Our Ref: LS/65/04/CSY/sba Your Ref: AG/LRRD/23/2000/5

THE LAW SOCIETY
OF SINGAPORE

39 South Bridge Road
Singapore 058673
Tel: 6538 2500
Fax: 6533 5700
Email: lawsoc@lawsoc.org.sg
Website: www.lawsociety.org.sg

20 April 2004

Mrs Joyce Chao
State Counsel
Law Reform & Revision Division
Attorney-General's Chambers
1 Coleman Street #10-00
Singapore 179803

Dear Mrs. Chao

Public Consultation on Electronic Contracting Issues

I refer to your letter of 15 March 2004 addressed to Ms Yasho Dhoraisingam, Chief Executive Officer.

I enclose for your consideration the comments from the Law Society's Corporate Practice Committee on the issues raised in the public consultation paper.

The Law Society has no objections to our comments being made public on the IDA website.

Please contact me at 65300 235(DID) or via email at <chu_sooi_yoon@lawsoc.org.sg> if you need any further information or clarification.

Yours sincerely

Chu Sooi Yoon (Ms)
Director, Practice Standards

Enc./

c.c. Council
c.c. Corporate Practice Committee

PRIVATE & CONFIDENTIAL
14 April 2004

LAW SOCIETY'S COMMENTS ON JOINT IDA-AGC PUBLIC CONSULTATION ON ELECTRONIC TRANSACTIONS ACT ("ETA") STAGE 1: ELECTRONIC CONTRACTING ISSUES

THE LAW SOCIETY
OF SINGAPORE

LAW SOCIETY'S COMMENTS ON JOINT IDA-AGC PUBLIC CONSULTATION ON ELECTRONIC TRANSACTIONS ACT ("ETA")
STAGE 1: ELECTRONIC CONTRACTING ISSUES

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?**

A1 Yes. This would provide for party autonomy and provide individuals with the same degree of protection afforded to the government in section 47(3) of the ETA.

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)

A2 Yes on both counts. This would allow individuals to decide the terms of their contract (and would be consistent with section 5 of the ETA) and to impose a regime with a higher standard of protection than the present one. As contracting parties, they would be in the best position to decide this.

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)**

A3 The provisions of the ETA represent a minimum standard of protection for users (particularly small consumers) which Parliament, in their discussions on the ETA were keenly aware of. It would not be consistent with this to allow for a lower standard to creep in, particularly given that this would allow large corporations with standard forms to impose unfair conditions on consumers. The internet is especially ill-suited to contract negotiation in such situations and to allow one party to in effect unilaterally impose lower standards of protection on another may undermine long-established rules governing the special position of written documents.

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)**

A4 No. It would not be helpful to draft specific provisions given the unpredictable nature of technological change. Such provisions may find themselves made redundant or causing unintended and unwanted consequences due to unforeseen circumstances.

Q5. **If Section 5 is retained, should it be amended to adopt the language of inconsistency[1] rather than making reference to a right to vary provisions of the ETA? (See paragraph 2.5.2)**

A5 The suggestion to adopt the "language of inconsistency" may itself create a conceptual difficulty whereby there could be a risk that parallel or collateral contracts would be created in the sense that relations between the parties may be governed by the actual concluded contract as well as the residual terms contained in the ETA.

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)?**

[1] i.e. that the provisions of the ETA shall apply to the extent that they are not inconsistent with any relevant agreement.

A6 Yes. The consent provisions are not redundant by reason of duplication and allow for greater flexibility in the application of the ETA.

Q7. **Should the ETA be amended to adopt the provision of article 9 of the draft UNCITRAL Convention on the recognition of electronic signatures?**

A7 Yes. Article 9 imposes minimum standards of reliability and proof in relation to electronic signatures which the ETA does not. This affords users a greater degree of protection and assurance.

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.**

A8 No. The definition of electronic signature is sufficiently wide to cover existing situations.

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.**

A9 No. The provisions of the ETA relating to this have never been tested (unlike the rules of offer and acceptance in non-electronic situations which have established rules and a limited range of circumstances). At this stage, it is likely that contracting parties are in the best position to determine their own arrangements for offer and acceptance.

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?**

A10 Conceptually, there is no real difference between such offers and your typical unilateral offer in the sense of the Carbolic Smoke case. Accordingly, given the undesirability of creating a dichotomy of regimes relating to electronic and non-electronic contracts, such a proposal should not be adopted. In any event, given the prevalence of statements that such "offers" are not to be considered binding, it appears that this proposal is moot.

Q11. **Should references to "declaration, demand, notice or request" be added to section 12 of the ETA for consistency with the UNCITRAL draft Convention?**

A11 Yes. This would create consistency with the ETA and UNCITRAL.

Q12. **Should the attribution provision in section 13 be retained? If section 13 is retained, should it be amended in any way?**
(See also amendments to section 13 discussed in paragraphs 4.4.6 to 4.4.9. below)

A12 Yes. It provides protection to both parties and creates a degree of certainty which is essential to the smooth flow of commerce.

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)**

A13

The provisions governing receipt of a data message ignore situations when the data message is capable of being retrieved but is unlikely to be retrieved on account of time (i.e. the data message was received after office hours or the addressee is not able to remote access his messages). There could also be other technological advances whereby emails could be 'hijacked' or an information system badly spammed or subjected to virus attack causing a loss in the email either in the despatch or receipt processes.

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?**

A14 No. The initial reason a definition was not set forth was the uncertainty over the range of types of information systems. This uncertainty is even more pronounced now.

Q15. **Should the ETA adopt the definition of "automated information system" from the draft UNCITRAL Convention? (See paragraph 6.1.2)**

A15 No. The range of automate information systems is also too wide as to be amenable to meaningful definition.

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)**

A16 Yes. This will inject certainty into the transaction process. Conceptually the automated information system could be compared to a specific mandate given to an agent to conclude contracts. Provided the conditions in the draft are met, the contract should be valid. If the automated information system exceeds its authority in situations where the other party is not aware of the same, the risk should be borne by the controller of the automated information system and not the other person.

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)**

A17 Yes – the operator of the automated information system should bear the risk as the system is under his control.

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?**

A18 Yes. Conceptually, there is no difference between a contracting party and one who chooses to delegate his power to contract to an automated system. It would not be useful to make such provisions as the potential range of situations would be too wide to enumerate or to cater for within the legislation.

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)**

A19 Yes. Additional safeguards should be put in place. It is paramount for a user of an automated information system to identify and correct errors.

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 6.4.5)**

A20 The provisions under the Canadian legislation (in paragraph 6.5.4) providing for the unenforceability of such a "single keystroke error" are reasonable and should be followed. There is no necessity to re-invent our own legislation.

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)**

A21

No. Such a provision is unnecessary for the reasons contained in paragraph 7.1.6

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)**

A22 No. The possible permutations are too wide and given the fact that the provisions of the ETA have not as yet been tested judicially, it would not be practical to do so.

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?**

A23 No. At this stage of electronic commerce development and with the ever changing technological landscape, commercial parties should be left to decide their own rules in a manner that is most efficient.

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.**

A24 For the avoidance of doubt, it should be made clear that UCTA and Contracts (Rights of Third Parties) Act apply to electronic contracts.

****