

September 21, 1999

BY FACSIMILE

Jimmy Ma
Legal Advisor
Legislative Council
Hong Kong

Dear Mr. Ma:

On behalf of the Business Software Alliance (BSA), a trade association representing multinational and Hong Kong-based software companies, I am submitting the attached comments on the Electronic Transactions Bill for your consideration. We would formally urge the creation of a Bills Committee to consider in detail the issues addressed in the Electronic Transactions Bill, and look forward to submitting more detailed comments in that review process.

If I can be of any assistance in answering questions about the BSA or its comments on the Bill, please call me at 2804 4340.

Sincerely,



Tom Robertson
Vice President

Hong Kong Electronic Transactions Bill

Concerns Raised by the Business Software Alliance September 1999

The Business Software Alliance (BSA) welcomes the opportunity to provide its comments on the current draft of the Hong Kong Electronic Transactions Bill (the Bill). BSA is concerned that the Bill is overly restrictive in its approach to the establishment of legally recognized Certification Authorities (CAs). The proposed rules are not technologically neutral, establish conditions for legal recognition that are too restrictive, and raise other concerns. Our detailed comments follow:

General Concerns

The Bill provides that only signatures generated by certified CAs will benefit from legal recognition. Initially, the Postmaster General would be the only CA to qualify and the government would draft regulations setting out specific technological requirements for the designation of other CAs. Unfortunately, this structure goes against the spirit of the UNCITRAL's Model Contract law and resulting electronic signature work, which are founded on the principles of non-discrimination and technological neutrality. The approach in the law is overly restrictive, which would among other things raise the following risks:

- Electronic signature services will be unnecessarily expensive for many users of these services on the Internet. Users' varying electronic signature needs will involve different levels of security that are priced at different levels. The market should be allowed to determine how much users are willing to pay for specific levels and types of security. As previous legislative attempts in Germany and several U.S. states have shown, a "one size fits all" solution is expensive and will be widely rejected by industry and consumers alike. Electronic signatures should not be denied legal effect, validity, enforceability or admissibility as evidence in legal proceedings solely on the grounds that the signatures do not conform to particular technical requirements.
- Electronic signature services will be expensive if, as may be the case with this legislation, the barriers for providing such services are so high that they create a monopoly or oligopoly of services providers.
- Innovation will be artificially limited if competition for different types of electronic signature services is precluded by a rigid set of criteria by which CAs are designated.
- Electronic signatures will be discriminated against vis a vis written signatures. Users will not have the same contractual freedom to accept electronically signed data in the same manner as they are currently free to contractually determine their acceptance of manually sign data.
- Hong Kong may be isolated from global e-commerce. By denying legal recognition of certificates which have not been generated by the Postmaster General or other Hong Kong-designated CA, Hong Kong is raising the barriers along its borders, thus making it far more difficult for its citizens to participate in global electronic commerce.

The Draft Bill is Not Technology Neutral

The electronic signature structure set out in the Bill is based on Public Key Infrastructure (PKI) system, which is only one of the current and future authentication systems. By basing the legislation on one particular technology, Hong Kong would be closing itself to future developments in authentication systems. Rather than using terms such as "digital signature", "asymmetric cryptosystem", "key pair", and "hash function", the law would benefit from technologically neutral wording, as adopted in the UNCITRAL Model Law. The legal recognition of an electronic document should not be linked to specific technological requirements.

Furthermore, the Bill provides that a "code of practice" containing standards and procedures for carrying out the functions of recognised CAs will be issued by the Director of Information Technology Services. Industry is not given any role in this process, which carries the risk that neither the most up-to-date nor the most open standards will be imposed.

The Draft Bill Establishes Overly-Restrictive Conditions for Legal Recognition

Legal recognition is only granted to electronic signatures generated by recognised CAs. The only recognised CA would be the Postmaster General until formal recognition criteria for other CAs is drafted and applied by the government. The UNCITRAL Model Law states that "information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message" and "where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be use-able for subsequent reference". The Bill contradicts its purpose by limiting legal recognition in the case of form requirements; "manner and format" requirements set by the government; and additional limitations imposed on the types of documents, types of courts in which electronic documents can be used, etc.

Other Concerns

In addition to the above-noted issues, the software industry is concerned that:

- Legal uncertainty is created for potential CAs and users by giving wide discretionary powers to the Director of Information Technology Services in the determination of recognition criteria and the setting of the "code of practice." The bill does not propose any clear objective criteria for these issues, leaving potential CAs and users in a situation of legal uncertainty. It is noteworthy that the Post Master General does not have to comply with any of these conditions.
- Issues such as liability should be determined by contractual arrangements rather than laws or regulations.
- The Bill does not now contemplate the need for legal recognition of electronic signatures generated abroad or authentication service providers based in a third country.