

For consideration on
17 March 2004

Bills Committee on Electronic Transactions (Amendment) Bill 2003

Proposed Committee Stage Amendments

Purpose

This paper proposes Committee Stage Amendments (CSAs) to the Electronic Transactions (Amendment) Bill 2003 (the Bill), as set out in paragraph 2 below.

Proposal

2. We propose to add “5A,” after “5,” in section 3 and section 13(1) and (3)(a) of the Electronic Transactions Ordinance (ETO) (Cap. 553) to provide for exclusion of the matters and proceedings in Schedules 1 and 2 to the ETO from the application of the new section 5A. The purpose is to make the application of the exclusions consistent.

Background and Justifications

3. One of the proposals in the Bill is to add a new section 5A to the ETO (clause 3 of the Bill) providing that, subject to certain conditions, the service of a document through electronic means is acceptable under the provisions in the new Schedule 3 to the ETO which require or permit the service of the document by personal service or by post.

4. Section 3 of the ETO provides for exclusion of the matters set out in Schedule 1 to the ETO from the application of the electronic process stipulated in sections 5, 6, 7, 8 and 17¹, while section 13 provides for exclusion of the proceedings set out in Schedule 2 from the application of

¹ Sections 5, 7 and 8 provide that electronic records may satisfy rule of law requirements for information in writing, presentation or retention of information in its original form, and retention of information respectively. Section 6 provides that digital signatures satisfy rule of law signature requirements. Section 17 provides that electronic records may be used in the formation of contracts.

the electronic process stipulated in sections 5, 6, 7 and 8. These exclusions were made because of, for example, the solemnity, significance and complexity of the transactions as well as the readiness of the multiple parties involved to deal with the related documents in electronic form.

5. As the matters and proceedings set out in Schedules 1 and 2 to the ETO are excluded from the application of the electronic process, amendments should also be made to exclude the service through electronic means of the documents involved in these matters and proceedings under the provisions in the new Schedule 3.

6. Copies of sections 3, 5, 6, 7, 8, 13 and 17 as well as Schedules 1 and 2 to the ETO are attached at Annex.

Next Step

7. Subject to Members' views, we will move CSAs to give effect to the amendments outlined in paragraph 2 above.

Commerce, Industry and Technology Bureau
March 2004

Electronic Transactions Ordinance (Cap. 553)

Section 3 - Matters to which sections 5, 6, 7, 8 and 17 are not applicable

Sections 5, 6, 7, 8 and 17 do not apply to any-

- (a) requirement or permission for information to be or given in writing;
- (b) requirement for the signature of a person;
- (c) requirement for information to be presented or retained in its original form;
- (d) requirement for information to be retained,

under a rule of law in a matter or for an act set out in Schedule 1, unless that rule of law expressly provides otherwise.

Section 5 - Requirement for writing

(1) If a rule of law requires information to be or given in writing or provides for certain consequences if it is not, an electronic record satisfies the requirement if the information contained in the electronic record is accessible so as to be usable for subsequent reference.

(2) If a rule of law permits information to be or given in writing, an electronic record satisfies that rule of law if the information contained in the electronic record is accessible so as to be usable for subsequent reference.

Section 6 - Digital signatures

(1) If a rule of law requires the signature of a person or provides for certain consequences if a document is not signed by a person, a digital signature of the person satisfies the requirement but only if the digital signature is supported by a recognized certificate and is generated within the validity of that certificate.

(2) In subsection (1), "within the validity of that certificate" (在該證書的有效期內) means that at the time the digital signature is generated-

- (a) the recognition of the recognized certificate is not revoked or suspended;
- (b) if the Director has specified a period of validity for the recognition of the recognized certificate, the certificate is within that period; and
- (c) if the recognized certification authority has specified a period of validity for the recognized certificate, the certificate is within that period.

Section 7 - Presentation or retention of information in its original form

(1) Where a rule of law requires that certain information be presented or retained in its original form, the requirement is satisfied by presenting or retaining the information in the form of electronic records if-

- (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form; and
- (b) where it is required that information be presented, the information is capable of being displayed in a legible form to the person to whom it is to be presented.

(2) For the purposes of subsection (1)(a)-

- (a) the criterion for assessing the integrity of the information is whether the information has remained complete and unaltered, apart from the addition of any endorsement or any change which arises in the normal course of communication, storage or display; and
- (b) the standard for reliability of the assurance is to be assessed having regard to the purpose for which the information was generated and all the other relevant circumstances.

(3) This section applies whether the requirement in subsection (1) is in the form of an obligation or whether the rule of law merely provides consequences for the information not being presented or retained in its original form.

Section 8 - Retention of information in electronic records

(1) Where a rule of law requires certain information to be retained, whether in writing or otherwise, the requirement is satisfied by retaining electronic records, if-

- (a) the information contained in the electronic record remains accessible so as to be usable for subsequent reference;
- (b) the relevant electronic record is retained in the format in which it was originally generated, sent or received, or in a format which can be demonstrated to represent accurately the information originally generated, sent or received; and
- (c) the information which enables the identification of the origin and destination of the electronic record and the date and time when it was sent or received, is retained.

(2) This section applies whether the requirement in subsection (1) is in the form of an obligation or whether the rule of law merely provides consequences for the information not being retained.

Section 13 - Rules of court or procedure only to apply where relevant authority provides for application

(1) Section 5, 6, 7 or 8 does not apply in relation to information given, presented or retained or signatures required for the purposes of any proceedings set out in Schedule 2, unless any rule of law relating to those proceedings provide for its application.

(2) Subsection (1) is not to be construed as affecting any provision in a rule of law referred to in that subsection, requiring or permitting, otherwise than by reference to this Ordinance, the use of electronic records or electronic signatures for the purposes of the proceedings to which the rule of law relates.

(3) Any authority given by a rule of law to make rules (however described) for the purpose of any proceedings set out in Schedule 2 is to be construed as including a power to provide for-

- (a) the application of section 5, 6, 7 or 8; and
- (b) the specification of the matters referred to in section 11(2)(a) and (b), by subsidiary legislation or otherwise, consequent to such application.

Section 17 - Formation and validity of electronic contracts

(1) For the avoidance of doubt, it is declared that in the context of the formation of contracts, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be in whole or in part expressed by means of electronic records.

(2) Where an electronic record is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that an electronic record was used for that purpose.

(3) For the avoidance of doubt, it is stated that this section does not affect any rule of common law to the effect that the offeror may prescribe the method of communicating acceptance.

Schedule 1 – Matters excluded from application of sections 5, 6, 7, 8 and 17 of this Ordinance under section 3 of this Ordinance

1. The creation, execution, variation, revocation, revival or rectification of a will, codicil or any other testamentary document.
2. The creation, execution, variation or revocation of a trust (other than resulting, implied or constructive trusts).
3. The creation, execution, variation or revocation of a power of attorney.
4. 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 that Ordinance relates.
5. Government conditions of grant and Government leases.
6. 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.
7. 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.
8. A document effecting a floating charge referred to in section 2A of the Land Registration Ordinance (Cap. 128).
9. Oaths and affidavits.
10. Statutory declarations.
11. Judgments (in addition to those referred to in section 6) or orders of court.
12. A warrant issued by a court or a magistrate.
13. Negotiable instruments.

Schedule 2 – Proceedings in relation to which sections 5, 6, 7 and 8 of this Ordinance do not apply under section 13(1) of this Ordinance

Proceedings before any of the following-

- (a) the Court of Final Appeal;
- (b) the Court of Appeal;
- (c) the Court of First Instance;
- (d) the District Court;
- (e) the Mental Health Review Tribunal established under the Mental Health Ordinance (Cap. 136);
- (f) the Lands Tribunal;
- (g) a coroner appointed under section 3 of the Coroners Ordinance (Cap. 504);
- (h) the Labour Tribunal;
- (i) the Obscene Articles Tribunal established under the Control of Obscene and Indecent Articles Ordinance (Cap. 390);
- (j) the Small Claims Tribunal;
- (k) a magistrate; (Amended L.N. 59 of 2000)
- (l) the Municipal Services Appeals Board established under the Municipal Services Appeals Board Ordinance (Cap. 220); (Added L.N. 59 of 2000)
- (m) the Insider Dealing Tribunal established under the Securities (Insider Dealing) Ordinance (Cap. 395) repealed under the Securities and Futures Ordinance (Cap. 571); (Added L.N. 59 of 2000. Amended 5 of 2002 s. 407(2))
- (ma) the Securities and Futures Appeals Tribunal or the Market Misconduct Tribunal established under Part XI or XIII of the Securities and Futures Ordinance (Cap. 571); (Added 5 of 2002 s. 407(2))
- (mb) any person arbitrating disputes in accordance with rules made under section 118(2) of the Securities and Futures Ordinance (Cap. 571); (Added 5 of 2002 s. 407(2))
- (n) the Administrative Appeals Board established under the Administrative Appeals Board Ordinance (Cap. 442); (Added L.N. 59 of 2000)
- (o) the Appeal Tribunal established under the Buildings Ordinance (Cap. 123); (Added L.N. 59 of 2000)
- (p) an Appeal Board established under the Town Planning Ordinance (Cap. 131); (Added L.N. 59 of 2000)
- (q) a Drainage Appeal Board established under the Land Drainage Ordinance (Cap. 446); (Added L.N. 59 of 2000)
- (r) the Minor Employment Claims Adjudication Board established under the Minor Employment Claims Adjudication Board Ordinance (Cap. 453); (Added L.N. 59 of 2000)
- (s) the panel and a tribunal established under the Housing Ordinance (Cap. 283); (Added L.N. 59 of 2000)
- (t) the Appeal Board established under the Hotel and Guesthouse Accommodation Ordinance (Cap. 349); (Added L.N. 59 of 2000)

- (u) the Appeal Board established under the Clubs (Safety of Premises) Ordinance (Cap. 376); (Added L.N. 59 of 2000)
- (v) the Appeal Board established under the Bedspace Apartments Ordinance (Cap. 447); (Added L.N. 59 of 2000)
- (w) the Appeal Board established under the Amusement Game Centres Ordinance (Cap. 435); (Added L.N. 59 of 2000)
- (x) an appeal board established under the Amusement Rides (Safety) Ordinance (Cap. 449); (Added L.N. 59 of 2000)
- (y) an Appeal Board established under the Air Pollution Control Ordinance (Cap. 311); (Added L.N. 59 of 2000)
- (z) the Appeal Board established under the Noise Control Ordinance (Cap. 400); (Added L.N. 59 of 2000)
- (za) an Appeal Board established under the Dumping at Sea Ordinance (Cap. 466); (Added L.N. 59 of 2000)
- (zb) an Appeal Board established under the Environmental Impact Assessment Ordinance (Cap 499); (Added L.N. 59 of 2000)
- (zc) an Appeal Board established under the Waste Disposal Ordinance (Cap. 354); (Added L.N. 59 of 2000)
- (zd) an Appeal Board established under the Water Pollution Control Ordinance (Cap. 358); (Added L.N. 59 of 2000)
- (ze) the Immigration Tribunal established under the Immigration Ordinance (Cap. 115); (Added L.N. 59 of 2000)
- (zf) the Registration of Persons Tribunal established under the Registration of Persons Ordinance (Cap. 177); (Added L.N. 59 of 2000)
- (zg) the Hong Kong Special Administrative Region Passports Appeal Board established under the Hong Kong Special Administrative Region Passports (Appeal Board) Regulation (Cap. 539 sub. leg.); (Added L.N. 59 of 2000)
- (zh) the Copyright Tribunal established under the Copyright Ordinance (Cap. 528); (Added L.N. 59 of 2000)
- (zi) an arbitration tribunal established under the Labour Relations Ordinance (Cap. 55); (Added L.N. 59 of 2000)
- (zj) a board of inquiry established under the Labour Relations Ordinance (Cap. 55); (Added L.N. 59 of 2000)
- (zk) (Repealed 5 of 2002 s. 407(2))
- (zl) (Repealed 5 of 2002 s. 407(2))
- (zm) a Solicitors Disciplinary Tribunal established under the Legal Practitioners Ordinance (Cap. 159). (Added L.N. 59 of 2000)