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**Report on the Bills Committee on
Electronic Transactions (Amendment) Bill 2003**

Purpose

This paper reports on the deliberations of the Bills Committee on Electronic Transactions (Amendment) Bill 2003 (the Bill).

Background

2. The Electronic Transactions Ordinance (Cap. 553)(ETO), which was enacted on 5 January 2000, aims to facilitate the use of electronic transactions for commercial and other purposes by giving electronic records and digital signatures the same legal recognition as that of their paper-based counterparts. It also establishes a voluntary recognition scheme for certification authorities (CAs) so as to ensure trust and security in electronic transactions. During the Second Reading debate on the Electronic Transactions Bill on 5 January 2000, the Administration undertook to conduct a review of the ETO 18 months after its enactment in the light of operational experience, international e-business development and technological advancement in order to ensure that Hong Kong has the most up-to-date legal framework for the conduct of e-business.

3. Following an internal review within the Government to seek the views of individual bureaux and departments on the implementation of the ETO, the Administration conducted a public consultation from March to April 2002 on its proposals to improve and update the Ordinance. Having considered the views received during public consultation, the Administration formulated a set of proposed amendments to the ETO.

The Bill

4. The major purposes of the Bill are:
- (a) to give legal recognition to other forms of electronic signature, in addition to digital signature, for transactions not involving the Government;

- (b) to accept the service of documents in the form of electronic record as satisfying the requirement of service by post or in person under the statutory provisions set out in the proposed new Schedule 3 to ETO; and
- (c) to introduce changes relating to the assessment of CAs so as to improve the operation of the voluntary recognition scheme for CAs.

The Bills Committee

5. Members agreed at the House Committee meeting on 27 June 2003 to form a Bills Committee to study the Bill. Hon SIN Chung-kai was elected chairman of the Bills Committee and the membership list of the Committee is at **Appendix I**. The Bills Committee has held a total of four meetings to examine the Bill. The organizations/individuals that have submitted views to the Bills Committee are listed in **Appendix II**.

Deliberations of the Bills Committee

6. In principle, the Bills Committee supports the policy objective of the Bill to improve and update the existing ETO so as to facilitate the conduct of electronic transactions in Hong Kong. The submissions received by the Bills Committee also indicate support for the Bill. Members' deliberation on a number of key issues is summarized in the following paragraphs.

Legal recognition of other forms of electronic signature

7. At present, not all forms of electronic signature¹ are recognized under ETO. A technology-specific approach is adopted whereby the Ordinance only gives legal recognition to digital signature² which is generated by the Public Key Infrastructure (PKI) technology. To enable the legal framework to better keep pace with technological advancement and to provide a wider range of options for satisfying signature requirements electronically, the Bill proposes to adopt a technology-neutral approach by extending legal recognition to all forms of electronic signature in transactions not involving the Government, subject to certain conditions as to reliability and appropriateness in relation to specific circumstances and the consent of the parties concerned. This approach is also

¹ Under the ETO, an electronic signature means any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted for the purpose of authenticating or approving the electronic record. Digital signature is one form of electronic signature.

² Digital signature is a secure form of electronic signature supported by public key infrastructure technology which is readily available in the market.

consistent with the technology-neutral model adopted in the United Nations Commission on International Trade Law - Model Law on Electronic Commerce. However, for transactions under a rule of law involving the Government, the Bill proposes that digital signature, not any other form of electronic signature, should continue to be used.

8. On the reasons for continuing to adopt a technology-specific approach based on digital signature for transactions with the Government under a rule of law, the Administration has submitted to the Bills Committee that this arrangement will provide for greater certainty and clarity to members of the public as to the form of electronic signature to be used for transactions with the Government. Moreover, it will be more cost-effective for government departments to be equipped to deal with only one specified form of electronic signature. Members note that the Administration's proposal is an improvement over the existing arrangement which accords legal recognition to digital signature only. The Bills Committee has not raised any view against the Administration's proposed amendments.

9. Proposed section 6(1) of the Bill, which covers cases in which the transacting parties are not government entities, requires the consent of the recipient to the method of generating the electronic signature. On whether such consent is necessary, the Administration has advised in the affirmative because it is important that the method to be used must be made known to and accepted by the recipient who must also have the right not to accept such method if he is not capable of handling the electronic signature due to technical or other reasons.

10. The Bills Committee notes that some deputations have raised concern about the security level of other forms of electronic signature such as the personal identification number (PIN). The Consumer Council (CC) has specifically suggested that some legislative standards should be set with regard to the proper management (i.e. creation, storage and use) of PIN for satisfying the signature requirement in law. CC also considers that the Bill should empower the Director of Information Technology Services (the Director) to set levels of reliability standard of the information system in handling the creation, storage and use of PIN and allow companies to seek recognition of the standard of their information systems.

11. The Administration has informed the Bills Committee that under a technology-neutral approach, it is not appropriate to set any direction or guidelines in the ETO to specify the technologies that are to be considered as acceptable by law. For transactions not involving government entities, the transacting parties may decide on their own accord the type of electronic signature to be used, having regard to factors such as reliability, risk level, simplicity and ease in use. As such, the Administration does not intend to set legislative standards on the use of various forms of electronic signature (such as PIN) among businesses or individuals.

12. On whether an electronic signature attached to or associated with a document which is not in the form of an electronic record should be given legal effect, the Administration has explained that as currently defined under the ETO, "electronic signature" means any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted for the purpose of authenticating or approving the electronic record. If a document exists only in paper form but the signature is in an electronic form, there may be difficulties in proving how the electronic signature in question is attached to or logically associated with the paper document. Nevertheless, members note that the ETO does not prohibit the use of an electronic signature to authenticate or approve a contract in non-electronic form, as long as the contracting parties, subject to common law, can agree to an approach/method for such authentication or approval.

Service of documents by electronic means

13. At present, some legislation contains references to or requirements of serving documents on the parties concerned by post or in person. These legal provisions were enacted at the time when electronic transactions were not prevalent and as such, there is currently no provision under these pieces of legislation to allow the service of documents by electronic means.

14. To facilitate the implementation of E-government, proposed section 5A of the Bill provides that the service of documents in the form of electronic records will satisfy the requirement of service by post or in person under the statutory provisions set out in the proposed new Schedule 3 to the ETO. These provisions relate to the service of notice, application or other documents on or by the Commissioner of Rating and Valuation and related parties under Part IV of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7), the Rating Ordinance (Cap. 116) and the Government Rent (Assessment and Collection) Ordinance (Cap. 515). The new Schedule 3 may be amended by the Secretary for Commerce, Industry and Technology from time to time by order published in the Gazette to include other relevant legal provisions on appropriate transactions.

15. In principle, the Bills Committee do not have any objection to allowing the service of documents by electronic means as proposed under the Bill. Some deputations have also expressed their support for the proposal. However, on the legislative approach, some members of the Bills Committee are of the view that if it is considered appropriate to allow service of documents by electronic means under the aforesaid three Ordinances, the amendments should be introduced to the three Ordinances *per se*, instead of by adding the proposed section 5A and Schedule 3 to the ETO specifying the statutory provisions for the purposes of which electronic service of documents is allowed. These members have pointed out that the latter approach is not user-friendly as a person perusing the relevant Ordinances would not be aware of the e-option for serving documents unless he also refers to the ETO.

16. The Administration has submitted to the Bills Committee that the ETO provides a generic legal framework to facilitate electronic transactions by accepting the service of documents by electronic means as satisfying the requirements under a rule of law for serving documents by post or in person. It is the Administration's intention to expand the statutory provisions listed in the proposed Schedule 3 over time so as to widen the scope of documents which can be served via the electronic means. As future amendments to the proposed new Schedule 3 are to be made by way subsidiary legislation, the Schedule can be updated without having to amend the principal ordinances *per se*. The Administration therefore considers that the current legislative approach provides a more convenient and efficient vehicle for accepting the electronic service of documents as satisfying the requirements in law for serving documents by post or in person. The Administration has informed the Bills Committee that during the public consultation on the review of ETO in 2002, both the Law Society of Hong Kong and the Hong Kong Bar Association have commented on and expressed support for this approach.

17. Some members maintain the view that it would be more appropriate to amend the relevant Ordinances *per se*, instead of by expanding the list of statutory provisions under the proposed Schedule 3 to ETO. Nevertheless, they have not raised objection to the Bill for the reason that they do not fully agree with the current drafting approach.

18. The Bills Committee notes that currently, Schedule 1 and Schedule 2 to the ETO set out respectively the matters and the proceedings which are excluded from the application of the electronic process stipulated in relevant sections of the ETO. These exclusions have been made on account 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. As the matters and proceedings set out in Schedule 1 and Schedule 2 to the ETO are excluded from the application of the electronic process, the Administration will move a Committee Stage Amendment (CSA) to also exclude the service through electronic means of the documents involved in these matters and proceedings.

Proposals to improve the operation of the voluntary recognition scheme for certification authorities

The requirement to furnish an assessment report or a statutory declaration

19. Under the voluntary recognition scheme for CAs established under ETO, the Director may grant recognition to CAs which provide a trustworthy service. Any CA applying for the Director's recognition is required to furnish an assessment report prepared by an independent assessor approved by the Director on whether the applicant CA is capable of complying with the relevant provisions of the ETO and the Code of Practice for Recognized CAs (the Code of Practice) published by the Director. Recognized CAs are also required to furnish to the Director an assessment report once every 12 months. However,

at present, there is no provision in the ETO which allows the Director to require a recognized CA to furnish an assessment report in between two annual assessments, even when there are major changes to the CA's operation.

20. To improve the operation of the voluntary recognition scheme for CAs, it is proposed in the Bill that :

- (a) the requirement to engage qualified and independent assessors only applies to assessment of the trustworthiness of the certification service, such as its system security, procedural safeguards and financial viability, while other operational aspects may be dealt with by a statutory declaration made by a responsible officer of the CA concerned; and
- (b) the Director should be empowered to require a recognized CA to furnish an assessment report and/or a statutory declaration as appropriate if there are major changes to its operation in between two annual assessments.

21. The Administration has advised that the proposed arrangements have the support of the CA industry and the Hong Kong Society of Accountants (HKSA). In principle, the Bills Committee has no objection to the Administration's proposal.

22. On the requirement under proposed section 43A(1) that a recognized CA should furnish a report/statutory declaration when required by the Director, some members have asked whether it would be more appropriate, for regulatory purposes, to require a CA to report major changes according to certain thresholds set by the Director, instead of for the Director to require the provision of such documents. In response, the Administration has assured members that the current practice of requiring recognized CAs to submit half-yearly reports pursuant to the Code of Practice and the quarterly meeting with CAs has been effective in helping the Director to identify if there has been or will be any major changes to the operation of CAs which require attention.

23. On the proposed amendment to section 37 of ETO to provide that a recognized CA must use a trustworthy system to perform its services to issue or revoke or suspend a recognized certificate, the Administration has confirmed, in response to members' query, that the revocation or suspension of a recognized certificate will not affect the valid use of the certificate in question before such revocation or suspension takes place.

Code of Practice for Recognized CAs

24. The Administration has proposed to amend section 33 of ETO to provide that the Director may issue a code of practice specifying, inter alia, the provisions in the ETO and in the code of practice for the purposes of which an assessment report or a statutory declaration is to be furnished to the Director.

The Administration has also confirmed that having regard to the views received during public consultation, the Director will spell out in the Code of Practice the matters which should be dealt with by an assessment report or by a statutory declaration.

25. Noting that under existing section 30 of ETO, the Director must specify by notice published in the Gazette any particulars and documents to be furnished by a CA applying for recognition and that the notice is not subsidiary legislation, members share the view that the Code of Practice issued by the Director under proposed section 33 should receive similar treatment. The Administration has accepted members' suggestion and will move a CSA to provide that the Code of Practice should be published in the Gazette and is not subsidiary legislation.

Obligation of secrecy and privacy concerns

26. The Bill proposes to amend section 46(1) of ETO to clarify the information which cannot be disclosed by a person who has access to such information in the course of performing a function under the ETO. However, under proposed section 46(2)(a) of the Bill, the obligation of secrecy does not apply to any disclosure which is necessary for performing or assisting in the performance of a function under or for the purposes of "this or any other Ordinance".

27. Members are concerned that as currently drafted, proposed section 46(2)(a) is too wide in scope and appears to give a blanket permission for disclosing information as long as such information is necessary for the purposes of the ETO or any other Ordinances. To provide a better safeguard on the disclosure requirement, members have requested the Administration to consider specifying in a Schedule to the ETO the Ordinances for the purposes of which disclosure of information can be allowed. Having regard to members' concern about the implications of proposed section 46(2)(a) and the fact that even without the proposed amendment, disclosure of information can still be effected under the direction or order of a magistrate or court pursuant to existing section 46(2)(d) of ETO, the Administration has decided to retain the existing section 46(2)(a) instead of proceeding with the currently proposed amendment.

28. As regards the comments of HKSA that section 46(2)(a), even in its existing wordings, may be too open-ended, the Administration has stressed that the existing provision has in fact been formulated after considering similar comments of HKSA when the Bill was first enacted in 2000. According to the Administration, the operation of existing section 46(2)(a) has not been the cause of any problem or complaint so far. Members have also been informed that provisions similar to existing section 46(2)(a) of ETO are commonly used in other Ordinances.

29. In its submission to the Bills Committee, the Privacy Commissioner for Personal Data (the Privacy Commissioner) has expressed concern about the information to be published by the Director in the CA disclosure record under proposed section 43A(3). In this regard, the Administration confirms that the information published by the Director in the disclosure record generally concerns the recognition status and trustworthiness of the systems and operation of the recognized CA, which is relevant for the purposes of ETO as provided under existing section 31(2) of ETO. It has advised that so far, no personal data have been published in the disclosure record. The Administration has assured members that if personal data is to be published, the Director will make reference to the guidelines issued by the Home Affairs Bureau in respect of the publication of personal data.

30. Under existing section 45 of ETO, a recognized CA must maintain or cause to be maintained an on-line and publicly accessible repository and that the Director must publish in the Gazette a list of the repositories maintained. For the avoidance of doubt, the Administration will move a CSA to specify that the list of repositories published by the Director in the Gazette is not subsidiary legislation. In this connection, the Bills Committee has noted the suggestion of the Privacy Commissioner that to safeguard the privacy of personal information contained in the repository maintained by the recognized CA, the Bill should include a requirement for CAs to provide a statement defining the purpose of use of the personal data.

31. The Administration's view is that under paragraph 3.6 of the Code of Practice, a recognized CA is required to comply with all applicable Ordinances and Regulations regarding the privacy of personal information. It therefore considers it unnecessary to repeat the same requirement in the ETO. Nevertheless, the Administration has agreed to expand the said paragraph 3.6 to specifically require a recognized CA to include a purpose statement in its repository along the lines suggested by the Privacy Commissioner. Regarding the collection of personal data by recognized CAs, the Administration has also agreed that the Director will include under paragraph 3.6 of the Code of Practice the requirement for a recognized CA to give a written Personal Data Collection Statement to data subjects before or upon the collection of personal data from the data subjects.

The way forward

32. Following a review on the existing institutional structure for delivering information technology (IT) functions, the Administration has proposed to merge the Information Technology Services Department with the IT-related divisions of the Communications and Technology Branch of the Commerce, Industry and Technology Bureau (CITB) to form a new, integrated entity within CITB responsible for IT-related policies and operational matters. The Administration has also proposed to create a new one-rank departmental post of Government Chief Information Officer (GCIO) to head the new entity

and to replace the existing Director of Information Technology Services post.

33. On the interface between the proposed institutional changes and the present Bill, members note that the Administration will move a CSA to stipulate 30 June 2004 as the date on which the Bill, if enacted, will come into operation. Originally, the Administration has planned to move a Resolution under section 54A of the Interpretation and General Clauses Ordinance (IGCO) (Cap.1) at the Council meeting on 30 June 2004 to transfer, with effect from 1 July 2004, the powers and functions conferred by the ETO as amended by the Bill on the Director to the GCIO. Subsequently, the Administration confirms that according to further legal advice, the proposed merger does not result in a transfer of functions from the Director to another public officer but only involves changes in the titles of the public officer and the public body (which includes any department of the Government). The Administration has advised that it will declare the changes in the titles by notice published in the Gazette by the Chief Secretary for Administration under section 55 of the IGCO. Subject to the approval of the proposed merger by the Finance Committee on 25 June 2004, the notice will be published on 2 July 2004 and will be given retrospective effect on 1 July 2004. The notice is subsidiary legislation subject to the negative vetting procedure.

Committee Stage Amendments

34. The Bills Committee supports the CSA proposed to be moved by the Administration and will not move any CSA in its name.

Recommendation

35. The Bills Committee supports the Administration's proposal to resume the Second Reading debate on the Bill on 23 June 2004.

Consultation with the House Committee

36. The House Committee was consulted on 21 May 2004 and supported the recommendation of the Bills Committee in paragraph 35.

Bills Committee on Electronic Transactions (Amendment) Bill 2003

Membership list

Chairman Hon SIN Chung-kai

Members Hon Kenneth TING Woo-shou, JP
Dr Hon Eric LI Ka-cheung, GBS, JP
Hon HUI Cheung-ching, JP
Hon CHAN Kam-lam, JP
Hon Howard YOUNG, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP

(Total : 7 Members)

Clerk Miss Polly YEUNG

Legal Adviser Ms Connie FUNG

Date 23 February 2004

Bills Committee on Electronic Transactions (Amendment) Bill 2003

**Organizations/individuals that have submitted views
to the Bills Committee**

IT-related bodies

1. Hong Kong Computer Society
2. Hong Kong IT Alliance Ltd

Industry operator

3. PCCW-HKT Telephone Limited

Statutory/professional bodies

4. Office of the Privacy Commissioner for Personal Data
5. Consumer Council
6. Hong Kong Society of Accountants

Individuals

7. Mr Damien WONG
8. Mr LAU Wai-cheung, a member of Sai Kung District Council