M1'S RESPONSE TO IDA-AGC'S REVIEW OF ELECTRONIC TRANSACTIONS ACT ("ETA"): ELECTRONIC CONTRACTING ISSUES

M1 welcomes the review of ETA to keep Singapore's e-commerce legislation relevant and robust. Our comments on the proposed revisions are as follows:

Part 2 Party Autonomy: Consent and Variation

Ref.	Question	Comments
Q1	Should the ETA include a consent provision similar to that in the draft UNCITRAL Convention, article 8, paragraph 2 in the context of all contractual transactions?	Yes, the proposed inclusion would be helpful as a clarificatory statement on implied consent.
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?	(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?	Yes, for certainty and uniformity. Allowing a variation to a lower standard will defeat the purpose of having minimum requirements and run counter to the establishment of a basic common practice.
Q4	Should section 5 be replaced with specific provisions within the relevant sections making the provisions apply subject to agreement otherwise by the parties?	Yes, as this allows a more nuanced approach to the particular provisions in Part II and IV.
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?	Please refer to comments for Q3 and Q4. The language should depend on the particular provision. It is suggested that section 5 be amended to a provision to cater to Q3 instead.
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)?	No, please refer to comments for Q1 and Q4.

Part 3 Recognition of Electronic Signatures

Ref.	Question	Comments
Q7	Should the ETA be amended to adopt the provisions of article 9 of the draft UNCITRAL Convention on the recognition of electronic signatures?	Not necessary as there is no substantive difference.
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.	No, we have no issue with the current provisions.

Part 4 Formation of Contract: Effectiveness of Electronic Communications and Attribution

Ref.	Question	Comments
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.	Yes, we feel that a robust stand should be taken to remove the unacceptable uncertainty surrounding this basic contractual issue affecting all e-commerce. There are arguments for either rule treating it as instantaneous or adopting the postal acceptance rule. One or the other should be selected and with more countries starting to adopt one form as a default rule, it is hoped that the usage will become commonplace enough and find acceptance with all e-commerce businesses. The view to be silent on this issue, which means in effect leaving it to the courts, is not supported as the common law has not proved adept at catching up with technology and evolving the basic framework to deal with the new means of contract-making. In fact, the greater the controversy, the less likely the issue will ever reach the courts and in the meantime, the prevailing uncertainty will continue to contribute to the overall legal risk disincentives discouraging the advent of e-commerce. It is suggested that the general rule based on actual receipt is preferable as electronic communications are commonly accepted as a form of instantaneous communication. The postal acceptance rule is an exception to the general rule and a strong policy reason has to exist for a deviation. Unlike postal acceptances where the risks to an offeror are limited by the physical means of transporting mail that acts as a natural cap on the number of acceptances, the ease of electronic communications means an offeror may be bound by voluminous binding acceptance clicks that arrive late even after it has posted a revocation of the offer. In order to encourage faster usage and acceptance of the general rule, we view that a default rule is preferable to an opt-in provision.

Ref.	Question	Comments
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?	Yes, as with Q9, there is an urgent need to establish a common default rule for all to follow.
Q11	Should references to "declaration, demand, notice or request" be added to section 12 of the ETA for consistency with the UNCITRAL draft Convention?	Yes, for consistency and clarity.
Q12	Should the attribution provision in section 13 be retained? If section 13 is retained, should it be amended in any way?	No, we view that the attribution provision in section 13 should not be retained as it may be too simplistic, rigid and not exhaustive enough to deal with evolving technologies. We also feel that the normal contract rules should be sufficient to address the issues arising so there is no need for legislative interference that may only serve to confuse the issue.

Part 5 Time and Place of Despatch and Receipt (Section 15 of the ETA)

Ref.	Question	Comments
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?	Article 10 of the draft Convention should be adopted, as it sets out the principle, rather than the mode in the current section 15, particularly for "receipt". The former approach is preferable as it allows flexibility for any future change in technology.
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?	Yes, there is no harm in having a general clarificatory definition of "information system", perhaps phrased in inclusive language to allow flexibility for future technology change. It may also be helpful to include examples of "information system" as the term should be clear.

Part 6 Automated Information Systems

Ref.	Question	Comments
Q15	Should the ETA adopt a definition of "automated information system" from the draft UNCITRAL Convention?	Yes, if the provision in Q16 is adopted.
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?	Yes, such a provision will be helpful to remove any doubts about the validity of such contracts.

Ref.	Question	Comments
Q17	Can you suggest any means of resolving the issue of conflicting terms in contracts concluded by automated information systems?	M1 views that this issue is best left to normal contract rules. For example, a party designing the automated system is akin to a party seeking to impose standard form contracts on the other party. If the designer of the automated system does not anticipate certain non-standard terms and conflicting clauses to arise in the conclusion of the order, then any ambiguity may be resolved against the designer.
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?	Please refer to the comments for Q12. It is proposed that the attribution provision be removed.
Q19	Should the ETA contain a provision requiring a party offering goods and 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?	Yes, this would be helpful and fair.
Q20	Should the ETA provide for the legal effect of a "single keystroke error"? If yes, please suggest the terms of such a provision.	Yes, the proposed Canadian-inspired provision in paragraph 6.5.4 would be helpful.

Part 7 Other Contract Issues

Ref.	Question	Comments
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.	Yes, a 'for the avoidance of doubt' statement may be inserted for clarity's sake.
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.	No, this is not necessary.
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, this can be explored at a later stage when and if there is scope in practice for actual application of the provision. If a rare case needing "originals" does arise, as per paragraph 7.2.6, it may be preferable to leave the private parties to agree on the acceptability of electronic equivalents if they so desire.

Ref.	Question	Comments
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.	Yes, we would like to highlight a problem concerning software contracts. The electronic environment does breed an unhealthy environment where the developer of a mass-market software enjoys an unusually strong bargaining position and is often free to impose many onerous terms on the other party with a "take it or leave it" stance, especially in a shrink-wrap or click-wrap type of licence or when they do not have to deal directly with the other party but through the local distribution agent of the software. This occurs not only to individual licensees but to commercial entity licensees who will find it even more difficult to rely on the Unfair Contract Terms Act for protection. In particular, there are 2 common forms of all-encompassing exclusions that need to be addressed, namely an exclusion of all warranties (including *non-infringement*) and an exclusion of all damages (including *direct* damages). If upheld, these clauses mean that the software licensor enjoys the benefit of collecting licensing royalties without the attendant legal burden on a supplier to at least provide, respectively, a basic intellectual property warranty/indemnity for its title or licensing right and a monetary recourse (eg. money-back) for the licensee. While there may be a common caveat that the provisions apply only to the extent permitted by local laws, the onus is still on the licensee to challenge the provisions. It is opined that the current Unfair Contract Terms Act and other relevant legislation that seeks to ameliorate inequitable contractual situations need to be strengthened to specifically protect the consumer or purchaser of such software licences. Any enactment meant to protect the consumer or purchaser should also be made mandatory and not excludable by contract, for that would defeat its purpose. For example, this has proven to be the experience with the Contracts (Rights of Third Parties) Act 2001 where parties now commonly include a provision to exclude its application.