Linklaters

Memorandum

27 August 2019

To

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Director-General (Telecoms & Post)
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From

Linklaters Singapore Pte. Ltd.

Consultation on review of the Electronic Transactions Act ("ETA")

1 Introduction

1.1 We would like to thank the Infocomm Media Development Authority (the "**IMDA**") for giving us the opportunity to provide comments on the consultation paper issued by IMDA on the review of the ETA (the "**Consultation Paper**").

1.2 The aim of this memorandum is to provide our response to **Questions 1, 3, 5, 8, 10, 12, 14 and 17** posed in Section 2 of the Consultation Paper dealing with the exclusion of various matters from the scope of the ETA as set out in the First Schedule (the "**First Schedule**").

1.3 If IMDA requires further information or would like to discuss our submission, please do not hesitate to contact Adrian Fisher at 6692 5856 or adrian.fisher@linklaters.com; or Kwok Hon Yee at 6692 5884 or kwok_hon.yee@linklaters.com. We would be happy to discuss our comments.

2 Executive Summary

2.1 Instead of minimising the items in the First Schedule as proposed in the Consultation Paper, we recommend removing the First Schedule entirely from the ETA. In summary, we take this view for the following reasons:

2.1.1 Removing the First Schedule will eliminate the uncertainties which currently exist as to how the requirements for writing and signature in respect of documents in the First Schedule can be satisfied. It will also remove any misunderstanding or perception that

documents in the First Schedule cannot be signed electronically. See Section 3 below.

2.1.2 A document listed in the First Schedule does not get the benefit of Part II of the ETA. Theoretically, Part III of the ETA which confers certain presumptions relating to secure electronic signatures and secure electronic records can still apply to documents listed in the First Schedule. It is unclear why the ETA makes a distinction between Part II and Part III for documents listed in the First Schedule. See Section 4 below.

2.1.3 Retaining some of the matters in the First Schedule as proposed in the Consultation Paper may give rise to issues of interpretation in practice as to whether the relevant document falls within the First Schedule. If the matters to be retained in the First Schedule are part of a larger document, it is unclear whether we can rely on Part II of the ETA to satisfy any requirements of writing or signature for the larger document. See Section 5 below.

2.1.4 The ETA is intended to be a facilitative legislation. Removing the exclusion list will help achieve that purpose and is also consistent with the progressive approach taken in jurisdictions such as the UK, Norway and New Brunswick. See Section 5.6.3 below.

3 Uncertainties as to the effect of a document being listed in the First Schedule

3.1 The Consultation Paper correctly points out that where legal form requirements apply, section 4, ETA does not automatically prevent the transactions or documents listed in the First Schedule from being carried out electronically. The Consultation Paper goes on to say that it may still be possible for electronic records or signatures to satisfy the requirements for writing or signature without reliance on Part II (sections 7 and 8 in particular) and that it would be a matter for legal interpretation whether an electronic form satisfies a legal requirement for writing or signature[1]. The tests in sections 7 and 8 are consistent with common law tests for satisfying the requirements of writing and signature. However, if a document is excluded from the ETA, it is unclear what other tests a court could apply to determine whether the requirements for writing and signature are satisfied. Although the court in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* applied "common law" tests to determine whether the requirements of writing and signature in section 6(d), Civil Law Act were satisfied; in substance they were similar to the tests in sections 7 and 8. The requirement of writing was satisfied because the email was a mode of representing or reproducing words in visible form or to put it in section 7 language, the information contained in the email is accessible so as to be usable for future reference. The requirement of a signature was satisfied because the method used identified the person and demonstrated an authenticating function (similar to the section 8 test). We submit that removing the exclusion list in the ETA will ensure that a consistent test is applied for all documents to determine whether the requirements of writing and signature are satisfied.

3.2 Removing the exclusion list will also eliminate the perception and misunderstanding that documents listed in the First Schedule which are signed electronically are invalid[2].

[1] Consultation Paper, para 2.2.3.

[2] Consultation Paper, para 2.3.3.

4 Part II and Part III

4.1 Section 4, ETA and the First Schedule only excludes the operation of Part II of the ETA in relation to the documents listed in the First Schedule. Theoretically, Part III of the ETA which confers certain presumptions relating to secure electronic records[3] and secure electronic signatures[4] can still apply to documents listed in the First Schedule. It is unclear why the ETA makes this distinction. One possible reason is that any document (even one which falls within the First Schedule) which applies a specified security procedure or a commercially reasonable security procedure should get the benefit of the presumptions in Part III. Whether or not this is the reason for the distinction, the exclusion of Part II but not Part III to the First Schedule documents is difficult to justify in practice.

4.2 For the reasons stated above, we r**ecommend** that the **current exclusion list** in the First Schedule should not only be minimised but should **be removed altogether** (**Question 1**).

5 Proposal to retain some exclusions

5.1 In the Consultation Paper, IMDA proposes to:

5.1.1 remove item 1 of the First Schedule (which deals with wills) (**Question 3**);

5.1.2 remove item 2 of the First Schedule (these documents include negotiable instruments, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money) (**Question 5**);

5.1.3 amend item 3 of the First Schedule so that only "true agency" POAs and declarations of trust relating to immovable property and dispositions of equitable interest do not get the benefit of Part II of the ETA. Indentures and powers of attorney for the enforcement of security interests will be removed from the First Schedule and therefore will get the benefit of Part II of the ETA (**Questions 8, 10 and 12**); and

5.1.4 remove items 4 and 5 of the First Schedule (these documents relate to contracts for the sale, conveyance or other disposition of immovable property or any interest in such property (**Questions 14 and 17**).

5.2 In summary, if the proposals are implemented, only "true agency" POAs and declarations of trust relating to immovable property and dispositions of equitable interest will be excluded from Part II of the ETA.

5.3 We **wholly support** the proposals in **Questions 3, 5, 10, 14 and 17** to **remove items 1, 2, 4 and 5** from the First Schedule. Items 2, 4 and 5 apply in a commercial context. Removing them from the First Schedule will greatly facilitate innovation and efficiency in contract formation and execution in commercial transactions.

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[3] ETA, section 17

[4] ETA, section 18.

5.4 However, we would **recommend** that IMDA go further and **remove item 3** entirely instead of implementing the proposals relating to "true agency" POAs and declarations of trust relating to immovable property and dispositions of equitable interest as proposed in **Questions 8 and 12**.

5.5 POAs

5.5.1 In commercial transactions, POAs are not necessarily limited to land transactions[5] or for the enforcement of security interests[6] as stated in the Consultation Paper.

5.5.2 POAs in commercial transactions can be signed by corporations or natural persons. They are typically used by a party to confer authority on someone to execute the transaction documents on its behalf. POAs, when used in this context, are typically standalone documents. POAs can also be used in a variety of other ways in commercial transactions.

5.5.3 POAs can be in **M&A transactions** in the following ways:

(i) By a seller conferring authority on a buyer of the seller's shares in a target company to exercise the seller's rights in relation to shares (for e.g. attending and voting at shareholder meetings) prior to the buyer being registered as the new holder of the shares. POAs, when used in this context, are typically included as a provision in the sale and purchase agreement (the "**SPA**").

(ii) By a shareholder conferring authority on another shareholder to enable the latter to sign documents to exercise his drag along rights. POAs, when used in this context, are typically included as a provision in the shareholders or joint venture agreement (the "**SHA**").

5.5.4 In a **loan transaction**, POAs are granted not only to facilitate enforcement of security interests but also for other wider purposes:

(i) By a chargor to the lender/security agent to do anything which the chargor is obliged to do under the finance documents. POAs, when used in this context, are typically included as a provision in most security documents.

(ii) By a subordinated creditor or a junior creditor to the lender/security agent to do anything which such subordinated creditor or junior creditor has authorised the lender/security agent to do in a Subordination Agreement or an Intercreditor Agreement. POAs, when used in this context, are typically included as a provision in the Subordination Agreement or the Intercreditor Agreement.

5.5.5 We **do not recommend** retaining "true agency" POAs (with a limited carve out for POAs relating to enforcement of security interests) as proposed in **Question 8**:

(i) Depending on how the concept of a "true agency" POA is drafted or defined in the ETA if the consultation proposal is accepted, the POAs described above are potentially caught.

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[5] Consultation Paper, para 2.6.2.

[6] Consultation Paper, para 2.6.3.

(ii) Having a carve out for POAs relating to the enforcement of security interests in an exclusion list is potentially confusing and will create additional issues of interpretation as to whether the carve out applies.

(iii) Many of the POAs above do not exist as a standalone document but are embedded as a provision in a larger document – for example, a SPA or SHA. If we are not able to rely on Part II of the ETA for the POA provision, does this also mean that we cannot rely on Part II for the larger document in which the POA is embedded?

5.5.6 If IMDA wishes to retain POAs in the First Schedule, because of concerns relating to abuse of the vulnerable, we recommend that instead of the proposed carve out for the enforcement of security interest, the carve out should be widened to include any POAs granted by a body corporate. This would cover most of the situations mentioned in 5.5.3 and 5.5.4 above.

5.6 Declarations of trust relating to immovable property and dispositions of equitable interest

5.6.1 In practice, the use of declarations of trust relating to immovable property and dispositions of equitable interest via a trust is not necessarily limited to a familial context[7]. It is used in a variety of ways in commercial transactions. For example:

(i) In a business sale **M&A transaction**, the SPA may contain a declaration of trust by the seller in favour of the buyer to deal with assets, including immovable property, which cannot transfer at completion because third party consents are still pending.

(ii) In **loan transactions**, a declaration of trust over immovable property may have to be used when the security agent holds the security (over the immovable property) as trustee for the lenders.

(iii) In a **capital markets transaction**, the creation of both legal and equitable security by the issuer in favour of a security trustee (on behalf of bondholders) is often used in the offering of secured bonds where certain assets (including potentially immovable property) are held as security for the life of the bonds.

5.6.2 We **do not recommend** retaining declarations of trust relating to immovable property and dispositions of equitable interest as proposed in **Question 12**:

(i) Including such an exclusion will give rise to issues of interpretation as to whether a transaction which includes a trust structure is caught by the exclusion.

(ii) These provisions are typically not found in standalone documents but are embedded as a provision in a larger document – for example, a SPA. If we are not able to rely on Part II of the ETA for the declaration of trust, does this also mean that we cannot rely on Part II for the larger document in which the declaration of trust is embedded?

[7] Consultation Paper, para 2.6.14.

(iii) It seems anomalous that while contracts for the sale, conveyance or other disposition of immovable property or any interest in such property will be removed from the First Schedule, declarations of trust relating to immovable property will be retained.

5.6.3 If IMDA wishes to retain declarations of trust in the First Schedule, because of concerns relating to abuse of the vulnerable, we recommend that in addition to the proposed carve out for testamentary trusts, the carve out should be further widened to include any declarations of trust granted by a body corporate. This would cover most of the situations mentioned above.

5.7 We are of the view that retaining the First Schedule will hinder the use of the ETA as a piece of facilitative legislation. If the ETA is to truly reflect and support the rapidly changing technological landscape that we are operating in, there is no reason in principle why all documents should not get the benefit of the facilitative provisions in the ETA. We support the progressive approach taken in jurisdictions such as the UK[8], Norway[9] and New Brunswick[10] where no documents are excluded from their ETA-equivalent legislation.

5.8 We note IMDA's concern about the potential for abuse in personal or familial transactions where family members or close relations may have access to user accounts, passwords and authentication devices of the vulnerable[11]. In practice, documents for personal or familial transactions are seldom signed electronically. If there are any real concerns, these should be addressed in specific legislation dealing with such transactions[12]. Retaining "true agency" POAs and declarations of trust relating to immovable property or dispositions of equitable interest in the First Schedule because of perceived concerns arising in personal or familial transactions has the inadvertent effect of unduly restricting commercial transactions where these documents are used.

[8] Consultation Paper, Annex A.

[9] Consultation Paper, Annex A.

[10] Consultation Paper, para 2.2.6.

[11] Consultation Paper, para 2.6.14.

[12] Such as the Wills Act or the Mental Capacity Act as noted in the Consultation Paper.