

香港律師會的信頭

**Letterhead of THE LAW SOCIETY OF HONG KONG**

**Practitioners Affairs**

Our Ref : PA0005/99/33927  
Your Ref : ITBB/IT 107/4/1 (99) XI  
Direct Line :

**BY FAX/POST**

16 November, 1999

Mr. Alan Siu  
Information Technology and Broadcasting Bureau  
1/F-2/F Murray Building  
Garden Road, Central  
Hong Kong

Dear Alan,

**Re: Electronic Transactions Bill**

This response is designed to address some specific points raised in the Bureau's response (dated 1 November 1999) to the Law Society's written submissions on the Electronic Transactions Bill dated 19 August 1999.

The Bureau is referred to the Law Society's oral representations (hard copy attached) made to the Bill's Committee on Friday 12 November 1999 for a detailed response and alternative solution to the question of digital signatures as currently provided for by the section 6 of the proposed Bill.

The Law Society notes the Bureau's comments that the proposed clause is in line with similar legislation in other jurisdictions, citing the examples of Germany, Malaysia and Utah. However, the following points should be noted

- 1 The relevant legislation of these jurisdictions is already relatively old, and in the process of being superseded by other countries. Other jurisdictions presently considering e-commerce legislation are pursuing a technologically neutral or non-specific approach to the question of digital signatures (i.e. Australia, Canada, the EU and the US Federal Model etc). If the Hong Kong bill remains in its present form, there is a real risk that we will found ourselves out of step with the international community on this issue which may have a significant negative impact on the growth of e-commerce within Hong Kong. In any event it is hard to see how legislating the framework for other electronic signatures to have legal recognition could have an adverse impact on the growth of e-commerce as stated in the Bureau's response.

- 2 It is common knowledge that the German legislation did not enjoy a high degree of market acceptance - the legislation was very technical in its demands (more so than the proposed Hong Kong legislation), but nevertheless it clearly serves as an indication that the Bureau should not try and lead, or anticipate, market movements in this area, but should work to establish the basic legal framework in which varying electronic signature technologies can compete on an equal footing and with equal recognition before the law. The Bureau originally indicated that the intention of clause 6 was to encourage CA's to apply for recognition under the Bill. This cannot be right, nor can it be the appropriate approach to take, if the Bureau is committed to maintaining a technologically neutral approach to this issue.
  
- 3 The German legal system is a Civil Code system, and by its very nature is more prescriptive in its tenets than the Hong Kong system, which is a Common Law jurisdiction. Great care should therefore be taken in assessing whether the German legislation is in fact a suitable model for a common law jurisdiction.

Yours sincerely,

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Encl.

cc Miss Salumi Chan, Clerk to Bills Committee

## Oral Comments on the The Law Society of Hong Kong's submissions on the Electronic Transactions Bill

1 These oral submissions are intended to complement The Law Society's written submissions on the Electronic Transactions Bill dated 9 November 1999. This oral submission is intended solely to comment on section 6 of the proposed Bill, which is of most concern to the Society in relation to the issue of e-commerce. While the security requirements that should be imposed on CA's in respect of securing their private keys from discovery by their parties, and the potential consequences and liability of a CA if its private key is so discovered are also a matter of great concern, the Law Society can not at present suggest a suitable solution to this problem. Accordingly, it is not intended to discuss the matter further than as is contained in the written submissions.

2 One of the aims of the Bill is to "*promote the development of e-commerce in Hong Kong*". Accordingly it is intended to give electronic records and digital signatures used in electronic transactions the same legal status as that of their paper-based counterparts. This aim is to be achieved by:

- A removing legal impediments to the conduct of electronic transactions
- B adopting a technologically neutral approach; and
- C by adopting a minimalist regulatory approach

3 The Law Society believes that section 6 of the Bill does not follow this approach. Briefly put, the section provides that where a rule of law requires the signature of a person, a digital signature will meet this requirement, provided that it is supported by a recognized digital certificate.

4 The clause is overly prescriptive in its approach. The proposed clause ignores other authentication mechanisms other than those based on digital signatures and pertains solely to the use of digital signatures within the PKI framework which the bill establishes

5 If purpose of the Bill is to promote electronic commerce by:

- A removing legal impediments to the conduct of electronic transactions
- B adopting a technologically neutral approach
- C minimalist regulatory approach

then the Bill should ensure that all *electronic* signatures are afforded appropriate legal recognition under the auspices of the Bill.

6 As long as an electronic signature is capable

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- A authenticating the person who affixes the signature; and
- B indicating the person's approval of the information contained in the electronic record itself

there should be no reason why they should not be accepted as alternative mechanisms deserving of legal recognition. After all, in a common law jurisdiction such as Hong Kong, there is nothing significantly different about an "electronic signature" than a signature conveyed by telegram, telex, facsimile or any other method presently accepted by the courts and commercial practice.

- 8 The UNCITRAL model law on electronic commerce addresses this issue in a technologically neutral fashion in Article 7, which is set out in the Law Society's written submission. Section (b) of Article 7 establishes a flexible approach to the question of security and, while not debarring the use of digital signatures supported by recognized certificates, would appear to be more appropriate in providing a technologically neutral approach to the Bill.
- 9 A suggested response to this question would be to follow the so-called two-tier approach (which the Bill, at present, only partially adopts). That is to say, the proposed legislation should accept all or most electronic authentication mechanisms and electronic records on a technologically neutral basis, and grant those mechanisms a basic set of legal rights (i.e. satisfying requirements as to writing and form requirement (which the proposed Bill does) and signature requirements (which the Bill does not). However such signatures would not be entitled to any **PRESUMPTIONS** concerning the signor's identify or intent - i.e. the signature would have to be proved in the normal manner.
- 10 At the next level, a "secure electronic signature" would have to meet a set of legislated requirements. Following the example set by Singapore the "secure electronic signature" would have to be:
- A unique to the person using it;
  - B capable of identifying the person;
  - C created through a means that is under the sole control of the person using it; and
  - D linked to the electronic record in such a way as to confirm the integrity of the document.

Digital signatures supported by a recognized CA would meet these requirements.

- 11 If these requirements were met the "secure electronic signature" would give to the related electronic record the following:
- A a presumption of integrity;
  - B a presumption that the signature is that of the person with whom it is associated; and
  - C a presumption that the user affixed the signature with the intent of approving or signing the document.
- 12 Such a two tier method would achieve the Bureau's goal of technological neutrality. At the same time it affords greater protection, certainty and benefits to those authentication mechanisms whose security permit greater confidence in their use. However, such a two-tier approach would not deprive legal recognition to those authentication mechanisms that do not require a significant external legal framework to establish.
- 13 To take the prescriptive approach to this question is to run the risk of stunting the development of other authentication mechanisms (or at least to legislate a preference for a technology that is still only in its earliest stages of commercial use). Additionally, such a preference may place Hong Kong outside the mainstream of technological advances in this area internationally, as would be the case for example if a bio-metric system were to gain market acceptance. Accordingly, The Law Society's view is that section 6 should be replaced with wording which is more technologically neutral and more in line with the spirit of the Bill as a whole.