

HONG KONG COMMENTARY AND ANNOTATIONS LIBRARY

ELECTRONIC
TRANSACTIONS
ORDINANCE (CAP.553)
COMMENTARY AND ANNOTATIONS

Second Edition

Jason Gerber



SWEET & MAXWELL

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CAP 553: ELECTRONIC TRANSACTIONS ORDINANCE

Introduction

The Electronic Transactions Bill was introduced into the Legislative Council on 8 July 1999. According to the Legislative Council Brief on the Bill, the objective was to provide a clear legal framework giving electronic records and digital signatures the same legal recognition as that of their paper-based counterparts, thereby promoting and facilitating the development of e-commerce in Hong Kong. [ETO0.01]

To this end, the Ordinance was enacted on 5 January 2000 to facilitate the use of electronic transactions for commercial and other purposes, and to enable the Postmaster General to provide the services of a certification authority. It also establishes a voluntary framework for recognition of certification authorities operating in Hong Kong. [ETO0.02]

Whilst the policy objective is to promote the wider adoption of electronic transactions, it is recognized that certain types of transactions and procedures would preferably be conducted through conventional means for the time being because of their solemnity, significance, complexity or other factors. The following items are currently exempted from the operation of the relevant provisions in the Ordinance: wills and other testamentary documents, trusts, power of attorney, affidavits, statutory declarations, warrants, bills of exchange, and any documents or instruments concerning land or property transactions (a full list of exempted documents is specified in Sch.1 of the Ordinance). In addition, judicial proceedings will also be exempted from the operation of the relevant provisions in the Ordinance. When the courts and tribunals form the view that electronic information can be accepted in their proceedings in future, the relevant exemptions with respect to these proceedings can be withdrawn. [ETO0.03]

The Ordinance is said to adopt a minimalist regulatory approach that is technologically neutral. In spite of this, one of the most common criticisms of the Ordinance is that for transactions involving the Government, only one type of digital signature is approved, namely the public key-private key signature based on public key infrastructure (PKI), and hence, is not technologically neutral. The use of PKI is not widespread and e-commerce [ETO0.04]

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HONG KONG SPECIAL ADMINISTRATIVE REGION ORDINANCE NO. 14 OF 2004

TUNG Chee-hwa
Chief Executive
29 June 2004

An Ordinance to amend the Electronic Transactions Ordinance.

[30 June 2004]

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Electronic Transactions (Amendment) Ordinance 2004.

(2) This Ordinance shall come into operation on 30 June 2004.

2. Interpretation

Section 2(1) of the Electronic Transactions Ordinance (Cap. 553) is amended—

(a) by repealing the definition of “accept a certificate” and substituting—

““accept” (接受), in relation to a certificate—

(a) in the case of a person named or identified in the certificate as the person to whom the certificate is issued, means to—

- (i) confirm the accuracy of the information on the person as contained in the certificate;
- (ii) authorize the publication of the certificate to any other person or in a repository;
- (iii) use the certificate; or
- (iv) otherwise demonstrate the approval of the certificate; or

(b) in the case of a person to be named or identified in the certificate as the person to whom the certificate is issued, means to—

- (i) confirm the accuracy of the information on the person that is to be contained in the certificate;
- (ii) authorize the publication of the certificate to any other person or in a repository; or
- (iii) otherwise demonstrate the approval of the certificate;”;

(b) in paragraph (e) of the definition of “certificate”, by repealing “a responsible officer of”

- (c) in the definition of “code of practice”, by repealing “issued” and substituting “published”;
- (d) by repealing the definition of “issue” and substituting—
““issue” (發出), in relation to a certificate, means to—
(a) create the certificate, and then notify the person named or identified in the certificate as the person to whom the certificate is issued of the information on the person as contained in the certificate; or
(b) notify the person to be named or identified in the certificate as the person to whom the certificate is issued of the information on the person that is to be contained in the certificate, and then create the certificate, and then make the certificate available for use by the person.”;
- (e) by adding—
““consent” (同意), in relation to a person, includes consent that can be reasonably inferred from the conduct of the person;
“government entity” (政府單位) means a public officer or a public body;
“Permanent Secretary” (常任秘書長) means the Permanent Secretary for Commerce, Industry and Technology (Communications and Technology);”.

3. Matters to which sections 5, 5A, 6, 7, 8 and 17 are not applicable

Section 3 is amended—

- (a) by adding “5A,” after “5.”;
- (b) by adding—
“(aa) requirement or permission for a document to be served by personal service or by post.”.

4. Section added

The following is added—

“5A. Service of documents

(1) Without limiting the generality of section 5, if a rule of law under a provision set out in Schedule 3 requires a document to be served on a person by personal service or by post (whether or not there is any further specification as to the address or place at which such service is to be effected), the provision shall be construed as also providing that service of the document in the form of an electronic record to an information system

designated by the person satisfies the requirement under the provision if the information contained in the electronic record is accessible so as to be usable for subsequent reference.

(2) Without limiting the generality of section 5, if a rule of law under a provision set out in Schedule 3 permits a document to be served on a person by personal service or by post (whether or not there is any further specification as to the address or place at which such service is to be effected), the provision shall be construed as also providing that service of the document in the form of an electronic record to an information system designated by the person is permitted under the provision if the information contained in the electronic record is accessible so as to be usable for subsequent reference.”.

5. Electronic signatures, digital signatures, etc.

Section 6 is amended—

- (a) by repealing subsection (1) and substituting—
“(1) Where—

- (a) a rule of law requires the signature of a person (“the first mentioned person”) on a document or provides for certain consequences if the document is not signed by the first mentioned person; and
- (b) neither the first mentioned person nor the person to whom the signature is to be given (“the second mentioned person”) is or is acting on behalf of a government entity,
an electronic signature of the first mentioned person satisfies the requirement if—
- (c) the first mentioned person uses a method to attach the electronic signature to or logically associate the electronic signature with an electronic record for the purpose of identifying himself and indicating his authentication or approval of the information contained in the document in the form of the electronic record;
- (d) having regard to all the relevant circumstances, the method used is reliable, and is appropriate, for the purpose for which the information contained in the document is communicated; and
- (e) the second mentioned person consents to the use of the method by the first mentioned person.

(1A) Where—

- (a) a rule of law requires the signature of a person on a document or provides for certain consequences if the document is not signed by the person; and
- (b) either or both of the person mentioned in paragraph (a) and the person to whom the signature is to be given is or are or is or are acting on behalf of a government entity or government entities,
- (c) a digital signature of the person mentioned in paragraph (a) satisfies the requirement if the digital signature is—
 - (c) supported by a recognized certificate;
 - (d) generated within the validity of that certificate; and
 - (e) used in accordance with the terms of that certificate;
- (b) in subsection (2)—
 - (i) by repealing “(1)” and substituting “(1A)(d)”;
 - (ii) in paragraph (a), by adding “by the Director, and the certificate is not revoked or suspended by the recognized certification authority that issues the certificate” after “suspended”;
 - (iii) by adding—
 - “(aa) in the case of a recognized certificate that is a certificate designated as a recognized certificate issued by the recognized certification authority referred to in section 34, the designation is not withdrawn by the certification authority”;

6. Part heading amended

The heading to Part IV is amended by adding “5A,” after “5.”

7. Permanent Secretary may make orders excluding application of section 5, 6, 7 or 8, etc.

Section 11 is amended—

- (a) in subsection (1), by repealing “Secretary” and substituting “Permanent Secretary”;
- (b) in subsection (2)—
 - (i) by repealing “Secretary” and substituting “Permanent Secretary”;
 - (ii) by repealing “this Ordinance” and substituting “section 5, 5A, 6, 7 or 8”;

- (iii) in paragraph (a), by adding “or a document in the form of an electronic record is to be served” after “or retained”;

- (c) in subsection (3), by repealing “Secretary” and substituting “Permanent Secretary”.

8. Electronic record to comply with specified requirements to satisfy sections 5, 5A, 6, 7 and 8

Section 12 is amended—

- (a) by repealing “Secretary” and substituting “Permanent Secretary”;
- (b) by adding, “the document served” after “or retained”;
- (c) by adding “文件” after “該等資訊”.

9. Rules of court or procedure only to apply where relevant authority provides for application

Section 13 is amended—

- (a) in subsection (1) —
 - (i) by adding “5A,” after “5.”;
 - (ii) by adding, “documents served” after “or retained”;
- (b) in subsection (3)(a), by adding “5A,” after “5.”

10. Consent required for sections 5, 5A and 7 to apply to transactions between persons who are not government entities

Section 15 is amended—

- (a) by adding—
 - “(2A) If an Ordinance requires a document to be served by a person on another by personal service or by post and neither person is or is acting on behalf of a government entity, section 5A(1) applies only if the person on whom the document is to be served consents to it being served in the form of an electronic record.
 - (2B) If an Ordinance permits a document to be served by a person on another by personal service or by post and neither person is or is acting on behalf of a government entity, section 5A(2) applies only if the person on whom the document is to be served consents to it being served in the form of an electronic record.”;
- (b) by repealing subsections (3) and (5).

11. Formation and validity of electronic contracts

Section 17 is amended by adding—

“(2A) For the avoidance of doubt, it is declared that in the context of the formation of contracts, if an offer or the acceptance of an offer is in whole or in part expressed by means of an electronic record, an electronic signature attached to or logically associated with the electronic record shall not be denied legal effect on the sole ground that it is an electronic signature.”

12. Certification authority may apply to Director for recognition

Section 20 is amended—

- (a) in subsection (3)—
 - (i) in paragraph (a)—
 - (A) by repealing “and” at the end;
 - (B) by adding “提供” before “根”;
 - (ii) by repealing paragraph (b) and substituting—
- “(b) a report which—
 - (i) contains an assessment as to whether the applicant is capable of complying with such provisions of this Ordinance and of the code of practice as are specified in the code of practice for the purposes of this subparagraph; and
 - (ii) is made by a person approved by the Director as being qualified to make such a report; and
- (c) a statutory declaration which—
 - (i) states whether the applicant is capable of complying with such provisions of this Ordinance and of the code of practice as are specified in the code of practice for the purposes of this subparagraph; and
 - (ii) is made by a responsible officer of the applicant; and
 - (iii) by repealing “長提供” and substituting “長”;
- (b) by adding—

“(3A) Any report or statutory declaration required to be furnished under subsection (3) must be made at the expense of the applicant.”;
- (c) in subsection (4)(b), by adding “or statutory declaration” after “report”.

13. Director may on application recognize certification authorities

Section 21(4)(d) is repealed and the following substituted—

“(d) any report or statutory declaration furnished by the applicant under section 20(3);”.

14. Director may recognize certificates

Section 22(10) is amended by adding “as they apply to an application for recognition” after “subsection (9)”.

15. Matters Director may take into account in revoking or suspending a recognition

Section 25(c) is repealed and the following substituted—

“(c) any report or statutory declaration furnished by the certification authority under section 43(1) or 43A(1).”.

16. Director may renew recognition of certification authority

Section 27 is amended—

- (a) in subsection (4), by repealing everything after “renewal” and substituting “must be made in the prescribed manner and in a form specified by the Director.”;
- (b) by adding—

“(5A) An applicant must furnish to the Director—

 - (a) the relevant particulars and documents specified under section 30;
 - (b) a report which—
 - (i) contains an assessment as to whether the applicant is and is capable of complying with such provisions of this Ordinance and of the code of practice as are specified in the code of practice for the purposes of this subparagraph; and
 - (ii) is made by a person approved by the Director as being qualified to make such a report; and
- (c) a statutory declaration which—
 - (i) states whether the applicant is and is capable of complying with such provisions of this Ordinance and of the code of practice as are specified in the code of practice for the purposes of this subparagraph; and
 - (ii) is made by a responsible officer of the applicant.

(5B) Any report or statutory declaration required to be furnished under subsection (5A) must be made at the expense of the applicant.”;

(c) in subsection (6), by adding “or (5A)” after “(4)”;

(d) by adding—

“(6A) In determining an application for renewal, the Director shall, in addition to any other matter the Director considers relevant, take into account—

- (a) any matter set out in section 21(4)(a), (b), (c), (e) or (f) which applies to the application for renewal as it applies to an application for recognition, subject to necessary modifications; and
- (b) any report or statutory declaration furnished by the applicant under subsection (5A).

(6B) Where—

- (a) an applicant has furnished to the Director a report for the purpose of complying with the requirements referred to in section 43(1)(a) or 43A(1)(c); and
 - (b) the Director considers that had the report been furnished for the purpose of complying with the requirements referred to in subsection (5A)(b), it would have satisfied those requirements,
- the Director may accept the report, and the report shall, for all purposes, be regarded as a report that is furnished under subsection (5A)(b) and that satisfies the requirements referred to in that subsection.

(6C) Where—

- (a) an applicant has furnished to the Director a statutory declaration for the purpose of complying with the requirements referred to in section 43(1)(b) or 43A(1)(d); and
 - (b) the Director considers that had the statutory declaration been furnished for the purpose of complying with the requirements referred to in subsection (5A)(c), it would have satisfied those requirements,
- the Director may accept the statutory declaration, and the statutory declaration shall, for all purposes, be regarded as a statutory declaration that is furnished under subsection (5A)(c) and that satisfies the requirements referred to in that subsection.”;

(e) by repealing subsection (7) and substituting—

“(7) In renewing the recognition of a certification authority, the Director may—

- (a) attach conditions to the renewal of the recognition; or
- (b) specify a period of validity for the renewed recognition.”.

17. Director to specify particulars and documents by notice in the Gazette

Section 30(1) is amended by repealing “27(4)” and substituting “27(5A)”.

18. Section substituted

Section 33 is repealed and the following substituted—

“33. Director may publish code of practice

(1) The Director may publish in the Gazette a code of practice—

- (a) specifying standards and procedures for carrying out the functions of recognized certification authorities;
- (b) specifying the provisions of this Ordinance and of the code of practice for the purposes of—
 - (i) section 20(3)(b)(i) and (c)(i);
 - (ii) section 27(5A)(b)(i) and (c)(i);
 - (iii) section 43(1)(a)(i) and (b)(i); and
 - (iv) section 43A(1)(c)(i) and (d)(i).

(2) The code of practice published under subsection (1) may make different provisions for different circumstances and provide for different cases or classes of cases.

(3) The Director may from time to time amend the whole or any part of the code of practice published under subsection (1) in a manner consistent with the power to publish the code under subsection (1), and any reference in this Ordinance to the code shall, unless the context otherwise requires, be construed as a reference to the code as so amended.

(4) Any code of practice published under subsection (1) is not subsidiary legislation.”.

19. Section substituted

Section 36 is repealed and the following substituted—

“36. Publication of issued and accepted certificates

Where a person named or identified, or to be named or identified, in a recognized certificate as the person to whom the certificate is issued—

- (a) accepts the certificate, the recognized certification authority concerned must publish the certificate in a repository as soon as reasonably practicable after it issues the certificate;
- (b) does not accept the certificate, the recognized certification authority concerned must not publish the certificate.”

20. Recognized certification authority to use trustworthy system

Section 37 is amended—

- (a) in paragraph (a), by repealing “or withdraw” and substituting, “revoke or suspend”;
- (b) in paragraph (b), by repealing “or withdrawal” and substituting, “revocation or suspension”.

21. Recognized certification authority to furnish report and statutory declaration on compliance with Ordinance and code of practice

Section 43 is amended—

(a) by repealing subsections (1) and (2) and substituting—
“(1) At least once in every 12 months, a recognized certification authority must furnish to the Director—

- (a) a report which—
 - (i) contains an assessment as to whether the certification authority has, from the specified date until the last day of the period to which the report relates, complied with such provisions of this Ordinance and of the code of practice as are specified in the code of practice for the purposes of this subparagraph; and
 - (ii) is made by a person approved by the Director as being qualified to make such a report; and
- (b) a statutory declaration which—

- (i) states whether the certification authority has, from the specified date until the last day of the period to which the statutory declaration relates, complied with such provisions of this Ordinance and of the code of practice as are specified in the code of practice for the purposes of this subparagraph; and
- (ii) is made by a responsible officer of the certification authority.

(2) Any report or statutory declaration required to be furnished under subsection (1) must be made at the expense of the certification authority.”;

(b) in subsection (3)—

- (i) by repealing “date of the report” and substituting “respective dates of the report and statutory declaration”;
- (ii) by adding “and statutory declaration” after “in the report”;

(c) by adding—

“(3A) Where—

- (a) the certification authority has furnished to the Director a report for the purpose of complying with the requirements referred to in section 27(5A)(b) or 43A(1)(c); and
 - (b) the Director considers that had the report been furnished for the purpose of complying with the requirements referred to in subsection (1)(a), it would have satisfied those requirements,
- the Director may accept the report, and the report shall, for all purposes, be regarded as a report that is furnished under subsection (1)(a) and that satisfies the requirements referred to in that subsection.

(3B) Where—

- (a) the certification authority has furnished to the Director a statutory declaration for the purpose of complying with the requirements referred to in section 27(5A)(c) or 43A(1)(d); and
- (b) the Director considers that had the statutory declaration been furnished for the purpose of complying with the requirements referred to in subsection (1)(b), it would have satisfied those requirements,

the Director may accept the statutory declaration, and the statutory declaration shall, for all purposes, be regarded as a statutory declaration that is furnished under subsection (1)(b) and that satisfies the requirements referred to in that subsection.”;

- (d) by repealing subsection (4) and substituting—
- “(4) In subsection (1), “specified date” (指明日期) means—
- (a) the date on which recognition is granted under section 21 or section 34 comes into operation; or
 - (b) the day following the last day of the period for which the last report or last statutory declaration, as the case may be, was furnished under that subsection, as the case may require.”.

22. Section added

The following is added—

“43A. Recognized certification authority to furnish report and statutory declaration when required by Director

- (1) Where the Director considers that there have been or will be—
- (a) major changes in—
 - (i) the financial status of a recognized certification authority for operating as such in accordance with this Ordinance and the code of practice;
 - (ii) the arrangements put in place by a recognized certification authority to cover any liability that may arise from its activities relevant for the purposes of this Ordinance; or
 - (iii) the system, procedure, security arrangements and standards used by a recognized certification authority to issue recognized certificates; or
 - (b) any other major changes that may affect the determination of the Director as to whether to—
 - (i) revoke under section 23(1) the recognition of any certification authority or the recognition of any certificate issued by a recognized certification authority; or
 - (ii) suspend under section 24(1) the recognition of any certification authority or the recognition of any certificate issued by a recognized certification authority,
 the Director may, by notice given to the certification authority, specify the major changes and require the

certification authority to furnish to the Director within the period specified in such notice all or any of the following—

- (c) a report which—
 - (i) contains an assessment as to—
 - (A) whether, having regard to the major changes that have occurred, the certification authority is and is capable of complying;
 - (B) whether, having regard to the major changes that will occur, the certification authority is capable of complying,
 with such provisions of this Ordinance and of the code of practice as are specified in the code of practice for the purposes of this subparagraph; and
 - (ii) is made by a person approved by the Director as being qualified to make such a report; and
- (d) a statutory declaration which—
 - (i) states—
 - (A) whether, having regard to the major changes that have occurred, the certification authority is and is capable of complying;
 - (B) whether, having regard to the major changes that will occur, the certification authority is capable of complying,
 with such provisions of this Ordinance and of the code of practice as are specified in the code of practice for the purposes of this subparagraph; and
 - (ii) is made by a responsible officer of the certification authority.

(2) Any report or statutory declaration required to be furnished under subsection (1) must be made at the expense of the certification authority.

(3) The Director must publish in the certification authority disclosure record for the certification authority the date of any of the report and statutory declaration and the material information in any of the report and statutory declaration.

(4) Where—

- (a) the certification authority has furnished to the Director a report for the purpose of complying with the requirements referred to in section 27(5A)(b) or 43(1)(a); and

- (b) the Director considers that had the report been furnished for the purpose of complying with the requirements referred to in subsection (1)(c), it would have satisfied those requirements, the Director may accept the report, and the report shall, for all purposes, be regarded as a report that is furnished under subsection (1)(c) and that satisfies the requirements referred to in that subsection.

(5) Where—

- (a) the certification authority has furnished to the Director a statutory declaration for the purpose of complying with the requirements referred to in section 27(5A)(c) or 43(1)(b); and
- (b) the Director considers that had the statutory declaration been furnished for the purpose of complying with the requirements referred to in subsection (1)(d), it would have satisfied those requirements, the Director may accept the statutory declaration, and the statutory declaration shall, for all purposes, be regarded as a statutory declaration that is furnished under subsection (1)(d) and that satisfies the requirements referred to in that subsection.

(6) A notice under subsection (1) is taken to have been given by the Director to a recognized certification authority if it is—

- (a) sent to the certification authority as an electronic record; or
- (b) sent by post or registered post to the last known address of the certification authority.

(7) If in a particular case it is not reasonably practicable to give a notice under subsection (1) by either of the means specified in subsection (6), the notice is taken to have been given if the Director publishes it in the relevant certification authority disclosure record.”

23. Recognized certification authority to maintain repository

Section 45 is amended by adding—

“(3) Any list of repositories published under subsection (2) is not subsidiary legislation.”

24. Obligation of secrecy

Section 46 is amended, in subsection (1), by adding “any information relating to another person as contained in” before “such record”.

25. Secretary may amend Schedules

Section 50 is amended by repealing “and 2” and substituting, “2 and 3”.

26. Schedule heading amended

The heading to Schedule 1 is amended by adding “5A,” after “5,”.

27. Schedule heading amended

The heading to Schedule 2 is amended by adding “5A,” after “5,”.

28. Schedule 3 added

The following is added—

“SCHEDULE 3

[ss. 5A & 50]

SERVICE OF DOCUMENTS

Item	Enactment	Provision
1.	Landlord and Tenant (Consolidation) Ordinance (Cap. 7)	Section 119Y(1)(a) and (b)
2.	Rating Ordinance (Cap. 116)	Section 50(1)
3.	Government Rent (Assessment and Collection) Ordinance (Cap. 515)	Section 45(1)”.