

Response to Comments
made by the Business Software Alliance

General concerns

- The primary aim of the Electronic Transactions Bill is to provide a certain and secure environment for the conduct of electronic transactions over open networks. Without certainty and security, electronic commerce will not be able to develop. Digital signature using public key infrastructure technology is currently the only form of electronic signature with a level of technical maturity that adequately meets the need for user authentication, integrity of data and non-repudiation of transactions. It is by far the most common form of electronic signature being used in the market which can address the issues of certainty and security.
- In considering whether we should give recognition to all forms of electronic signatures, we should look at the practical implications. If the Government and others in the community have no commonly available means to accept and deal with electronic signatures other than digital signatures, any move to recognise other forms of electronic signature would be premature.
- Recognition of other forms of electronic signature which have not yet reached a level of technical maturity to satisfactorily address identified security issues relating to electronic transactions would lead to uncertainty. Security breaches of any kind due to immaturity of the technology would substantially undermine the confidence of the public in participating in electronic commerce. This would impede the development of electronic commerce in Hong Kong.
- However, users of electronic commerce are free to accept various forms of electronic signature which suit their intended purposes. Recognition of electronic signatures other than digital signatures would be governed by common law.

- The adoption of digital signature is technologically neutral in the sense that digital signature is not based on particular types of algorithm products in the market. Moreover, it is up to the user to decide what level of security in respect of the digital certificate should be adopted to suit the intended purpose.
- Technological advances in electronic signature would be accommodated through suitable amendments to the Electronic Transactions Ordinance after its enactment. The concept of electronic signature is already written into the Electronic Transactions Bill as currently drafted. Legal recognition of new forms of electronic signature other than digital signature could be achieved, as and when appropriate, through an amendment to the Electronic Transactions Ordinance. The amendment involved is not envisaged to be complicated. We shall monitor closely developments in the area of electronic signature with a view to keeping our legal framework in step with technological advances in this area.
- It does not seem to be the case that most recently adopted laws give legal recognition to all forms of electronic signature. The Electronic Transaction Law of Korea enacted earlier this year is based on digital signature. The Act on Digital Signature of Denmark which is still in the form of a draft Bill also gives recognition to digital signature only.
- We do not agree that we are creating a de-facto mandatory licensing regime. Certification authorities which intend to provide certification services in Hong Kong are free to decide whether to obtain a recognition from Government. It is only prudent that we give legal recognition to digital signatures supported by certificates issued by certification authorities which have reached an acceptable trustworthy level.
- The Director of Information Technology Services (DITS) has published the code of practice for recognised certification authorities for public consultation. The objective is to reach a consensus with the industry on the detailed standards and procedures for carrying out the functions of recognised certification authorities. The term "code of practice" is commonly used in other similar situations under existing legislation where industry standards and practices are dealt with.

Other concerns

- We note the comments on Clause 20(3) of the Bill. Besides the specific factors set out in Clause 20(3) and (4) of the Bill, the DITS may only consider other matters which are relevant. The relevance of a matter considered by the DITS is subject to appeal to the Secretary for Information Technology and Broadcasting (SITB). The SITB's decision is in turn subject to judicial review.
- We note the comments on Clause 19(4) of the Bill. We have undertaken that we shall propose a Committee Stage Amendment to Clause 19(4) to the effect that the DITS may invoke the waiving provision only for the purpose of facilitating the recognition in Hong Kong of certification authorities licensed, registered or otherwise recognised in a place outside Hong Kong if there is recognition in that place on a reciprocal basis of certification authorities recognised in Hong Kong.
- To properly discharge the function as the recognition authority, the DITS has to be given some flexibility so that he can deal with applications for recognition as recognised certification authorities having regard to the specific circumstances and facts of each application. However, the DITS has to exercise such authority in a reasonable manner.
- We consider the proposed appeal mechanism under the Bill adequate and appropriate having regard to the voluntary nature of the certification authority recognition scheme. Moreover, it is quite common in existing legislative that an appeal against the decision of an executive body of the Government over a certain matter is made to the Policy Secretary responsible for that matter. That the decision of the SITB on appeal is subject to judicial review should provide a sufficient safeguard to protect the interest of certification authorities. We do not consider that there is a need to add a further layer to the appeal mechanism by establishing an independent appeal body.
- The Postmaster General is a recognised certification authority under the Electronic Transactions Bill. It is only exempt from Part VII of the Bill on "Recognition of certification authorities and certificates by Director" which

deals with procedures for seeking recognition and for the DITS to suspend and revoke recognition. Apart from this, the Postmaster General has to comply with other parts of the Bill in the same way as other recognised certification authorities.

- The Postmaster General, as a public authority, has a duty to abide by the laws of Hong Kong, including the provisions in the Electronic Transactions Bill and the code of practice to be issued by the DITS. The Postmaster General will also act in accordance with public interests.
- The liability of recognised certification authorities is limited only in prescribed circumstances whereby the recognised certification authorities have complied with the requirements in the Bill and in the code of practice issued by the DITS and no negligence, intentional or reckless misrepresentation is involved. The main aim is to encourage the development of certification authorities in Hong Kong and to provide for certainty, thereby minimizing unnecessary dispute and litigation. As similar provisions exist in overseas legislation on certification authorities, e.g. the Electronic Transactions Act of Singapore, the Malaysian Digital Signature legislation and the Utah Digital Signature Act, we do not consider it premature to deal with the issue.
- It is our plan to develop and establish cross recognition between the HKSAR and other economies in respect of the operation of certification authorities so as to facilitate cross-border electronic commerce. This is one of the new initiatives of the Information Technology and Broadcasting Bureau set out in the 1999 Policy Address.