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# Trinidad and Tobago National ICT Plan

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E-commerce legal and regulatory issues

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# Agenda

- Selected perceptions of current legal infrastructure and ways forward
- Legal and regulatory fundamentals
- Towards a legal and regulatory framework: a seven-point approach
- Identifying the laws and regulations in place and their effectiveness
- Identifying and removing legal, legislative and regulatory barriers
- Facilitating e-commerce by law and regulation
- Developing new players, markets and industries
- Determining the extent of regulation
- Acquiring and localising legal expertise
- The international dimension

# Selected perceptions of current legal infrastructure and ways forward

# Current legal infrastructure

“Perhaps even more stifling than the constraints presented by the reluctance of the financial sector is the inappropriateness of our legislation to cope with modern business transactions. Electronic documents, the lifeblood of electronic transactions, are not recognized under current laws. To engage in e-commerce, then, requires that the local businessman take more risk than his foreign counterpart.”

Bridging the Digital Divide – A T&T Perspective  
Presented by Roger Bertrand, NeCS website,  
<http://www.ecommerce.gov.tt>

# Local questions...

- “What about consumer protection, does it exist in this environment?”
- What are the legal boundaries? Where does T&T law end and Grenada’s law begin in cyberspace?....

- How much regulation is needed and by whom?...”

E-Commerce: Trinidad and Tobago Begins the Journey,  
Governor Winston Dookeran, Central Bank of Trinidad and Tobago

# The way forward...

“...government’s principal role is to facilitate the creation of an environment that facilitates the expanded use of E-Commerce and its related technologies by the private sector, government and individuals.”

Report of the NECPC, Preparing Trinidad and Tobago for Doing Business in The Internetworked Global Digital Economy

# The way forward...

“With regard to the Clarification of Marketplace rules, the objective is to ensure that the rules which govern commercial transactions in cyberspace would be clear to all participants. Ideally, one would expect that the same principles would apply to offline as well as online transactions.”

Report of the NECPC, Preparing Trinidad and Tobago for Doing Business in The Internetworked Global Digital Economy

# Legal and regulatory fundamentals

# Legal and regulatory fundamentals:1

- Compliance with constitution
- Need to balance facilitation and regulation
  - Emphasis on facilitation
  - “Light touch” in regulation

# Legal and regulatory fundamentals:2

- Avoid over-engineering law and regulation
  - Electronic signatures, digital certificates
  - Digital rights
  - E-government
- Legislation
  - Technologically neutral
  - Flexible
  - Enduring
  - Clearly understood

# Other fundamentals

- Telecommunications infrastructure and regulation
- Communications charges
- The cost of ICT
- Technical and operational opportunities/threats
- Government support for development of services sector and export markets
- Access to capital markets
- Business and consumer buy-in
- Educational policies
- Social policies
- Development agenda
- Fulfilment
- Supportive judicial system and effective, timely access to justice

# Towards a legal and regulatory framework: a seven-point approach

# The seven-point approach

- Identifying the laws and regulations in place and their effectiveness
- Identifying and removing legal, legislative and regulatory barriers
- Facilitating e-commerce by law and regulation
- Developing new players, markets and industries
- Determining the extent of regulation
- Acquiring and localising legal expertise
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# Identifying the laws and regulations in place and their effectiveness

# Existing legal and regulatory regime

- Need to identify the whole body of applicable law and regulation
  - How much is in force?
  - How is it being applied?
  - Is it readily intelligible to users?
  - Is it comprehensive?
  - Does it work?
- Review of law and regulation
  - To identify legal barriers in statutory and common law of Trinidad and Tobago
  - To identify areas of legal uncertainty
  - To frame new legal and regulatory policies for e-commerce
  - To amend existing law and/or prepare new legislation

# Existing legal and regulatory regime

- Current legislation

- Telecommunications Act 2001
- Computer Misuse Act 2000
- Electronic Transfer of Funds (Crime) Act 2000
- Copyright Act 1997
- Trademarks Act 1994

- Proposed legislation

- Electronic Transactions Bill 2002
- Data Protection Bill
- Trademarks Amendment Bill 2003
- Copyright Amendment Bill 2000

# Comparison with other Commonwealth countries: Singapore

- Electronic Transactions Act 1998
  - Legal recognition of electronic records, electronic signatures and digital certificates
  - Retention of electronic documents
  - Recognition of electronic contracts
  - Electronic contract formation
  - Control of certification authorities
  - Duties of certification authorities

# Comparison with other Commonwealth countries: India

- Information Technology Act 2000
  - Provision for digital signatures
  - Legal recognition of electronic records for private and governmental purposes
  - Retention of electronic records
  - Electronic contract formation
  - Regulation of certifying authorities
  - Digital certificate subscriber duties
  - Cyber Regulations Appellate Tribunal
  - Offences: unlawful access, tampering with systems, digital

obsce ility

# Comparison with other Commonwealth countries: New Zealand

- Electronic Transactions Act 2002

- Legal recognition of electronic records and electronic signatures
- Retention of electronic records
- Liability of network service providers
- Formation and effectiveness of electronic contracts
- Effect of electronic signatures
- Regulation and duties of certification authorities
- Government use of electronic records and signatures

# Identifying and removing legal, legislative and regulatory barriers

# Typical legal and legislative barriers

- “Signed and in writing”, “written notice”, etc.
- Admissibility and weight of evidence
- Electronic document retention and processing not recognised
- Electronic contracts/contract formation not recognised
- Electronic communications not recognised
- Electronic signatures/digital certificates not recognised
- Intellectual property and digital rights
- Policy-driven exclusions, eg land, negotiable instruments, insurance contracts
- Old consumer protection rules
- Current law causing unforeseen consequences

# Facilitating e-commerce by law and regulation

# Facilitating law and regulation

- Recognising binding electronic contracts/contract formation
- Recognising validity of electronic communications as “writing”
- Recognising electronic document retention and processing
- Forensic admissibility of electronic data and other computer-generated evidence
- Regulating cryptography/digital trust service providers
- Legal effect for digital certificates/electronic signatures
- Protection for new intellectual property digital rights
- Recognition and regulation of e-money
- E-government, including health care

# Developing new players, markets and industries

# New players in e-commerce

- Telecommunications operators
- Internet Service Providers
- Trust and security
  - Cryptography service providers
  - Certification and registration authorities
  - Trusted third parties
  - Key escrow agents
- Content providers
- Software developers
- Online educators
- Dispute resolution and conciliation services
- On and offshore outsourcing services
- E-money issuers
- Regulators

# New e-commerce-driven markets and industries

- Financial services
- Gaming
- Data warehousing
- Offshore outsourcing
  - Software development
  - Contact centres
  - Middle and back office processing
  - Medical transcription

# Legal and regulatory infrastructure

- Financial services
- Gaming
- Data warehousing
- Offshore outsourcing
  - Software development
  - Contact centres
  - Middle and back office processing
  - Medical transcription
- Strong, credible regulatory regimes and prudential supervisor
- Strong anti-money laundering, drug-trafficking and counter-terrorism laws
- Data protection laws focused on target markets
- IPR protection
- Compliance with target market law, eg US HIPAA
- Flexible employment law
- Favourable, neutral direct and indirect corporate tax system
- Fiscal incentives
- Independent and efficient judiciary and court system

# Telecommunications regulation

- Telecommunications critical to adoption of ICT and e-commerce
- To encourage private sector investment in communications infrastructure?
- Regulatory prerequisites

# Regulatory prerequisites

- Independent regulatory authority
- Separate from incumbent monopoly operator and government
- Essential that regulatory decisions made on a fair and transparent basis
- Operator licences to be issued on publicly available, non-discriminatory and objective criteria
- Operators to be protected from arbitrary/expropriatory revocation, unfair competition or unlawful interference with rights granted
- Fair competition
- Rights over public and private property

# Regulator's powers

- Licensing operators
- Setting standards and rules for interconnection
- Resolution of interconnection disputes
- Information gathering and investigation
- Allocating number and radio spectrum
- Setting tariffs to be charged by the incumbent, especially with regard to universal service obligation

# Fair competition

- Prevention of unfair cross subsidies
- Prevention of predatory pricing and price squeezing
- Restrictions on bundling of services that require other operators/users to take additional services they do not require
- Prevention of unreasonable refusal to or undue delays in interconnection
- Restriction on use of confidential information for purposes for which it has been obtained

# Determining the extent of regulation

# A sectoral and functional analysis

- Typically regulated sectors
- Typically regulated activities
- State intervention
- “Regulation” includes permitted range of activities, controls and absolute/partial prohibition

# Regulated sectors

- Financial services
- Medical and pharmaceutical
- Professional services
- Cryptography and digital trust services
- Telecommunications
- ISPs
- Gaming
- Consumers
- MSMEs

# Cryptography and digital trust services

- Statutory recognition of services
  - Digital certification, electronic signatures
  - Registration authority services
  - Cryptography services
  - Trusted Third Parties (TTPs)
  - Key escrow services
- Registration
  - Voluntary
  - Industry self-regulation
  - Codes of practice
  - Compulsory
- Admission and removal criteria and procedures
- Legal acceptance of services from registered providers

# Internet service providers: 1

- Carrier liability for content
  - Criminal
  - Defamatory
  - Infringing third party rights
  - Unsolicited communications
- Liability for content: innocent transmission
  - No initiation
  - No selection of recipient
  - No selection or modification of content
- Caching
  - Automatic, intermediate and temporary storage
- Hosting
  - Data storage by service recipient

# Internet service providers: 2

- Conditionality
  - ISPs still required to comply with legal orders to terminate or prevent transmission, caching, hosting
  - No actual or constructive knowledge
  - Must act promptly to remove or disable content access
- General duty to monitor
- Specific Duties
  - To identify users at authorities' request
  - To monitor electronic transmissions at authorities' request
  - To act on behalf of fiscal authorities
  - Cost implications

# Consumers/MSMEs: 1

- Level of consumer and similar protection
- Basic protection
  - Privacy
  - Opt in/out for electronic communications
  - Unsolicited electronic communications
  - Contract formation
  - Supplier/agent details in electronic communications
  - Identification of nature of electronic communications
  - Unfair terms
  - “Cooling off” periods
  - Redress

# Consumers/MSMEs: 2

- Advanced protection
  - Anti-avoidance measures
  - Jurisdictional issues: governing law
  - Venue for legal proceedings
  - Substitutions for “signed and in writing” requirements in consumer credit transactions
  - Bank and credit card protection schemes for online purchases

# Regulated activities

- Criminal activity
  - Technological neutrality for existing criminal offences
  - Extension to online crime
- Civil wrongs
  - Technological neutrality for existing common law and statutory torts
  - Extension to online torts
- Human rights
- Privacy and data protection
- Interception of communications

# Regulated activities

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# Criminal activity

- Terrorism
- Espionage
- Money laundering
- Hacking/computer misuse
- Obscenity and pornography
- Child abuse, pornography and the Internet
- Gambling
- Offers/sales of unlawful material (Yahoo case)
- Copyright and other IPR infringements
- Extra-territorial application
- Conspiracy, collusion and other inchoate offences

# Protection of children

- UK: child pornography has risen by 1,500% since 1988 (NCH Report, January 2004)
- Industry self-regulation and codes of practice
  - Filters and barring
  - Age checks at point of sale
  - Denial or control of access to chat rooms, 3G mobile network services, instant messaging, SMS
- Government Internet safety campaigns
- US 2000 Children's Internet Protection Act
- Implementation of Internet-control software: "cybersnooping"
- New criminal offences: online "sexual grooming" leading to the commission of sexual offences

# Civil wrongs

- Denials of service and trespass (eBay v Bidder's Edge)
- Other economic torts
- Negligence
- Defamation
- Copyright, trade mark, database and other intellectual property rights infringements

# Privacy and data protection: initial policy decisions

- Why?
  - Human rights and protection of local citizens
  - To facilitate export of offshore services
  - Compliance with target market laws, eg EU data protection regime, US HIPAA
- Balance of interests
  - New primary legislation
  - Additional regulation
  - Additional enforcement agency
  - Additional burden on local business and government
  - Access to new export markets
  - Creation of new domestic markets and industries

# Privacy and data protection: policy questions

- To what level?
- Scope and structure of legislation
  - Categories of data?
  - Format: electronic and/or manuscript data?
  - What kind of data storage systems?
  - Range of data subjects: individuals and/or corporates?
  - Who must comply with the law?
  - Basic data protection rights
  - Access rights
  - Range of exemptions
  - Remedies: civil and/or criminal?
  - Defences
  - Separate regulator?
  - Regulatory functions

# Privacy and data protection: EU data protection principles

- Fair and lawful processing
- Processed for limited purposes
- Adequate, relevant and not excessive
- Accurate
- Not kept for longer than is necessary
- Processed in line with subject rights
- Secure
- Not transferred to countries without adequate protection

# State intervention

- Control of cryptography and digital trust service providers
- Controls on import/export and use of powerful encryption technologies
- Interception of private communications
- Access to private electronic communications
- Access to public and private communications networks and systems
- Access to keys
- Supporting powers of investigation, search and seizure

# Acquiring and localising legal expertise

# New deals, new structures, new techniques

- Web hosting and similar services
- Online trading terms
  - NECPC “Marketplace Rules”
  - B2C
  - B2B
  - EDI/e-commerce “rule book”
- Online auctions, markets and exchanges
- Privacy rules, statements and policies
- Content licensing and data sharing
- Linking agreements
- Domain name acquisition/dispute resolution
- Service levels for new service transactions
- On and offshore outsourcing
- Public/private partnerships

# Training needs

- Identify “best of breed” jurisdictions
- Workshops/training and training tools for local lawyers, business and government
- Judicial training
- Legislative support for government
- Interest and focus groups
- Precedent base
- Continuing professional education and development
- Online access to relevant data sources and learning materials

# The international dimension

# Legal and regulatory aspects

- Jurisdiction
  - Regulatory
  - Mutual recognition of regulators
  - Commercial and private law
  - Enforcement of judgments
- Taxation
- Access to foreign markets
- Trade agreements and relationships
  - WTO
  - NAFTA, EU and Southern Cone
  - Caricom

# Taxation

- E-commerce undermines existing taxation structures
- OECD Taxation Framework Conditions
  - Neutrality
  - Efficiency
  - Certainty and simplicity
  - Effectiveness and fairness
  - Flexibility