

E-Cheques

(Relevant to AAT Examination Paper 6 — Fundamentals of Business Law)

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Introduction

Electronic Transactions Ordinance (Amendment of Schedule 1) Order 2014 ('ETO Order') came into operation on 1 April 2015. The ETO Order is a piece of subsidiary legislation, the purpose of which is, as the name suggests, to amend Schedule 1 of the Electronic Transactions Ordinance. As it is a subsidiary legislation, the ETO Order was not made by the Legislative Council, but rather by some other bodies. In this article, we examine how a subsidiary legislation is made using the ETO Order as an example, and we then consider how an electronic cheque could meet the definition of a cheque under the Bills of Exchange Ordinance, Cap 19.

How a subsidiary legislation is made

The purpose of Electronic Transactions Ordinance Cap 553 ('ETO') is, among others, to facilitate the use of electronic transactions for commercial and other purposes. There are a number of Schedules (i.e. Schedules 1, 2 and 3) under the ETO that relate to the scope of technical and procedural details covered, including appropriate handling of legal proceedings under the Ordinance, the service of documents under the ETO, and a list of documents or items to which the ETO does not apply.

If changes had to be made to these Schedules through the formal legislative process, it would take the Legislative Council a great deal of time to debate these detailed sets of rules. Since the Schedules involve technical or procedural matters, it is more convenient for the ETO to delegate the power to amend the Schedules to the government and to allow the government to amend these Schedules by Order under section 50. The ETO is thus the parent or enabling legislation and the ETO Order is the subsidiary legislation. Subsidiary legislation is also known as delegated legislation, secondary legislation or subordinate legislation.

In cases in which the government proposes to amend Schedule 1 of the ETO, then before an Order is made, a public consultation will be conducted. The Legislative Council Panel on Information Technology and Broadcasting will be briefed about the proposal, as it is a legislative change on a matter related to information technology.

You might perhaps be wondering which officer in the government has the power to make an Order to amend these Schedules. Section 50 of the ETO states that the "Secretary" can make the Order. Before November 2015, the "Secretary" was the Secretary for Commerce and Economic Development. However, following the establishment of the Innovation and Technology Bureau on 20 November 2015, the "Secretary" in section 50 of the ETO now means the Secretary for Innovation and Technology.

In the case of the legislation covering e-cheques, a proposal to amend Schedule 1 of the ETO was made in 2014. The ETO Order was thus made by the Secretary for Commerce

and Economic Development. After the ETO Order was made, it was gazetted and tabled by the Legislative Council for negative vetting. This means that the ETO Order was laid on the table of the Legislative Council at the next sitting after it was published in the Gazette. The Legislative Council could then amend the ETO Order by resolution at a Council meeting within 28 days after the sitting.

What has been changed under the new law?

The ETO recognises electronic records as having the same legal status as their paper-based counterparts. An electronic record is admissible as evidence in any legal proceeding. However, the law recognises that there are some documents or items where the conventional paper form is more appropriate, for example, because of their solemnity or the complexity of the transactions concerned. Therefore there is a list of documents such as trusts and court orders where the ETO does not apply (section 3 and Schedule 1 of the ETO).

The ETO was enacted in 2000. At that time all negotiable instruments were within the excluded category in Schedule 1. As a cheque falls within the definition of a negotiable instrument, it could not be made in electronic forms at that time.

With advances in technology and the general acceptance by the public of conducting transactions electronically, the government, the Hong Kong Monetary Authority and the banking sector have been actively developing the platform for e-cheques over the past few years. In tandem with these changes, the law has to be amended so that this policy can be implemented. How could this be achieved? One simple way, and that actually adopted, was to amend the list in Schedule 1 of the ETO so that a cheque is no longer within the excluded category. As explained above, the procedure in amending the Schedule 1 was by means of subsidiary legislation, which is why an ETO Order was needed. Under the new law, negotiable instruments are still in the excluded category in Schedule 1 of the ETO but cheques that bear the words “not negotiable” are excepted (i.e. they are listed as an exception in the excluded category).

How could an e-cheque meet the definition of a cheque under the Bills of Exchange Ordinance, Cap 19?

A cheque is defined as a bill of exchange drawn on a banker payable on demand under section 73 of the Bills of Exchange Ordinance. In other words, a cheque is one type of bill of exchange.

A bill of exchange is defined as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to bearer (section 3 of the Bills of Exchange Ordinance).

For a paper cheque, the requirements that the cheque must be in writing and must be signed by the drawer can be easily met. How, though, can an e-cheque satisfy these two requirements? It is here that the ETO will be of assistance. The ETO recognises electronic records and electronic/digital signatures.

As for the requirement that the bill of exchange be in writing, section 5 of the ETO provides that if a rule of law requires information to be in writing, an electronic record satisfies that requirement if the information contained in the electronic record is accessible so as to be usable for subsequent reference. "Information" includes data, text, images, etc. "Electronic record" means a record generated in digital form by an information system, which can be (a) transmitted within an information system or from one information system to another; and (b) stored in an information system. Typically, an e-cheque is in PDF format and contains information equivalent to that contained on a paper cheque. The e-cheque can also be uploaded and deposited through an Internet banking system. As an electronic record, an e-cheque thus satisfies the requirement for information in writing.

Under section 6 of the ETO, where a rule of law requires the signature of a person, a digital signature satisfies that requirement so long as the digital signature is supported by a recognized certificate that has been generated within the validity of that certificate, and that is used in accordance with the terms of that certificate.

"Digital signature" means an electronic signature of the signer generated by the transformation of the electronic record using an asymmetric cryptosystem and a hash function such that a person having the initial untransformed electronic record and the signer's public key can determine (a) whether the transformation was generated using the private key that corresponds to the signer's public key; and (b) whether the initial electronic record has been altered since the transformation was generated. This definition is full of technical terms used by the IT industry and it is beyond the scope of this article to explain these technical terms.

In short, a digital signature makes use of encryption technology to verify the authenticity of the transaction. Where an e-cheque is signed digitally, it also satisfies the requirement of a signature of a person under the Bills of Exchange Ordinance.

Conclusion

Generally, an e-cheque is issued by the drawer through his or her bank's Internet banking system. The drawer selects his or her withdrawal account and fills in information such as the payee's name, the amount and the date. After some verification, the drawer can download the e-cheque in PDF format and email it to the payee. The payee will then present the e-cheque by depositing it into his or her bank account through the bank's Internet banking system. The cheque amount will then be credited to the deposit account. Therefore the use of e-cheques is quicker, safer, less costly, more convenient and more eco-friendly than traditional cheque handling.

The e-cheque service was launched in Hong Kong last year. Some retail banks have begun offering e-cheque issuance service and all banks are now able to accept e-cheques deposited by their customers.