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Microsoft's Comments on the Review of the Electronic Transactions Act

March 2004

Introduction

Microsoft welcomes this opportunity to submit comments on the Joint IDA-AGC Review of the Electronic Transactions Act. The electronic marketplace provides unparalleled opportunities for economic growth worldwide. Ultimately, however, the willingness of both consumers and businesses to engage in e-commerce depends, in large measure, on the existence of reliable, well-developed legal structures to govern the formation of e-contracts and the rights of parties. Parties will be deterred from contracting where the governing legal rules are uncertain and the risks unclear. These concerns are magnified in the online world, where geographic boundaries no longer form a barrier to trade.

Fortunately, countries around the world have adopted or are adopting legal structures that allow parties to form contracts online with confidence as to their validity and enforceability. Singapore was one of the first countries to enact comprehensive e-contracting legislation, and its Electronic Transactions Act (ETA) provides clear and uniform rules that result in welcome certainty and reliability for e-transactions, encouraging greater consumer confidence in e-commerce.

Now countries, through the work of the United Nations Commission on International Trade Law (UNCITRAL), are considering a Convention on Electronic Contracting, in order to provide greater certainty to cross-border transactions. At present, many industry players are not convinced of the need for such a Convention. Most countries e-contracting laws embrace the principal of party autonomy, giving contracting parties in business-to-business transactions the freedom to vary background legal rules to suit their particular transaction. In general, these party autonomy provisions, combined with clear choice of law elections in the contract, provide all that is needed for legal certainty in international e-commerce transactions.

Notwithstanding this fact, it appears that UNCITRAL will go forward and prepare a Convention. In that event, it is desirable, as the consultation paper notes, for Singapore's law to be amended in line with the Convention, so that the same rules apply to both domestic and international e-contracts. In that vein, Microsoft welcomes the review of the ETA in light of UNICTRAL's work. However, we would caution Singapore to await the final results of the Convention before undertaking steps to amend the ETA, as many of the Convention's provisions remain in flux.

Responses to Consultation Questions

Party Autonomy: Consent and Variation

Question #1: Should the ETA include a consent provision similar to that in the draft UNCITRAL Convention, article 8, paragraph 2 in the context of all contractual transactions?

The ETA should include a consent provision similar to that in the draft UNCITRAL Convention for all contractual transactions. E-contracting, like other forms of contracting, is based on a meeting of the minds between the parties. While e-contracting can bring benefits to businesses and consumers alike, its use should be voluntary. As the consultation document notes, some people may not have regular access to computing facilities. Likewise, some parties may fear that an email thought to be an informal communication may later be claimed by the other party to be a notice under a contract, or that a binding contract may be formed by an exchange of emails meant to precede formalization of the contract. Such parties may wish to protect themselves by specifying limitations in emails or other electronic records – for example, that a particular email is not meant to constitute a binding offer or acceptance of a contract.

Questions #2 and #3: Do you agree that parties should be able to agree: (a) not to use electronic records to satisfy rules of law requiring writing, signature and retention of records; and (b) to requirements that are more stringent than those in Part II of the ETA?

Do you agree that parties should not be able to agree to standards that are lower than the mandatory requirements for electronic communications provided in the ETA or in other rules of law?

Consistent with the principal of party autonomy, parties should be free to agree that, as between them, electronic records do not satisfy rules of law requiring a writing, a signature, or retention of records. Although Microsoft hopes that few, if any, parties would ever make such an election, they should be able to do so. We also agree with the consultation document that parties should not be able to agree to standards regarding whether an electronic records satisfies writing, signature, or retention of records requirements that are lower than the mandatory requirements of the ETA. In our view, form requirements should be kept to the minimum necessary to ensure confidence in electronic transactions. Those established by the ETA meet this standard. However, we believe that further form requirements are unnecessary; thus, we urge Singapore not to add form requirements for electronic transactions to other, substantive laws.

Questions #4 and #5: Should section 5 be replaced with specific provisions within the relevant sections making the provisions apply subject to agreement otherwise by the parties?

If section 5 is retained, should it be amended to adopt the language of inconsistency rather than making reference to a right to vary provisions of the ETA?

We believe that the provision allowing parties to vary the provisions of the ETA as between themselves by agreement is important to the success of e-commerce. Many e-contracts are formed, and most e-signatures are used, within closed systems in which the parties' rights and obligations are defined by prior agreement. This business model is likely to remain dominant for the foreseeable future. Thus, it is important to the growth and development of e-commerce that national laws give effect to such agreements, provided they are otherwise valid and enforceable, just as national laws give effect to other types of agreements concerning business practices and methods. Parties should be free, on an informed basis, to establish by agreement the terms and conditions (including choice of law rules and rules of liability) under which they will engage in e-contracting and use and accept e-signatures. If parties can vary e-contracting and e-signature rules by agreement, parties can respond to the needs and demands of the marketplace, facilitating the growth of e-commerce.

In our view, a catch-all provision allowing parties to vary (as between them) certain provisions of the ETA by agreement is preferable to inserting in each provision language indicating that it is subject to agreement otherwise by the parties. Although the legal effect of the two approaches is identical, the former approach makes it easier for one to read and interpret the ETA by indicating in one location those provisions the parties can alter by agreement, rather than requiring an examination of each provision.

We also prefer the ETA's current explicit grant of permission to the parties to vary, as between themselves, certain of its provisions. The proposed alternative formulation – namely, that the relevant ETA's provisions would apply provided they are not inconsistent with the agreement – would necessitate an examination of the contract to determine if in fact there is inconsistency between it and the relevant ETA provisions. Only if an inconsistency is found would the ETA provisions not apply. Given that parties may not explicitly refer to the ETA in their agreements, this approach could result in significant uncertainty about whether an inconsistency in fact exists and thus whether the relevant ETA provisions apply. By contrast, the current formulation makes the terms of the agreement controlling, unless they are inconsistent with the mandatory provisions of the ETA. This is the better approach, as it gives primacy to the agreement, thereby fully respecting the autonomy of the parties. In sum, we prefer an approach that gives effect to the terms of the agreement unless they are inconsistent with the mandatory provisions of the ETA, rather than one that gives effect to

the non-mandatory provisions of the ETA unless they are inconsistent with the terms of the agreement.

Question #6: Should there be both a general consent provision and provision for variation ETA provisions by agreement of the parties (whether in section 5 or in specific provisions)?

We agree that the ETA should include both a general provision requiring the consent of the parties to contract electronically as well as a provision allowing parties, once they have explicitly or implicitly given such consent, to vary certain provisions of the ETA by agreement. As the consultation paper notes, the general consent relates to agreement of the parties to contract electronically in the first place. The provision permitting variation, by contrast, goes to the ability of the parties to set the rules under which they contract electronically, once they have agreed to do so.

Recognition of Electronic Signatures

Questions #7 and #8: Should the ETA be amended to adopt the provisions of article 9 of the draft UNCITRAL Convention on the recognition of electronic signatures?

Should section 8 of the ETA or the definition of "electronic signature" be amended in any way? If yes, please explain the problem addressed by the suggested amendments.

The ETA should be amended to reflect the provision of Article 9 of the draft UNCITRAL Convention, now that Variant B has been deleted. The provisions of Variant A of Article 9 do no more than indicate that the e-signature method used must identify the person, indicate that he or she has "approved" the contents of the message, and be reliable in light of the circumstances. This gives courts the freedom to evaluate, on the specific facts of the case, whether a particular e-signature should be given legal effect. After all, a click button might be a perfectly reasonable form of e-signature for a low-value transaction, but not for a high-value one. As the consultation points out, the term "approval" may be too narrow, as one may sign a document simply to indicate that one has reviewed it, without intending to bind oneself to its contents. Thus, the formulation in the ETA's definition of electronic signature – "authenticating or approving" – is preferable to that of the draft UNCITRAL Convention.

Finally, in amending the ETA to reflect the provisions of Article 9 of the draft UNICTRAL Convention, Singapore should also eliminate Sections 17 and 20 (as well as related provisions) of the ETA that give a rebuttable presumption of reliability to e-signatures meeting certain criteria. Electronic signatures legislation should not extend legal benefits to "preferred" forms of electronic signatures, such as digital signatures based on a public-key infrastructure. The information technology sector has been remarkably successful in developing technical and other standards through consumer choice and industry consensus. These market-driven standards fully respond to consumer demand, while providing industry with the flexibility to adapt quickly to user needs and technological advances. Giving preferences to particular electronic signatures may cause parties to use those forms of signatures in order to benefit from legal certainty, even though new and better technologies may have been developed, or the level of security provided by the type of e-signature and its cost may not be warranted by the value of the transaction.

Formation of Contracts

Questions #9 and #10: Should the ETA provide when an offer and acceptance in electronic form takes effect? If yes, please suggest the terms of the necessary legislative provision to effect the change and comment whether the provision should apply only if the parties opt-in.

Should the ETA provide that proposals to enter a contract made by electronic means to the world at large are to be treated as an invitation to make offers, unless the proposal indicates that the person making the proposal intended to be bound in case of acceptance?

The ETA should not be amended to define when offer and acceptance take effect. Electronic contracting rules should be kept to the minimum necessary to address issues that are not addressed adequately by existing contract law. Electronic communications via email resemble exchanges of letters (except that transmission is quicker); thus the traditional mailbox rule should apply, just as it applies to contracts formed via mail. By contrast, contracts formed by interactions with websites are more instantaneous, and thus similar to in-person signing of a contract. In both cases, however, existing contract law provides all of the principles necessary to resolve any disputes. The same is true of determining whether a website constitutes and offer or an invitation to make offers – the same rules should apply in both the online and offline worlds.

Question #11: Should references to "declaration, demand, notice or request" be added to section 12 of the ETA for consistency with the UNCITRAL draft Convention?

If these references remain in the UNCITRAL Convention, then Section 12 should be amended in line with them, in order to ensure consistency in the rules applicable to domestic and international contracts. No amendment is needed for substantive reasons, as "declaration of intent or other statement" covers all of the documents referenced in the UNCITRAL Convention list.

Question #12: Should the attribution provision in section 13 be retained? If section 13 is retained, should it be amended in any way?

The attribution provision is important insofar as it gives legal effect to the acts of electronic agents. The need to give legal effect to the acts of electronic agents is discussed more fully in the section on automated information systems below. If the provisions of the draft UNICTRAL Convention relating to automated information systems are incorporated into the ETA, however, they would suffice to give legal effect to the acts of electronic agents even if Section 13 were removed.

Time and Place of Despatch and Receipt

Question #13: Would there be any other implications in adopting the provisions on time and place of despatch or receipt in article 10 of the draft UNCITRAL Convention?

No. Although important to have rules on time of despatch and receipt so that parties have certainty about when a contract is formed, we doubt that as a practical matter they are invoked often. In the vast majority of cases, there will be no dispute regarding these issues. In those rare cases in which these issues arise, what is important is to have clear rules, rather than the exact content of the rules themselves.

Question #14: Should the ETA adopt a definition of "information system" based on the draft UNCITRAL Convention whether generally, or in relation to any specific provisions?

No. It is better to leave this term undefined, to account for changing technical possibilities. As computers and networks continue to evolve, and people contract using an ever-increasing variety of technical devices, it is not advisable to define this term, lest there be doubt whether some types of systems and devices fall within the definition.

Automated Information Systems

Questions #15 and #16: Should the ETA adopt the definition of "automated information system" from the draft UNCITRAL Convention?

Should the ETA adopt a provision to clarify the validity of contracts resulting from the interaction of automated information systems from the draft UNCITRAL Convention?

The ETA should be amended to include a definition of automated information system, as well as the provisions on automated information systems, found in the draft UNCITRAL Convention. These provisions ensure that the acts of electronic agents are given legal effect. Electronic agents are increasingly used in electronic commerce. Electronic agents are computer programs that initiate or respond to messages without contemporaneous human intervention. The bidding systems on Internet auction sites that increase bids up to a maximum amount depending on what others have bid are one example of electronic agents. Electronic agents already are in widespread use. Typically, they engage in transactions on behalf of a principal who has created the agent and authorized it to act on his or her behalf — for example, in online supplier and data exchange systems. As e-commerce grows, the use of electronic agents is expected to become increasingly prevalent, because they facilitate efficient on-line transactions. If e-commerce is to reach its full potential, the acts of electronic agents must be given the same legal effect as similar acts of the principal. By adopting the provisions of the draft UNCITRAL Convention, Singapore will ensure that the ETA gives legal recognition to the acts of electronic agents.

Question #17: Can you suggest any means of resolving the issue of conflicting terms in contracts concluded by automated information systems?

As with many other e-contracting issues, this one has an equivalent in the paper world: the "battle of the forms". The same rules that apply when parties submit competing standard terms should apply to conflicting terms in contracts concluded by automated information systems. This ensures that parties are subject to the same rules in both the online and offline world.

Question #18: Should section 13 of the ETA apply to contracts concluded by automated information systems? Should provisions be made to attribute communications in any specific situations involving the use of automated information systems?

Please see our answer to Question #12.

Questions #19 and #20: Should the ETA contain a provision requiring a party offering goods or services through an automated information system to make available to parties that use the system some technical means allowing them to identify and correct errors?

Should the ETA provide for the legal effect of a "single keystroke error"? If yes, please suggest the terms of such a provision.

The ETA should require parties offering goods and services through an automated information system technical means allowing parties that use the system a means of identifying and correcting errors. Because the interaction is occurring between a person and a computer, the person should be given an opportunity to review the transaction and correct errors. This is consistent with rules in other jurisdictions, notably Article 11.2 of the EU Electronic Commerce Directive.

Other Contract Issues

Questions #21 and #22: Should the ETA adopt a provision stating that incorporation by reference applies in electronic transactions? If yes, please specify the terms of such a proposal.

Should the ETA elaborate specific rules as to whether there is incorporation in particular specified circumstances? If yes, please specify the terms of such a provision.

As noted above, special rules for electronic transactions should be kept to the minimum needed. As there are already rules on incorporation by reference for paper contracts, there is no need to clarify that these rules apply to e-contracts. Rather, general principles of contract law should apply, leading to the same results in the online and offline worlds. Otherwise, one creates an incentive to contract via paper or electronically based on which system has the more favorable rules for the transaction in question. The decision whether to contract electronically should be based on the merits of the form of communication, not on arbitrage of differences between contracting regimes in the online and offline worlds.

Question #23: Should the ETA include a provision on electronic originals in the context of contractual transactions? If yes, what should be the criteria for the electronic functional equivalent?

Inserting a provision in the ETA regarding electronic originals probably would add little to the existing law of e-commerce in Singapore. As the consultation paper notes, most legal areas in which the existence of an original has legal meaning – in particular, negotiable instruments and documents of title -- are excluded from the ETA, pending further legal developments. (In passing, Microsoft notes its support for provisions governing electronic negotiable instruments and documents of title that follow those of the U.S. Uniform Electronic Transactions Act.) And we agree that legislation on electronic originals is not needed to support existing commercial practice, given parties' freedom to agree between themselves what types of electronic records they will accept.

Question #24: Should any concepts of contract law (including those highlighted above) be clarified in relation to electronic transactions? If yes, please explain the problem faced, with reference to practical examples, and propose possible solutions.

The consultation paper discusses a number of interesting issues relating to contracts in the information technology sector. Some of these issues, such as viral contracts, are independent of whether the contract is formed electronically or via paper. And most of these issues relate not to contracts in general, but to contracts dealing with specific subject matters, such as computer licenses. Microsoft believes that the issues raised are important ones to address. However, they are sufficiently complex that they should be considered separately, rather than in connection with possible amendment of the ETA. One of the chief virtues of the ETA is that it sets rules applicable to contracts formed electronically, whatever the subject matter. Put another way, the ETA is a procedural, not a substantive, statute. Thus, rather than considering these issues as an add-on to reform of the ETA, Microsoft would ask the Singapore government to treat them separately.

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Microsoft appreciates this opportunity to comment on the Review of the Electronic Transactions Act. We would welcome further opportunities to discuss the views set forth herein. If there are any questions concerning these comments, please contact Sheila Saw at +65 6337 6088 or by email at sheilasa@microsoft.com.