15 March 2004

Dear Charles

JOINT IDA-AGC REVIEW OF ELECTRONIC TRANSACTIONS ACT – CONSULTATION PAPER, STAGE I: ELECTRONIC CONTRACTING ISSUES

Introduction

We refer to the above Consultation Paper (hereafter "the Paper"). What follows are views from both myself and Associate Professor Mary Wong. However, owing to the scope of the Paper and the short timeframe, we found ourselves unable to respond to each and every question. We therefore offer our views on what appear to us to be the more significant issues.

Our response is organized along the following lines. We commence by setting out our views on important *general* issues, followed by views on the more specific issues. We conclude by offering some observations on certain of the "Other Issues" in current electronic contracting law and practice outlined in the final part of the Paper.

General

The Draft Convention was first discussed by the UNCITRAL Working Group on Electronic Commerce in 2001. Since then, the draft text has undergone several revisions and in its current draft form retains a considerable number of variants and issues upon which members of the Working Group have yet to agree or resolve. Although the Consultation Paper states that work on the Draft Convention is "in its final stages", it appears difficult to predict (at this time) what the final form or scope of the Draft Convention will be with a sufficient degree of precision.

We agree with the Paper's stated expectation that, should a Convention be adopted and acceded to by Singapore, the ETA will have to be amended for consistency. The issues and questions outlined in the Paper seem to us to demonstrate the Government's commitment to the facilitation of e-commerce, the harmonization and clarity of the applicable law thereto, and the specific issues that may need to be addressed should the Convention be finalized and adopted. In light of this, therefore, highlighting these issues for continuing public discussion and feedback is an important step. However, except in those instances where the ETA has been either demonstrated or perceived (eg, through industry feedback) as unclear, out of date or difficult to apply in practice, we believe generally that any concrete proposal to amend specific provisions of the ETA may be premature.

This is so particularly because there are parts of the Paper which attempt to arrive at a conclusion on issues that are still in the process of being discussed by the

UNCITRAL Working Group on Electronic Commerce (for example, Part 5 of the Paper entitled "Time and Place of Despatch and Receipt (Section 15 of the ETA)", covering **Questions 13 and 14**). We are of the view that it would be preferable to make concrete recommendations on such issues only when concluded views have been arrived at by the Working Group. Even if views were presently proffered and recommendations subsequently arrived at, they would need to be re-evaluated after the Working Group has given its views. Needless to say, we therefore have, with some exceptions, not expressed specific views on many of these issues (at least not in the form of specific recommendations).

As a matter of conceptual starting-points, it also seems to us that policy-makers should decide whether or not the *substantive* law of contract ought – or ought not – to be impacted in the first instance. The original philosophy behind the Model Law (on which the ETA was based) was to avoid such an impact. But if this is the case, then many issues ought then to be left to the general law of contract and – to that extent – should not be dealt with legislatively at all. We are, however, of the view that in certain selected areas (for example, whether the general rule or the postal acceptance rule should apply), an exception ought to be made and a position taken legislatively. It is true, though, that in many other areas, the issues concerned are best dealt with under general law (prominent examples are the issues raised in Part 7 (covering **Questions 21-24)** of the Paper entitled "Other Contract Issues" as well as many issues raised in paragraph 6.4.1 *et seq* (covering **Questions 18-20**)). Indeed, we are of the view that legislative intervention should take place only where the facts (whilst always important) are less crucial and/or it is appropriate to state the law in a more general and concise fashion. We should also add that such instances would also encompass situations where the law is fairly well-established. Looked at in this light, many of the issues raised in the Paper would militate *against* legislative intervention (and see the instances just cited above). This would be no bad thing, in our view, as the general approach also appears to be to bring the principles of general law for domestic contracts into line with those for (international) contracts governed by the ETA (see paragraph 1.5 of the Paper): in particular, the general rules of Singapore contract law have worked well and might not require the amendments or modifications that would ensue if the ETA were amended to any significant extent. In other words, if amendments to the existing domestic (Singapore) law of contract are necessary in order to be consistent with any amendments effected to the ETA, then, given the smooth operation as well as flexibility of the former, *minimal* amendments should – on principle – be effected to the latter (ie, the ETA).

We summarize here the arguments for and against UNCITRAL's adopting a Convention on electronic contracting, in the hope that it will prove a useful context and reference point for further discussion.

Reasons that have been proffered in support of a Convention include the following:

(1) the success of the 1996 Model Law on E-Commerce in influencing fairly harmonized e-commerce legislation illustrates the usefulness of uniform rules in specific e-commerce transactions such as electronic contracts ("e-contracts");

(2) the Model Law did not, however, address all issues and aspects that arise in e-contracting, including those creating uncertainties for business practice;
(3) a Convention may have a greater influence and effect on some UN member states (over and above a Model Law, which, even if adopted, may be with varying degrees of uniformity); and
(4) a Convention may also be the most appropriate and/or efficient means to update and modernize other international conventions and texts for the electronic environment.

Reservations that have been expressed about adopting a Convention include the following:

(1) inconsistencies between the Convention and the earlier UNCITRAL Model Law on Electronic Commerce could prove confusing;
(2) overlaps between the Convention and the Model Law could render the Convention unnecessary;
(3) difficult issues could arise as regards conflict, overlap and/or matters covered under existing conventions such as the UN Convention on Contracts for the International Sale of Goods (CISG);[1]
(4) a Convention would add to the growing number of international instruments and texts on similar issues, hence possibly complicating harmonization;
(5) generally, it is unclear whether (if such an instrument were to be adopted) it should take the form of a Convention or another Model Law;[2]
(6) specifically, conceptual and practical difficulties can arise regarding the line to be drawn between broadly clarifying that the traditional rules on contract formation apply to electronic contracts and pronouncing on substantive matters of contract law;[3] and
(7) it may not be appropriate or possible to carve out or agree on specific areas – whether because they impinge on national laws or politically sensitive policies (such as consumer protection, consent issues and excluded contracts) – in a Convention.

Where Singapore law other than the ETA is concerned, certain unresolved issues with the Draft Convention could also be relevant: for example, the outcome of the discussions on whether and how to deal with consumer protection laws, and on the exclusion of contracts dealing with intellectual property rights. Where consumer protection is concerned, the recently-passed Consumer Protection (Fair Trading) Act will now have to be considered, in part because it contains provisions that impact on contracts within its ambit.[4] Where contracts relating to intellectual property rights are concerned, in particular as regards licensing of intellectual property, the latest proposed text of the Draft Convention notes that the Working Group has yet to agree on whether or not to

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[1] The CISG was a primary basis for the initial draft Convention.

[2] As in the earlier texts issued by UNCITRAL Working Group for E-Commerce, *viz*, the Model Law for E-Commerce (1996) and for Electronic Signatures (2001).

[3] Which, traditionally, have been matters largely for domestic legislation.

[4] Eg, in Section 3, where the Act will apply if the offer or acceptance relating to the consumer transaction is made in or sent from Singapore.

exclude such contracts from the scope of the Convention (and that the World Intellectual Property Organization sees no need for an exclusion). In this context, the controversy surrounding the promulgation of the Uniform Computer Information Transactions Act (UCITA) by the National Conference of Commissioners for Uniform State Laws (NCCUSL) in the United States should be noted.

Specific Selected Issues

(1) Consent to Accept Electronic Communications

In response to **Question 1**, we wonder whether what is proposed under Article 8, paragraph 2 of the draft Convention already exists under the general law. If so, we do not think it necessary to incorporate a consent provision similar to this Article in the ETA. As pointed out in the Paper, not all consent provisions in electronic transaction legislation are alike. Further, there may be a need for more specific or broad consent provisions in certain transactions or contexts (eg, consumer protection policy or requirements, such as those found in E-SIGN or UETA[5] in the United States, or the EU Electronic Commerce Directive).

(2) Variation (Section 5 of the ETA)

In response to **Question 3,** we also agree with the proposal in paragraph 2.4.7 of the Paper for the reasons stated therein.

In response to **Questions 4 and 5**, whilst we agree with the proposal in paragraph 2.3.2 of the Paper, we do not agree with the specific mechanism embodied within paragraphs 2.5.2 and 2.5.4 of the Paper simply because the reasons given do not appear sufficiently persuasive to warrant such an approach.

In response to **Question 6**, we are of the view that there should be both a general consent provision as well as a provision for variation (in section 5) for the reasons stated in paragraph 2.5.5.

(3) Electronic Signatures (response to Questions 7 and 8)

We note that Art 9 of the Draft Convention could potentially be wider in scope than the current Section 8(2) of the ETA. This is because, while Art 9 introduces a reliability requirement, it does not limit the form of signature to electronic signatures only (though this is a "method" that would generally be included in the concept described in Art 9). At the same time, however, while Section 8 of the ETA deals only with electronic signatures and proof thereof, besides not mandating reliability as a separate requirement, it also does not limit the ways in which an electronic signature can be proved. To the extent, therefore, that reliability is deemed a desirable characteristic of an electronic signature (or indeed of any other method of indicating or proving a "signature"), and yet

[5] The federal Electronic Signatures in Global and National Commerce Act of 2000 and the model state law known as the Uniform Electronic Transactions Act promulgated in 1999, respectively.

flexibility in the matter of its proof is to be retained, it may be more appropriate to introduce the concept of reliability into the definition of "electronic signature" rather than the proof/form requirement in Section 8.

It may be useful to note, however, that the notion of reliability is not universally provided for in other national laws, eg, Canada and the United States. It does not appear to us to be necessary to introduce this concept into provisions regarding form requirements, in particular where such provisions are concerned with a particular method or form that is already defined elsewhere (ie, an "electronic signature"). In addition, the ETA as a "two-tier" system contains the additional concept of "secure electronic signatures". This is not expressly contemplated by the Draft Convention, which could explain the broad acceptance of a variety of methods that can satisfy form requirements in Art 9. As acknowledged in the Paper, a secure electronic signature implies a certain measure of reliability, and it is consistent with the principle of party autonomy that parties seeking such reliability could use secure electronic signatures and records in their transactions. This would thus militate against introducing an additional element of reliability into the definition of "electronic signature" or any provision relating to form or proof.

Given that the issue of electronic signatures will be more fully canvassed at a subsequent stage of public consultation, we do not propose to delve into the general concept in any great detail. We agree with the note in the Paper that a question could arise as to whether or not limiting the definition of "electronic signature" to the functions of either approving or authenticating an electronic record. In light of this and our previous observations, we would be cautious of proposing any change to the definition of an "electronic signature" at this point.

There may be an issue as regards the meaning of, or perhaps more accurately, the distinction between, the terms "approving" and "authenticating" in the current ETA definition of an electronic signature (in relation to the signatory's intention when executing or adopting the electronic signature). While this wording is less restrictive than similar legislation elsewhere that expressly equates the signatory's intent to signing the record, it is also not identical to the definition in either the Draft Convention or the 2001 UNCITRAL Model Law on Electronic Signatures.[6] Any proposed changes to the ETA's definition of an "electronic signature" ought therefore to take these other points into consideration.

(4) Formation and Validity of Contracts – The General Rule or The Postal Acceptance Rule?

In response to **Question 9**, we are of the view that there is no reason in principle why a definite position ought not to be taken as to whether or not the general rule or the postal acceptance rule should apply. There are arguments both for and against each

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[6] Which defines an "electronic signature" as data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message" (see Art 2(a)).

position but it would conduce to (especially) commercial certainty if a definite position were taken. If so, the ultimate decision arrived at would, presumably, be a policy decision. In this regard, if a default rule is laid down in the ETA, an opt-out regime might represent the preferable approach.

It is admitted, though, that while there is the problem of uncertainty, the current approach to electronic offers and acceptances under the ETA has the benefit of not prescribing a substantive rule of contract formation specifically for the electronic context (and leaving such formulations to the common law or other, more general or appropriate, laws). An additional advantage of the current approach is that legal analysis of the effect of a particular act or action is performed in a similar way to traditional or paper-based transactions (ie, based on the actual facts, methods of communication used, parties' conduct and so on). The creation of dual regimes for electronic and paper-based contracts and transactions could also lead to uncertainty, including where there is an opt-out regime, or if parties can vary the application of the statute (both are possible exceptions that accord with the principle of party autonomy).

A comprehensive and concise attempt to codify specific and complex rules can therefore be difficult. Besides the possibility of permitting opting-out, a default rule can also be considered. Such a default rule can be one that can be either varied by the parties' agreement or rendered inapplicable by the parties' intentions as evidenced by their conduct (in the latter case, it would be somewhat similar to the proposal regarding interpreting consent through conduct). The first-mentioned default rule could, however, be problematic in consumer contracts and mass-market transactions. The latter default rule would in some cases lead back to the approach already enshrined in the common law, *viz*, attribution and interpretation based on the parties' conduct. We mention these various factors and considerations to emphasise that, although (as we suggest) it seems preferable to have a default rule in this regard for electronic transactions, there are benefits to the retention of the present legal regime which exists under the general law.

(5) Invitation to Make Offers

In response to **Question 10**, we do not think that it would make any difference to effect the proposed amendment to the ETA simply because the proposed amendment itself merely restates the present law which would therefore apply in any event. However, to the extent that the proposed amendment would reflect the language of the former Art 12 (now Art 11 in the new revised draft), it is not without problems, eg, it is not clear what "generally accessible" (in relation to the use of an "information system") is – the 1996 Model Law uses the word "accessible", as does the ETA, in relation to the retention and retrieval of electronic records and information. Further, the phrase "a proposal to conclude a contract" is fairly vague; eg, it is not clear that a merchant who mass e-mails electronic images of goods that he sells (and that he may be prepared to sell online) is thereby making "a proposal to conclude a contract … through … [a] data message". A technical, but potentially significant, additional point is that the current wording of Art 12 seems to envisage website screen displays as encompassed within the meaning of the phrase "data message."

In addition, there may be a distinction – probably already present the case in terms of perception and/or practice – between online auctions and other online contractual transactions. The example of online auction provider eBay comes to mind (http://www.ebay.com). Many eBay listings carry a notice to the effect that "a bid is a contract", where a bid is placed by a potential buyer against an item listed for sale. In the traditional "offer and acceptance" analysis, whether or not the listing is therefore an offer and the bid an acceptance will depend a great deal on the parties' intentions. The words and description of the listing will be highly relevant to the analysis. It should be noted, however, that the auction process means that a higher bid may "cancel out" an earlier, lower bid. This fact complicates a simple "offer and acceptance" analysis, which in the absence of contra-indications, could in some cases mean, *prima facie*, that the seller is bound to sell the item to the first bidder!

Such complications aside, the eBay example illustrates both the uncertainty and lack of uniformity in result of not having a standard (or even a default) rule for online transactions.[7] Yet, it illustrates also the problem of adopting a "one size fits all" standard or default rule for all online contracts.

In summary, the adoption of default or standard rule for electronic contracts (or contracts concluded by electronic means) would provide some certainty and in the case of Singapore, language similar to that of Art 12 would not change the law of contract formation. Such a rule could also encourage parties to spell out more clearly if they intend to be bound by the proposal they are making. However, difficulties can arise with respect to the precision, clarity and scope of the language to be used in crafting such a rule.

(6) Attribution (Section 13 of the ETA)

In response to **Question 12**, we are of the view that the attribution provision in section 13 ought to be retained without amendment on the basis that assumption of responsibility must, in the final analysis, fall upon someone.

(7) Implications in Adopting Art 10 of the Draft Convention

In response to **Question 13**, we offer the following additional comments on Art 10 of the Draft Convention.

Art 10(1) includes a default rule covering situations where the data message has not entered an information system outside the sender's control (or, in the alternative formulation, where it has not left an information system within the sender's control). This default rule is that the message is then dispatched when it is received. Besides constituting an additional concept to the principle of dispatch (which is currently absent

[7] Notably, while eBay has some fairly comprehensive policies in place (eg, as regards retracting a bid), it does not purport to be the arbiter of whether and when a contract is formed in any one bidding situation.

also in the ETA), this default rule also links this subsection to the issue of time of receipt (dealt with in Art 10(2) of the Draft Convention.) A curious consequence of the default rule may be noted here, *viz*, it creates a link between the time of dispatch and receipt, although by Art 10(3) the place of each, respectively, can be deemed to be different.

It is helpful that the phrase "capable of being retrieved" in Art 10(2) is clarified by a presumption (ie, that this occurs when the message enters an information system of the addressee). The existing ETA provisions on time of receipt implicitly presume that entry of an electronic record either into a designated information system or a non-designated information system of the addressee's renders it capable of being retrieved. The existing ETA provisions thus are specific, if narrower, applications of the concept outlined in Art 10(2).

It appears to us that the ETA provisions, while somewhat complicated, serve to provide a useful element of certainty to transacting parties. They also enable parties to determine, based on knowledge of the consequences of their actions and/or of the nature of their information systems, which method of communication best serves the transaction, and to designate such methods and systems that provide the most certainty of communication. As such, any changes to Section 15 should be carefully considered, possibly only after further clarity on the outcome of Art 10 of the Draft Convention is obtained.

(8) Definition of "Information System"

In response to **Question 14**, we agree that the flexibility provided by the lack of definition of "information system" in the ETA is desirable, particularly if there has been no feedback or indications that this has caused any disputes or uncertainty. We wish therefore only to note the fact that the US model state law on electronic transactions (UETA) does in fact have a definition of an "information processing system",[8] in terms generally similar to that for "information system" in Art 5(e) of the Draft Convention and the 1996 Model Law (although the federally enacted E-SIGN does not).[9]

(9) Automated Information Systems – Contractual Intention

In response to **Question 16**, although it is very true that the general proposal in paragraph 6.2.5 of the Paper would not address all the various issues related to the use of automated information systems (see paragraph 6.2.6), we see no objection in principle to including such a general provision proposed in the ETA.

(10) Incorporation Issues

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[8] As meaning "an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information."

[9] UETA, E-SIGN and our ETA do, however, contain very similar definitions for the word "information" where the Draft Convention does not.

In response to **Questions 21 and 22**, we do not believe that adding a provision along the lines of Art 5*bis* of the Model Law would be helpful, in large part because the common law rules on incorporation are well-established, and in part also because there also seems to be a well-established acceptance of similar methods of incorporation in paper-based contracts.

We agree with the note in the Paper that some slight alteration of the rules of reasonable notice may be necessary as a result of the use of Internet websites. However, given the variety of methods of electronic contracting and communications, and the possible combinations of electronic and non-electronic documents and transmissions, we also do not think it is helpful to attempt to elucidate specific rules for specific circumstances, not least because this could lead to the possibility of uncertainty in those circumstances (whether currently anticipated or not) that are not expressly dealt with.

Final Observations

We conclude this response with some thoughts on a few of the issues highlighted in **Paragraph 7.3** and **Question 24** of the Paper.

(1) "Clickwrap" and "Shrinkwrap" Contracts

In addition to these two types of contracts, there is also at least one other form of contract which electronic contracting laws could affect, *viz*, the "browsewrap" contract.[10] There has been at least one case in the United States that has considered the validity of a "browsewrap".[11] With regard to the relatively longer line of US cases on "shrinkwraps" and "clickwraps", it remains difficult to state conclusively that their validity under US law has been definitively settled. In the United Kingdom, there has been one case on "shrinkwrap" contracts,[12] although to our knowledge, there has not been a case decided in either Australia or Singapore on the validity of these forms of contracts.

It seems fair, however, to say that those courts that have been faced with these contracts have been attempting to apply traditional concepts of contract formation to them, with varying results. To the extent, therefore, that it is deemed undesirable and/or unnecessary to draw a line between contracts concluded by electronic means and those that are not, it seems to us to be unnecessary for the legislators to step in at this point, at least insofar as the legislative means would be via amendments to the ETA, which

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[10] A "browsewrap" contract is one where the contractual terms are made available on a website and which purport to bind the website user, commonly without the need for the user to intimate acceptance thereof through, e.g., a mouse-click (unlike a "clickwrap" contract.) A "browsewrap" is thus somewhere in between a "clickwrap" contract and a "shrinkwrap" contract in that where the former usually requires some act on the user's part, what constitutes a valid acceptance in the latter can arise through more passive means, eg, the user's retaining, installing and running the software product that is subject to the contract.

[11] *Specht et al v Netscape Communications Corporation*, Docket Nos. 01-7860 (L), 01—7870 (CON), 01-7872 (CON.)

[12] *Beta Computers (Europe) Ltd. v Adobe Systems (Europe) Ltd.,* [1996] SLT 604, (1996) 35 IPR 147, [1996] FSR 367.

heretofore has been a fairly minimalist law that avoids changing or carving out legal rules for the electronic environment.

(2) Software as "goods" or "services"

The issue of categorizing software and digitized products as either "goods" and "services" has also arisen in the United States, where the Uniform Commercial Code (UCC) is the primary law governing commercial contracts, including the sale of goods. The lack of uniformity in the application of the UCC's provisions in various "shrinkwrap" cases illustrate the difficulty which the US courts have had in this regard, since there is currently no indication in the UCC of the appropriate categorization.

It is therefore open to Singapore to decide to resolve this issue in the context of the Sale of Goods Act, which would be a more appropriate framework for the matter than the ETA. The difficulties with doing so are beyond the scope of this submission, however.

(3) UCITA and "mass market licenses"

As the Paper points out, consumer protection issues often arise with the proliferation of standard term contracts and mass market transactions. While this is not a phenomenon new to electronic forms of contracting, it seems undeniable that increasing reliance by sellers, licensors and others on contracts such as "shrinkwraps", "clickwraps" and "browsewraps" means an increasing imposition of non-negotiable, standard terms on buyers and licensees (which are not always limited to consumers). The fact that the Uniform Computer Information Transactions Act (UCITA) – a model (US) state law – was promulgated by NCCUSL is itself an indication of the growing importance and widespread adoption of these contracts.

UCITA contains provisions that impact (in some cases fairly significantly) on several aspects of substantive contract law, from assent to terms and a right of return to the issue of contractual warranties. In general, UCITA validates a number of electronic contracting practices in the "information transaction" industry. However, it is now extremely unlikely that UCITA will become law in more US states, in part because NCCUSL has determined it will no longer attempt to encourage the adoption of UCITA in more states.[13] As such, it is open to both US law and the legislatures in other countries (including Singapore) to consider the proposals contained in UCITA carefully, and determine if and how the issues it deals with can (or should) be resolved.

Conclusion

We hope that you will find the above comments and suggestions of interest and/or use.

[13] This can be seen in the discharge of NCCUSL's Standby Committee on UCITA in July 2003.

With warmest regards and all best wishes.

Yours sincerely

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