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BY EMAIL

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**ECA 2006*** sets out the criteria and circumstances in which commercial transactions concluded electronically are legally binding.
3. 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 the ***ECA 2006***?

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4. 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.

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

### 2.1 Consent as the cornerstone of legality

5. The use of electronic means is not compulsory. In other words and as provided under HelloSign Service Specific Terms,<sup>1</sup> for HelloSign-concluded transactions to be binding between the parties, the use of HelloSign must be consensual.
6. Consent needs not be express and can be inferred from the person's conduct.
7. In HelloSign, all it takes is for the users to create an account and login with their respective email address and right away correspond with each other on the documents. With this hassle-free process, the consent can

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<sup>1</sup> HELLOSIGN API, Paragraph 8.

be elicited or solicited from the parties with ease.

## 2.2 The requirement on signature

8. The purpose of signature is always evidential. It signifies the identity of the person and his intention to be bound by the signed documents.
9. Under the **ECA 2006**, any letter, character, number, sound or any other symbol or any combination thereof created electronically and adopted by a person as a signature would qualify as an *electronic signature*.
10. In this respect, HelloSign allows users to create signature flexibly by drawing, typing or uploading images.
11. What matter more, however, are HelloSign's safeguards on authenticity. There are two aspects to this, namely the signatory must be adequately identified and the signature must be reliable.

### *Identification of the signatory*

12. 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>2</sup>
13. Besides, before corresponding in HelloSign, the users are also required to set their name.

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<sup>2</sup> ECA 2006, Section 17.

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14. The users' respective email address and name would then appear on the correspondence.
15. These enable adequate identification between the users.

## *Reliability of the signature*

16. The use of email address is private and discreet, much like the use of one's bank card or account.
17. With its use made compulsory in HelloSign, it is certain that the creation of electronic signature is linked to and under the control of that particular user only.
18. Understandably and in fact, under HelloSign Terms of Use,<sup>3</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 in HelloSign.
19. Upon completion of the signing, the users would receive the duly signed document together with an audit trail, by way of email.
20. The audit trail specifies the origin and destination of the document, in the form of users' respective email address and Internet Protocol (IP) Address. It also timestamps the status of and the users' activity over the subject document i.e. sending, viewing, signing and completion.
21. Additionally, with the use of hashing technology, HelloSign is able to provide unique records of pre- and post-signed documents for

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<sup>3</sup> HelloSign Terms of Use, Clause 3.1.

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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>4</sup> The provision of such records, however, is only available upon request for court purposes.<sup>5</sup>

22. These measures ensure the integrity of both the document and signatures and render any alteration or tampering after completion detectable.
23. As an overview, HelloSign satisfies the test of authenticity under the ***ECA 2006***.<sup>6</sup>

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

24. In addition to emailing the signed document together with the audit trail to the users, HelloSign also automatically stores the same. The users are able to retain and retrieve it, in the software itself, for subsequent reference.
25. Users can assuredly process documents, which are required to be stored and kept under the law, with HelloSign.<sup>7</sup>

## **2.4 The requirement on witness**

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

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<sup>4</sup> HelloSign Legality Statement on Contract Authenticity.

<sup>5</sup> Further clarifications with HelloSign's representatives by a conference call and emails.

<sup>6</sup> ECA 2006, Section 9.

<sup>7</sup> ECA 2006, Section 13.

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27. This, coupled with its safeguards on authenticity,<sup>8</sup> makes HelloSign a legally viable platform to process documents required to also be signed by witnesses.<sup>9</sup>

## 2.5 The requirement on original form and copy

28. The safeguards on authenticity and the storage function aforementioned also qualify HelloSign as an electronic platform to process documents required to be executed in its original form<sup>10</sup> and to retain and serve the documents in copies.<sup>11</sup>

## 2.6 The requirement on service and delivery

29. As much as users use HelloSign to electronically sign documents, the users could also validly serve and deliver documents<sup>12</sup> on the other parties by availing themselves with the “JUST ME” option in HelloSign.

30. HelloSign would indicate to the users, by email, the origin, destination, time and date of service and delivery, as required under the **ECA 2006**.

31. The users would also be notified by email upon viewing by the recipient. This qualifies as an acknowledgment of receipt.

32. 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.

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<sup>8</sup> ECA 2006, Section 9.

<sup>9</sup> ECA 2006, Section 11.

<sup>10</sup> ECA 2006, Section 12.

<sup>11</sup> ECA 2006, Section 14.

<sup>12</sup> ECA 2006, Section 16(1).

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## 3.0 The audit trail and its admissibility in court

33. 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.
34. 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.
35. 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.

### *Certificate*

36. Under **section 90A(2)**, this can be proven by tendering a certificate signed by a person who manages or maintains the operation of HelloSign.
37. 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.
38. To illustrate, the person could be a computer 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.

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39. The certificate would then constitute a sufficient proof that HelloSign-generated or processed documents are fit to be accepted by the court. It is then up to the other party to show otherwise.
40. Currently, HelloSign does not provide such certificate.
41. Instead, HelloSign publicizes the status and condition concerning the software's operation for users' viewing at <https://status.hellosign.com/>.

## *Oral evidence*

42. Alternatively, the party can summon the person who is familiar with the operation of HelloSign as a witness to give oral evidence<sup>13</sup> with reference to and with the aid of the information in <https://status.hellosign.com/>.
43. 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>14</sup>

## **4.0 The limitations**

44. Not all documents can be processed by HelloSign.
45. As stated in HelloSign Terms of Use,<sup>15</sup> it is the users' responsibility to ensure that the documents processed by HelloSign are appropriate for electronic signatures.

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<sup>13</sup> Ahmad Najib bin Aris v Public Prosecutor [2009] 2 MLJ 613 by the Malaysian Federal Court.

<sup>14</sup> R v Shepherd [1993] 1 ALL ER 225 by the English House of Lords.

<sup>15</sup> HelloSign Terms of Use, Clause 7.3.



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46. Generally, documents that are required to be notarized or attested before the Commissioner for Oaths such as affidavits are off limits to electronic processing.
47. Users are also advised to verify beforehand the viability of electronic processing for dealings involving third-party governmental agency or authority.
48. The **ECA 2006** itself also stipulates documents or transactions that cannot be electronically processed. They are the Power of Attorney, the creation of wills and codicils, the creation of trusts and negotiable instruments.<sup>16</sup>
49. On service and delivery, the **ECA 2006** states that the following documents cannot be electronically processed<sup>17</sup>: -

*(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

50. 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

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<sup>16</sup> ECA 2006, Schedule.

<sup>17</sup> ECA 2006, Section 16(2).

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audit trail in addition to the records by emails., similar to the one for documents executed by more than one party,

51. 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

52. HelloSign is compatible with the **ECA 2006** in every respect.
53. 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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