RESPONSE

TO STAGE 1 OF THE JOINT IDA-AGC REVIEW OF THE ELECTRONIC TRANSACTIONS ACT

15 April 2004

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Reply to Question 1.

Whether there should be a consent provision similar to Article 8 para 2 of draft UNCITRAL Convention ?

No. The common law provides that a party need not accept contractual offers if they do not consent to the same.

The common law provides that a person becomes bound to a contractual obligation by way of consent or agreement. A detailed system of rules and standards (e.g. capacity to consent, intention to create legal relations, mistake etc.) are in place in the common law to ensure that a person has consented to contract.

To provide a provision as to consent would either :

(a) deem to nullify the detailed system of rules and standards in place in common law;
(b) cause confusion as to whether the common law rules and standards should apply to determine consent since the exception in Article 8 paragraph 2 is that of by conduct; or
(c) result in the courts paying lip-service to the requirement of consent and reverting back to the detailed system of rules and standards in place in common law.

To ensure certainty in the corpus of law, it would be preferable not to enact provisions dealing with consent to accept contractual offers by way of data messages. The common law is well equipped to deal with the issue as to whether a party consented to accept contractual offers electronically.

Whether any provision enacted should not create a regime that applies only to international contracts ?

Yes. This is to prevent disharmony between contracts made internationally and those made within Singapore.

To do otherwise would pose some difficulties. For example, would a Singaporean who uses his notebook to enter into a contract from England with a Singaporean company be subject to the international law provisions of ETA or the common law of contract.

Reply to Question 2

Parties should have to freedom to either :

(a) not to use electronic records to satisfy the Rules of Law (as defined in the Interpretation Act) requiring writing, signature and retention of records; or
(b) use more stringent requirements than those prescribed in the ETA.

This will ensure that parties have freedom to contract in the manner by which they intend to govern their relationship.

Reply to Question 3

Parties should be free to agree to standards that are lower than those provided for in the ETA only.

Care should be used in enacting such a provision as it would be difficult to determine on a qualitative basis with reference to the factual matrix of parties use of electronic communications whether the standards they have agreed between each other would be qualitatively "lower" or "higher" than those provided in the ETA.

On a policy level, such minimum standards could be viewed as requiring companies to be subject to further "red tape".

However, parties should not be free to contract out of the existing minimum standards provided in other legislation (e.g. record retention under the Companies Act etc.).

Reply to Question 4

Instead of replacing section 5 with specific provisions providing variation, section 5 could be amended to provide that parties could vary specific provisions.

In this manner parties will still be free to either :
(a) exclude the provisions they do not want; or
(b) exclude the entire Parts II and IV of the ETA.

Reply to Question 5

Section 5 should be amended to adopt the language of inconsistency subject to a provision providing that it is applicable. The language of inconsistency should only be operable if the parties have not expressly varied any provision or entire Parts II and IV of the ETA.

Reply to Question 6.

There should not be a general consent provision (see reply to question 1 above). There should only be provisions for variations (see reply to question 4 above).

Reply to Question 7

No. We agree that the requirement of reliability has already been provided in section 17 ETA.

We feel that the existing Section 8 ETA provides the bare minimum standard for an electronic signature which parties may adopt without fear of requiring costly IT solutions to ensure reliability as provided under section 17 ETA.

Reply to Question 8

Yes. It should be amended to clarify that entering an alphanumeric sequence such as that provided by Personal Identification Numbers ("PIN") to access/dispatch an electronic record constitutes an electronic signature.

This proposed amendment, clarifies that executing a PIN is equivalent to executing a "symbol" as provided by the inclusive definition in section 8(2) ETA.

Reply to Question 9

No. The common law provides that a party need not accept contractual offers if there is no offer and acceptance.

A detailed system of rules and standards are already in place to determine whether there may be offer and/or acceptance.

Reply to Question 10

No. The common law provides that a party need not accept contractual offers if they do not consent to it.

A detailed system of rules and standards (e.g. invitation to world at large, capacity to consent, intention to create legal relations, mistake etc.) are in place in the common law to ensure that a person has consented to contract.

Further, the preponderance of mistakes in pricing on the world wide web has made many web-based vendors/retailers conscious of including terms and conditions that specify the manner by which one may contract with them (e.g. Dell.com). Such terms and conditions would impliedly include, which portions of the transactions are invitations to make offers.

Therefore there is little need for such an amendment.

It would be preferable that parties are free to regulate by way of contract (e.g. terms and conditions on a web-site) as to when obligations become binding. Where terms and conditions are silent, the common law's rules and standards should be used.

Reply to Question 11

There should be no change to the existing section 12 ETA.

The UNCITRAL draft Convention does not specifically state that the demand, declaration, notice or request in connection with a contract refers to pre and post contract correspondence.

It is felt that the existing section 12 ETA has been drafted wide enough to cover most forms of electronic communications in relation to pre and post contract correspondence.

Reply to Question 12

The danger with section 13 ETA is that a person may easily hijack an e-mail address and cause an electronic record to be attributable to a 3rd party.

The hijacked e-mail address could be used to send an e-mail to a unknowing recipient who will only be able to determine that the e-mail was hijacked after detailed survey of the e-mail header. Detailed survey of the e-mail header requires detailed knowledge of the Simple Mail Transfer Protocol.

Arguably, one could attempt to stretch the defence of fraud or non-est factum to apply to hijacked e-mail addresses. It may be preferable to amend section 13(4) ETA to include a defence to ensure that an e-mail is not attributed to a party if it is later discovered to have been hijacked or tampered with.

Further, the definition of "originator" as provided in the UNCITRAL draft Convention would have to be amended according not to include the word "purports" as it would seem to allow e-mail hijacking.

It also should be noted that each server/computer on the Internet keeps its own time. There is no Internet Clock to which all computers must synchronize. This allows a server/computer to time stamp wrongly if its administrator has not ensured that it is set to the correct time.

Aside from the reservations above, it is felt that section 13 ETA is still relevant in providing evidential guidance to the courts as to whether an offer was sent or

received. An outsource provider could easily be considered an agent of the sender or recipient.

Reply to Question 13

We are unable to determine any other implications at this point of time save for the reservations about e-mail address hijacking under the reply to Question 12 above.

Reply to Question 14

We agree that there should be no change in the definition of "information system" to maintain technical neutrality.

Neither should any definition be used to specifically exclude network service providers such as ISPs and telecommunications providers. Corporations should not be excluded simply because they themselves are contracting with a 3rd party and are also telecommunications providers over which the data message of offer/acceptance is sent.

Reply to Question 15

There should be a definition of "automated information system" to facilitate contracts between intelligent agents and to enhance web services subject to the reservations stated below.

The phrase "without review or intervention by a natural person each time" in the draft UNCITRAL convention neglects an important fact, that bots are merely computer software that are parameter driven.

It was a human who programmed the bot to follow parameters. That human could have provided for that bot to refer back to him/her each time it is not able to find the right pricing structure (parameter) or encounters an error. Therefore there could possibly be a situation where there is a review or intervention by a natural person each time.

Further, a bot could even perform a contract immediate if the subject matter of the contract is allowing a download of a software program and issuance of a software key.

In light of this, the definition of electronic agent used by the US E-Sign Act and the Canadian Uniform Electronic Commerce Act is preferred as it refers to :

(a) performance of in whole or in part by the bot; and

(b) each action performed by the bot without renewal or action by an individual at the time of the of the action.

Reply to Question 16

Yes.

Reply to Question 17

We agree that this matter needs to be solved by general law as we are unable to contemplate all factual matrices in which this situation will occur.

Reliance could be placed on the common law of mistake where parties clearly intended for terms to be different. Guidance as to the manner by which such issues can be edalt with under the law of mistake can be gleaned from the Judgment of V K Rajah JC in *Chwee Kin Keong v Digilandmall.com Pte Ltd* (Suit 202 of 2003/E unreported).

A technical solution or change in technical standard may need to be developed to ensure that bots or web service servers mutually exchange their "agreed" parameters thereby ensuring a "safety check" that there has been no mistake as to the terms between each bot or web-service server.

Reply to Question 18

Section 13 should apply to automated information systems.

Reply to Questions 19 and 20

No. E-tailers should not be imposed with additional regulatory burdens.

The ETA should avail itself, if necessary, to the solution(s) provided in the Consumer Protection (Fair Trading) Act for provisions regarding the legal effect of 'keystroke" error.

Reply to Question 21

No.

Reply to Question 22

No.

Reply to Question 23

No. Parties should have the freedom to agree whether documents derived electronically can be treated as originals. If there is no agreement, the Evidence Act will apply.

Reply to Question 24

No. Guidance as to the manner by which such issues can be determined can be gleaned from the Judgment of V K Rajah JC in Chwee Kin Keong v Digilandmall.com Pte Ltd (Suit 202 of 2003/E unreported).