

IV. OVERVIEW OF THE REGULATORY FRAMEWORK FOR E-COMMERCE IN SELECTED PACIFIC ISLAND COUNTRIES

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Introduction³³

Economies based on information and communication technology would contribute significantly to facilitate the inflow of financial investments. Adopting online transaction systems would provide small island countries with the opportunity to show their natural and marine resource endowments to international markets through accessible information portals. E-commerce would also assist their rapid integration into the global economy.³⁴

The increasing pace of globalization and advancements in technology stretch the traditional boundaries of contract and commerce, so much so that the conduct of electronic commerce by means of online transactions is fast becoming a worldwide phenomenon. It is clear that while small Pacific island states aspire to be part of this trend, they are nonetheless vulnerable in a number of ways.³⁵ One common view of their vulnerability is the perceived geographical disadvantage associated with their remoteness from major global and trading centres.

To overcome challenges, the use of the Internet and associated technologies anchored and operating in a suitable legal framework has now been seen as necessary. The Internet and ICT would assist in converting their perceived disadvantages into strengths. With a suitable legal framework and a functional ICT infrastructure, particularly in the area of e-commerce, the small island states in the South Pacific would be in a position to open their economies to much-needed foreign investment in the form of equity as well as joint venture capital. At the same time, they would be able to market electronically their natural resources or products in regional or

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³³ Mohammed L. Ahmadu, 2004 (forthcoming), "E-Procurement as a Development Imperative in Small Island States in the South Pacific", *James Cook University Law Review*.

³⁴ Nick Carter, 2004. "E-Procurement in Aid of Business" *International Trade Forum* 4, 27.

³⁵ Vulnerability is often described in terms of fragile ecology, comparatively small economies, low absorptive capacities, and so forth.

global markets, without the need to engage expensive intermediary services. There are innumerable benefits, both potential and actual, which flow from the electronic procurement and sale of goods and services.

A. Overview³⁶

A general overview shows that the Pacific islands are comprised of 22 sovereign and dependent states covering 30 million square kilometres of ocean. For a number of years, many island nations have based their unique development strategies in terms of their geographical isolation, comparatively small land area, cultural and ethnic diversity and vulnerability to nature.

Five Pacific island countries are considered in this study based on their varying levels of development and cultural diversity.³⁷ Vanuatu is Melanesian, Kiribati is Micronesian and Samoa and Tonga are Polynesian. Fiji is a hybrid of the three, though identifying more generally with Melanesia.

B. Regulatory situation³⁸

1. Kiribati

At present, there is no national ICT policy or e-commerce legislation. The Copyright Ordinance Cap 16 can be considered as supportive legislation, but there is no recognition for computer software or programmes.

2. Fiji

The national ICT policy extends to the departmental level and supports integrated government information portals. At the time of this writing, it was reported that no e-commerce legislation existed, although it was being contemplated. Supportive legislation includes the Copyright Right Act 1999.

In terms of administrative steps, there is a properly equipped and functional government ICT centre. A Cabinet Paper has been written on e-governance in 2001.

³⁶ Based on Mohammed L. Ahmadu, 2004 forthcoming. "UNCITRAL Model Law on Procurement of Goods, Construction and Services: Globalizing Effects and Small Island States", *Asia-Pacific Journal of Law and Policy*, 5(1).

³⁷ Fiji, Kiribati, Samoa, Tonga and Vanuatu.

³⁸ Information reproduced here is based on field research studies by the author in Fiji, Kiribati, Samoa and Vanuatu, funded by the University of the South Pacific Research Committee.

The Southern Cross Fibre-Optics Communications Cable linking Fiji with the United States of America, Australia and New Zealand has been completed.

3. Samoa

At present, Samoa does not have a national ICT policy. However, it is able to support limited government information portals. There is no e-commerce legislation.

Supportive legislation in Samoa consists of the Posts and Telecommunications Internet Act Number 27 of 1997, the Postal and Telecommunications Act 1999 and the Copyright Act Number 25 1998.

Administrative steps that have been taken include formation of an ICT Steering Committee in 2002.

4. Tonga

A policy revision has been under consideration for the national ICT policy in order to consider online economic activities. However, there was no e-commerce legislation at the time of this writing. Supportive legislation includes the Communications Act 2000 and the Radio-Communications, Telegraph and Broadcasting Acts (2000) as amended.

Several matters are still under consideration in terms of administrative steps. Consideration is being given to the Tongan Civil Service IT Strategic Plan. There is prospective legislation on (a) electronic signatures and authentication of a network user's identity and (b) international cooperation on security on cyberspace issues. An ICT Consultative Committee has been established.

5. Vanuatu

The national ICT policy of Vanuatu is not integrated, but it is able to support limited government portals for mainly financial and commercial information. Two acts that can be considered as e-commerce legislation are the Electronic Transactions Act (2000) and the E-Business Act (2000).

There are two pieces of relevant supportive legislation. One is the Companies (e-Commerce Amendment) Act Number 27 of 2000 which amended section 378 of the Companies Act Cap 191. The other piece of legislation is the International

Companies (e-Commerce Amendment) Act 2000 which amended section 10 of the International Companies Act Number 32 of 1992.

6. Prospective legislation in selected Pacific island countries

Several pieces or types of legislation are being considered in selected Pacific island countries. One is the Computer Misuse Act or Computer Crimes Act, or extensive amendment to the existing Penal or Crimes Act. Another piece of legislation is the Digital Signature Act or an amendment to the Evidence Act. Digital Telecommunications or Multimedia or Telemedicine Acts are also being considered, according to appropriateness.

C. Basic information on selected countries

1. Fiji

The country became independent in 1970, and the legal system is derived from Britain. The court system consists of the Magistrates' Court, the High Court, Court of Appeal and the Supreme Court as the highest appellate court in the country. There is also the native or *Tikina* Courts system operating at the village level.³⁹

In comparison to the other four countries, communications and information technology is fairly developed, although at present there is no coherent national ICT policy. However, departmental level initiatives support a number of government information portals. There is a properly equipped and functional government ICT Centre that services the IT needs of the government. There is a copyright law, and in the near future, e-commerce and ICT-related laws would be introduced.

2. Kiribati

The country became independent in 1979 and the legal system is derived from Britain. The court system consists of the Magistrates' Court, High Court and the Court of Appeal is the highest appellate court for the country. There are also some local courts.⁴⁰

³⁹ Michael A. Ntuny (ed.), 1993, *South Pacific Islands Legal Systems*, Honolulu: University of Hawaii Press, chapter 2.

⁴⁰ *Ibid.*, p. 82.

There is at present no national information technology and communications policy in Kiribati. However, in the area of intellectual property, there is a Copyright Ordinance. However, this offers no recognizable protection for computer software or programmes. The situation in Kiribati could be described as an extreme case scenario for lack of policy or legal support of ICT in the Pacific island subregion.⁴¹

3. Samoa

At the time of independence in 1962, Samoa adopted the parliamentary system of representative government based on universal suffrage. The country has a written constitution that provides for the separation of powers for the executive, legislature and judiciary. There is a unicameral legislature.

The court system is made up of the Magistrates, Supreme and Court of Appeal, which is the highest appellate authority. The Court of Lands and Titles handles disputes affecting customary land.⁴²

There is no national ICT policy at present. However, a number of initiatives have enabled the government to support limited government information portals. An Information and Communications Technology Steering Committee was formed in 2002. A number of associated laws have been amended.⁴³

In 1997, Samoa amended its Communications Act to encourage the operation and development of Internet services in the country. It transferred the property held by the defunct Pacific Internet Services Limited to the Post Office.⁴⁴ Aside from this action, nothing in policy formulations indicates movement in the direction of developing a national information and communication technology policy or promulgating e-commerce laws.⁴⁵

⁴¹ Mohammed L. Ahmadu, 2004 (forthcoming), "E-Procurement as a Development Imperative in Small Island States in the South Pacific", op. cit.

⁴² Michael A. Ntumu (ed.), op. cit., chapter 15.

⁴³ These include the Posts and Telecommunications Internet Act Number 27 of 1997; Postal and Telecommunications Act 1999; and the Copyright Act Number 25 1998.

⁴⁴ See the Posts and Telecommunications Internet Act Number 27 of 1997: Cf. Communications (Amendment) Act Number 251 (2000) Niue. It amended the Communications Act 1989 by designating the ownership and management of the country's code Top level Domain NU.

⁴⁵ Mohammed L. Ahmadu, 2004 (forthcoming), "E-Procurement as a Development Imperative in Small Island States in the South Pacific", op. cit.

4. Vanuatu

The country became independent in 1980. The legal system was derived from the English, but also incorporates French laws formerly enforced by the French colonial power.⁴⁶ The court system consists of the Magistrates Court, Supreme Court and the Court of Appeal, which is the highest appellate court in the country. There are also local customary courts known as Island Courts. A land tribunal has recently been established to resolve land disputes in line with local customs.⁴⁷

Vanuatu has no integrated national ICT policy, but existing initiatives are able to support limited government portals used mainly for financial and commercial information. The government has passed laws on electronic commerce, international companies and trusts. Two laws that have been passed dealing with electronic commerce are the Electronic Transactions Act 2000 and the E-Business Act 2000.

The Electronic Transactions Act aims at regulating the increasing pace of electronic transactions, including telemedicine. This is primarily due to the trend of using information technology to conduct business deals based on Vanuatu's status as an offshore finance centre. The law covers the legal requirements of electronic records; communication of electronic records; electronic signatures; encryption and data protection; and intermediaries and e-commerce service providers. These important aspects of e-commerce are now regulated in Vanuatu.

The E-Business Act is intended to complement the conduct of electronic business transactions, in a general sense. However, the scope of the law is limited to electronic businesses carried out by international companies.⁴⁸ It is not of general assistance to all types of online contracts or transactions. The law covers cyber-suite contracts and electronic business contracts; cyber-suites and e-business accounts.

The laws in Vanuatu are not part of a national information technology or electronic commerce policy strategy of the government. While there is some progress, it is apparent that the current initiative is limited to private sector needs. It is confined only to the sectors of banking, Internet gambling and casino operations.⁴⁹

⁴⁶ Don Paterson, "Vanuatu" in M. Ntummy (ed.), *op. cit.*

⁴⁷ *Ibid.*

⁴⁸ The domestic counterpart is the Companies (E-Commerce Amendment) Act Number 27 of 2000, which amended section 378 of Cap 191. See also the International Companies (E-Commerce Amendment) Act 2000, which amended section 10 of the International Companies Act Number 32 of 1992.

⁴⁹ These are also offshore transactions.

For now, there appears to be no public sector support towards ensuring that a technological foundation emerges to compliment the laws in this area. However, to a certain extent Vanuatu has recognized the need to pass such laws and prepare for integration into the global information revolution. Even though this preparation has been done step by step, it is a positive indication that Vanuatu is looking forward to developing the necessary integrated national infrastructure for e-commerce in the future.

D. Practical legal issues of common concern

Digital and Internet technologies have combined to create additional legal dilemmas in the way contracts are formulated and executed, as already pointed out. These problems can be overcome, but some important issues require clear legal resolution if e-commerce is to be accepted. This is especially significant for island states that have limited resources, lack requisite technical know how and have inadequate infrastructure. A few such legal issues can be considered.⁵⁰

1. Security issues

The use of technology to transact online has created the problem of user-identification.⁵¹ This is a particular problem because the transaction has a remote nature, there is a physical distance separating the parties and people have the ability to make instantaneous changes to electronic documents with little or no trace of detection. The cost factor associated with putting a reliable identification system in place would make the technology suspect for some time to come, at least from a legal point of view and particularly in the context of small island states.

2. Problems of e-signature

The logic flowing from issues of security is also a problem of writing and authenticating digital signatures. The use of private and public keys encoded in electronic documents to authenticate or validate electronic transactions is widely regarded as a means for safeguarding the integrity of business deals. Encryption technology has also been aiding the process of authenticating digital signatures, but

⁵⁰ Simon Potter, 2000, "In Search of the Paperless Transaction" *E-Commerce Law and Policy* 2(3), 10-11. Tonia Gilbert et al., 2000, "Surviving a Virtual Future" *Legal Business* (Supp) 105, 4-6.

⁵¹ Raymond Perry, 2003, "E-Conveyancing: Problems Ahead", *Conveyancer and Property Lawyer* (May/June), 215-224.

appropriate laws would be needed to support the transition from conventional to electronic signature systems.

3. Integrity of digital information

There are other problems associated with establishing and managing round the clock digital databases. The fundamental issue is data integrity and the utmost importance for databases to be accurate and up-to-date in order to prevent fraud and unauthorized access or misuse.⁵² It is the responsibility of digital information registries to put in place adequate protection and security safeguards for storing electronic data, because they are custodians of the data, legally speaking. As Lipton observed, “Information property right holders have an obligation of accuracy in any information maintained by the right holder in a proprietary database.”⁵³

4. Role of certification authorities

At this time, it would be difficult for small island countries to set up and manage national certification authorities to process digital signatures. There are financial and technical problems associated with the storage of digital signatures and the protection of such databases from viral and other attacks. A certification authority can be a reliable manager of digital signatures if it can eliminate the major risks for using these signatures between the sender and recipient.⁵⁴ Island states need to put in place national policies and frameworks to address the establishment and management of digital certification agencies.

5. Spam control

Unsolicited commercial information and junk email sent through mass mailing systems are increasingly becoming a regulatory issue even in small island countries. The ability of spammers to relocate their operations to new ISPs or move extraterritorially by including the discrete use of Internet cafes for spamming activities add to the difficulties of control. This problem needs to be tackled in a systematic and effective way due to the additional cost to users of online transaction systems.

⁵² Mark Heighton, 2002, “Electronic Conveyancing: Moving With the Times”, *Electronic Business Law* 3(12) 11-12. Phillip H. Kenny, 2002, “Digital Fears”, *Conveyancer and Property Lawyer* (Jan./Feb.) 4-6.

⁵³ Jacqueline Lipton, 2004, “Information Property: Rights and Responsibilities”, *Florida Law Review* (56), 135-190.

⁵⁴ Stephen Mason, 2003, “Practical Problems of Digital Signatures”, *Internet Newsletter for Lawyers* (Nov./Dec.) 9-10.

6. Resolution of e-disputes

Where transactions are conducted electronically, it is inevitable that disputes can arise similar to conventional transactions. The challenge would be to resolve these disputes electronically, without additional paper-based exchanges. This would add to the efficiency of online transactions.

E. Some challenges to address⁵⁵

1. Sustained public enlightenment campaigns

There is a need for public enlightenment to create awareness of emerging issues in e-commerce. This would contribute to economic progress. For example, Fiji has taken the lead in establishing and managing a national land information system. It still needs to be fully digitized in order to record and incorporate all parcels of land held in native reserves into its electronic database. The public would need to be enlightened about the implications of online transactions. This may be an economical and cost-effective venture for comparatively larger island countries such as Fiji, Samoa and Vanuatu, but it could be a difficult undertaking for smaller island governments such as Kiribati, Nauru, Niue and Tokelau. However, this perceived problem could be overcome by forming a regional digital information network and perhaps launching a region-wide IT awareness campaign.

2. Development of appropriate infrastructure and workforce

The technology and expertise required to operate e-commerce systems are costly and difficult to procure by small island countries with comparatively limited resources. However, because globalization is putting pressure on developing countries to accede to the World Trade Organization (WTO) and World Intellectual Property Organization (WIPO), these countries really have no time to lag behind.⁵⁶ Building appropriate technical infrastructure and developing appropriate skills should be handled at two levels, national and regional. It might be the appropriate time for the South Pacific Forum Secretariat to take the lead in this area.

⁵⁵ Revised discussion from Mohammed L. Ahmadu, "Legal Aspects of Electronic Lands Registries in Small Pacific Island States", paper presented at the Real Property Teachers Conference, University of Canterbury, Christchurch, New Zealand, 1-3 July 2004.

⁵⁶ Mohammed L. Ahmadu and Robert Hughes, 2004 (forthcoming), *Commercial Law and Practice in the South Pacific*, London: Cavendish Publishing.

3. Institution of an e-readiness programme

It is essential to have an e-readiness programme for the development of appropriate technological capability. Short, medium and long-term goals are required, including (a) capacity-building and training; (b) institution of appropriate information technology curricula at all levels of education; and (c) on the job training to upgrade IT skills of workers, both in the public and private sector. In the absence of a coordinated regional approach, the pace could be determined by the national IT policy goals of each island country.

4. Establishment of complimentary e-government structures

This is a simple and sensible way to inaugurate e-transactions for the general public, especially in relation to online sales and e-conveyances. In island countries, governments are the major employers. This helps to provide training opportunities for a broad range of civil servants. Governments also dominate in the provision of public infrastructure projects and services due to the limited capacity of the private sector. Therefore, the public sector is in the best position to guide the revolutionary changes needed to generally support the establishment of e-business structures.⁵⁷

E-government would require ministries, departments and statutory boards to provide the following to the general public: e-mail addresses; web sites detailing governmental functions and responsibilities; and the provision of information hubs containing data on environment, health, investment and tourism, land tenure, etc. A more developed version may incorporate e-filing of documents, online permits and electronic tax payments.⁵⁸ Island countries need to set priorities if they are to provide these services to the public as complimentary activities to the conduct of e-commerce in the private sector.

F. Recommendations

1. Promulgate simple but effective legislation

In the particular case of small island countries, it is worth noting that e-commerce laws that have to be promulgated should be simple in structure, yet

⁵⁷ United Nations, 2002, *Internet Infrastructure and e-Government in Pacific Island Countries: A Survey on the Development and Use of the Internet*, Paris: UNESCO, March 2002.

⁵⁸ World Bank, 2002, *E-Government Handbook for Developing Countries*, Washington, DC: InfoDev-World Bank and Centre for Democracy and Technology, November 2002.

effective and easy to administer. As the practical realities of their economies and legal systems dictate, complex e-commerce legislation would be likely to fail or may prove difficult to administer.

In this context, island countries would need to examine the suitability of some provisions contained in the various e-commerce model laws. They should consider the model laws in relation to their local circumstances. It is important that they align the provisions of these model laws to suit their national policy aspirations, socio-economic situations, environmental considerations and pace of legal development.

2. Give tailor-made professional training

In general, only a very small percentage of lawyers in the region are familiar with e-commerce laws. This is also true for members of the judiciary, staff in ministries of justice and civil servants in relevant departments. It is necessary to institute and maintain sustained training programmes suited to the needs of these categories of professionals.

For example, donor agencies may consider funding continuing legal education modules on e-commerce law and practice for public sector lawyers in the various island countries. The University of the South Pacific has a Community Legal Centre, which is based in the School of Law. That centre could handle such a project, either on a country or region-wide basis. The University of the South Pacific Judicial Training Programme based in the Institute of Justice and Applied Legal Studies, working in conjunction with the School of Law, might also be able to administer similar training modules for judges in the region. These capacity-building initiatives would be necessary to guarantee the future of e-commerce in the region.

According to Prior, “Training is directed towards behaviour change resulting in performance improvement which is readily measurable.”⁵⁹ Accordingly, he further asserted that learning opportunities should be made available to individuals and groups within the public and private sectors of the economy to equip them with skills and capacities to be more efficient.

⁵⁹ John Prior (ed.), 1994, *Handbook of Training and Development* (2nd ed.), Aldershot, UK: Gower, p. 69.

3. South Pacific E-Commerce Law Programme

ESCAP and other interested donor agencies may consider partial or full funding of specific e-commerce law courses as part of the undergraduate or postgraduate curriculum in law at the University of the South Pacific. This would support the current undergraduate offerings in commercial, corporate, trade and tax laws. At the postgraduate level, it would compliment intellectual property and advanced commercial and securities laws currently being offered by the Law School in Vanuatu. This curriculum could easily be offered to distance students via online delivery.

4. Establishment of a South Pacific ICT centre

It might be timely to consider a regional strategy rather than piecemeal approaches by individual countries for ICT development. An information technology and law centre (ITLC) would need to be established to assist island countries to develop the necessary legal and technological structures to support e-transactions. Three basic legal frameworks can guide the establishment of a proposed regional committee on information and communication who may be tasked with the responsibility of establishing this proposed facility.⁶⁰

The proposed ITLC might serve as a regional administrative, technical and legal advisory facility for e-transactions by addressing issues of common interest to all countries. Examples include; recognition of external certification agencies and the issuance of digital certificates. The governments of island countries would definitely have some say in matters involving encryption technology and certification procedures due to the potential impact on national security issues.

As a starting point, it might prove helpful to South Pacific island states to become signatories to the WTO Agreement on Government Procurement 1994. Perhaps they might also adapt versions of the UNCITRAL Model Law on Electronic Commerce 1996 and UNCITRAL Model Law on Electronic Signatures 2001 to serve as legal guidelines when drawing up their national e-commerce laws.

Most island countries are becoming increasingly integrated into the global economy through direct participation in the WTO or through regional arrangements such as Pacific Agreement for Closer Economic Cooperation (PACTA), Pacific Island Countries Trade Agreement 2001 (PACER), South Pacific Regional Trade and Economic

⁶⁰ The WTO Agreement on Government Procurement 1994; the UNCITRAL Model Law on Electronic Commerce 1996; and the UNCITRAL Model on Electronic Signatures 2001.

Cooperation Agreement (SPARTECA), the Melanesian Spearhead Group⁶¹ and the Cotonou Convention.⁶² Countries participating in these arrangements could adopt internationally recognized e-commerce model laws as a way to further assist their effective integration into the global economy.

In particular, the Model Law on Electronic Commerce can serve as a useful legal guide to Pacific island nations willing to formulate their future e-commerce laws. It deals with all areas of interest relevant to electronic commerce. In particular, it applies legal requirements to data messages and covers issues about communication of data messages – explicitly giving recognition to the validity of online contracts, among others. Significantly, Part 2 of the Model Law deals with specific electronic commerce transactions such as carriage of goods. National authorities must work within the framework of the Model Law to devise suitable provisions in their proposed e-commerce laws.

For most of the island countries, the technical and legal expertise necessary to accomplish the objective of making new laws is not readily available. Consequently, some form of assistance may be requested from ESCAP or UNCITRAL to help achieve this objective. This would help indicate why it is necessary for small island countries to also consider joining the WTO Agreement on Government Procurement.

The public sector provides a good example. Pacific island governments are generally the largest consumers of goods, construction and services. If existing manual systems of public procurement were transformed into electronic systems, it would enhance efficiency, save costs and speed up decision-making. Overall, this will contribute to national development goals and aspirations. In addition, governments in the region could effectively maximize their e-procurement choices. There are also many potential benefits in the areas of commercialization and privatization of economic activities.

Policy makers in countries of the Pacific island subregion should realize that one of the most important factors for generating personal and national wealth is the optimal utilization of technical knowledge. Traditional factors of production are still useful, but the contribution of knowledge utilization has become a more valuable input. The current revolution in ICT is clearly knowledge-based. Embracing the

⁶¹ The Melanesian Spearhead Group is comprised of Fiji, Papua New Guinea, Solomon Islands, Vanuatu and New Caledonia. The group signed a free trade agreement in 1994.

⁶² This replaced the Lomé IV Convention between the European Union and African-Caribbean-Pacific (ACP) countries which expired in 2000.

ICT advances would no longer make limitations in size, land mass and material or human resources serve as a hindrance to development.

In the near future, the transition to an e-based society in the Pacific islands would certainly be driven by the public sector in view of the enormous costs involved to set up and operate the technology and ICT systems. A mixture of encouragement and appropriate incentives could help to attract the private sector to play a leading role in ensuring that a solid ICT foundation is created in the region.

5. Regional technical cooperation

Perhaps another possibility for ICT development is for island countries to pool their resources together and create what may be called a circular loop of information highway facility. This facility would link all Pacific island countries into a network for high-speed data and information exchange, as well as a storage and retrieval system, perhaps in the form of a regional information portal or gateway. Such a regional technical arrangement could probably be hosted by one of the countries in the region. At this time, such a proposal has not been actively considered before.

Finally, there is no specific regional body at this time to handle issues affecting ICT. Such a proposed facility might lay the foundation for the establishment of a regional e-commerce regulation and coordination centre. This would be possible only if Pacific island countries would be prepared to embrace ICT as part of their national policy objectives. It is expected that when such a facility is established would be coordinated and integrated on a regional basis.⁶³

⁶³ Fuatai Purcell and Janet Toland, "E-Finance for Development: Global Trends, National Experience and SMEs" at www.is.cityu.edu.hk/research/ejisdc/vol11/v11c6.pdf+%22E-Commerce+in+the+South+Pacific%22&hl=en (Visited 6 June 2004).