Dear A-G Chambers:

Congratulations on the very helpful material that you have published on the Electronic Transactions Act. It sets a clear context for your review exercise, and is useful to me in my ongoing (if informal) review of our own similar legislation. I look forward to your documents in phases two and three.

I have only one comment at this time, on electronic signatures.

I am very sceptical of any legal requirement that electronic signatures must be as reliable as appropriate in the circumstances. We thought of using such a requirement when we did the Uniform Electronic Commerce Act in Canada, and decided against it. So far none of the provinces that have implemented the Uniform Act (and all the common law provinces and the Yukon Territory have done so) have inserted a clear reliability rule.

The first reason for not having such a rule is that there is no such rule for handwritten signatures (or any of the other marks on paper that may constitute a signature at law). The person relying on a signature always takes the risk that the signature is not genuine, so he or she acts accordingly. That is to say, the relying party evaluates the risk that the signature is not genuine and protects himself or herself or itself accordingly. This may involve checking the signature against known genuine versions of it, or getting the signature witnessed, or getting the signature notarized, or getting the signature guaranteed by a bank, or various other techniques. The risk analysis will of course include the cost of having the signature made more reliable and the cost of its being not genuine. So a course of dealings with the purported signer, or a low-value transaction, may persuade someone to rely on a signature that from a stranger or for a high value would not be satisfactory.

These precautions and judgments are not a matter of law but a matter of prudence.

The law applicable to electronic signatures can be the same.

Second, the common law does not impose any form requirement on signatures - which means it is arguable that an electronic signature is a good signature without any law reform. At common law, I can sign something by authorizing someone else to sign my name - meaning that a handwritten signature does not look like what I would write but is mine and enforceable against me nonetheless. (There are questions of proof in all of this - and so there are in e-signature questions - but they should not distort the law on the point.) Likewise I can sign by machine (with the same practical questions.)
If I can sign by a machine that prints my name - possibly but not necessarily in the form of my handwritten signature - then why should I not sign with a machine that creates electrons that link me with the text?

The basic - arguably the only - common function of a signature is to link a person (i.e. legal entity) with a document. Nothing in the form of the signature states the legal effect of that link. One cannot know the link without knowing the context - starting with the obvious question what the document is that bears the signature (or to which the signature relates).

The context will always have to be demonstrated, whether on paper or electronic. Sometimes that will be hard, most of the time it will be easy. But the key point remains: it's not the form of the signature that gives it any legal effect.

Therefore any information in any medium that is capable of linking a legal entity with a document (electronic or paper or other) should be able to be a signature at law.

Third, in my view law reform should not restrict this flexibility of the common law. There are many examples where the law will give effect to practices that may not be prudent for people to engage in. People are expected to be prudent. An "X" in pencil on a piece of disposable tissue paper can be a legally effective signature, but most people would not accept a valuable contract made on such a medium with such a signature, because the risks are too great.

Part of the challenge is that people have many years of experience in evaluating how reliable a signature on paper is, and thus can judge what is prudent. People are much less familiar with the potentials and vulnerablilities of methods of signing electronically. However, I would submit that the law does not add any value to this lack of familiarity with an "appropriate reliability" test. Such a test merely transfers the prudential judgment from the relying party to a judge - who may be no more competent to make it, though he or she will have the advantage of expert evidence. Such evidence is also available to the relying party - at a more useful time, before the transaction is consummated.

Fourth, a reliabiility requirement risks becoming a trap for the unwary, or a potential loophole for the unscrupulous. One can readily imagine a situation where the relying party knows the person who created an electronic signature and there is no question about the link to a document - yet tries to avoid an agreement by saying "yes, I know all that, but the method of the e-signature was not reliable enough for this transaction, so the signature, and thus the transaction, should not be valid." The person who created the signature cannot know at the time of creating it - at the time of the e-transaction that the ETA is intended to facilitate - whether a court will hold it to be appropriately reliable. The other party can argue it is not,in bad faith, possibly.

In short, the reliability test does not deal with what parties should reasonably be expected to ascertain - who signed what for what purpose? It adds a wild card, a trapdoor, an optional escape method, for attacking a signature with respect to which all relevant questions are answered. And it does not help answer any of them independently.

(I would also submit that the list of tests in the Model Law on Electronic Signatures (article 6(3)) adds little of real value as well, but that's a whole different set of arguments.

Do businesses in Singapore actually try to conform with the requirements that the ETA adopted from the Illinois Act, that the Model Law and the EU Directive were influenced by? I doubt that European businesses try to conform with the requirements for advanced electronic signatures, either - they just use the

general non-discrimination rule, since that allows for business judgments unclouded by technological demands that may not be relevant except because of the statute/Directive.)

Is consumer protection an exception, since consumers may be even less able to judge prudence of accepting an e-signature than a commercial party? I doubt that consumes would be helped by an open-ended reliability requirement either. They too can be trapped by it. Consumers probably need to know identity more than they need to see a signature as such demonstrated. So consumer protection in e-commerce should turn more on enforcing full disclosure of identity, place of business, and rights and remedies for the transaction than the artificial and generaly irrelevant consideration of the form of a signature.

(All this assumes that there actually are rules of law that require a signature, since if there aren't, the ETA does not apply at all. It does not apply to support or weaken a signature on a private transaction not covered by any statutory requirement. All the more reason not to have any wild cards - in the few cases when the issue may come up, the parties will be even less expecting such a strange loophole. Some statutes spell out the signature requirements in more detail, e.g. our Wills Act requires two signatures of witnesses both present at the same time and signing at the same time. Those statutes are not affected by the ETA or at least their rules are not changed - and a reliability test adds little to such a statute. In such cases one would want to be less technology neutral and more prescriptive, I expect.)

I trust that these comments may be helpful. Naturally I'd be happy to discuss them further if they are of interest to you.

Good luck with the rest of the consultations.

John Gregory

Of course the cautionary note below my contact information is relevant here: these are my views, not necessarily those of the Ministry.

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