
WONGPARTNERSHIP LLP

**RESPONSE TO THE INFOCOMM MEDIA DEVELOPMENT AUTHORITY'S CONSULTATION PAPER
ISSUED BY THE INFOCOMM MEDIA DEVELOPMENT AUTHORITY ON REVIEW OF THE
ELECTRONIC TRANSACTIONS ACT (ETA) (CAP 88)**

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1. **INTRODUCTION**

- 1.1 We wish to thank the Infocomm Media Development Authority ("**IMDA**") for the opportunity to comment on the *Consultation Paper Issued by the Infocomm Media Development Authority on Review of the Electronic Transactions Act (ETA) (Cap 88)* (issued 27 June 2019) ("**Public Consultation**").¹
- 1.2 As one of Singapore's largest and leading law firms, with clients in the public infrastructure space, financial services, telecommunications, essential services, as well as technology sectors, we are keen to share our thoughts and concerns in relation to the Public Consultation, as it may have material impacts on many of our clients.
- 1.3 In preparing our responses herein, we have had discussions with our clients to understand their concerns. We are fully supportive of IMDA's efforts to engage in stakeholder discussions, and would be happy to further discuss or elaborate on any of the points submitted upon.
- 1.4 We are pleased to provide our comments below and highlight some concerns in relation which we think merit further deliberation and consideration.

2. **QUESTION 5**

Question 5: IMDA welcomes views and comments on IMDA's proposal to remove documents such as bills of lading, warehouse receipts, dock warrants or negotiable instruments such as bills of exchange, promissory notes or cheques from the exclusion list under the First Schedule to the ETA.

- 2.1 We understand the Government's desire to promote the growth of electronic transactions, but we would urge caution in respect of this proposal.
- 2.2 As a starting point, we agree that the current ETA approach of excluding the operation of the ETA in the manner set forth in Section 4 in relation to documents referenced in the First Schedule should be reviewed, but we should also guard against the effect of the removal of this exclusion creating any misconceptions that the removal was intended to signal that these instruments can now by application of the ETA be validly executed electronically *without more*.
- 2.3 At the same time, in respect of documents which may be used by individuals (as opposed to institutions) who may not have access to legal advice or adequate electronic document storage systems, the outright removal of such documents from the First Schedule (eg. in the case of wills) may lead to misunderstandings by such individuals that such documents may now be electronically executed, where it is not necessarily clear that the existing formality requirements under general law (eg. the need for there to be 2 witnesses and initialling of pages of the will) may be readily met via electronic means or that the general public readily understands the nuances and complexities associated with an "electronic signature".
- 2.4 For example, individuals commonly assume that an electronic signature may be created by scanning an image of a wet-ink signature and attaching the graphical file to a document. Depending

¹ <https://www2.imda.gov.sg/-/media/Imda/Files/Regulation-Licensing-and-Consultations/Consultations/Consultation-Papers/Public-Consultation-on-the-Review-of-the-Electronic-Transactions-Act/Public-Consultation-Paper-on-the-Review-of-the-Electronic-Transactions-Act-27-Jun-2019.pdf?la=en>

on the circumstances in which this graphical file was applied and by whom, such a signature may not in fact signify the assent of the signor, and/or could increase the risk of forgery or fraud.

- 2.5 In relation to wills, such issues and risks are not desirable at all, not least from a public interest standpoint, because the testator will in all likelihood have passed on at the time the validity of the will is contested, thereby raising the prospect of litigation which may be costly and difficult to resolve.
- 2.6 There will also be practical concerns such as the ability to locate these electronic documents and/or their readability after the lifetime of the testator due to obsolescence of technology. For such matters, we do not see significant benefits in promoting digitisation, and would suggest that these types of documents not be removed from the First Schedule.
- 2.7 Please also see our further comments below on documents relating to real property.

3. **QUESTION 6**

<p>Question 6: IMDA welcomes views and comments on IMDA's proposal to adopt the MLETR into Singapore law.</p>
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- 3.1 We are generally agreeable with IMDA's rationale behind its proposal to adopt the MLETR. We have also received some client feedback supporting the removal of such documents from the exclusion list, and the adoption of the MLETR into Singapore law, as this would facilitate the growth of digital transactions and the use of electronic transferable records in trade finance between counterparties.

Tension between "possession" and "control"

- 3.2 Legal issues may arise as to the tension between the common law concept of "possession" and the MLETR's concept of "control".
- 3.3 Fundamentally, in relation to possession, rights in goods represented by documents of title are typically conditioned by the physical possession of an original paper document. As there is only one document representing the right to goods or money, possession provides the means to determine who is entitled to the rights.
- 3.4 The most common type of a document of title is the bill of lading² – a bill of lading is a document of title transferable by endorsement and delivery, giving the holder the right to sue on it. Hence at common law, a person without legal possession of the bill of lading is unable to transfer the possessory title of the goods.³ This concept of transfer of possession however, cannot be exactly replicated for electronic documents; even if their transmission could be said to give the recipient a kind of possession of these documents, it would not deprive the sender of them.⁴ The transmission

² IDA Singapore and Attorney-General's Chambers of Singapore, *Joint IDA-AGC Review of Electronic Transactions Act Stage II: Exclusions under Section 4 of the ETA* at paragraph 9.2.

³ Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) [6-002].

⁴ Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) [8-096].

of paper equivalents in contrast, necessarily deprives the sender the possession of it, and provides the recipient the possession thereof.

- 3.5 Whilst the MLETR seeks to address a functional equivalent for the concept of possession, through the concept of "control",⁵ this poses problems in relation to the concept of "possession". Specifically, Article 11(1) of the MLETR provides that, "where the law requires or permits the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:
- (a) to establish exclusive control of that electronic transferable record by a person; and
 - (b) to identify that person as the person in control."
- 3.6 However, at common law, a person without legal possession of the bill of lading is unable to transfer the possessory title of the goods⁶ because of the legal principle that no person can give a better title than he has. The concept of "control" may suggest that the person in possession of such document of title has a better title than his mere possession at common law (as "control" may suggest he has "control" over the underlying goods), and if the MLETR is adopted in full, the approach of deeming the person in control of the ETR to have "possession" of the ETR may create a different class of legal possession between that at common law and statute.

Issues in Relation to Authentication

- 3.7 There may also be issues with authenticating the legal digital identity of the parties of the ETR, especially if a distributed ledger would be used to record electronic documents of title. The concept of a distributed ledger is that "it is a database that is replicated on multiple computers at the same time. This database is not managed by a central authority; instead, in the classical implementation of the technology, everyone in the network gets a copy of the same whole database and can add to it. To enter the database, any new addition has to be confirmed by the other participants on the network."⁷ However, if each node of a distributed ledger contains the same copy of the whole database, it cannot be said that there is only one unique original authentic copy of an ETR.
- 3.8 A client has also highlighted that where there are underlying negotiable instruments involved in transactions between corporates and their counterparties, issues of validating / authenticating the legal digital identity of the parties in the ETR may arise, and alternatives would need to be developed if ETRs are to be adopted widely. They have therefore suggested that one possible method in relation to authentication could possibly be done through CorpPass.
- 3.9 The client notes that at present, CorpPass is a form of corporate digital identity used by businesses and certain entities (such as non-profit organisations and associations) to transact with Government agencies online. As CorpPass is used for the Networked Trade Platform, the use of a corporate digital identity should also be extended to electronic transactions put through in trade for B2B

⁵ Article 11(1), MLETR.

⁶ Guenter Treitel and Francis Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2011) [6-002]

⁷ A. Doychev, *Executive Guide to Distributed Ledger Technology: Introduction to the Corda platform—architecture, properties, and industry solutions* (Medium Apr. 1, 2019), available at: <https://medium.com/industria-tech/executive-guide-to-distributed-ledger-technology-9e13c2316942>

transactions, including transactions with financial intermediaries and their counterparties. This will facilitate the digitisation of trade beyond G2B transactions.

Replaceability

- 3.10 We also note that Articles 17 and 18 MLETR provide for the concept of replaceability between electronic and non-electronic versions of documents.
- 3.11 The adoption of these Articles should be carefully reviewed because they are at odds with fundamental principles of evidence in Singapore. For example, the first created original of a document (whether physically or electronically) will be treated as primary evidence of the same, and subsequent reproductions are secondary evidence thereof. In court proceedings, the general position is that subject to certain limited exceptions, primary evidence should be produced to prove the existence of an original document.
- 3.12 The replaceability articles in the MLETR appear to be inconsistent with such a concept because they appear to allow for an original to be “transferred” into another form, whereupon the original ceases to have effect. This will not be compatible with current rules of evidence, and it will be very
- 3.13 There are other practical concerns. The inherent reproducibility and distributability of electronic records means that multiple copies of these records may exist, which may pose problems for ensuring that all copies are reliably voided, and in relation to paper documents, how the reversibility may be reliably reflected.
- 3.14 Given these concerns, we urge caution in the adoption of these reversibility articles into Singapore law, at least until clearer norms are established for the operation of this concept of reversibility.

4. QUESTION 12

Question 13: IMDA welcomes views and comments on IMDA's proposal to not remove declarations of trust relating to immovable property, and dispositions of equitable interest.

- 4.1 Please see our response to Question 14.
- 4.2 In addition, IMDA can consider allowing declarations of trust made by corporations / institutions to be recognised e.g. in the context of a REIT since there should be fewer concerns of fraud as compared to those declarations of trust

5. QUESTIONS 13, 14, AND 15

Question 13: IMDA welcomes views and comments on how the potential challenges (such as verification/authentication and technological obsolescence) with the use of electronic contracts for the sale or disposition of immovable property can be addressed with existing technologies.

- 5.1 We are of the view that IMDA can consider using or building on existing SingPass / CorpPass platforms, if such platforms are deemed sufficiently secure.

Question 14: IMDA welcomes views and comments on IMDA's proposal to remove contracts for the sale or disposition of immovable property from the exclusion list under the First Schedule to the ETA.

- 5.2 With regard to Question 14, we are generally in agreement with the IMDA's proposal to move towards recognising electronic contracts for the sale or other disposition of immovable property, but would suggest that this be strictly subject to the requirement that only secure electronic signatures or digital signatures are accepted for property, but would suggest that this be strictly subject to requirement that only secure electronic signatures or digital signatures are accepted for property conducted electronically. In this regard, please also see our comments in relation to secured electronic signatures at paragraph 2.3 and 2.4 of our response.
- 5.3 Separately, we note that the IMDA has taken the approach to continue to exclude True Agency POAs and declaration of trust over immovable properties on the basis that such instruments are subject to concerns of potential abuse by family members or close relations (at paragraphs 2.6.2 and 2.6.14 of the Consultation Paper).
- 5.4 We would submit that as with True Agency POAs and declaration of trusts over immovable property, the risk of fraud will similarly exist for the sale of other disposition of immovable property, and it is arguable that the same considerations of potential concerns of abuse by family members or close relations would likewise apply to property transactions e.g. family member who fraudulently gifts or transfers the property to himself/herself.
- 5.5 IMDA may wish to adopt a consistent approach in this regard.

Question 15: IMDA welcomes views and comments on the proposed requirement that only secure electronic signatures or digital signatures will be accepted for property transactions conducted electronically to ensure greater certainty, mitigate concerns of fraud and safeguard the vulnerable.

- 5.6 This is absolutely critical in our view. Given the high value and significance of property transactions, relevant safeguards must be put in place to mitigate the risk of fraud and to protect the vulnerable and also the persons who place reliance on the contract having been executed.
- 5.7 In our view, an electronic contract for sale of immovable property should not be readily recognised unless it has been very clearly "executed" by the parties to it, so it is good to know that this has been considered by IMDA (in paragraphs 2.7.3 and 2.7.5 of the Consultation Paper) by maintaining the requirement for secure electronic signatures or digital signatures.
- 5.8 For businesses – lawyers, property agents, and bankers – it is important also that the framework to be instituted for authentication of signatures should allow for reliance to be made on the secure electronic signatures or digital signatures without further requirement for a witness or verification of the same (especially in relation to documents / contracts which are typically witnessed / certified e.g. Additional Buyer's Stamp Duty / Seller's Stamp Duty Declaration Forms and certificate of correctness (see also our comments to Question 18 below)). Otherwise, contrary to paragraph 2.7.6 of the Consultation Paper, there would be more (and not less) administrative burden for such businesses to process and would defeat the purpose of electronic records.
- 5.9 With regard to questions 13, 14, and 15, we have received client feedback that from an operation perspective, organisations will need to know the systems, processes and methods involved, and how implementation of the same would impact their existing resources, systems and procedures.

On an industry-wide level, it will likely be challenging to transact via digital signatures as the industry has not yet established or built the requisite infrastructure and protocols to accept such signatures. In this regard, all stakeholders will need to agree upon a common set of protocols and infrastructure that will be recognised and accepted for use. In relation to property transactions, it is suggested that only secure electronic signatures and secure digital signatures should be accepted.

6. **Questions 16 and 17**

Question 16: IMDA welcomes views and comments on whether Singapore should amend its legislation to facilitate the use of electronic contracts for the sale or disposition of immovable property.

- 6.1 It is noted at paragraph 2.2.3 of the Consultation Paper that even without changes to legislation, the common law already recognises in certain cases, electronic contracts for the disposition of an interest in immovable property.
- 6.2 We would suggest that any amendments should be facilitative (as opposed to making electronic contracts mandatory) as parties should remain free to decide whether they wish to use electronic contracts or to contract via non-electronic means.

Question 17: IMDA welcomes views and comments on IMDA's proposal to remove the conveyance of immovable property or the transfer of any interest in immovable property from the exclusion list under the First Schedule to the ETA.

- 6.3 We are generally in agreement with the IMDA's proposal to move towards recognising electronic conveyances / transfers, but would suggest that this be subject to the same requirement (as with contracts for sale or disposal of immovable property) that only secure electronic signatures or digital signatures are accepted for such electronic conveyances / transfers (please see our comments to Question 15 above).
- 6.4 Additionally, it is noted that with regard to conveyances / transfers, lawyers are currently required, pursuant to the Land Titles Act (Cap. 157, 2004 Rev. Ed.) and its subsidiary legislation / regulations, to verify signatures and sign certificates of corrects for, *inter alia*, Instruments of Transfer lodged with the Singapore Land Registry (see Section 59 of the Land Titles Act).
- 6.5 It is hard to envisage how lawyers would be able to continue to comply with such requirements in the case of electronic conveyances / transfers under the framework to be instituted for electronic signatures.
- 6.6 Consideration should be given to amend the Land Titles Act and its subsidiary legislation / regulations to remove or abolish such requirements in the case of electronic conveyances / transfers. Otherwise, lawyers may, for compliance, have to continue to insist on conveyances / transfers being signed non-electronically, which would defeat the purposes of recognising electronic conveyances / transfers in the first place.
- 6.7 In this regard, it is comforting to note that the IMDA has recognised that amendments to other relevant statutes (including the Land Titles Act) may be required if electronic conveyances are to be recognised (see paragraph 2.8.8 of the Public Consultation).

Comments from Our Clients

6.8 In relation to both Questions 16 and 17, client feedback we have received is supportive of legislative amendments being effected to facilitate the use of electronic contracts for the sale or disposition of immovable property, and agree that these items should be removed from the exclusion list.

7. **QUESTION 19**

Question 19: IMDA welcomes views and comments on IMDA's views that the ETA does not prohibit the use of DLT, smart contracts and biometrics and that no further amendments to the ETA are necessary to facilitate the usage of biometric technology in electronic transactions.

7.1 We generally agree with the IMDA that the ETA does not prohibit the use of DLT, smart contracts and biometrics and that no further amendments to the ETA are necessary to facilitate the usage of biometric technology in electronic transactions. However, we wish to highlight that there may be some tension between the characteristics of these technologies with the current language of the ETA.

DLT

7.2 The IMDA has provided at Paragraph 3.2.6 of the Public Consultation that it is of the preliminary view that the DLT is not inconsistent with ETA concepts such as "electronic record", "in writing", "electronic signature", "secure electronic record" and "secure electronic signature".

7.3 We would however, highlight the following:

Section 9: Retention of electronic records

7.4 Section 9(1) of the ETA provides that a requirement for a document, record or information to be retained is satisfied if the electronic record is retained in its original form, or in a format which accurately demonstrates its original form.

7.5 In distributed ledgers, it is likely that multiple copies of a document are created, replicated and retained across the various copies of the ledger. The concept of "originality" under Section 9(1) of the ETA may thus need to be reviewed in light of these developments.

Section 16: Errors in electronic communications

7.6 Section 16(1) of the ETA establishes that electronic communications are required to include a means by which portions of it in which errors are made can be withdrawn.

7.7 In the case of distributed ledgers, transactions are stored in 'blocks' and consensus protocols may also operate. As such, DLT concepts would not sit well with section 16(1) ETA, which provides the 'right to withdraw the portion of the electronic communication in which the input error was made'.

7.8 We would further highlight that as IMDA has provided at paragraph 3.2.10.4 secure electronic signatures are inapplicable to permissionless blockchains. Furthermore, even in respect of notionally permissioned blockchains, users may make transactions using pseudonyms or the identity of users may not have been sufficiently validated. The definitions of secure electronic signatures/records in the ETA may need to be specifically clarified to address such concerns.

- 7.9 Indeed, a client has also suggested that more specificity would also be helpful in providing organisations with more certainty and clarity as to how the implementation of DLT in any context would be permissible. As such, it would be very helpful if the ETA could set out upfront the requirements that will need to be satisfied in order for the use of any DLT to be permissible or to meet the requirements of secure electronic records. In the absence of any such specificity or guidance, then notwithstanding that the DLT is not inconsistent with ETA, organisations will still, in each case, have to obtain expert opinion and advice as to whether the use of the DLT in question would comply with the requirements of the ETA.

SMART CONTRACTS

- 7.10 The IMDA has provided at Paragraph 3.3.5 of the Public Consultation that section 15 of the ETA provides that smart contracts formed via automated message systems shall not be denied validity or enforceability, by sole virtue of its automatic formation, and IMDA is of the preliminary view that the ETA does not prevent the use and formation of smart contracts by organisations. However, we wish to point out the tension between section 16(1) of the ETA with the immutability characteristic of a smart contract.
- 7.11 Section 16(1) of the ETA, as laid out in the previous section (on DLTs), imposes the requirement that where an input error is made, the erring party must be given 'the right to withdraw the portion of the electronic communication in which the input error was made'. One key feature of smart contracts is their immutability, the inability for any input data to be removed or edited. While enforcing compliance and ensuring certainty, this feature also prevents the correction of errors – information entered into smart contracts is highly difficult or even impossible to change or remove. An example of this is the Ethereum DAO hack, where a bug in the programming of the Ethereum blockchain resulted in 3.6 million ETH being drained by the DAO common fund before they could be fixed.
- 7.12 Given the difficulty of the correcting such errors, this may lead to tension between this particular characteristic with section 16(1) of the ETA.

BIOMETRICS

- 7.13 We note IMDA's comments at paragraph 3.4.5 that ETA, being technology neutral, permits biometrics to be deployed as a supporting technology for authentication purposes, and that IMDA is of the preliminary view that no further amendments to the ETA are necessary to facilitate the usage of biometric technology in electronic transactions.
- 7.14 IMDA may wish clarify the interface between the ETA and the Personal Data Protection Act (Act No. 26 of 2012), eg. that consent for collection, use and disclosure of such signatures will be deemed and not further required.

8. QUESTIONS 21 AND 22

Question 21: IMDA welcomes views and comments on whether the existing voluntary nature of the CA accreditation framework for Digital Signatures should be maintained.

Question 22: IMDA welcomes views and comments on the adoption of the latest version of either (or both) International CA audit frameworks (Webtrust and ETSI) directly for applicants applying / renewing for CA accreditation to comply with.

- 8.1 IMDA provides at paragraphs 4.4.3 of the Public Consultation that it intends to retain the current voluntary accreditation framework, and at 4.5.7 of the Public Consultation that it is of the view that the review of the Certification Authority ("**CA**") accreditation framework and the adoption of digital signature and authentication services.
- 8.2 We agree that the existing voluntary nature of the CA accreditation framework for Digital Signatures should be maintained. We share IMDA's view that doing so would give CAs the flexibility to determine if there is a business case for applying for accreditation, and also are of the opinion that the current system will be beneficial to the development of the market.
- 8.3 First, by providing limited liability for accredited CAs, there is already incentive for CAs to comply with regulations and become accredited, making it unnecessary to impose a compulsory licensing framework.⁸
- 8.4 Per paragraph 4.4.2 of the Public Consultation, the voluntary accreditation framework is widely-used, supporting the idea that it is a beneficial system. EU Directive 1999/93/EC goes as far as to say that CAs should not be subject to mandatory licensing within the EU.⁹
- 8.5 In principle, a voluntary accreditation framework is highly beneficial for the development of the market, as it allows CAs to demonstrate their own levels of security and trustworthiness, and gives them the freedom of determining security levels of particular certification services in specific contexts.
- 8.6 This view is similarly echoed represented in EU Directive 1999/93/EC, which provides that:
- Voluntary accreditation schemes aiming at an enhanced level of service-provision may offer certification-service-providers the appropriate framework for developing further their services towards the levels of trust, security and quality demanded by the evolving market; such schemes should encourage the development of best practice among certification-service-providers; certification-service-providers should be left free to adhere to and benefit from such accreditation schemes¹⁰*
- 8.7 In a similar vein, the ETA allows accredited CAs to specify different reliance limits for the different types, classes or certificates used.¹¹ This gives them the ability to distinguish between large and small transactions,¹² and set the appropriate level of reliance for each individual transaction, allowing for more efficiency.

⁸ Yee Fen Lim, *Digital Signatures, Certification Authorities - Certainty in the Allocation of Liability*, (2003) 7 Singapore Journal of International & Comparative Law 183 at 194

⁹ EU Directive 1999/93/EC Recital 10

¹⁰ EU Directive 1999/93/EC Recital 11

¹¹ Section 44(2), Electronic Transactions Act.

¹² Yee Fen Lim, *Digital Signatures, Certification Authorities - Certainty in the Allocation of Liability*, (2003) 7 Singapore Journal of International & Comparative Law 183 at 196

8.8 We would however, perhaps suggest the limitation to the exemption of liability for accredited CAs. Under the ETA, CAs are given the discretion to specify reliance limits as they see fit.¹³ Furthermore, as the CAs are exempt from any liability for loss caused by forged digital signatures, provided that they adhere to the requirements of the ETA.¹⁴ A baseline definition of acts and misrepresentations for which strict liability will apply should be established, as it may help to promote even greater confidence in the CAs and encourage the taking up of digital signatures.¹⁵

We would respectfully request that the IMDA consider our points when introducing relevant amendments to the ETA and we remain happy to provide more detailed comments or clarifications as IMDA may consider appropriate.

WONGPARTNERSHIP LLP

27 September 2019

¹³ Electronic Transactions Act Third Schedule, paragraph 10

¹⁴ Electronic Transactions Act Third Schedule, paragraph 11

¹⁵ Yee Fen Lim, *Digital Signatures, Certification Authorities - Certainty in the Allocation of Liability*, (2003) 7 Singapore Journal of International & Comparative Law 183 at 195.