

**HONG KONG SOCIETY OF ACCOUNTANTS' COMMENTS ON
ELECTRONIC TRANSACTIONS (AMENDMENT) BILL 2003 (THE "BILL")**

We are in full support of the objects of the Bill to update and improve the Electronic Transactions Ordinance (ETO) to ensure that Hong Kong has the most up-to-date legislative framework for the conduct of e-business.

We have made a number of comments in our submission dated 3 May 2002 in response to the Information Technology and Broadcasting Bureau's (ITBB) consultation on the proposed review of the ETO. A copy of our submission is attached to this Annex. We are pleased that our submission has been considered positively by the ITBB and most of our comments have been included in the proposed amendments to the ETO in the Bill. However, there are two comments which have not been addressed in the Bill. These two remaining comments are set out below.

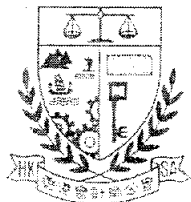
Section 19 – Sending and receiving electronic records

1. Under the ETO, it is open to an addressee to define a more precise point at which receipt of an electronic record occurs. The proposed "default" arrangement provided in section 19(2) may create practical problems. An addressee may have access only to part of a system and it is possible that information reaching another part of the system may not immediately be retrievable by him.

We understand that "comes to the knowledge of the addressee" in section 19(2)(a) is intended to be construed as the point when he becomes aware that information intended for him is available on the system. However, the term is not self-explanatory and it cannot be certain that this is the interpretation that would be given to it by the court. Perhaps a more self-explanatory term or one which has already been subject to appropriate judicial interpretation in other relevant jurisdictions should be adopted.

Section 46 – Obligation of secrecy

2. We repeat our comment on the Electronic Transactions Bill (1999) that in relation to the exemption under section 46(2)(a) (Clause 41(2) of the Electronic Transactions Bill (1999)) it is too open-ended and could potentially undermine the effectiveness of the secrecy obligation under sub-section (1).



香港會計師公會

HONG KONG SOCIETY OF ACCOUNTANTS

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3 May 2002

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

Dear Mr. Siu,

Review of the Electronic Transactions Ordinance

In response to the ITBB's consultation on the proposed review of the Electronic Transactions Ordinance (ETO), I have pleasure in submitting the Society's comments. These are provided in two parts: Part A deals with matters covered specifically in the Consultation Paper. Other matters are referred to in Part B.

We are in full support of the objects of the proposed review: to update and improve the ETO from experience gained in its operation in the last 18 months, and to keep the legal framework up-to-date for e-business. Having regard to the rapid changes in technology and the e-business environment, this is a timely exercise. We welcome this review and thank you for the opportunity to provide our comments.

Part A - Matters discussed in the Consultation Paper

Legal recognition of other forms of electronic signatures

1. In the context of the Society's recent comments on the Inland Revenue (Amendment) (No.2) Bill 2002 ("IR(A) Bill"), we noted that overseas there are two main streams of e-commerce legislation, namely those providing for electronic signatures, the scope of which covers passwords, voice recognition etc., and those providing for digital signatures, which imply an underlying public key infrastructure (PKI). It seems clear that when the ETO was introduced, the Government had chosen to legislate for the latter, more technology-driven approach of the two.
2. At the time of introducing the ETO, the Government stated its objective and proposals "to take action to address public concerns about the security and certainty of electronic transactions, e.g. the legal status of electronic records and digital signatures, authentication of the parties to electronic transactions, the confidentiality and integrity of electronic messages transmitted over open communication networks and non-repudiation of electronic transactions. To provide a secure and trusted environment for the conduct of electronic transactions, Government has spearheaded the establishment of a public key infrastructure (PKI) in Hong Kong"(source: LegCo Brief on the Bill).

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3. Recently, however, we are seeing various attempts to introduce specific provisions in respect of e-transactions in other legislation which has the effect of extending the legal recognition given to digital signatures to other forms of electronic signatures. For example, the IR(A) Bill introduced in November 2001 proposed to provide for the use of password as a signing device for the purpose of authenticating certain types of electronic tax filing. We believe the issue of whether legal recognition should be extended to cover other forms of electronic signatures in addition to digital signatures should be addressed by a review of the ETO rather than piecemeal adoption in specific legislation. We are therefore pleased that this issue is being put forward for consultation in the proposed review of the ETO.
4. It is our belief that use of digital signatures provides a higher level of assurance in respect of the authenticity and integrity of e-transactions. However, from a pragmatic angle and to facilitate e-business development, there may be an argument for making the ETO more technology neutral and for giving legal recognition to other means of authentication, particularly where they are in practice commonly adopted and where, as the Consultation Paper states, the level of security that they afford is commensurate with the risk involved.
5. Nevertheless, minimum standards of system security may need to be stipulated as a condition for such recognition (also see point 16 below). The public should also be made aware of the legal and security implications of recognising e-transactions authenticated by methods other than by digital signatures. The Personal Data (Privacy) Ordinance is a good example where principles and good practices can be referred to and form part of the legislation. We strongly suggest that a set of security principles / standards should be established to illustrate and support the security requirements in relation to electronic transactions. In relation to this, the Society would be able to assist in the development of such standards if required.

The legal requirement of “delivery by post or in person”

6. Under the law of contract, there are common law rules and precedents, although these may be overridden by specific statutory provisions, governing issues such as when acceptance is deemed to have occurred in relation to responses by mail. The interface with this area of the law will need to be looked at carefully if it is proposed to treat delivery by post or mail under certain circumstances as automatically extending to electronic delivery. In this connection, questions of e.g. security and authenticity arise in relation to electronic delivery that differ from those applying to more traditional methods of transacting business. In relation to the IR(A) Bill we have pointed out that relatively unsophisticated users may be put at a potentially disadvantageous legal position if important matters like non-repudiation are dealt with by simply inserting e-transactions into the existing legal framework for paper-based transactions. This area will also need to be considered carefully in the course of the review.

Exemptions under the ETO

7. Given the aim of moving further towards general acceptance of conducting transactions by electronic means, any exemptions should be minimised and only those that are clearly justified should be retained. The list should also be kept under review so that for example those exemptions that are applied on purely practical grounds can be repealed as and when the practical considerations cease to apply.

The operation of the voluntary recognition scheme for certification authorities

Scope of the assessment

8. The Society supports the proposal in paragraph 20 of the Consultation Paper to amend the ETO and split the assessment into two parts: the first part concerning the trustworthiness of the certification service, that must be prepared by a qualified and independent person approved by the Director; and the second part concerning provisions which are not related to trustworthiness of the certification service, that can be dealt with through a declaration made by an authorised person of the CA in question.
9. We share the view in paragraph 20 of the Consultation paper that it is vital to set out clearly for public information as to which provisions under the ETO regime are related to trustworthiness of the certification service and which are not. Based on our experience in developing the Auditing Practice Note, PN 870 “The assessments of Certification Authorities under the Electronic Transactions Ordinance”, providing guidance to Certified Public Accountants acting as assessors on the scope, conduct and reporting requirements of an assessment of Certification Authorities, we are happy to offer our assistance to the Administration in the future revision of the ETO and the Code of Practice in this area.

Submission of “special” assessment report

10. We support the proposal at paragraph 21 to amend the ETO so that the Director has the authority to ask the recognized CA (RCA) to furnish an assessment report to be prepared by a qualified person approved by the Director when there are or will be major changes concerning the RCA, and that such assessment report should focus only on the concerns raised by the Director.

Voluntary recognition scheme

11. We note the view expressed in the Consultation Paper that the scheme of voluntary recognition for CAs has generally worked well and therefore no substantial changes should be made to it. While procedurally it may have worked effectively, it is our understanding that the usage of digital signatures in Hong Kong has remained relatively low and that so far the development of e-commerce via this means cannot be heralded as a great success. We believe that the review should consider whether the legislative and administrative framework has been a contributory

factor in limiting progress or whether, on the other hand, further revisions to it could assist in facilitating the development of e-commerce in Hong Kong.

Part B - Other Matters

(a) General Issues

Section 16 – Disapplying Sections 5, 6, 7 and 8 if their operation affects other statutory requirements

12. Section 16 provides that the ETO gives way to conflicting provisions in other legislation. In commenting upon the Electronic Transactions Bill (ETB) we pointed out that section 16 (clause 15 of the ETB) created some uncertainty by disapplying key provisions of the ETO in circumstances that were not entirely clear. We indicated that this reinforced the importance of conducting a review of other legislation on which the ETO may impinge. We still believe that such a review would be desirable.

Interface between the ETO and the Code of Practice

13. The framework of the legislation itself could do with being more self-explanatory and more extensive. We commented in relation to the ETB on the need to review the interface between the Code of Practice for RCAs, issued under section 33 of the Ordinance, and the Ordinance itself and to ensure that the latter established clear principles and proper authorities for the effective oversight of e-commerce and regulation of CAs. Recent experience has shown that this would still be a useful exercise.
14. The legislation is drawn up in such a way that significant scope is left to the Code to supplement the Law where it is lacking. This is unsatisfactory given that failure to comply with the ETO or the Code of Practice may result in a CA not being approved for recognition or having its recognition suspended or revoked, as the case may be, even though the Code is not stipulated to be subsidiary legislation and does not have the force of Law.
15. A recent example of an amendment to the Code sought to deem that an RCA grants a “licence” to the Director to publish and reproduce in full, or in part, any information/report e.g. the assessors’ report submitted by the RCA to the Director. Amongst the questions arising from this proposal was the issue of whether or not this was consistent with the authority given to the Code under the Ordinance.

Provisions for suitable security protection

16. Security is still one of the main concerns surrounding the further development of e-commerce. We suggested in our comments on the ETB that consideration should be given to including provision for the adoption of suitable security protection arrangements (quoting “WebTrust” as one such example) within the framework of legislation. This issue should be addressed

particularly if less IT-driven methods of transacting, such as passwords, are to be provided for in the ETO.

(b) Detailed Points

Section 2 - Interpretation

17. We note that when we suggested in relation to the ETB that various definitions should be made more precise and that additional definitions be included (e.g. for the term “electronic transactions”), the Government’s response was that the ETB reflected a similar approach to that adopted in corresponding legislation overseas. Given the passage of time since the ETO was enacted, we would suggest that the review should revisit this question and see what changes, if any, have been made to e-commerce legislation and what difficulties have been faced elsewhere.

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

18. Related to the above point, we previously queried the general nature of this provision on retaining records in an electronic form given, for example, the lack of criteria for determining whether or not “there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form” (s7(1)(a)). The Government responded that “[w]e consider it prudent to adopt the current version for the time being and review the situation when suitable standards emerge with the development of electronic commerce, and use these standards as guidance”. This issue should also be reviewed given the passage of intervening time.

Section 19 – Sending and receiving electronic records

19. While under the ETO, it is open to an addressee to define a more precise point at which receipt of an electronic record occurs, the proposed “default” arrangement provided in section 19(2) may create practical problems. An addressee may have access only to part of a system and it is possible that information reaching another part of the system may not immediately be retrievable by him.
20. We understand that “comes to the knowledge of the addressee” in section 19(2)(a), is intended to be construed as the point when he becomes aware that information intended for him is available on the system. However, the term is not self-explanatory and it cannot be certain that this is the interpretation that would be given to it by the court. Perhaps a more self-explanatory term or one which has already been subject to appropriate judicial interpretation in other relevant jurisdictions should be adopted.

Section 46 – Obligation of secrecy

21. We repeat our comment in relation to the ETB that the exemption under section 46(2) (clause 41(2) of the ETB) is too open-ended and could potentially undermine the effectiveness of the secrecy obligation under sub-section (1).

We trust that you will find the above comments to be constructive. If you have any questions or comments in respect of the above, please feel free to contact Peter Tisman, Deputy Director (Business & Practice).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Winnie C. W. Cheung', with a horizontal line underneath the name.

WINNIE C. W. CHEUNG
SENIOR DIRECTOR
PROFESSIONAL & TECHNICAL DEVELOPMENT

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