scope of documents or transactions that HelloSign is able to process in Malaysia is formidably wide.

Yours faithfully,

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