

**Types of Documents and Acts
Excluded from the Application
of Clauses 5, 6, 7, 8 and 16
of the Electronic Transactions Bill**

Introduction

This paper sets out the criteria for determining what types of documents and acts are to be excluded from the application of Clauses 5, 6, 7, 8 and 16 of the Electronic Transactions Bill and makes comparison with relevant legislation in overseas countries.

Schedule 1 of the Electronic Transactions Bill

2. While it is our policy objective to promote the wider adoption of electronic transactions, we appreciate that legal recognition of electronic records and digital signatures is a fairly recent development both locally and globally. We thus consider that a step-by-step approach in this regard would be more conducive to engendering public confidence in electronic transactions. With this in mind, we propose that for the time being certain types of transactions would preferably be conducted through conventional means and that the Electronic Transactions Bill should not go as far as to require acceptance of electronic documents and digital signature in all types of transactions before the community at large is ready for such a change. We have therefore set out in Schedule 1 of the ETB that documents in respect of the following matters and acts are excluded from the application of Clauses 5, 6, 7, 8 and 16 of the Bill :-

- (a) the creation, execution, variation, revocation, revival or rectification of a will, codicil or any other testamentary document;
- (b) the creation, execution, variation or revocation of a trust;

- (c) the creation, execution, variation or revocation of a power of attorney.
- (d) the making, execution or making and execution of any instrument which is required to be stamped or endorsed under the Stamp Duty Ordinance (Cap. 117) other than a contract note to which an agreement under section 5A of the Ordinance relates;
- (e) Government conditions of grant and Government leases;
- (f) any deed, conveyance or other document or instrument in writing, judgments, and lis pendens referred to in the Land Registration Ordinance (Cap. 128) by which any parcels of ground, tenements or premises in Hong Kong may be affected;
- (g) any assignment, mortgage or legal charge within the meaning of the Conveyancing and Property Ordinance (Cap. 219) or any other contract relating to or effecting the disposition of immovable property or an interest in immovable property;
- (h) an estate agency agreement entered into between an estate agent and its client;
- (i) oaths and affidavits;
- (j) statutory declarations;
- (k) judgments (in addition to those referred to in item 2 (f)) or orders of court;
- (l) warrants; and
- (m) bills of exchange within the meaning of the Bills of Exchange Ordinance (Cap. 19).

3. We shall propose Committee Stage Amendments to delete item 2(h) on "estate agency agreement entered into between an estate agent and its client" after further consultation with the Estate Agents Authority and will add to the Schedule "a floating charge and a fixed charge as described in section

2A(1) and (2) of the Land Registration Ordinance (Cap. 128) after discussion with the legal advisor of the Legislative Council Secretariat.

Criteria

4. In identifying items to be included in the exclusion list in Schedule 1, we have taken into account the following factors -

- (a) the solemnity of the transactions involved;
- (b) the need for secondary authentication, involving swearing, attestation or the transaction "being witnessed";
- (c) protection of Government revenue; and
- (d) practical reasons or reasons associated with current technical capabilities of the systems.

5. On the ground of solemnity, we have proposed to exclude wills (including codicils), trusts, oaths, affidavits, statutory declarations, judgments, court orders and warrants.

6. Under the Power of Attorney Ordinance (Cap 31), an instrument creating a power of attorney shall be signed and sealed by, or by direction and in the presence of, the donor of the power. Where such an instrument is signed and sealed by a person by direction and in the presence of the donor of the power, two other persons shall be present as witness and shall attest the instrument. Therefore, on the ground of the need for secondary authentication, we have proposed to exclude powers of attorney.

7. As regards land and property transactions, there is little demand from the community that such transactions should be carried out through electronic means. Given that multiple parties involved in every case of land and property transactions are not yet technically ready to deal with all related documents in electronic form, these documents should for the time being remain in writing and be signed in the conventional manner so as to maintain a reliable and secure system of land and property ownership.

8. As for bills of exchange (e.g. cheques), it is conventionally exchanged by hand and there is little demand for it to be exchanged by electronic means. We have therefore proposed to exclude them as well.

9. As regards instruments which are required to be stamped or endorsed under the Stamp Duty Ordinance other than a contract note to which an agreement under section 5A of the Ordinance relates (i.e. instruments for non-listed stocks), they have to be carried out in paper form in order to provide an audit trail for the collection of stamp duty by the Government on the transactions made.

Consultation

10. We have consulted the legal profession and other parties on the list of exclusions in Schedule 1 of the Bill. There is no objection to the present list except that the Law Society has proposed that the list should be extended to cover all documents of title and negotiable instruments as well. We do not consider it necessary to make the extension to cover all other documents of title like bills of lading (electronic bills of lading are now available). We are, however, examining whether all negotiable instruments like promissory note, and not just bills of exchange, should be excluded.

Overseas Legislation

11. We have made reference to overseas legislation in drawing up the exclusion list under Schedule I of the Electronic Transactions Bill. The Electronic Transactions Act of Singapore and the Uniform Electronic Commerce Act of Canada have included similar exclusions based on the same sort of criteria as set out in the Annex.

Review

12. Clause 45 of the ETB provides that the Secretary for Information Technology and Broadcasting may by order amend Schedule 1. The order is a subsidiary legislation which is subject to the negative vetting of the Legislative Council. We will closely monitor technological developments and the

changes in community perception and practices and will review the list of exemption as and when necessary.

**Information Technology and Broadcasting Bureau
October 1999**

**Exclusions in the
Electronic Transactions Act of Singapore
and the Uniform Electronic Commerce Act of Canada**

(a) Electronic Transactions Act of Singapore

- (i) the creation or execution of a will;
- (ii) negotiable instruments;
- (iii) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney with the exception of constructive and resulting trusts;
- (iv) any contract for the sale or other disposition of immovable property, or any interest in such property;
- (v) the conveyance of immovable property or the transfer of any interest in immovable property; and
- (vi) documents of title.

The Minister may by order modify the provisions of this subsection by adding, deleting or amending any class of transactions or matters.

(b) Uniform Electronic Commerce Act of Canada

- (i) wills and their codicils;
- (ii) trusts created by wills or by codicils to wills;
- (iii) powers of attorney, to the extent that they are in respect of the financial affairs or personal care of an individual;

- (iv) documents that create or transfer interests in land and that require registration to be effective against third parties; and
- (v) negotiable instruments, including negotiable documents of title.

The appropriate authority may, by statutory instrument, amend this subsection to add any document or class of documents, or to remove any document or class of documents previously added under this subsection.