

LEGISLATIVE COUNCIL BRIEF

Electronic Transactions Ordinance (Chapter 553)

ELECTRONIC TRANSACTIONS (AMENDMENT) BILL 2003

INTRODUCTION

A At the meeting of the Executive Council on 3 June 2003, the Council ADVISED and the Chief Executive ORDERED that the Electronic Transactions (Amendment) Bill 2003 (the Bill), at **Annex A**, should be introduced into the Legislative Council, to update and improve the Electronic Transactions Ordinance (the Ordinance) in order to facilitate the use of electronic transactions.

JUSTIFICATIONS

Background

2. The Ordinance, enacted on 5 January 2000, aims to provide a clear legal framework for the conduct of electronic transactions by giving electronic record and digital signature the same legal recognition as that of their paper-based counterparts. It also establishes a voluntary recognition scheme for certification authorities (CAs), which enhances public confidence in the adoption of electronic transactions. We have committed to the Legislative Council to conduct a review of the Ordinance 18 months after its enactment, in the light of operating experience, international e-business development and technological advancement, to ensure that Hong Kong has the most up-to-date legal

framework for the conduct of e-business.

3. Following an internal review within the Government to seek the views of individual bureaux and departments on the implementation of the Ordinance, we conducted a public consultation from March to April 2002 to consult the public on a set of proposals to improve and update the Ordinance. After considering the views received during the public consultation, we have formulated a package of proposed amendments to the Ordinance. Details of the proposed amendments are set out in paragraphs 4 to 11 below.

Signature Requirements

4. The Ordinance differentiates between two kinds of transactions, i.e. those that pertain to a requirement under a rule of law and those that pertain to a case of contract. In this context, the Ordinance stipulates specifically that digital signature¹ as a form of electronic signature² satisfies a signature requirement under a rule of law. Such an approach is therefore technology-specific. On the other hand, the Ordinance is silent on the technology to be used to generate electronic signature in the case of contract, if there is such signature in the electronic record. The common law position is that this is a matter to be determined by the parties concerned and implicitly, a technology neutral approach is adopted.

5. Our view is that we should as far as possible encourage a technology-neutral approach in promoting electronic transactions generally and in defining signature requirements specifically. The rationale is that such an accommodating approach would enable the legislative framework and future development of e-business within it to better keep pace with technological advancement, as well as provide a

¹ Digital signature is a secure form of electronic signature supported by public key infrastructure technology which is readily available in the market.

² Under the Ordinance, an electronic signature means any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted for the purpose of authenticating or approving the electronic record. Digital signature is one form of electronic signature.

wider range of options for satisfying signature requirements electronically.

6. However, a technology-specific approach based on digital signature should continue to apply to transactions with the Government under a rule of law. This is necessary and defensible. It provides for certainty and clarity to members of the public as to the form of electronic signature to be used for transactions with the Government. It will be cost-effective for Government departments to be equipped to deal with only one specified form of electronic signature. In other words, to maintain the status quo in transactions with the Government under a rule of law will be in the public interest.

7. To reflect the above approach, we propose to amend the Ordinance to clearly provide for the following:

- (a) for transactions under a rule of law involving Government entities, we will continue to require digital signature;
- (b) for all other cases, the signature requirement under law is met by any form of electronic signature, subject to certain conditions as to reliability and appropriateness in relation to specific circumstances and consent of parties concerned; and
- (c) in the case of contract, for the avoidance of doubt, if the contract contains a signature, the parties may use electronic signature.

This should make it clear to all parties concerned that we adopt a technology-neutral approach and all types of electronic signature are accepted except in the case of transactions with the Government, where only digital signature is accepted for practical reasons.

Legal Requirement of Serving Documents “by Post or in Person”

8. Some legislation at present contains references to or requirements of serving documents on the parties concerned by post or in person. These legal provisions were enacted at the time when electronic

transactions were not prevalent. In some cases, there are now no justifications to exclude the electronic means for serving the documents and such legal provisions have indeed become an impediment to electronic transactions and the implementation of e-Government.

9. Against this background, we seek to provide a new schedule in the Ordinance specifying, with qualifying conditions, the acceptance of electronic records satisfying the requirements in law of serving documents by post or in person. Initially we intend to include in the new schedule provisions which provide for serving notice, application or other documents by the Commissioner of Rating and Valuation and related parties under Part IV of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7), the Rating Ordinance (Cap. 116) and the Government Rent (Assessment and Collection) Ordinance (Cap. 515). The schedule will be expanded over time through an ongoing process of including relevant legal provisions on appropriate transactions.

Voluntary Recognition Scheme for Certification Authorities

10. Under the voluntary recognition scheme for CAs set up under the Ordinance, the Director of Information Technology Services (the Director) may grant recognition to CAs which provide a trustworthy service. A CA applying for recognition needs to engage an independent assessor approved by the Director to submit to him an assessment report on its compliance with the relevant provisions of the Ordinance and the Code of Practice for Recognized Certification Authorities (Code of Practice) published by the Director under the Ordinance. Recognized CAs also have to furnish to the Director an assessment report once every 12 months and when they apply for renewal of recognition. The relevant provisions in the Ordinance and the Code of Practice generally fall into two categories relating respectively to trustworthiness (e.g. system security, procedural safeguard and financial viability, etc.) and other operational aspects (e.g. the requirement to take care of the needs of persons with disabilities). There is also no provision in the Ordinance which allows the Director to require a recognized CA to furnish an assessment report when there are major changes to its operation in between two annual assessments. Such changes could have a bearing on suitability for recognition.

11. We propose to simplify the preparation of the assessment report so that the requirement to engage qualified and independent assessors only applies to the assessment of trustworthiness, whereas other operational aspects may be dealt with through a statutory declaration to be made by a responsible officer of the concerned CA. We also propose that the Director should be empowered to require a recognized CA to furnish an assessment report and/or a statutory declaration as appropriate if there are major changes to its operation between two annual assessments.

THE BILL

12. The main provisions of the Bill are as follows:

- (a) **Clause 3** provides for the service of a document in the form of an electronic record having the same effect as service by post or in person for the purposes of the provisions set out in the proposed Schedule 3 to the Ordinance (paragraph 9 above);
- (b) **Clause 4** sets out the signature requirements under a rule of law for transactions with the Government and between non-Government parties. In the case of the former, digital signature is stipulated. In the case of the latter, a technology-neutral approach without specifying the form of electronic signature to be used is provided for (paragraph 7(a) and (b) above);
- (c) **Clauses 6 and 7** transfer powers under the Ordinance technical in nature and with no policy implications from the Secretary for Commerce, Industry and Technology to the Permanent Secretary for Commerce, Industry and Technology (Communications and Technology)³;

³ The post of Permanent Secretary for Commerce, Industry and Technology (Information Technology and Broadcasting) will be retitled to Permanent Secretary for Commerce, Industry and Technology (Communications and Technology) upon the re-organisation of the Commerce, Industry and Technology Bureau on 1 July 2003.

- (d) **Clause 9** provides for certainty for the use of electronic signature in contract formation (paragraph 7(c) above);
- (e) **Clauses 10, 14 and 19** split the assessment reports required for recognition or renewal of recognition and annual assessments into two parts so that the first part concerning trustworthiness are prepared by a qualified and independent person, and the second part concerning other operational aspects are dealt with by a statutory declaration to be made by a responsible officer of the concerned CA (paragraph 11 above); and
- (f) **Clause 20** empowers the Director to require a recognized CA to furnish an assessment report prepared by a qualified and independent person and/or a statutory declaration as appropriate in the event of major changes to its operation (paragraph 11 above).

B The existing provisions being amended are at **Annex B**.

LEGISLATIVE TIMETABLE

13. The legislative timetable will be –

Publication in the Gazette	13 June 2003
First Reading and commencement of Second Reading debate	25 June 2003
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE BILL

14. The Bill is in conformity with the Basic Law, including the provisions concerning human rights. It will not affect the current binding effects of the Ordinance. It also has no financial or civil service implications, and no significant sustainability implications. We expect

that the Bill will have positive economic, productivity and environmental implications in the longer term as it will be conducive to wider adoption of paperless transactions and e-business which will in turn enhance productivity in various economic sectors and Hong Kong's overall competitiveness in the international market.

PUBLIC CONSULTATION

15. We conducted a public consultation in March and April 2002 on the review of the Ordinance. We received 40 submissions on the review. The views received are generally supportive and specific comments have been reflected in the Bill where appropriate.

16. We also briefed the Legislative Council Panel on Information Technology and Broadcasting and the Information Infrastructure Advisory Committee Working Group on Enabling Environment for IT Development in November 2002 on the major comments received during the public consultation and our proposals set out above. No adverse comments were received.

PUBLICITY

17. We will issue a press release. The Bill will also be posted on the website of the Commerce, Industry and Technology Bureau and other relevant websites. A spokesman will be available to answer public and media enquiries.

ENQUIRIES

18. For enquiries, please contact Miss Adeline Wong, Principal Assistant Secretary for Commerce, Industry and Technology (Information Technology and Broadcasting), at 2189 2207 or by facsimile at 2511 1458.

Information Technology and Broadcasting Branch
Commerce, Industry and Technology Bureau
11 June 2003