To : Head, Law Reform and Revision Division. Attorney-General's Chambers

Please see attached for our response to the Joint IDA-AGC Review of ETA Stage 1.

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DBS Response to ETA Stage 1 :
Review of Joint IDA-AGC Review of Electronic Transactions Act
Stage 1: Electronic Contracting Issues

Infocomm Development Authority - Attorney-General's Chambers Questions	Draft United Nations Commission on International Trade Law (UNCITRAL) - 43rd Session	Electronic Transactions Act (ETA) 1998	Our Response
Q1 Should the ETA include a consent provision similar to that in the draft UNCITRAL Convention, article 8, paragraph 2 (see paragraph 2.1.1) in the context of all contractual transactions?	Article 8, Paragraph 2 Nothing in this Convention requires a person to use or accept information in the form of data messages, but a person's agreement to use or accept information in the form of data messages may be inferred from the person's conduct.	No such provision.	Q1 Yes, due to the existence of a 'digital divide' where not everyone can send and receive electronic communications, either because they lack access to the necessary facilities or knowledge on how to use the necessary IT tools. When applied, "inferred from the person's conduct" needs to be further clarified, with examples.
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)?	The Guide to Enactment of UNCITRAL Model Law on Electronic Commerce explains that the provisions contained in Chapter II of Part one (equivalent to Part II of the ETA) should be regarded as stating the minimum acceptable form requirements and are, for that reason, to be regarded as mandatory, unless expressly stated otherwise.	Section 5 of the ETA applies to the provisions of Part II of the ETA. This allows parties to agree not to use electronic records to satisfy a rule of law requiring writing, signature or retention of records. As it stands, however, Section 5 appears even to allow parties to agree to less stringent or different requirements from those in Part II.	Q2 (a) Yes. (b) Yes.
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)?	The Guide to Enactment of UNCITRAL Model Law on Electronic Commerce explains that the provisions contained in Chapter II of Part one (equivalent to Part II of the ETA) should be regarded as stating the minimum acceptable form requirements and are, for that reason, to be regarded as mandatory, unless expressly stated otherwise.	Section 5 of the ETA applies to the provisions of Part II of the ETA. This allows parties to agree not to use electronic records to satisfy a rule of law requiring writing, signature or retention of records. As it stands, however, Section 5 appears even to allow parties to agree to less stringent or different requirements from those in Part II.	Q3 Yes.

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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.)?	Not applicable.	There has been feedback to IDA that the words "may be varied by agreement" in Section 5 of the ETA may result in some ambiguity as to the applicability of the ETA provisions. It was suggested that Section 5 should be reworded to the effect that the provisions of the ETA shall apply to the extent that they are not inconsistent with any relevant agreement.	Q4 Yes, to enhance clarity.
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)?	Not applicable.	There has been feedback to IDA that the words "may be varied by agreement" in Section 5 of the ETA may result in some ambiguity as to the applicability of the ETA provisions. It was suggested that Section 5 should be reworded to the effect that the provisions of the ETA shall apply to the extent that they are not inconsistent with any relevant agreement.	Q5 Yes, to enhance clarity.
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)?	Not applicable.	There has been feedback to IDA that the words "may be varied by agreement" in Section 5 of the ETA may result in some ambiguity as to the applicability of the ETA provisions. It was suggested that Section 5 should be reworded to the effect that the provisions of the ETA shall apply to the extent that they are not inconsistent with any relevant agreement.	Q6 Yes, to enhance clarity.

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Q7 Should the ETA be amended to adopt the provisions of article 9 of the draft UNCITRAL Convention on the recognition of electronic signatures?	Article 9, Paragraph 3 Where the law requires that a contract or any other communication, declaration, demand, notice or request that the parties are required to make or choose to make in connection with a contract should be signed, or provides consequences for the absence of a signature, that requirement is met in relation to a data message if: (a) A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) That method is as reliable as appropriate to the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.	Such a requirement was implicitly expressed.	Q7 Yes, to enhance clarity.

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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.	Article 9, Paragraph 3 Where the law requires that a contract or any other communication, declaration, demand, notice or request that the parties are required to make or choose to make in connection with a contract should be signed, or provides consequences for the absence of a signature, that requirement is met in relation to a data message if: (a) A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) That method is as reliable as appropriate to the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.	Such a requirement was implicitly expressed.	Q8 Yes, to address the provisions in Section 13 (Attribution) of the ETA which was enacted before the advent of the Internet and in view of the wide range of business models now available for electronic commerce where the contracting party may be different from the party that enters the transaction (for example, brokers or private bankers).
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.	Not applicable.	Currently, it is unclear whether the general rule (that a contract is concluded only on actual receipt of the offeree's acceptance) or the postal acceptance rule (that the contract is concluded at the point of posting) applies with regard to transactions concluded via electronic means. It has therefore been suggested that the ETA should clarify which rule should prevail, with the possibility of statutory exceptions to achieve balance between the parties concerned.	Q9 No, as some forms of electronic communications are instantaneous (general rule applies) and some are not (postal acceptance rule applies) and it is doubtful whether a single rule should apply to all these differing situations.

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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?	Article 11 A proposal to conclude a contract made through one or more data messages which is not addressed to one or more specific persons, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information system, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the person making the proposal to be bound in case of acceptance.	No such provision.	Q10 Yes, as the underlying concern which the provision addresses is that a presumption of binding intention would be detrimental for sellers holding limited stocks of certain goods or when there are bona fide errors, for example, in on-line pricing.
Q11 Should references to "declaration, demand, notice or request" be added to Section 12 of the ETA for consistency with the UNCITRAL draft Convention?	Article 8, Paragraph 1 Where a communication, declaration, demand, notice or request that the parties are required to make or choose to make in connection with an existing or contemplated contract, including an offer and the acceptance of an offer, is conveyed by means of data messages, such communication, declaration, demand, notice or request shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.	Section 12 As between the originator and the addressee of an electronic record, a declaration of intent or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record.	Q11 Yes, for consistency.
Q12 Should the attribution provision in Section 13 be retained? If Section 13 is retained, should it be amended in any way?	Not applicable.	Section 13 of the ETA, in summary, deems that the party using a human agent or pre-programmed computer system assumes responsibility for their actions unless the other party knew or ought to know that the message is not the originator's (that is, did not reflect the originator's intentions).	Q12 Yes, as risks arising thereof are part of outsourcing risks or agency risks.

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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)?	Article 10, Paragraph 1 The time of dispatch of a data message is the time when the data message [enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator] [leaves an information system under the control of the originator or of the person who sent the data message on behalf of the originator], or, if the message had not [entered an information system outside the control of the originator or of the person who sent the data message on behalf of the originator] [left an information system under the control of the originator or of the person who sent the data message on behalf of the originator], at the time when the message is received.	Section 15, Paragraph 1 Unless otherwise agreed to between the originator and the addressee, the despatch of an electronic record occurs when it enters an information system outside the control of the originator or the person who sent the electronic record on behalf of the originator.	Q13 No other implications for time and place of despatch.

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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)?	Article 10, Paragraph 2 The time of receipt of a data message is the time when the data message becomes capable of being retrieved by the addressee or by any other person named by the addressee. A data message is presumed to be capable of being retrieved by the addressee when the data message enters an information system of the addressee unless it was unreasonable for the originator to have chosen that particular information system for sending the data message, having regard to the circumstances of the case and the content of the data message.	Section 15, Paragraph 2 Unless otherwise agreed between the originator and the addressee, the time of receipt of an electronic record is determined as follows: (a) if the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs - (i) at the time when the electronic record enters the designated information system; or (ii) if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record is retrieved by the addressee; or (b) if the addressee has not designated an information system, receipt occurs when the electronic record enters an information system of the addressee.	Q13 Yes, there is a risk that the originator will not be able to determine when a message has entered an information system and is "capable of being retrieved by the addressee".
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?	Article 5(e) "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages.	Not defined.	Q14 The definition should be in relation to specific provisions as the notion of "information system" is ambiguous in view of the range of information technology options now available and in use.

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Q15 Should the ETA adopt the definition of "automated information system" from the draft UNCITRAL Convention (see paragraph 6.1.2)?	Article 5(f) "Automated information system" means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system.	Not defined.	Q15 Yes, to enhance clarity.
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)?	Article 12 A contract formed by the interaction of an automated information system and a person, or by the interaction of automated information systems, shall not be denied validity or enforceability on the sole ground that no person reviewed each of the individual actions carried out by such systems or the resulting agreement.	No such provision.	Q16 Yes, it will help remove ambiguities.
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)?	Article 12 A contract formed by the interaction of an automated information system and a person, or by the interaction of automated information systems, shall not be denied validity or enforceability on the sole ground that no person reviewed each of the individual actions carried out by such systems or the resulting agreement.	No such provision.	Q17 A provision for the withdrawal of offers (via human intervention) in cases of conflicting terms in contracts should be provided.

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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?	Article 12 A contract formed by the interaction of an automated information system and a person, or by the interaction of automated information systems, shall not be denied validity or enforceability on the sole ground that no person reviewed each of the individual actions carried out by such systems or the resulting agreement.	The ETA has an attribution provision in Section 13 based on the UNCITRAL Model Law on Electronic Commerce. However, it is uncertain how the attribution provisions should apply to automated information systems.	Q18 Yes to both questions, as ownership of information systems equates responsibility over the contents and messages sent.
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)?	Article 14 [Unless otherwise [expressly] agreed by the parties,] a contract concluded by a person that accesses an automated information system of another party has no legal effect and is not enforceable if the person made an error in a data message....	No such provision.	Q19 Yes, to minimise such incidents.
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).	Article 14 [Unless otherwise [expressly] agreed by the parties,] a contract concluded by a person that accesses an automated information system of another party has no legal effect and is not enforceable if the person made an error in a data message....	No such provision.	Q20 No, in view of the fact that most customer-facing systems nowadays are designed to provide the customer with the opportunity to confirm his transactions and the considerable number of electronic transactions processed.
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).	The UNCITRAL Model Law on Electronic Commerce, article 5 bis, adopted by the Commission in June 1998, provides as follows: "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, *but is merely referred to in that message.* [Italics added]"	No such provision.	Q21 No, unless these references are universally agreed ones that apply to all e-contracts for that business.

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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).	The UNCITRAL Model Law on Electronic Commerce, article 5 bis, adopted by the Commission in June 1998, provides as follows: "Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, *but is merely referred to in that message.* [Italics added]"	No such provision.	Q22 No comments as this is best left to Legal & Secretariat to comment.
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?	The UNCITRAL Model Law on Electronic Commerce provides for the requirement for an original to be met by an electronic functional equivalent.	No such provision.	Q23 No, as this would be better dealt with through a specific legislative and technological regime, rather than by a general provision.
Q24 Should any concepts of contract law be clarified in relation to electronic transactions? If yes, please explain the problem faced, with reference to practical examples, and propose possible solutions.	Not applicable.	Not applicable.	Q24 No comments as this is best left to Legal & Secretariat to comment.