

Property Sale and Purchase contracts: Going digital amidst COVID-19

March 27, 2020

As COVID-19 cases around the world continue to rise, more countries and companies are enforcing lockdown and quarantine measures. In such circumstances, there will be practical difficulties when parties are unable to physically produce, execute and witness their contracts, especially when the law requires the aforesaid legal requirements to be satisfied for certain contracts.

As such, we, as the lawyers acting for developers of property, have been receiving an increasing number of requests from Purchasers to exercise their options by faxing or emailing to us their signed contracts, as they are unable to return the physical signed contracts before the exercise deadline. What exactly is a party to a property transaction to do in this current situation? Are electronic exchanges of and electronic signatures on contracts for the sale and purchase of immovable property (SPAs) acceptable?

Is electronic exchange allowed?

To answer this question, we need to examine what the legal form requirements are for an SPA. Under section 6(d) of the Civil Law Act (Cap. 43) (CLA), SPAs are required to be evidenced in writing and signed. Prima facie, this means physical SPAs with wet ink signatures are required. While there is case law that suggests the SPAs may be evidenced in writing by email, and signatures do not necessarily need to be handwritten, each case turns on its facts. Case law therefore cannot be relied upon to confirm that an electronic exchange and signature would always satisfy the provisions of section 6(d) of the CLA.

Can we then rely on the provisions of the Electronic Transactions Act (Cap. 88) (ETA) to enter into an electronic form of SPA?

Unfortunately, electronic equivalents of SPAs are not accorded the certainty vis-a-vis legal enforceability that the ETA provides for other kinds of contracts. SPAs, for now, fall under the exclusion list in the First Schedule to the ETA. The rationale behind this is that SPAs involve immovable property, which are of high-value and high-significance to the parties, and there is a greater need to mitigate against the risk of fraud which arises from the challenge of verifying the identities and intentions of the parties to an SPA.

The Public Consultation Paper issued by IMDA on Review of the ETA last year proposed to remove SPAs from the exclusion list in the First Schedule to the ETA, with the additional requirement that only secure electronic signatures be used for SPAs to mitigate concerns of fraud. This is a welcome and much needed move, especially in view of the constraints parties face amidst the COVID-19 pandemic.

As for the sale of units under construction, the necessary amendments will also need to be made to the relevant legislation such as the Housing Developers Rules and the Sale of Commercial Properties Rules, to allow for electronic exchanges and execution of the sale agreements prescribed thereunder.

How electronic exchange and signatures are used in other jurisdictions

Singapore will not be the first jurisdiction to allow for electronic SPAs if the ETA is amended to remove SPAs from the exclusion list in the First Schedule thereof.

In Australia, usage of electronic forms and signatures for SPAs are expressly allowed under both federal and certain state laws, and the usage have been implemented for some time now. Generally, such usage must fulfil the following conditions:

1. There is a way to identify the person executing the SPA and the person's intentions;
2. The process used in executing the electronic signature must be reliable; and
3. Parties must consent to the electronic exchange and the use of electronic signatures.

Similarly, in Scotland, electronic exchange and signatures for SPAs are also allowed under legislation subject to parties' prior agreement. In particular, for SPAs to be duly signed by electronic means, a specific form of secure electronic signature must be used. This electronic signature must be:

1. Uniquely linked to the signatory;
2. Capable of identifying the signatory;
3. Created using means that the signatory can maintain under his sole control; and
4. Linked to the SPA data such that any subsequent change of the data is detectable.

In both jurisdictions, there are provisions included in their ETA-equivalents to specifically provide for a more secure form of electronic signature, and that such use must be agreed beforehand between parties to a contract.

Typically in practical terms, parties will include a clause in their SPA or sign an agreement hosted by the electronic signature platform to document their consent to the electronic exchange of the SPA and the use of electronic signatures. The electronic signature platform, which has built-in security features, will also be used to authenticate the identities of the parties electronically signing the SPA.

Interim legislation may be required to combat disruptions arising from COVID-19

If the COVID-19 situation worsens and Singapore implements more stringent lockdown measures, our present laws may pose serious disruptions to transactions to dispose or purchase immovable properties in Singapore.

As parties are unable to physically produce, execute and witness their SPAs, they may not be able to advance their real estate transactions, and may even be in breach of their legal obligations under the SPAs.

Thus, interim legislation is likely required to address the operational challenges that parties may face due to COVID-19.

COVID-19 trends

As COVID-19 compels more companies to implement and invest in infrastructure to allow employees to work from home and people adapt to the new remote working systems, the global economy may move towards decentralised

working systems even after it recovers from COVID-19. Consequentially, more transactions are moving towards electronic means, and such trends may become permanent.

We can expect more and more requests from vendors and purchasers alike to exchange and execute SPAs electronically. The same applies for payments, and we expect to see more requests, from both vendors and purchasers, to make and accept electronic payments.

It is thus imperative that our laws respond to the changing needs of the modern economy, and our laws be amended to allow such electronic exchanges and execution – the Singapore real estate industry will be better positioned to make a strong comeback when COVID-19 blows over.

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