RESPONSE TO CONSULTATION PAPER

Consultation topic:	Consultation Paper – Review Of The Electronic Transactions Act
Attention:	**Aileen Chia (Ms)** Deputy Chief Executive (Policy, Regulation & Competition Development), Director-General (Telecoms & Post) Infocomm Media Development Authority 10 Pasir Panjang Road #03-01 Mapletree Business City Singapore 117438
Name:	We (Allen & Gledhill LLP) make this submission on behalf of Allen & Gledhill LLP and the following participants: 1. Citibank N.A., Singapore branch; 2. UBS AG, Singapore branch; and 3. Standard Chartered Bank (Singapore) Limited, (the "**Participants**"). This submission sets out the Participants' comments to the Consultation Paper on the Review of the ETA (defined below) issued by the Infocomm Media Development Authority ("**IMDA**") on 27 June 2019 ("**Consultation Paper**")

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	Please note that this submission only touches on certain matters discussed in the Consultation Paper. Individual Participants may have their own views on certain aspects of the Consultation Paper and may provide such comments independently.
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1. SUMMARY OF MAJOR POINTS

1.1 The Participants generally welcome the proposal to remove those matters listed in the First Schedule ("**First Schedule**") to the Electronic Transactions Act (Cap 88, Rev Ed 2011) (the "**ETA**") as being excluded by Section 4 of the ETA (collectively, the "**Excluded Matters**") particularly in respect of commercial transactions, subject to the following key concerns:

1.1.1 necessary and appropriate safeguards should be put in place to protect the vulnerable persons from abuse; and

1.1.2 digital equivalents to existing legal formalities should be clarified.

1.2 We explain further below.

2. STATEMENT OF INTEREST

The Participants, amongst which include banks and a law firm, are involved in significant volumes of commercial dealings and transactions.

3. COMMENTS

3.1 Question 1: *IMDA welcomes general views and comments on IMDA's overall approach to minimise subject matter under the current exclusion list*.

3.1.1 The Participants are generally supportive of the overall approach to minimise the Excluded Matters, in view of facilitating electronic dealings and transactions for time and cost savings for commercial parties involved.

3.1.2 As Singapore and the rest of the world continue along the trajectory of increasing digitisation of businesses, our laws and regulations must all the more remain relevant and conducive for commercial transactions while containing appropriate safeguards.

3.1.3 Nonetheless, we highlight three areas which, we respectfully submit, can be more comprehensively addressed in the review of the ETA.

3.1.4 Enforceability in foreign jurisdictions

(i) We recognise that updates to the ETA to minimise Excluded Matters would benefit companies looking to digitise their businesses. We also note that, as pointed in the Consultation Paper, "*[w]hile important as a form of benchmark, international norms and other jurisdictions' preferences for the use of hardcopies in certain transactions … should not, by themselves, restrict our approach to favour a wide application of the ETA*"[1].

[1] Consultation Paper at paragraph 2.3.1

(ii) However, in respect of companies with a business presence in foreign jurisdictions, the benefit conferred by the broadening of our ETA may be limited by the extent to which these foreign jurisdictions recognise that the electronic records or signatures which would otherwise be contractually valid and enforceable under the ETA are similarly valid or enforceable under the applicable laws and regulations of that jurisdiction (*e.g.* where matters removed in the Excluded Matters continue to excluded in those jurisdictions). If so, global institutions may find it difficult to adopt the use of electronic signatures and records to a full extent (even if these matters are removed from the Excluded Matters in the ETA) in practice, due to enforceability issues. In this matter, we whole-heartedly support inter-governmental cooperation.

3.1.5 Uncertain digital equivalents

(i) Merely removing the Excluded Matters from the First Schedule, without more, is insufficient to address concerns about uncertain digital equivalents. Crucially, it is premised on the procrustean assumption that the equivalent comparators to the form of the documents in the First Schedule are necessarily electronic records and signatures.

(ii) By way of example, deeds are important and widely used tools for commercial transactions - for instance, Section 53 of the Conveyancing and Law of Property Act (Cap 61, Rev Ed 1994) ("**CLPA**") stipulates that a conveyance of any estate or interest in land other than a lease for a period not exceeding 7 years is void at law unless it is by deed in the English language.

(iii) Under common law, a deed must be signed, sealed and delivered to be legally binding on the relevant parties. Where a document is to be electronically executed as a deed (*e.g.* for the conveyance of land), an issue may arise as to what the digital equivalents of the required formalities are – for instance, what would the digital equivalents of sealing and delivery be?

(iv) In this regard, we would point out the High Court case of *United Overseas Bank Ltd v Lea Tool* [1998] 1 SLR(R) 373 wherein the High Court held that merely signing on a blank space opposite the words "*signed, sealed and delivered*" (and without any seal affixed) was not sufficient evidence that the defendant intended to sign and deliver the document as a deed, and to hold otherwise would be to risk obliterating altogether the distinction between deeds and ordinary contracts.[2]

(v) The above highlights that merely removing Excluded Matters from the First Schedule, without more, may be insufficient to address issues relating to legal formalities and their digital equivalents under the ETA.

[2] *United Overseas Bank Ltd v Lea Tool* [1998] 1 SLR(R) 373 at [24]

(vi) For completeness, we note that pursuant to Section 41B of the Companies Act (Cap 50, Rev Ed 2006) ("**Companies Act**") (as recently amended), the requirement of sealing has been broadened. Under Section 41B of the Companies Act, a company is now entitled to execute a deed without affixing its common seal if certain signature requirements are satisfied. Doing so has "*the same effect as if the document were executed under the common seal of the company*"[3]. Whilst arguably in such a scenario, the digital equivalent for sealing under Section 41B of the Companies Act may well be in electronic signatures (*i.e.* of the director(s), secretary and/or witness), we respectfully suggest that amendments to the ETA should seek to streamline and harmonise the digital equivalents of legal formalities other than "*in writing*" and "*signing*"[4].

3.1.6 All Excluded Matters should be removed

(i) Some Participants respectfully submit that the proposed approach may not go far enough and that all Excluded Matters should be removed from the First Schedule, especially given Singapore's push towards the digitisation of our society and economy.

(ii) It is noted that the Consultation Paper raises concerns that vulnerable persons may be abused by family members or close relations who have access to their user accounts, passwords and authentication devices.[5] The general approach taken by the Consultation Paper is thus that only those matters relating to business transactions would be removed from the First Schedule, and not those matters which involve "*personal or familial transactions which could require greater safeguards*"[6].

(iii) The Consultation Paper therefore proposes that:

(a) "*True Agency*" Powers of Attorney[7];

(b) declarations of trust relating to immovable property[8]; and

(c) dispositions of equitable interests[9],

(the "**Residual Matters**")

should not be removed from the First Schedule.

[3] Section 41B of the Companies Act
[4] Consultation Paper at paragraph 2.3.3
[5] Consultation Paper at paragraphs 2.6.2 and 2.6.14
[6] Consultation Paper at paragraph 2.8.9
[7] Consultation Paper at paragraph 2.6.2
[8] Consultation Paper at paragraph 2.6.14
[9] Consultation Paper at paragraph 2.6.14

(iv) Some Participants respectfully disagree with the above approach and would instead suggest that:

(a) all matters in the First Schedule be removed; and

(b) for matters which require special safeguards, such appropriate safeguards be enacted in amendments to the ETA (or other enabling legislation, where appropriate).

(v) The above suggestion is not different or far from the approach already taken in the Consultation Paper in its proposals to remove the other matters listed under the First Schedule. For example:

(a) **Wills**: The Consultation Paper suggests removing wills from the First Schedule as the Wills Act (Cap 352, Rev Ed 1996) ("**Wills Act**") already provides certain "*traditional formalities safeguarding the creation and execution of wills*"[10]. For the same reason, the Consultation Paper also suggests that testamentary trusts be removed from the First Schedule.[11]

(b) **LPAs**: The Consultation Paper suggests removing Lasting Powers of Attorney ("**LPAs**") from the First Schedule as the Mental Capacity Act (Cap 177A, Rev Ed 2010) ("**Mental Capacity Act**") already contains safeguards like the need for an independent person to confirm, amongst other things, that the donor understands the scope of the LPA and is not under any undue pressure or duress. Furthermore, this safeguard "*will remain in the online system for LPA creation*".[12]

(c) **Immovable property**: The Consultation Paper suggests removing contracts for the sale and disposition of immovable property from the First Schedule, and recommends that to mitigate fraud and to protect vulnerable parties, parties to the transaction should use secure electronic signatures.[13]

(vi) It should be noted that the aforementioned examples are not restricted to business transactions and would similarly occur in a "*personal or familial*" context in which vulnerable persons may potentially be abused.

(vii) Yet, it respectfully submitted that:

(a) just as the Residual Matters engage concerns of protecting the vulnerable from abuse, so too do the abovementioned examples require safeguards to protect the vulnerable from abuse; and

[10] Consultation Paper at paragraphs 2.4.2 and 2.4.3
[11] Consultation Paper at paragraph 2.6.12(a)
[12] Consultation Paper at paragraph 2.6.9
[13] Consultation Paper at paragraphs 2.7.3-2.7.5

(b) just as appropriate safeguards can be developed and enforced for the aforementioned examples, so too can appropriate safeguards be developed and enforced for the Residual Matters.

(c) For example, one safeguard that has been suggested is for electronically executed documents to contain an additional warning statement for the signor to confirm that the signor has read the document carefully and intends to be bound by the document. The signor's attention would have to be specifically brought to the warning statement.

(viii) On balance, given the push towards the digitalisation in Singapore, some Participants humbly suggest that IMDA consider removing all Excluded Matters from the First Schedule, balanced with the introduction of appropriate specific safeguards (whether by technological or legislative means or otherwise) to protect the vulnerable.

(ix) Alternatively, and as a middle-ground, IMDA could consider safe harbour provisions or assumptions for transactions carried out by sophisticated investors and other specified categories of commercial transactions in respect of the Residual Matters.

3.2 Question 2: ***IMDA welcomes views on the necessity and adequacy of the sunrise period until 2021 to address any policy/implementation challenges with the use of electronic versions of the transactions/documents currently excluded from the application of the ETA.***

3.2.1 The Participants welcome having a sunrise period to address transitional issues and policy matters arising from the removal of the Excluded Matters and amendments to the ETA.

3.2.2 Specifically, whether or not the proposed sunrise period of 2021 is an adequate timeframe would depend on the extent of amendments to the ETA (and related legislation, if necessary).

3.2.3 Banks would, naturally, seek to avail themselves of the presumptions under the ETA. It should be noted that implications for banks in the event that the presumptions are successfully rebutted are significant and would, for instance, call into question past transactions with other clients and which were transacted at any stage using the same agreed method for electronic signing. Given this, some Participants envisage that notwithstanding the more accommodative framework proposed by IMDA, before any implementation, banks would still need to address existing concerns in relation to accepting electronically signed documents.

3.2.4 It is also respectfully suggested that during the interim period prior to 2021 (or such end of the sunrise period), parties who wish to avail themselves of the broadening of the ETA should be able to contractually stipulate otherwise – *i.e.* expressly agree to the effect that the new provisions are applicable to that contract. This would be

consistent with the push towards facilitating electronic transactions and having a more pervasive adoption of digital technologies in Singapore.

3.3 Question 3: *IMDA welcomes views and comments on IMDA's proposal to remove wills from the exclusion list under the First Schedule to the ETA, on the basis that the safeguards in the Wills Act will be maintained.*

3.3.1 The Participants generally welcome the proposal to remove wills from the First Schedule, subject to the existing safeguards in the Wills Act being maintained.

3.3.2 However, it is respectfully suggested that absent further safeguards like adequate verification and authentication processes and processes for managing and maintaining electronic wills, perhaps wills should only be removed from the First Schedule unless and until such safeguards are established.

(i) Of note, the present situation with regards wills is unlike that of LPAs where further safeguards presently exist for the latter, for instance: (1) requiring the LPA to be registered with the Public Guardian; (2) requiring an independent third person (being a practising lawyer, accredited doctor or psychiatrist) to certify amongst other things that the donor understands the purpose of the LPA and the scope of the authority at the time of execution of the instrument.

(ii) It is respectfully suggested that IMDA, in conjunction with other relevant government stakeholders where necessary, could consider introducing similar or other appropriate safeguards.

3.4 *Question 4: IMDA welcomes views and comments on the potential challenges/concerns with the use of electronic wills (such as technological obsolescence) and how they may be addressed with existing technology.*

3.4.1 We have three key concerns with the use of electronic wills.

(i) **Interpretation of requirements in Wills Act**

(a) Any amendments to the ETA to exclude wills from the First Schedule would have to be harmonised with the existing requirements in the Wills Act, in particular, the (physical) requirements in respect of formalities under Section 6.

(b) "*Every will shall be signed at the foot or end thereof*"[14]: In accordance with Section 6 of the Wills Act, the signature of the testator (or the person directed by him), if in electronic form, must be shown to be at the foot or end of the Will. The definition of "*signature*" in the ETA is "*a method (electronic or otherwise) used to identify a person and to indicate the intention of that person in respect of the information contained in a record*". Strictly speaking, electronic signing (as defined under the ETA)

[14] Section 6 of the Wills Act

may not result in an output of a physical signature on a document (for instance in the case of hashing and private key systems). To avoid confusion and inconsistency, the requirement of a physical location of a signature should be reconciled with the broad definition of an electronic "*signature*" under the ETA.

(c) "*in the presence of two or more witnesses present at the same time*" [15]: Presently, the physical presence of two witnesses is required under the Wills Act. We are respectfully of the view that such a physical safeguard applicable in the physical world should continue if wills are removed from the First Schedule and an "*online presence*" in the conventional sense is insufficient. In this regard, we highlight Section 9A of the Interpretation Act (Cap 1, Rev Ed 2002) ("**Interpretation Act**") which states that "*an interpretation that would promote the purpose or object underlying the written law*"[16] is preferred. To prevent the Wills Act from being read in an updating manner, we humbly suggest that amendments to legislation (or explanatory statement) relating to the removal of wills from the First Schedule make clear whether and to what extent the physical presence of the testator and witnesses is still required under the Wills Act.

(ii) **Verification of authenticity**: A potential challenge may lie in verifying the authenticity of an electronic will – this could perhaps be addressed by requiring that all electronic wills be executed securely via a specified portal or online registry.

(iii) **Cross-jurisdictional administration**: With regards wills relating to estates which are cross-jurisdictional in nature, electronic wills may need to be re-sealed or required as proof of ownership in foreign jurisdictions where electronic wills are not recognised, valid or otherwise accepted. This may create additional administrative hurdles for executors and administrators of such wills. In this matter, we whole-heartedly support inter-governmental cooperation.

3.5 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.***

3.5.1 We welcome the 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 ("**Transferable Documents**") from the First Schedule as this would generally facilitate business and trade.

[15] Section 6 of the Wills Act
[16] Section 9A of the Interpretation Act

3.5.2 We respectfully highlight two new risks and challenges that may arise and which would need to be addressed in removing Transferable Documents from the First Schedule.

(i) **Uniqueness**: Amongst the Transferable Documents are certain classes of documents which may confer title or ownership, or upon presentation of which the holder is entitled to delivery of goods or monies. Care should be taken to ensure that the amendments to the ETA address the creation, use and transference of such documents to guarantee the singularity / uniqueness and authenticity of the electronic record constituting the transferable document of instrument. This is to avoid a situation whereby there may be multiple claims for the performance of the same obligation. We respectfully suggest that Transferrable Documents only be removed from the First Schedule after IMDA and AGC have completed their review of the adoption of the Model Law on Electronic Transferable Records ("**MLETR**") into Singapore law so that all necessary amendments to the ETA can be introduced at the same time, for consistency.

(ii) **Cheque images**: We note that the removal of cheques from the First Schedule is in line with Singapore's aim to be "*cheque-free*" by 2025[17]. In practical terms, this would assist banks by allowing the Cheque Truncation System (CTS) images of cheques to be used without the need for an Image Return Document (IRD) to be printed. However, the bank receiving the cheque may no longer be able to ascertain if there has in fact been any tampering with the cheque or other fraud perpetrated. Policy and commercial decisions would be involved when deciding whether the issuing bank should be the entity assuming the risks of fraud arising from the cheque.

3.6 Question 6: *IMDA welcomes views and comments on IMDA's proposal to adopt the MLETR into Singapore law.*

3.6.1 We welcome the adoption of appropriate provisions of the Model Law on Electronic Transferable Records ("**MLETR**") into Singapore law. Transferable Documents are crucial for commercial dealings and transactions, and a significant volume of such dealings and transactions are cross-jurisdictional in nature. The adoption of the MLETR would facilitate this.

3.7 Question 7: *IMDA welcomes views and comments on how the potential concerns and challenges (such as verification/authentication and technological obsolescence) with the use of electronic POAs can be addressed with existing technologies.*

3.7.1 It is respectfully suggested that IMDA could consider the following to address the potential concerns and challenges with the use of electronic POAs:

[17] Channel News Asia, "*Singapore should aim to be cheque-free by 2025: Ong Ye Kung*" (accessed on 22 August 2019 at https://www.channelnewsasia.com/news/singapore/singapore-should-aim-to-be-cheque-free-by-2025-ong-ye-kung-10452570)

(i) using a specified portal or online registry for electronic POAs to be executed securely; and

(ii) using secure electronic signatures (as defined under the ETA) as part of the public key infrastructure.

3.8 Question 8: ***IMDA welcomes views and comments on the proposal to remove POAs for the purposes of enforcement of security interests from the exclusion list under the First Schedule to the ETA***.

3.8.1 We welcome the removal of POAs for the purposes of enforcement of security interests from the First Schedule. However, for the reasons stated at paragraph 3.1.6 above and further below, some Participants are of the view that a broader range of POAs should be removed from the First Schedule, subject to appropriate safeguards being put in place.

3.8.2 POAs are important for banks in particular as their use brings about certain advantages under the CLPA, including:

(i) **Execution**: a donee of a POA may if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power[18];

(ii) **Payment or act made good**: any person making or doing any payment or act, in good faith, in pursuance of a POA, is not liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become mentally disordered, or bankrupt, or had revoked the power, if the fact of death, mental disorder, bankruptcy or revocation was not at the time of the payment or act known to the person making or doing the same[19];

(iii) **Proof of non-revocation**: a statutory declaration by an attorney to the effect that he has not received any notice or information of the revocation of such POA by death or otherwise, if made immediately before or within 3 months after any such payment or act, is conclusive proof of such non-revocation at the time when the payment or act was made or done[20];

(iv) **Deposit of POA**: an instrument creating a POA, its execution being verified in accordance with Section 48(1) of the CLPA, may be deposited in the Registry of the Supreme Court.[21] In this regard, Order 60 Rule 6 of the Rules of Court (Cap 322, R 5, Rev Ed 2014) ("**Rules of Court**") provides that a POA which is presented for deposit in the Registry of the Supreme Court under

[18] Section 45(1) of the CLPA
[19] Section 46(1) of the CLPA
[20] Section 47(1) of the CLPA
[21] Section 48(1)(a) of the CLPA

Section 48 of the CLPA can be deposited if certain conditions are met, including that the execution of that instrument has been verified in accordance with the Order 60 Rule 7 of the Rules of Court. The value of such lodgement and the ability to inspect the instrument goes towards the authenticity of the instrument, the authority of the attorney, and the due execution of the instrument. From an evidential point of view, this could potentially be advantageous to banks;

(v) **Committees of inspection during liquidation**: in the context of liquidation, Section 278(1) of the Companies Act permits creditors and contributories holding, *inter alia*, general powers of attorney to be appointed as part of the committee of inspection of the company under liquidation; and

(vi) **Agency relationship**: although not strictly conclusive, in the event of a dispute, a power of attorney may be advantageous to banks in characterising the principal-agent relationship between a client and the bank under certain agreements.

3.8.3 POAs are frequently used by banks and other commercial entities in the context of commercial transactions, which may or may not involve the enforcement of security interests, for example:

(i) POAs granted in the context of a put option between companies; and

(ii) POAs granted to financial investment managers (*e.g.* limited partners and general partners of private equity funds) and other corporate service providers.

3.8.4 In such cases where the parties involved are sophisticated entities or persons who are able to better protect their interests, concerns about protecting vulnerable persons from abuse by family members or close relations, as raised in the Consultation Paper, would not apply in the same way. Furthermore, institutions would already have existing internal checks to ensure that signatories are properly authorised and that the POAs are valid and enforceable. In any event, the terms of POAs are also generally construed narrowly. It is therefore respectfully submitted that IMDA consider removing from the First Schedule POAs in respect of commercial transactions.

3.8.5 Even in circumstances where there may be a potential for familial wrongdoing, banks have their existing internal due diligence checks on potential donees / grantees of POAs and their existing checks and balances on actions taken in relation to bank accounts. Given that these risks already addressed through existing internal checks, it is respectfully submitted that IMDA consider also removing from the First Schedule POAs granted by regulated entities (*e.g.* a bank or trust company), or POAs granted over assets held by such entities, such as:

(i) limited POAs granted by a regulated trustee to the settlor of a trust or to a family member nominated by the settlor; and

(ii) POAs granted by a client of a bank to a family member over bank accounts.

3.8.6 Given the above, it is respectfully submitted that IMDA consider broadening the types of POAs to be removed from the First Schedule.

3.8.7 Alternatively, perhaps a middle-ground solution (as opposed to the complete removal of all POAs) might be to introduce safe harbour provisions or assumptions in respect of transactions carried out by sophisticated investors and other specified categories of commercial transactions.

3.9 Question 9: ***IMDA welcomes views and comments on IMDA's proposal to remove Lasting Powers of Attorney from the exclusion list under the First Schedule to the ETA, on the basis that safeguards in the Mental Capacity Act will be maintained.***

3.9.1 We welcome the removal of LPAs from the First Schedule, and are of the view that safeguards in the Mental Capacity Act should continue to be maintained.

3.10 Question 10: ***IMDA welcomes views and comments on IMDA's proposal to remove indentures from the exclusion list under the First Schedule to the ETA.***

3.10.1 We welcome the proposal to remove indentures from the First Schedule. However, and as alluded to in paragraph 3.1.5 above, we are respectfully of the view that doing so, without more, is insufficient to address concerns of uncertain digital equivalents.

3.10.2 As a preliminary point, we note that there may be an issue as to whether and to what extent indentures may be different from deeds (see *Thomas Chong Fook Hong and Another v Low & Yap (a firm) and Others* [1992] SGHC 101 and *The Law of Contract in Singapore*[22]).

3.10.3 Notwithstanding the above, from a formalities standpoint, indentures (and deeds) are required to be signed, sealed and delivered to be effective. As regards indentures, there may well be a separate requirement for indenting, although as discussed in *The Law of Contract in Singapore 2012*[23] this may not be strictly required.

3.10.4 For the avoidance of doubt, however, it would be useful if there were legislation providing that indenting is not (or is) necessary. Alternatively, we would respectfully suggest that amendments to legislation provide for the digital equivalent of indenting (if necessary), sealing and delivering.

[22] Andrew Phang & Tham Chee Ho, *The Law of Contract in Singapore 2012,* Chapter 14: Privity of Contract (Academy Publishing, 2012) ("***The Law of Contract in Singapore***") at fn 28
[23] *The Law of Contract in Singapore* at fn 28

3.11 Question 11: ***IMDA welcomes views and comments on IMDA's proposal to remove testamentary trusts from the exclusion list under the First Schedule to the ETA on the basis that safeguards in the Wills Act will be maintained.***

3.11.1 We generally welcome the removal of testamentary trusts from the First Schedule, and are of the view that safeguards in the Wills Act should continue to be maintained.

3.11.2 We nonetheless set out key concerns of some Participants:

(i) As set out in paragraph 3.3.2 above, some Participants respectfully suggest that absent further safeguards like adequate verification and authentication processes and processes for managing and maintaining testamentary trusts, perhaps testamentary trusts should only be removed from the First Schedule unless and until such safeguards are established.

(ii) Further, with regards trusts administered by international trust companies or banks which hold assets which are cross-jurisdictional in nature, the electronic versions may not be recognised, valid or otherwise accepted in foreign jurisdictions and an original trust deed may be required. In this matter, we whole-heartedly support inter-governmental cooperation.

3.12 Question 12: ***IMDA welcomes views and comments on IMDA's proposal to not remove declarations of trust relating to immovable property, and dispositions of equitable interest.***

3.12.1 As mentioned above, some Participants remain of the view that all declarations of trusts relating to immovable property and dispositions of equitable interests should be removed from the First Schedule, subject to further safeguards (whether technical, legislative or otherwise) that can be introduced.

3.12.2 Alternatively, it is respectfully suggested that perhaps a middle-ground position could be taken, whereby declarations of trust relating to immovable property and dispositions of equitable interests are removed from Schedule where:

(i) such trusts are managed by a professional trustee. This is because where a trust is administered by a regulated trustee (*e.g.* a bank or independent trust company) or in a commercial context, the risk of familial abuse or interference is lower; and

(ii) such trusts are otherwise related to or executed in connection with commercial transactions. Doing so would facilitate commerce, while also having regard to potential familial abuse of vulnerable persons.

3.12.3 We would also be grateful if IMDA could clarify the scope of a "*declaration of trust*"[24] and whether the term includes, for example, (i) trust deeds; (ii) deeds amending trust deeds, and/or (iii) deeds exercising a power under a trust deed.

3.13 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.***

3.13.1 A possibility suggested is to require that electronic contracts for the sale or disposition of immovable property be executed securely via a specified portal or online registry.

3.14 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.***

3.14.1 We welcome the proposal to remove contracts for the sale or disposition of immovable property from the First Schedule, subject to necessary technological safeguards being implemented. This would facilitate the carrying out of land transactions and would bring the ETA in line with the common law position as set out in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR(R) 651 and *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338.

3.15 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.***

3.15.1 Whilst we have no objection to, and indeed welcome, using secure electronic signatures or digital signatures for property transactions conducted electronically, much would depend on the technology behind and the operationalisation of the secure electronic signatures or digital signatures. For instance:

(i) whether the relevant technology and processes could be efficiently implemented on the ground and adopted by users - if the processes and technology are overly sophisticated or complex, this may deter the average person from using the prescribed technology or process; and

(ii) whether this would indeed mitigate concerns of fraud and indeed safeguard the vulnerable. For instance, in the case of public key infrastructure wherein subscribers are issued private keys and certificates, mitigation of fraud would depend on the integrity and security of the public and private keys. Further, depending on how private keys are stored, secured and accessed, vulnerable persons may still be abused if family members are able to access devices containing their private keys thereby allowing them to fraudulently execute

[24] Consultation Paper at paragraph 2.6.14

transactions in place of the vulnerable. If so, further safeguards (beyond the use of secure electronic signatures or digital signatures) would be necessary and appropriate.

3.15.2 Separately, it has also been suggested that an alternative option to the above is to require secure electronic signatures or digital signatures only where a party to the transaction is an individual.

3.16 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.***

3.16.1 We welcome the proposal to amend legislation to facilitate the use of electronic contracts for the sale or disposition of immovable property, subject to necessary technological safeguards being implemented.

3.17 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.***

3.17.1 We welcome the proposal to remove the conveyance of immovable property or the transfer of any interest in immovable property from the First Schedule, subject to necessary technological safeguards being implemented.

3.17.2 Some Participants have raised concerns with the commercial impact of the definition of a "*commercially reasonable procedure*" (see Sections 17 and 18 of the ETA). Under the ETA, only those electronic records and signatures which have been created through application of, *inter alia*, a commercial reasonable procedure agreed by the parties would trigger the crucial presumptions in Section 19 of the ETA. We are concerned that the agreed "*commercially reasonable procedure[s]*" should not be tainted by electronic risks. For instance, in the context of mortgages, the mortgagor, mortgagee and their respective solicitors would be required to each sign the mortgage document. If banks were to accept electronically signed mortgages moving forward, banks cannot be expected to investigate and assess whether the various solutions used in each transaction by the parties satisfy the requirements of being secure electronic records or signatures.

3.17.3 Bearing the above in mind, it is respectfully suggested that the Digitalised Property Transactions Workgroup along with the relevant government stakeholders consider enhancing the capability of the STARS Electronic Lodgement System to cover the execution of mortgages as well. This may, hopefully, provide a single, established platform which the industry can adopt.

3.18 Question 18:

3.18.1 [*This has been left blank as there is no Question 18 in Consultation Paper.*]

3.19 **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.***

3.19.1 We agree that the ETA does not prohibit the use of DLT, smart contracts and biometrics.

3.20 **Question 20:** ***IMDA welcomes views on other possible technologies that enterprises or sectors may wish to deploy, but are unclear whether the ETA facilitates or prohibits these.***

3.20.1 We have no comments to this question.

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

3.21.1 We do not have any comments on whether the existing voluntary nature of the Certification Authority ("**CA**") accreditation framework for Digital Signatures should be maintained.

3.21.2 However, some Participants respectfully suggest that another way of verifying digital signatures could be to establish a central register of signatures, at least for certain types of transactions. From an implementation perspective, a barrier to implementing a truly frictionless electronic process is the need for a wet ink signature to verify an electronic signature (and tie that signature back to an official document for Know-Your-Client purposes).

3.22 **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.***

3.22.1 We are supportive of the proposal and agree that a robust legal framework for the accreditation of CAs would facilitate the establishment and use of digital signatures and authentication services in Singapore.

3.22.2 However, it is respectfully submitted that IMDA clarify the limits of liability (*e.g.* what the recommended reliance limits are) that accredited CAs enjoy, and to ensure that CAs are adequately insured against the event that the evidentiary presumption for digital signatures generated from the certificates issued by the CAs is successfully rebutted and a claim is made by the transacting parties (*e.g.* a subscriber and relying party).

3.23 **Question 23:** ***IMDA welcomes views and comments on whether the above areas adequately cover what the ETA Review should include.***

3.23.1 Save for our relevant responses above, we have no comments to this question.

4. CONCLUSION

We are supportive of the removal of the Excluded Matters. Doing so is a needed step towards a more digitised society and economy.

We again thank IMDA for the opportunity to participate in this public consultation.