

Review of Electronic Transactions Act: Exclusions under section 4 of the ETA

Dear Sir/Madam,

On behalf of Barclays Bank PLC, Singapore, we would like to submit our views/comments in relation to the above subject matter as follow:

Q1. Do you agree that electronic wills should continue to be excluded from the application of the ETA? If you think electronic wills should be recognised, please justify and suggest how they may work in practice.

Our comment: We agree that Wills should be excluded from the application of the ETA because it is imperative that the person making the Will has testamentary freedom. One safeguard to ensure this testamentary freedom is that the Will is signed in the presence of 2 witnesses, who can then attest to whether the maker of the Will was of sound mind, was under duress, etc. Having electronic wills would remove this important safeguard.

Q2. Should the Wills Act be amended to facilitate the use of electronic wills in exceptional cases? If yes, please suggest what circumstances such a provision may be used in and the amendments that should be made.

Our comment: There should be no exceptional cases where electronic wills are allowed, as this may then lead to uncertainty and confusion. The formalities involved in execution of wills are in order to ensure that the maker's true intentions are reflected. Any exceptions may result in that protection being eroded.

Q3. Do you agree that negotiable instruments should continue to be excluded from the application of the ETA? Our comment: The exclusion of negotiable instruments should remain, until such time as electronic negotiable instruments (like e-cheques) can be recognised on an international level. Otherwise the differences between each jurisdiction's computer systems could render e-cheques unenforceable internationally.

Q4. Should the creation, performance or enforcement of an indenture continue to be excluded from the application of the ETA? Our comment:

The creation, performance or enforcement of an indenture could perhaps be excluded from Section 4; however, to ensure protection that the deed is sealed, corresponding provision should also be made with regards to electronic sealing of documents.

Q5. Should Singapore adopt a provision in the ETA to allow secure electronic signatures (or only secure digital signatures) to satisfy the requirement for sealing? Our comment: If indentures are to be excluded from Section 4, then a provision allowing for secure digital signatures should be adopted. Digital rather than electronic signatures are preferable, as digital signatures have the added security of private key values to ensure authenticity of the signature and the identity of the signor.

Q6. If you answered yes to Q5, should any class of transactions be excluded from the provision allowing electronic signatures (or secure digital signatures) to satisfy the requirement for sealing e.g. land transactions? Our comment: Transactions involving land/immovable property should still be excluded under Section 4, as these transactions are high in value and records of them have to be kept alive for many years. The technology used to electronically sign land transactions may become obsolete in future, rendering the electronic documents unreadable when they are required in future. Such transactions should be governed by their own specific regulations, if necessary.

Q7. Should the ETA enable a secure electronic signature (or secure digital signature) to satisfy the attestation requirement, i.e. signing of a document by its maker using such a signature need not be witnessed by another person? Our comment: Yes, if paragraph 5.6.3 of the Consultation Paper is indeed accurate, since digital signatures may be more effective than witnessing in determining the identity of the signor. Witnessing may sometimes be a formality that not all parties strictly adhere to - it is not unheard of for a signor to sign a document first, then hand it over to a witness to 'witness' his signature at a later date. In such cases, digital signatures can more accurately identify the signor.

Q8. Should the ETA provide that a legal requirement for a signature or seal to be witnessed is met by the witness' electronic signature? Our comment: Perhaps the use of private key technology as stated in paragraph 5.6.3 (of the Consultation Paper) would be more reliable in identifying the signor, than requiring a witness to actually affix his electronic signature.

Q9. If you answered yes to Q7 or 13, should any class of transactions be excluded from the provision e.g. land transactions? Our comment: My answer to Q6 is also applicable here.

Q10. When should an electronic indenture take effect? Our comment: An electronic indenture should take effect upon the indenture being electronically signed (and that signature being accordingly authenticated by the private key method) by both parties; if parties do not sign at the same time, then the date of the indenture should be the date that the last party has signed it.

Q11. What should be the requirements for withdrawal from or amendment of an electronic indenture? Our comment: Parties should not be allowed to withdraw or amend unilaterally. Withdrawals or amendments should be mutually agreed upon, and perhaps parties can electronically acknowledge the amendments using the same private key technology as was used in the initial execution of the document.

Q12. Do you agree that section 4 should exclude testamentary trusts i.e. the ETA should not apply to testamentary trusts? Our comment: Testamentary trusts should still be excluded because testamentary trusts perform a similar function to Wills. Hence the same considerations should apply.

Q13. Do you agree that section 4 should exclude trusts in relation to land i.e. the ETA should not apply to trusts for land? Our comment: Since we are proposing to retain the exclusion of all land/immovable property transactions under Section 4, trusts in relation to land should also be excluded for the same reasons.

Q14. Do you agree that Parts II and IV of the ETA should be allowed to apply to implied trust, in addition to constructive and resulting trusts (which are currently allowed)? Our comment: Yes, since like constructive and resulting trusts, their formation does not have strict requirements for paper, writing or signatures. However, such trusts in relation to land should still be excluded.

Q15. Do you agree that Parts II and IV of the ETA should be allowed to apply to trusts (other than testamentary trusts and trusts in relation to land) created electronically? If the ETA is amended to enable non-testamentary trusts to be made electronically, what special requirements, if any, should apply to the creation of such trusts? Our comment: Agree. The creation of such non-testamentary and non-land trusts (that are capable of being created electronically) should be governed by digital signature private key technology to safeguard the identity of the creator.

Q16. Should electronic powers of attorney continue to be excluded from the application of the ETA? If you think electronic powers of attorney should be permitted, please explain why they should be permitted and how they may work in practice. Our comment: Yes. Powers of attorney, like Wills and testamentary trusts, may need to be kept alive for a long time, so the same issues of technological obsolescence apply.

Q17. Do you agree that powers of attorney used in relation to the disposition of land should continue to be excluded from the application of the ETA? Our comment: Agree, for the same reasons that all transactions relating to land/immovable property should be excluded.

Q18. Should any classes of persons be excluded from the operation of section 4(1)(d) or (e) of the ETA i.e. to enable them to enter electronic contracts for the sale or other disposition of land, or any interest in land? If yes, please specify in relation to which kinds of transactions, and propose any additional safeguards that may be necessary. Our comment: No. Although electronic land transactions may benefit large corporations like HDB and JTC, and large corporate landlords, some tenants who are contracting with these large corporations may still be considered 'unsophisticated' tenants, and will therefore be at a disadvantage. The benefit may therefore only be to a very specific type of contracts where both parties are corporations who are aware of their rights and have equal bargaining power.

Q19. Should any classes of land transactions be excluded from the operation of section 4(1)(d) or (e) of the ETA i.e. to enable such transactions to be carried out electronically? If yes, please specify any additional safeguards that may be necessary. Our comment: No. Our comment to Q6 is again applicable here.

Q20. Do you agree that electronic documents of title should continue to be excluded from the application of Parts II and IV of the ETA? Our comment: Agree, for reasons of technological obsolescence as mentioned earlier.

Q21. Should Singapore enact any legislation to facilitate the use of electronic documents of title? If yes, please specify what kinds of documents of title, how they may work in practice and what legislative provisions will be required. Our comment: Any legislation to govern the use of electronic documents of title should be enacted together with legislation providing for electronic transactions in respect of land/immovable property.

Q22. Should Singapore enact legislation based on chapter 1 of Part 2 of the UN Model Law on Electronic Commerce relating to documents used in carriage of goods? Our comment: Not within the ETA. Like for land transactions, any such amendments should be contain within industry-specific legislation.

Q23. Should any class of parties or transactions be excluded from the operation of section 4 of the ETA? If yes, please explain. Our comment:
No.

Q24. Should any transactions be added to the exclusions under section 4 of the ETA? If yes, please explain. Our comment: No.

Q25. Do the form requirements in any legislation need to be clarified as to whether or not they may be satisfied by electronic means? If yes, please specify and explain the difficulty posed by the provision. Our
Comment: No.

Should you have any queries, please give me a call at 63953877 or reply to this email. Thank you.

Regards,
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Barclays Bank PLC