

## **OVERVIEW OF THE ELECTRONIC TRANSACTIONS BILL, 2006**

### **Object and Reason for the Bill**

The advent of electronic commerce and the rapid development of information and communication technologies over the past decade have revolutionized business practice.

The legal framework for commercial, banking, trade and other financial relationships are derived from the pre-computer era and are ill-suited to the notion of electronic commercial.

Many of the laws under which the Government and private sector conduct their operations are still heavily dependent on paperwork evidenced by original versions of executed paper documents.

Without modifications to Jamaica's legal framework, directed at accommodating and promoting the emerging electronic commerce economy, the full development and implementation of online processes in Jamaica will be impeded.

For these reason the decision was taken to enact legislation to facilitate the use of electronic transactions by eliminating the barriers to electronic commerce resulting from uncertainties over writing and signature requirements within the legal framework.

### **General Overview of the Bill**

- It is technology-neutral, that is, it does not favour any particular form of technology therefore the Act will not require amendment as technology advances.
  
- Security concerns are addressed by ensuring that;
  - a) there is a reliable method of authenticating a person's identity.

- b) communication is complete and accurate without it having been altered in any way during transmission or storage.
  - c) there is no possibility of the sender of the communication denying that it was sent or sent in the form in which it was received by the recipient.
- The rules of formation of contracts electronically are clearly stated.
  - There is legal recognition of electronic communication and signatures.
  - The rules define the rights and duties of the parties to the electronic transactions and ensure that electronic and paper communications are treated in the same way legally. Both are admissible in court.

### **Clause by Clause Overview of the Bill**

#### **Clause 1**

Contains the short title of the Act; “The Electronic Transactions Act”.

#### **Clause 2**

Contains definitions of terms and expressions used throughout the Bill.

#### **Clause 3**

Contains the objects of the Bill which are to:

- a) Facilitate electronic transactions by means of reliable electronic communications;
- b) Promote the development of the legal and business infrastructure necessary to implement secure electronic commerce;
- c) Eliminate barriers to electronic commerce resulting from uncertainties over writing and signature requirements;

- d) Promote public confidence in the integrity and reliability of electronic communications and electronic transactions, in particular through the use of electronic signatures to ensure the authenticity and integrity of electronic communications;
- e) Establish uniformity of legal rules and standards regarding the authentication and integrity of electronic communications;
- f) Facilitate electronic filing of information with government agencies and statutory corporations and to promote efficient delivery of government services by means of reliable electronic communications.

#### **Clause 4**

This Clause exempts the following transactions from the provisions of the Act:

- a) The making, execution alteration or revocation of a Will or other testamentary instrument.
- b) The conveyance or transfer of land or any interest in land.
- c) The creation, variation, performance or enforcement of a Trust or Power of Attorney.
- d) Procedures governed by the Civil Procedure Rules or rules of Court made pursuant to law.

The Minister is also given power to amend this Clause by Order subject to affirmative resolution.

#### **Clause 5**

Indicates that the Bill does not impose an obligation on any person to communicate electronically and only applies to persons who have agreed to

transact electronically. This agreement can be made expressly or can be inferred from the surrounding circumstances or the conduct of the parties. However, in the case of the Government it must be expressly stated. It also allows the parties to contract out of Part II (Application of legal requirements) and Part III (Conduct of parties in relation to electronic communications and signatures) of the Bill.

### **Clause 6**

Gives validity and admissibility to information communicated, created or stored electronically as well as information which is referred to but is not contained in an electronic document.

### **Clause 7**

Indicates that a legal requirement for writing is satisfied if the information is given electronically, provided:-

- (a) it is readily accessible to and capable of retention for future reference by the addressee;
- (b) the information is being given to the Government and it is given in accordance with the manner prescribed by Government; and
- (c) the person receiving the information consented to the information being presented electronically.

The Clause also provides that where more than one copy of the information is requested, that requirement is satisfied where the information is provided electronically.

For the purpose of the Bill giving of information includes making applications, lodging a claim, serving a notice, making a declaration, lodging or issuing a certificate, lodging an objection and giving a statement of reasons.

### **Clause 8**

Provides for the validity of electronic signatures and provides a method for individuals to verify a signature.

It sets out the requirements that encrypted signatures need to meet, for example, it must be:

- capable of identifying the person;
- uniquely linked to the person; and
- created by using a means that the person can maintain under his sole control.

### **Clause 9**

Provides the requirement for the attestation, notarization and verification of documents. The requirement is considered met if the following is attached:

- the encrypted signature;
- a statement attesting to the identity of the signatory; and
- a statement certifying the performance of all obligations imposed on the signatory by law.

### **Clause 10**

Addresses rules of law that require documents to be in original form for the purposes of ensuring integrity.

Provides that the legal requirement for an original document is satisfied by an electronic copy of the document if:

- (a) the method of producing the information provides a reliable means of assuring the maintenance of the integrity of the information;
- (b) the information is readily accessible and capable of retention for future reference;
- (c) where the information is being produced to Government, the Government's requirement is satisfied; and

(d) where the information is being produced to a person other than the Government, that person consents to the document being produced electronically.

**Clause 11**

Provides that where the law requires a document to be stored in its original form storing the document electronically is sufficient provided that, among other things, the:

- (a) information when first generated is readily accessible and capable of retention for future reference; and
- (b) the method of retaining the information provides a reliable means of assuring the maintenance of the integrity of the information.

**Clause 12**

Provides that in legal proceedings information given electronically shall not be denied admissibility in evidence solely on the ground that it is in electronic form or that, if it is the best evidence that could be reasonably obtained, it is not in its original form.

However, evidential weight is to be determined by having regard to, among other things, the:

- (a) reliability of the manner in which the information was generated, stored or communicated; and
- (b) manner in which the integrity of the information was maintained.

**Clause 13**

Provides that the serving or delivering of documents electronically will be allowed provided the information is sent to the person upon whom service is to be effected and that person acknowledges receipt of the information.

#### **Clause 14**

Gives the Minister responsible power to make regulations providing for the creation of electronic forms that are similar to prescribed forms and that may be used for the same purpose as the prescribed form.

#### **Clause 15**

Under this section, the payment of money to the Government may be done electronically and the Minister responsible may make regulations to allow and facilitate this.

#### **Clause 16**

This Clause provides legal certainty as to the conclusion of contracts by electronic means and provides for the formation of contracts electronically provided the parties agree to form a contract in that manner.

It further states that a contract may be formed by the interaction of the automated communications devices of the parties even if no one reviewed the actions of the device or the terms of the contract.

With a view to offering full protection to the parties the Clause also provides that the individual, where contracting with an automated communications device, will not be bound by the terms of the contract unless the terms were capable of being reviewed by the individual prior to the formation of the contract.

#### **Clause 17**

Attributes electronic documents to specific persons and provides that an electronic document is attributable to a particular person if the communication resulted from the action of that person or through an agent or his automated communications device.

An addressee is entitled to assume that an electronic document is being sent by the originator provided he applies a procedure agreed to by the parties to determine whether or not the document is that of the originator.

However, the assumption does not arise when the addressee is notified that the document is not from the originator. Nor is he able to rely on the assumption if he knew or ought to have known, that the document was sent in error or contains errors as a result of the transmission thereof.

### **Clause 18**

Provides a procedure for dealing with errors and changes in electronic documents and gives the conforming party the power to avoid a contract where the non-conforming party fails to use an agreed security procedure to detect errors in the document.

The effect of the document may also be avoided where the party in dealing with the automated communications device of another person makes an error and the device does not allow the party to correct that error and that party promptly notifies the person of the error and takes instruction for the return or disposal of the consideration (if any) received as a result of the erroneous document.

### **Clause 19**

Deals with situations in which a request for acknowledgment of receipt of electronic communication is agreed to and when there is no such agreement.

Once there is an agreement to that effect, receipt must be acknowledged, failing which the document will be treated as if it was never sent until acknowledgement is received by the originator.

If the method of acknowledgement has not been agreed by the parties any reasonable method of acknowledgement can be used provided it indicates to the originator that the document has been received.

Where there is no such agreement the originator is entitled to indicate to the addressee the time by which acknowledgement must be received, failing which the originator may treat the document as never being sent.

### **Clause 20**

This clause deals with the time and place of dispatch and receipt of electronic document. It states that, unless otherwise agreed, a message is dispatched once it enters an electronic communications system outside the control of the originator. It sets out the method for determining the time at which electronic communication was received.

### **Clause 21**

Deals with the conduct of the 'relying party', that is, one who acts on the basis of a certificate or encrypted signature. It places responsibility on the relying party to ensure that he or she verifies the encrypted signature and the validity and currency of the certificate which supports the signature.

### **Clause 22**

This Clause provides that the signatory must safeguard his signature creation device and places a responsibility upon him to inform the addressee that the signature has been or may have been compromised.

### **Clause 23**

This Clause sets out the responsibility of the Certification Service Provider, that is, a person who issues certificates for the purpose of electronic signatures or provides other services related to an electronic signature. Its responsibilities include, among other things, the need to

- ensure the accuracy and completeness of material representation made by it in relation to the certificate.
- utilize trustworthy systems, procedures and human resources in performing its services.

#### **Clause 24**

Enables the certificate service provider, at the request of the signatory, to use a pseudonym in the relevant certificate instead of the signatory's name; provided that the certificate service provider shall reveal the identity of the signatory when required by law so to do.

#### **Clause 25**

Sets out the liability of intermediaries, that is, a person who sends, receives or stores an electronic document on behalf of another person, and provides protection from civil or criminal proceedings for any information contained in an electronic document in respect of which he provides services. Provided;

- he is not the originator of the document;
- has no actual knowledge of acts or omissions that gives rise to liability;
- and
- has no knowledge of any facts or circumstances from which the likelihood of civil or criminal liability ought reasonably to have been known.

The Clause does not place a duty on the intermediary to monitor any information contained in an electronic document in order to establish knowledge of any act or circumstance that would give rise to liability. However, it does require the intermediary, if he has actual knowledge of such acts or circumstances, to immediately remove the document from his electronic communications system and cease to offer services with regard to the said document.

#### **Clause 26**

Speaks to the electronic formation of agreements for the sale, hire, exchange or supply of goods and services. It points out that the clauses in Part IV (Obligations in relation to electronic transactions for the supply of goods, services or facilities) applies to suppliers in Jamaica who sells to persons within or outside of Jamaica and suppliers outside of Jamaica who sells to persons in Jamaica.

### **Clause 27**

Sets out the obligations of the supplier in the conduct of electronic transactions. It requires him to set out on his website information such as:

- whether the entity is incorporated under any law
- the description and price of the goods, services or facilities
- the method of payment
- the time of dispatch or delivery of goods
- the return, exchange and refund policy
- the privacy policy as it relates to payment and personal information.

The supplier is also required to allow the consumer to review the entire transaction, correct errors and withdraw from the transaction before finally placing an order. Failure on the part of the supplier to comply gives the consumer the ability to cancel the transaction, return the goods and receive a refund of all payments made.

The supplier is also required to utilize a sufficiently secure payment system and is liable for any damage suffered by a consumer because of his failure to provide such a system.

### **Clause 28**

Provides that the consumer may cancel, without a penalty or charge or without giving any reason, an agreement for the supply

- of goods within seven days after the receipt of the goods.

- of services within seven days after the date on which the agreement is made.

Where payment has been made the consumer is entitled to a full refund within thirty (30) days of cancellation.

The Clause also sets out transactions which are exempt from this general rule. These include financial, banking, insurance, catering, accommodation and transport services, auctions, and lotteries.

### **Clause 29**

Specifically states that no agreement is concluded where a consumer fails to respond to unsolicited commercial communications.

It also provides that a person who sends unsolicited commercial communications must give the consumer an opportunity to decline to receive any further communications and upon request by the consumer the source from which the person obtained the consumer's personal or contact information. Failure to comply results in the commission of an offence.

### **Clause 30**

Goods and services are to be supplied within the time specified in the agreement. Where no such time is specified, goods and services are to be supplied within thirty (30) days of the agreement. Failure to supply within the time entitles the consumer to cancel the agreement seven (7) days after giving the supplier notice of his intention to do so.

Where failure to supply is as a result of the unavailability of the goods, the supplier must notify the consumer immediately. If the goods do not become available within thirty (30) days the consumer must be refunded.

### **Clause 31**

Indicates that the rights or obligations under Part IV cannot be excluded from any agreement.

### **Clause 32**

A consumer may make a complaint against a supplier to the Consumer Affairs Commission in accordance with section 7 of the Consumer Protection Act.

### **Clause 33**

Establishes a Certifying Authority and states the functions and powers of that Authority. Its functions include, among other things;

- Issuing certificates.
- Issuing and regulating the use of the public and private key pairs.
- Authenticating certificates issued by any local or overseas certification service provider.

### **Clause 34**

Addresses the penalties for breaching the provisions of the Act.

### **Clause 35**

States that where a corporate body commits an offence, any director, manager company secretary, or similar officer of the body corporate shall be held liable, if proven that the offence was committed with the consent or connivance of an officer of the body corporate.

### **Clause 36**

Provides that the Crown is bound by the provisions of the Act.

### **Clause 37**

Gives the Minister power to make regulations under the Act.

**Clause 38**

Amends Clause 6 of Consumer Protection Act to empower the Consumer Affairs Commission to carry out, at the consumer's request, investigations to determine whether goods and services were sold or provided in contravention of Part IV of the Electronic Transactions Act.

**Clause 39**

Gives the Minister power, subject to affirmative resolution, to amend any monetary penalty or schedules under the Act.

Legal Department  
30/08/06