

## Consumer Council

### Submission to the Bills Committee on Electronic Transactions (Amendment) Bill 2003

#### Introduction

1. The Consumer Council welcomes the opportunity to provide its comments to the Committee on the proposed Electronic Transactions (Amendment) Bill 2003. The Council (CC) recognises the importance of Hong Kong having an up-to-date legislative framework for the conduct of e-business and supports Government efforts towards that end.

2. As a consumer advocate, CC will confine its views, within the perspective of ensuring adequate choices and safeguards for consumers, in relation to the following issues:

- (a) legal recognition of other forms of electronic signatures, construed as covering service by electronic means where there is legal requirement of service by post or personal service; and
- (b) aspects related to the formation of electronic contracts.

#### Other Forms of Electronic Signatures

3. CC supports amending the Electronic Transactions Ordinance (ETO) to make other forms of authentication such as personal identification number (PIN) acceptable under new law as an acceptable form of signature in transactions not involving government entities, subject to certain conditions and consent of the parties involved.

4. Notwithstanding the CC's support for the proposal to recognize PIN under the ETO, and even though PIN has been commonly used in banking transactions, consumers may not be aware of the different safeguards that will apply for PIN and digital signatures under the new ETO.

5. The provisions of the ETO 2000 and the Code of Practice issued thereunder provide safeguards in the establishment and maintenance of digital signatures through a trusted third party, i.e. a recognized 'certification authority'. A certification authority (CA), due to the various obligations under the Code of Practice, auditing requirements, and supervision by the Director of Information Technology Services, is able to ensure for consumers an appropriate degree of trustworthiness over a digital signature.

6. The new provision section 6(1), is drafted as *"an electronic signature (including PIN) of the first mentioned person satisfies the requirement if ...; (d) having regard to all the relevant circumstances, **the method used is reliable**, and is appropriate, for the purpose for which the information contained in the document is communicated; ...and as such seeks to impose a due diligence requirement.* However, there is no degree of oversight similar to that for digital signatures for companies creating and maintaining a data base of PIN for transaction purposes. For example, the Code of Practice for recognized certification authorities sets out detailed obligations as to

- (a) the publishing of information for public knowledge regarding matters such as liabilities limitations on liability, rights and obligations of the recognized certification authority (Part 4);
- (b) the maintenance of a trustworthy system, in terms of maintaining a specified minimum standard of security controls over its operation (Part 5);
- (c) the need to abide by advertising standards, for certification services, that are decent, honest and truthful, fair and not misleading and that claims shall be capable of independent substantiation (Clause 15.1);
- (d) the regular provision of an up to date and independent audit report regarding the trustworthiness of the certification system (Part 12).

7. The absence of similar requirements imposed on parties who maintain data bases of PIN for transaction purposes means that while PIN will have legal recognition as electronic signature not required to be supported by a recognized certificate issued by a certification authority, there will not be the same safeguards.

8. The 2002 consultation paper notes at paragraph 8 that "with proper management it [PIN] can be considered for acceptance as a form of electronic signatures for satisfying the signature requirement under the law in specified cases where the level of security offered by it is commensurate with the risk of the service involved." Now that PIN is proposed to be acceptable for satisfying signature requirement in specified cases, some legislative standards should also be set with regard to the proper management, i.e. creation, storage and use of PIN for satisfying the legal signature requirement.

9. It is understood that different degrees of reliability of the information system should be allowed under different circumstances and with respect to different amounts of money involved in the transaction. CC recommends that the amended legislation should include provisions allowing the Information Technology Services Department (ITSD) to set levels of reliability standard of the information system in handling the creation, storage and use of PIN and that companies can seek recognition of the standard of their information systems.

10. Different degrees of reliability of the information system in managing the creation, storage and use of PIN cost differently and involve different levels of risk. The disclosure of the degree of reliability will help consumers in choosing the appropriate service provider having regard to the nature of the transaction, the risk involved and the cost they have to pay in conducting transactions by means of electronic records.

### **Electronic Contract**

11. CC agrees to the Government proposal to introduce section 17(2A) to give legal effect to electronic signatures.

12. CC would like the Committee to consider issues raised by the United Nations Commission on International Trade Law Working Group (Electronic Commerce) about the need to enhance legal certainty and predictability of electronic contracting. This might be achieved by legal provisions that facilitate a determination, among other factors, of the character of a contract, if an offer or the acceptance of an offer is in whole or in part expressed by means of an electronic record.

13. The Working Group drafted a number of provisions aimed at resolving the uncertainty of electronic contracting. CC would like the Committee to consider including the following provisions recommended by the Working Group (Articles 11, 12 and 13 of A/CN.9/WG.IV/WP.108) in the Amendment Bill to facilitate determination of the legal right of contracting parties in Hong Kong conducting electronic transactions and giving legal recognitions to the current practices of the e-commerce<sup>1</sup>.

(a) *Article 11 Invitations to Make Offers*

"A proposal to conclude a contract made through the means of electronic records, which is not addressed to one or more specific persons, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information system, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the person making the proposal to be bound in case of acceptance."

(b) *Article 12 Use of automated information systems for contract formation*

"A contract formed by the interaction of an automated information system and a person, or by the interaction of automated information systems, shall not be denied validity or enforceability on the sole ground that no person reviewed each of the individual actions carried out by such systems or the resulting agreement".

(c) *Article 13 Availability of contract terms*

"A party offering goods or services through an information system that is generally accessible to persons making use of information systems shall make the data message or messages which contain the contract terms available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction."

*Invitation to Make Offer*

14. As argued by the Working Group, a company that advertises its goods or services on the Internet or through other open networks should be considered as merely inviting those who access the site to make offers, where an offer of goods or services through the Internet would not *prima facie* constitute a binding offer.

15. If an Internet web site that uses interactive applications may enable negotiation and immediate conclusion of a contract (in the case of virtual goods even immediate performance), there would be little difference to an advertisement. The Working Group has proposed that such interactive applications might be regarded as an offer "open for acceptance while stocks last", as opposed to an "invitation to treat".

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<sup>1</sup> Reference can be made to the documents A/CN.9/WG.IV/WP.104/Add1 and A/CN.9/WG.IV/WP.104/Add4 of the United Nations Commission on International Trade Law Working Group (Electronic Commerce) regarding the backgrounds, pros and cons arguments and overseas court cases regarding the suggested provisions.

16. This proposition of offers to the public that are binding upon the offeror “while stocks last” is recognized in common law practices. However, the potentially unlimited reach of the Internet and the risk of errors in electronic communications, including in posting price and other product information on a web site, compounded by the use of automatic reply functions which do not provide an opportunity for review and correction of errors, would to call for caution.

17. The difficulty that may arise is how to strike a balance between a trader's possible intention of being bound by an offer on the one hand, and the protection of buyer relying on the offer in good faith on the other hand. Arguments in favor of attaching a default presumption of binding intention to use of interactive applications have appealed to the aim of enhancing legal certainty in electronic transactions.

#### *Use of automated information systems for contract formation*

18. Automated computer systems, sometimes called “electronic agents”, are being used increasingly in electronic commerce but the analogy between an automated system and a sales agent is not appropriate. It is unclear whether general principles of agency law can be used in connection with the operation of such systems.

19. As the Working Group argued, the attribution of actions of automated information systems to a person or legal entity is based on the paradigm that an automated information system is capable of performing only within the technical structures of its preset programming. However, at least in theory it is conceivable that future generations of automated information systems may be created with the ability to act autonomously, and not just automatically. That is, through developments in artificial intelligence, a computer may be able to learn through experience, modify the instructions in their own programs, and even devise new instructions.

20. The provision is useful for a legal instrument to make it clear that the actions of automated systems programmed and used by people will bind the user of the system, regardless of whether human review of a particular transaction has occurred.

#### *Availability of contract terms*

21. Except for purely oral transactions, most contracts negotiated through traditional means result in some tangible record of the transactions to which the parties can refer in case of doubt or dispute. In electronic contracting, such a record, which may exist as an electronic record, may only be temporarily retained or may be available only to the party through whose information system the contract was concluded. Thus, some recent legislation on electronic commerce, such as the EU Directive, requires that a person offering goods or services through information systems accessible to the public should provide means for storage or printing of the contract terms.

22. CC shares the view of the Working Group that creating such specific obligations can enhance legal certainty, transparency and predictability in electronic transactions and it is not unreasonable to require certain information to be provided or technical means to be offered in order to make available contract terms in a way that allows for their storage and reproduction.

23. CC believes that disclosure obligation as to certain basic information about a business contract would promote good business practices and increase consumer

confidence in electronic commerce.

Consumer Council  
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