Time of Receipt of Electronic Records by an Information System not Designated by the Addressee for Receiving Electronic Records

Introduction

This paper addresses the current provision in Clause 18(2)(a)(ii) of the Electronic Transactions Bill concerning the time of receipt of electronic records by an information system not designated by the addressee for receiving electronic records.

United Nations Model Law

2. The United Nations Commission on International Trade Law (UNCITRAL) – Model Law on Electronic Commerce provides that unless otherwise agreed between the originator and the addressee, the time of receipt of a data message occurs, if the data message is sent to an information system of the addressee that is not the designated information system for receiving data messages, at the time when the data message is retrieved by the addressee.

3. The Electronic Transactions Act of Singapore adopts a similar provision.

Electronic Transactions Bill

4. In the course of drafting our Electronic Transactions Bill, we had carefully examined this issue. We considered that if we strictly followed the UNCITRAL model, injustice might result in a situation where an addressee was aware that an electronic record had been received by his information system but he refused to retrieve it. Under such circumstances, no matter how long the electronic record has been received by the information system of the addressee, receipt would not occur unless and until the addressee actually retrieves the electronic record. This

would be unfair to the originator of the electronic record.

5. In the light of the foregoing, we consider it more reasonable to stipulate that the electronic record is regarded as received when it comes to the attention of the addressee. This means that an addressee who actually knows, or should reasonably know in the circumstances, of the existence of the electronic record in his information system should be considered to have received the electronic record. Whether he would actually retrieve the electronic record is another matter. This would address situations where the addressee may avoid receipt by deliberately refusing to retrieve and open the electronic records received.

6. We note that the Uniform Electronic Commerce Act of Canada and the Electronic Transactions Bill of Australia adopt a similar approach as ours.

Further Consideration

7. We note that Members are concerned about the clarity of the formulation: "comes to the attention of", which is not commonly used in the laws of Hong Kong. We also note the view of the Legislative Council Secretariat legal advisor that "comes to the knowledge of" is a more commonly used formulation in our law. We consider that the phrase "comes to the knowledge of" would achieve the same policy objective as "comes to the attention of" in balancing the rights of the originator and the addressee and would improve the clarity of the provision.

8. We shall, therefore, propose a Committee Stage Amendment to replace "comes to the attention of" by "comes to the knowledge of" in Clause 18(2)(a)(ii) of the Bill. For the same reason, we shall propose a Committee Stage Amendment to Clause 18(2)(b) of the Bill to also replace "comes to the attention of" by "comes to the knowledge of" in respect of the time of receipt of electronic records when the addressee has not designated any information system for the receipt of electronic records.

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