

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay containing text. The foreground shows a paved plaza with geometric patterns and a few stanchions.

E-Commerce and Electronic Transactions in Bermuda

Preface

This publication has been prepared for the assistance of anyone interested in the areas of e-commerce and electronic transactions in Bermuda. It deals in broad terms with the relevant provisions and requirements of Bermuda law and, where applicable, the policies of the Bermuda government. It is not intended to be exhaustive but merely to provide general information to our clients and their professional advisers.

We recommend that our clients seek legal advice in Bermuda on their specific proposals before taking any steps to implement them.

Conyers Dill & Pearman

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1. ABOUT BERMUDA

Bermuda is an Overseas Territory of Great Britain situated 917 km due east off the North Carolina coast in the Western Atlantic Ocean. Its constitution provides for democratic self-Government. The legal system is common law and its currency, the Bermuda Dollar, is pegged to the US Dollar. Modern company, trust, banking, insurance and other related laws have made Bermuda a leading offshore financial centre. The Bermuda government's attitude towards and open communication with the private sector encourages the promotion and maintenance of Bermuda's offshore business. The Island enjoys a sophisticated telecommunications system, an abundance of professional service providers, as well as economic and political stability.

2. DEVELOPMENT OF E-COMMERCE IN BERMUDA

At the heart of establishing and maintaining a successful e-commerce venture is the availability of expertise and reliable service providers. Despite its size of 21 square miles, Bermuda has an abundance of talented professionals including lawyers, accountants and IT specialists. There are six¹ local Internet Service Providers and a number of telecommunications companies on the Island who can provide an e-business with its necessary services. Digital certification for electronic signatures, hosting and secure server co-location facilities and dedicated lines are just a few of the options available in Bermuda to e-commerce entrepreneurs. In The Economist: Economist Intelligence Unit: Digital economy rankings 2010: Beyond e-readiness, Bermuda ranked 22 out of 70 jurisdictions and was the only offshore financial centre to appear.

The Bermuda government has supported efforts to establish the Island as a top offshore e-commerce centre. Bermuda was one of the first countries to pass e-commerce legislation and the first country in the world to include e-commerce in a Cabinet Minister's portfolio. The Minister of Economic Development has publicly stated that the Bermuda government has measures in place to enable the Island to compete against other countries looking to secure rare, highly skilled IT workers. The Ministry has also given assurances that if the required expertise is not available on Island, work permit applications will be processed as expeditiously as possible.

3. THE E-COMMERCE CORPORATE VEHICLE

Bermuda law distinguishes between local companies, those predominantly owned by Bermudians, and those owned predominantly by non-Bermudians, exempted companies. Only local companies are permitted to carry on and compete for local business. Exempted companies are based in Bermuda but can only carry on business in connection with transactions and activities which are external to Bermuda. The Bermuda exempted company is the preferred vehicle for e-commerce business.

3.1. Approval

The Bermuda Monetary Authority (the "BMA") must approve the incorporation of all Bermuda exempted companies. Each of the ultimate beneficial owners holding 10% or more of the share capital of the proposed company is required to sign a declaration attesting to his or her good standing and provide a

¹ i.e. BTC, One Communications, Link Bermuda, Live Net Bermuda, Tele Bermuda International and World on Wireless.

certified copy of their passport or other official identification. The ultimate beneficial owners' identity must, in all instances, be disclosed.

3.2. Name

If time permits, the proposed name of the company can be reserved with the Registrar of Companies (the "**Registrar**") for three month periods. The name reservation can usually be confirmed within 24 hours. Reservation will be refused if there is an obvious conflict with an existing registered name. Formal clearance cannot be obtained until incorporation but reservation at least ensures that no other person can incorporate a company using an identical or very similar name in the meantime.

3.3. Constitution

The memorandum of association and the bye-laws together form the constitution of a Bermuda exempted company. Please see our publication on Exempted Companies for more information regarding the objects and powers, capital requirements etc. of a Bermuda exempted company.

3.4. Taxes and Exchange Control

There is no Bermuda income or profits tax, withholding tax, capital gains tax, capital transfer tax, estate duty or inheritance tax payable by a Bermuda company or its shareholders, other than shareholders ordinarily resident in Bermuda.

Under the Exempted Undertakings Tax Protection Act 1966, an exempted company may apply to the Minister of Finance for an assurance that if any legislation is enacted imposing tax computed on profits or income, or computed on any capital assets, gain or appreciation, or any tax in the nature of estate duty or inheritance tax, it shall not be applicable to the company until March 2035. No stamp duty is payable in respect of any instrument executed by an exempted company or in respect of an instrument relating to an interest in an exempted company, except on transactions involving Bermuda property.

Bermuda is independent for the purposes of exchange control. Exempted companies and permit companies are designated non-resident for exchange control purposes. The non-resident designation allows these entities to operate free of exchange control regulations and enables them to make payments of dividends, to distribute capital, and to acquire, hold and sell any currency and foreign securities without reference to the BMA.

4. COST

The cost of establishing and operating an e-commerce exempted company from Bermuda is reasonable in the circumstances. The benefits of the offshore domicile should outweigh the higher costs of communications and with competition heating up in the local communications market, the outlook for cost reduction in this area looks bright.

5. BANKING AND SECURITY

Whether engaged in Business to Business, Business to Consumer or Business to government transactions, local banks in Bermuda are well equipped to assist an e-business requiring offshore secure payment processing services. The availability of multi-currency settlement payment processing

is particularly attractive to Internet merchants as most consumers are more comfortable buying goods online in their own currencies. Allowing consumers the option of purchasing goods in a variety of currencies can boost earnings potential, provide a competitive edge and substantially reduce the costs and risks associated with foreign exchange transactions for the e-business.

6. ELECTRONIC TRANSACTIONS

The Electronic Transactions Act 1999 (the “**ETA**”) came into force in Bermuda on 4 October 1999. Copies of the ETA are available from Conyers upon request. The ETA is a flexible and enabling Act that represents the contributions and ideas of the local and international business community and the Bermuda government. The objectives of the ETA are to enhance the reputation of Bermuda as an international business centre, facilitate electronic transaction on a technology neutral basis by means of reliable electronic records, remove uncertainties in relation to conducting business on-line, promote public confidence in the validity, integrity, and reliability of conducting transactions electronically, and promote the development of the legal and business infrastructure necessary to implement electronic transactions securely. Outlined below is a summary of a few of the areas addressed by the ETA that will no doubt be of vital importance to an e-business.

6.1. Legal Recognition of Electronic Records

The ETA gives electronic records legal recognition. It provides that information shall not be denied legal effect, validity, admissibility or enforceability solely on the ground that it is in the form of an electronic record.

6.2. Legal Requirements in Relation to Electronic Records

Writing

Where information is required by law to be in writing, an electronic record will satisfy that requirement if it is accessible and capable of retention for future reference.

Delivery

An electronic record will satisfy the legal requirement for information to be delivered, dispatched, given or sent, or served on a person where the originator of the electronic record states that receipt is to be acknowledged and the addressee acknowledges receipt. Unless otherwise agreed by the originator and the addressee, the dispatch of an electronic record occurs when it enters an information processing system outside the control of the originator.

Electronic Signatures

The ETA provides that the legal requirement for a person’s signature will have been met if a reliable method is used to identify a person and indicate that they intended to sign or otherwise adopt the information in the particular electronic record. Under Bermuda’s common law, valid signatures may be created by any electronic method, including lightpens, encryption software, and jpeg files that add an image of a signature or other attribute to a document with the intention of authenticating that the document’s author put it there.

Electronic Signature Certification

Electronic signatures can be certified by an accredited certificate issued by a certification services provider (CSP) authorised by the Minister of Economic Development. An accredited certificate issued by a CSP will be deemed to identify the signatory and indicate that such person intended to sign or adopt the information in the electronic record. Currently the only CSP authorised by the Minister of Economic Development is Quo Vadis Limited, a Bermuda company. The Department of E-Commerce has indicated that overseas CSPs may be able to qualify for authorisation by adopting a recognised international standard.

Variation by Agreement

The ETA provides that the legal requirements and communication of electronic records may be varied by agreement.

6.3. Formation and Validity of Contracts

In the context of formation of contracts, the ETA enables an offer and the acceptance of an offer to be expressed by means of electronic records.

The ETA does not apply to wills or other testamentary instruments or to a conveyance of an interest in real property. Certain activities that are generally prohibited under Bermuda law, for example the operation of a lottery or gambling facility, are also prohibited by electronic means.

6.4. Standard for Electronic Transactions

The Standard for Electronic Transactions (the “**Standard**”) is an extension of the ETA designed to protect the interests of consumers and businesses by means of a regulatory standard. It applies to intermediaries and e-commerce service providers carrying on business in Bermuda, or which are identified with Bermuda for the purposes of the ETA.

The Standard imposes a level of responsibility upon intermediaries and e-commerce service providers to (i) observe business integrity; (ii) know your customer; (iii) know your own business; (iv) protect personal data; and (v) avoid abusive usage. E-commerce service providers must also (i) advertise truthfully; (ii) deal fairly and openly with customers; and (iii) settle complaints and disputes quickly and fairly.

Where an intermediary or e-commerce service provider has actual knowledge of any matter or conduct which falls below the standard required, they must take action forthwith to remedy or terminate the matter or relationship giving rise to the non-compliance. If in doubt as to how to proceed, they may apply to the Minister for directions. The Minister of Economic Development will initially give an intermediary or e-commerce service provider who does not comply with the Standard a written warning directing them as appropriate. If they fail to adhere to the written warning, they will be guilty of an offence and liable on summary conviction to a fine of US\$5,000 for each day on which the contravention continues.

An intermediary or e-commerce service provider shall be deemed to have observed the Standard and be in compliance if their systems, procedures and practices are substantially in accordance with the following Safe Harbour Guidelines:

- The Maintenance of Effective Monitoring Systems
- The Establishment of Effective Contracts
- Institute Effective “Know Your Customer” Practices
- Establish Systems to Protect Privacy (which an intermediary or e-commerce service provider may opt out of by notifying its customers or other persons from whom it collects personal data or business records that it does not intend to observe the Safe Harbour Guidelines principles in relation to private data)
- Establish Practices to Avoid Abusive Usage
- Establish Complaints and Disputes Systems
- Establish Business Practices which are Transparent
- Establish Systems to Avoid Misleading Statements or Omissions

6.5. Encryption

Pursuant to the ETA, the Minister of Economic Development is vested with the power to make regulations in relation to the use, import and export of encryption programs. To date no such regulations have been made.

6.6. Data Protection

The ETA empowers the Minister of Economic Development to make regulations dealing with data protection. To date no such regulations have been made. Notwithstanding this, the ETA itself, through the Standard, recognizes the European “Safe Harbour” principles (enabling intermediaries and e-commerce service providers to opt in to the European standard in connection with data transfer between Bermuda and EU Countries) while also taking account of the US view that the free exchange of information is a necessary right. In so doing, it provides for a satisfactory compromise between the European and American approaches by allowing an intermediary or e-commerce service provider to “opt in” to the “Safe Harbour” principles when transferring data between Bermuda and European countries and “opt out” when transferring data between Bermuda and all non-EU countries.

The Personal Information Protection Act 2016 (“**PIPA**”) was recently enacted. For further information please contact us.

6.7. Intermediaries and Service Providers

Recently much concern has been expressed in other jurisdictions over whether an intermediary can be subject to civil or criminal liability for information contained in an electronic record. The ETA provides

that an intermediary is not civilly or criminally liable for information contained in an electronic record of one of its customers provided the intermediary was not the originator of the electronic record and (a) has no actual knowledge that the information gives rise to civil or criminal liability; (b) is not aware of any facts or circumstances from which the likelihood of civil or criminal liability in respect of the information ought reasonably to have been known; or (c) follows the procedure set out in Section 28 of the ETA if the intermediary: (i) acquires knowledge that the information gives rise to civil or criminal liability; or (ii) becomes aware of facts or circumstances from which the likelihood of civil or criminal liability in respect of the information ought reasonably to have been known.

It is important to note that there is no obligation placed on an intermediary to monitor any information contained in electronic records authored by its customers. However, once the intermediary acquires knowledge of information giving rise to civil or criminal liability or becomes aware of facts or circumstances from which the likelihood of civil or criminal liability in respect of the information ought reasonably to have been known, it must, among other things, remove the information from systems within its control and notify the Minister of Economic Development of the facts and identity of the person.

If it fails to do this, the Minister will give the intermediary a written warning. If the intermediary then fails to comply with the terms of the warning it will be guilty of an offence and may be fined US\$5,000 for each day it continues to contravene the warning.

The ETA provides that where a corporation is guilty of an offence, each person who was a director or officer of the corporation at the time of the offence is guilty of the offence unless they prove the offence took place without his or her consent or that he or she exercised all due diligence to prevent the commission of the offence.

6.8. Law and Jurisdiction

The ETA does not contain any deeming provisions in respect of any applicable law or jurisdiction for dispute resolution. It is intended that the determination of the proper law and jurisdiction be made on the basis of existing conflict of laws principles.

6.9. Cryptocurrencies

Cryptocurrencies, as used in e-commerce, are defined by the Financial Action Task Force as “distributed, open-source, math-based peer-to-peer virtual currencies that have no central administering authority, and no central monitoring or oversight”. Bermuda’s regulators have to date issued no regulations or guidance regarding the use of cryptocurrencies, e.g. Bitcoin.

7. INTELLECTUAL PROPERTY

Bermuda has comprehensive legislation protecting all aspects of intellectual property (“IP”). Bermuda IP laws largely derive from their UK equivalents and continue to evolve to meet the needs of technological developments and trends.

If an e-business is incorporated in Bermuda, it may register its domain name on the “.bm” domain. The “.bm” domain is only available to companies incorporated in Bermuda. Registering and using a .bm domain name may also be advantageous to an e-business for other reasons. The European Union E-Commerce Directive defines the place of establishment as the place where an operator actually pursues an economic activity through a fixed establishment, irrespective of where websites or servers are situated or where the operator may have a mailbox. It may be advisable for an e-business wishing to establish itself in Bermuda to, among other things, incorporate a limited liability company and register a .bm domain name so as many steps as possible are taken to demonstrate that it is established and domiciled in Bermuda.

The Domain Administration for the .bm Country Code Top Level Domain is provided by the Bermuda NIC Registry. For more information on the .bm domain please logon at www.bermudanic.bm.

Bermuda operates its own independent trade mark and patent registries. More information on the registration process can be obtained from Conyers’ publication “Intellectual Property and Trade Mark Protection in Bermuda”. Qualifying copyrights are protected by statute from the time of creation. Registration of copyright in Bermuda is not necessary or even possible.

The relief available in Bermuda for Intellectual Property infringement is extensive. It includes emergency and permanent injunctions, Anton Piller orders where the destruction of evidence by the defendant is likely, delivery up and/or destruction of infringing articles, and full discovery upon oath and damages, which could either be by way of an enquiry or an account of profits. Taxed costs of the proceedings will usually be awarded to the winning party.

8. CONCLUSION

The world of e-commerce changes quickly. Bermuda as a jurisdiction is particularly adaptive to change, making it well suited to add e-commerce to its areas of expertise. A sensible regulatory environment, together with an abundance of quality service providers, makes Bermuda a prime jurisdiction for the establishment of e-commerce business. Bermuda has been on the cutting edge of e-commerce legislation from the industry’s beginnings and promises to remain there by maintaining a flexible approach to new technological advancements.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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