Review of the Electronic Transactions Act: Electronic Contracting Issues

Dear Sirs,

Please refer to your email of 24 February 2004 to The Association of Banks in Singapore inviting all its member banks to comment on the consultation paper on the Review of the Electronic Transactions Act (ETA): Electronic Contracting Issues conducted by IDA and AGC.

We have reviewed the consultation paper and would like to provide our comments in the attached file for your consideration. If you need clarification, please do contact us.

Regards,

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United Overseas Bank Limited

Nos	List of Questions	Comments	Remarks
	2.1 Consent to Accept Electronic Communications		
Q1	Should the ETA include a consent provision similar to that in the draft UNCITRAL Convention, article 8, paragraph 2 (see para 2.1.1) in the context of all contractual transactions?	Yes, there should be a consent provision in the ETA that is similar to that of the draft UNCITRAL Convention.	
	2.2 Variation		
Q2	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; (b) to requirements that are more stringent than those in Part II of the ETA? (See paragraph 2.4.3.)	Yes, we agree to points (a) and (b).	
Q3	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? (See paragraph 2.4.7.)	Yes, the agreed standards should not be lower than that specified in the Act as one of the purposes of having the Act is to ensure that there is a baseline for compliance. However, there could be exceptions which should be explicitly specified upfront in the ETA.	
Q4	Should section 5 be replaced with specific provisions within the relevant sections making the provisions apply subject to agreement otherwise by the parties? (See paragraph 2.3.2 and 2.5.4.)	Yes, section 5 should be replaced with specific provisions as mentioned.	
Q5	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? (See paragraph 2.5.2)	Use of the language of inconsistency is preferred as this facilitates the parties to vary the agreement and yet at the same time restricts the terms to be in line with that so provided for in the Act. However, preference is for section 5 to be replaced (see comments to question 4).	
Q6	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)?	Yes, there is a need for a general consent provision as well as a provision for variation of the ETA provisions by agreement of the parties.	

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	3 Recognition of Electronic Signatures		
Q7	Should the ETA be amended to adopt the provisions of article 9 of the draft UNCITRAL Convention on the recognition of electronic signatures?	Consideration to amend the ETA should be given as the existing statements on electronic signatures do not adequately address the security requirements that must be observed to ensure the authenticity of electronic signatures. Also, there should be an agreement on cross-certification issues between Certification Authorities of different countries if we are to adopt the provisions of article 9 of the draft UNCITRAL Convention.	
Q8	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 current ETA's version is incomplete or not definitive enough. Section 8 of the ETA could be amended along the lines of article 9 of the draft UNCITRAL Convention on the recognition of electronic signatures. Paragraph 4 of article 9 specifies the criteria that must at least be met in order for the electronic signature to be considered as reliable. Moreover, the definition in the draft UNCITRAL Convention expressively refers to the identification function. This may help address the spoofing problems or the like.	
	4.1 Formation and Validity of Contracts		
Q9	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.	If it is agreed that the postal acceptance rule cannot be applied universally to all kinds of transactions concluded via different electronic means, it is wise to consider including such a provision in the Act. If such a provision is included, it should apply unless the parties concerned specifically opt out. This is to ensure that the parties are protected regardless of whether they are aware of the provision. For opt-out cases, "when an offer and acceptance in electronic form takes effect" should be governed by the terms and conditions of agreements	

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		made between contracting parties.	
	4.2 Invitation to make Offers		
Q10	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?	To reduce uncertainty, it is a good idea to consider including such a provision in the Act.	
	4.3 Effectiveness of Communications between Parties		
Q11	Should references to “declaration, demand, notice or request” be added to section 12 of the ETA for consistency with the UNCITRAL draft Convention?	If "other statement" mentioned in section 12 of the ETA is considered to have covered "declaration, demand, notice or request" as specified in article 8 of paragraph 1 of the draft UNCITRAL Convention, then there is no necessity to include them. However, if we want to make it more restrictive, then "declaration, demand, notice or request" should be included.	
	4.4 Attribution		
Q12	Should the attribution provision in section 13 be retained? If section 13 is retained, should it be amended in any way? (See also amendments to section 13 discussed in paragraphs 4.4.6 to 4.4.9. below)	No comment.	
	Part 5 Time and Place of Despatch and Receipt		
Q13	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? (See paragraphs 5.5 and 5.11)	Time discrepancies due to incorrect clock settings on the computer systems used by the originator and the addressee are not uncommon. If there will be any dispute on the actual time of dispatch or receipt, there will be a need to ascertain the correct time. How the correct time is	

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		to be determined is currently not guided by the provisions.	
	5.13 Definition of Information System		
Q14	Should the ETA adopt a definition of “information system” based on the draft UNCITRAL Convention whether generally, or in relation to any specific provisions?	Definition of "information system" based on the draft UNCITRAL Convention may be adopted. Please also see comments on question 15.	
	6.1 Definition of Automated Information System		
Q15	Should the ETA adopt the definition of “automated information system” from the draft UNCITRAL Convention? (paragraph 6.1.2)	Based on the definition given to the term “automated information system” in the draft UNCITRAL Convention, the term “automated information system” carries a much narrower meaning than the term “information system”. If this is intended as defined, then the definition should be adopted for the purpose. However, the terms “automated information system” and “information system” which are merely differentiated by just the word “automated” may be easily misinterpreted to be the same. Consideration should therefore be given to change the term "automated information system" to avoid confusion.	
	6.2 Contractual Intention		
Q16	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? (see paragraph 6.2.3)	Yes, it provides clearer guidance by being explicit.	
	6.3 Conflicting Terms		
Q17	Can you suggest any means of resolving the issue of conflicting terms in contracts concluded by automated information systems? (see paragraph 6.3.1)	Specific provisions may be included in the Act to deal with conflicting terms in contracts concluded by automated information systems. Any non-standard terms should be	

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		highlighted to the other party for his/her agreement.	
	6.4 Attribution		
Q18	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?	To be consistent, the section should also apply to contracts concluded by automated information systems. In view of unintended situations that may happen to the use of automated information systems, special provisions should be considered.	
	6.5 Single Keystroke Error		
Q19	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? (See paragraph 6.5.3)	Yes, some technical means should be provided for identification and correction of errors. In addition, there should be means (e.g., confirmation screens) by which the party who uses the system can confirm that what he or she has entered is correct and that the terms and conditions relating to the offer are acceptable. The issue on how to ensure non-repudiation needs to be addressed too.	
Q20	Should the ETA provide for the legal effect of a "single keystroke error"? If yes, please suggest the terms of such a provision. (See paragraph 6.5.4).	Yes, the provision indicated in paragraph 6.5.4 may be considered for inclusion.	
	7.1 Incorporation by Reference		
Q21	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. (See paragraph 7.1.1 and 7.1.6).	No comments.	
Q22	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. (See paragraph 7.1.8)	Yes, we agree to the suggestion mentioned in paragraph 7.1.8.	

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	7.2 Provision of Originals		
Q23	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?	No comments.	
	7.3 Other Issues		
Q24	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.	Unless current systems can be enhanced, preference is for a receipt in electronic form or otherwise to confirm an electronic communication. The legal implications of the proposed amendments to the ETA on contracts would have to be considered in depth before implementation.	