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25 August 2004

Dear Sir,

Re: Exclusions under section 4 of the ETA

When the ETA was enacted in 1998, it was never intended for the legislation to be everlasting. In fact, section 4 of the ETA empowered the Minister to alter the list of excluded transactions. With the developments over the last few years, it is generally believed that the list of excluded transactions should be reviewed. To that end, the Infocomm Development Authority of Singapore and the Attorney-General's Chambers have initiated this review with a public consultation.

Therefore, we are pleased to submit our responses to the Joint IDA-AGC Review of Electronic Transactions Act: Exclusions under Section 4 of the ETA.

We wish to add that although Tan & Tan Partnership does advise clients in the information technology, telecommunications and Internet sectors, our response herein is our own and does not necessarily reflect the views of any of these clients.

Kind regards

Bryan Tan
Tan & Tan Partnership

Q.1 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.

We agree that wills should continue to be excluded. There are two reasons to support this conclusion:

- (i) the will is a unique document whose effect is seen after the passing of the maker, thereby depriving any chance of ascertaining reliability;
- (ii) wills are not common transaction documents and the current formalities are not difficult to achieve.

Q.2 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.

We do not believe that exceptional cases should facilitate the use of electronic wills as such exceptional cases will invariably be deprived of the very same checks that non-electronic wills are required to contain.

Q.3 Do you agree that negotiable instruments should continue to be excluded from the application of the ETA?

We agree that negotiable instruments should continue to be excluded.

Q.4 Should the creation, performance or enforcement of an indenture continue to be excluded from the application of the ETA?

We think that exclusion should be discontinued in line with the passing of the proposed Instruments (Formalities) Bill.

Q.5 Should Singapore adopt a provision in the ETA to allow secure electronic signatures (or only secure digital signatures) to satisfy the requirement for sealing?

We are split on this topic. Doing so will encourage the use of secure electronic signatures (or indeed secure digital signatures) but would also seek to place additional importance on the concept of sealing. However, if the proposed Instrument (Formalities) Bill were to do away with the formalities of sealing (and rely instead on the intention to seal), then this provision only seek to place the electronic documents under more stringent requirements than their non-electronic counterparts.

Q.6 If you answered yes to Q.5, 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?

Certainly land transactions which are excluded should not be covered.

Q.7 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?

Since a secure digital signature overcomes the identity issues to any person relying on the signature, we think that only a secure digital signature should be allowed to satisfy the attestation requirement.

Q.8 Should the ETA provide that a legal requirement for a signature or seal to be witnessed is met by the witness' electronic signature?

Although conceptually this would sound like a good idea, we struggle to identify situations where allowing a witness to satisfy the legal requirement by an electronic signature would not be more appropriately met by the signor's own secure digital signature.

Q.9 If you answered yes to Q.7 or 13, should any class of transactions be excluded from the provision e.g. land transactions?

Yes, land transactions should definitely be excluded.

Q.10 When should an electronic indenture take effect?

We think that an electronic indenture should take place when delivered and such delivery (if despatch is to be deemed delivery) can be in accordance with section 15 of the ETA.

Q.11 What should be the requirements for withdrawal from or amendment of an electronic indenture?

We think that the withdrawal or amendment of an electronic indenture (by electronic means) should be exactly the same as its creation – if a secure digital signature is required to create the indenture, then a secure digital signature is required to amend the indenture.

Q.12 Do you agree that section 4 should exclude testamentary trusts i.e. the ETA should not apply to testamentary trusts?

Yes.

Q.13 Do you agree that section 4 should exclude trusts in relation to land i.e. the ETA should not apply to trusts for land?

Yes.

Q.14 Do you agree that Parts II and IV of the ETA should be allowed to apply to implied trusts, in addition to constructive and resulting trusts (which are currently allowed)?

Yes.

Q.15 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?

We agree that the trusts other than testamentary trusts and trusts in relation to land should be given effect under Parts II and IV of the ETA. We do not see any reason for any special requirements to apply to the creation of such trusts.

Q.16 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.

Yes, they should continue to be excluded. Power of attorney largely deal with land and are not common transactions which can benefit from being electronically implemented.

Q.17 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?

Yes, we do.

Q.18 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.

We should point out that certain classes of land transactions are already excluded from sections 4(1)(d) and (e) of the ETA – these include short-term leases which are not required to be in writing and signed. These would include the numerous online hotel booking transactions that take place each day. Arguably, leases under 7 years are similarly excluded from sections 4(1)(d) and (e). The reason behind the parties unwillingness to enter into such electronic transactions is probably psychological.

Q.19 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.

Please see our response to Q18.

Q.20 Do you agree that electronic documents of title should continue to be excluded from the application of Parts II and IV of the ETA?

We agree subject to our response in Q21.

Q.21 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.

Yes. I think Singapore should seriously consider enacting and leading legislation on the use of electronic bills of lading. Even with its limited success and limited recourse, the Bolero project has garnered a percentage of shipping volume. As a world leader in logistics and shipping, Singapore is poised to marry its edge in IT to adopt a system where the electronic documents of title will steadily build the volume of electronic transactions taking place.

Q.22 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?

Yes, however, more detailed legislation is required.

Q.23 Should any class of parties or transactions be excluded from the operation of section 4 of the ETA? If yes, please explain.

No.

Q.24 Should any transactions be added to the exclusions under section 4 of the ETA? If yes, please explain.

No.

Q.25 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.

At this point in time, we cannot think of any instances.

Other comments: