

e-Commerce 2015

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Getting the Deal Through is delighted to publish the eleventh edition of *e-Commerce*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 24 jurisdictions featured. New jurisdictions this year include Belgium, Brazil, Canada, Denmark, Hungary and Portugal. This year the volume features chapters on Monitoring in the Workplace and The Growth of Outsourced Solutions.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Robert Bond of Speechly Bircham LLP for his continued assistance with this volume.

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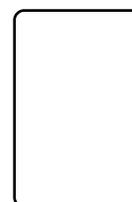
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Peru

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General

- 1 How can the government's attitude and approach to internet issues best be described?

The current government is not fully clear regarding its approach to internet issues. It is important to note and congratulate that the Broadband Promotion and Red Ridge Construction Act provides broadband network neutrality in its article 8: 'The Internet access providers respect the neutrality of networks that can not arbitrarily block, interfere with, discriminate against or restrict the right of any user to use an application or protocol, regardless of source, destination, nature or property.' Also, there are worrying legislative initiatives such as the Bill on Child Protection from Internet Pornographic Content proposing that all internet connections in Peru be filtered by a state commission to protect children from obscene and pornographic content. This bill could undermine the right of access to information and freedom of expression in addition to being used as an instrument to give the government control of content.

Legislation

- 2 What legislation governs business on the internet?

Although there is no specific rule governing e-commerce, there are several regulations that apply at different stages, either through restrictions or providing facilities.

First, article 141-A of the Civil Code allows the evidencing of intent through electronic means, considering it an express declaration.

Then, in making a contract, the Law of Digital Signatures and Certificates (Law No. 27,269) and its rules govern the use of electronic signatures, so that they have the same validity and legal effect as a written signed document.

In the advertising or promotion of goods and services provided by natural or legal persons, Law No. 28,493 regulates the use of unsolicited commercial e-mail (spam), which will be considered as such when it has been sent without the request or consent of the recipient. This Law also establishes the conditions of legality of unsolicited commercial e-mail.

Peru also has free trade agreements with different countries, for example, with the United States, which contain articles about the authentication of digital signatures and certificates for full identification of the parties so as to carry out valid transactions with greater security and confidence, through the exchange of information on standards, regulations and other relevant documents.

In addition, the Additional Protocol to the The Pacific Alliance Agreement established that neither party may adopt or maintain legislation on electronic authentication that prevents the parties to a transaction by electronic means of having the opportunity to prove to the courts or administrative authorities, that those transactions accomplish the authentication requirements established by legislation. Finally, the Data Protection Law (Law No. 29,733) regulates

the personal databases of private and public entities, processing, storage, security and communication, including outside the country.

In addition, we can mention the recent report of the Superintendency of Tax Administration (SUNAT), which establishes that the import and sale of e-books is subject to VAT.

Protection Law (Law No. 29,733) regulates the personal databases of private and public entities, processing, storage, security and communication, including outside the country.

Regulatory bodies

- 3 Which regulatory bodies are responsible for the regulation of e-commerce and internet access tariffs and charges?

OSIPTEL (the Peruvian Organisation for Private Investment in Telecommunications) regulates internet access fees and expenses; it sets out general rules, but does not interfere with internet service prices as these are regulated by the market. There is no specific regulatory institution for e-commerce.

Jurisdiction

- 4 What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions (or disputes) in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

In Peru, the courts do not define internet-related transactions or disputes. However, at the administrative level, the National Institute for the Defence of Competition and Protection of Intellectual Property (INDECOPI), by Resolution No. 0827-2005/TPI-INDECOPI, is competent to hear disputes concerning the use of distinctive signs on the internet, even if it is determined that the website in question is under the ownership, management or administration of a company domiciled in Peru. If the website has commercial effect in Peru (using the ccTLD domain name '.pe' or advertising content aimed at the Peruvian public), INDECOPI is competent to decide a case related to this site.

This resolution is important because it reflects an interpretation of INDECOPI that can be applied in other cases and areas, not only intellectual property issues, but also consumer protection or unfair competition.

Contracting on the internet

- 5 Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

Yes, it is possible to form and conclude contracts electronically. The Civil Code allows the expression of will to take place electronically between absent people, although there are no specific requirements for accreditation.

The usual practice in our country is that the buyer will receive an e-mail confirming that the purchase has been successful, allowing for proof of the contract between the parties, but this is not mandatory.

- 6** Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

Contracting on the internet is governed by the Civil Code and the Consumer Defence and Protection Code (Law No. 29,571). The Civil Code governs business-to-business contracts, and the Consumer Law governs business-to-consumer contracts.

- 7** How does the law recognise or define digital or e-signatures?

A digital signature is defined as a signature that uses the technique of asymmetric cryptography, based on the use of a single key pair, with associated private key and a public key mathematically related to other, so that those who know the public key cannot decode the private key.

The digital signature ensures non-repudiation of the original electronic document and has the same legal validity as the use of a handwritten signature, if and only if it is generated within the framework of the Official Infrastructure of Electronic Signatures.

- 8** Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

No, there is no requirement in relation to the formation of electronic contracts.

Security

- 9** What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

There is no legislation requiring private sector companies to implement technical security measures for internet transactions. However, providers of e-mail services domiciled in the country are regulated by Law No. 2,8493, which regulates the use of unsolicited commercial e-mail (spam) and requires the provision of locking systems or software or filters for the reception or transmission made through their server, for the e-mails requested by the user.

On the other hand, Circular No. G-140-2009, issued by the Superintendency of Banks and Insurance (SBS), requires banks to establish, maintain and document information security management systems. For instance, in the case of fund transfers to third parties through electronic channels, financial institutions should implement an authentication scheme based on at least two items of personal customer information.

It is also important to know that Computer Crimes Act, Law No. 30,096, modified by Law No. 30,171, article 8, establishes about computer the following provision:

Whoever knowingly and unlawfully procures for himself or another an unlawful advantage to the detriment of third party through design, input, alteration, deletion, removal, cloning of computer data or any interference or manipulation in the operation of a computer system, shall be punished with a sentence of not less than three nor more than eight years and sixty to one hundred and twenty day-fines.

The penalty shall be imprisonment for not more than five nor more than ten years and fined eighty to one hundred and forty days when the State property intended or assistance programmes of social support is affected.

- 10** As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

Peruvian law does not expressly empower authorities to make available private keys, but a judge could request a party to produce such keys if it is necessary in a judicial process.

The Law of Signatures and Digital Certificates, Law No. 27,269, does not allow for a judge or administrative authority, including certification authorities, to request private keys of encrypted communications.

Domain names

- 11** What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

The Peruvian ccTLD administrators incorporate an EPP protocol (with registrars) that does not have any kind of restriction on the registration of domain names (no nationality or residency requirements).

- 12** Do domain names confer any additional rights (for instance, in relation to trademarks or passing-off) beyond the rights that naturally vest in the domain name?

No, only the right to use the domain name.

- 13** Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

Yes, is possible to use an LDRP (alternative system based on the principles of Uniform Domain-Name Dispute-Resolution Policy). The World Intellectual Property Organization Arbitration Center is a dispute resolution provider.

On the other hand, in a recent modification of the LDRP, protection was extended to the ownership of:

- appellations of origin protected in Peru;
- names of individuals or pseudonyms publicly recognised in Peru;
- names of official bodies of Peruvian central, regional or local government; and
- company names registered in Peruvian public records.

Advertising

- 14** What rules govern advertising on the internet?

There is no specific legislation regulating advertising on the internet, but there are a number of laws that can be applied, such as the Consumer Defence and Protection Code (Law No. 2,9571).

Article 13 of the Code defines the purpose of the protection of the consumers in relation to advertising, and this regulation also applies to the internet:

Article 13. Purpose:

The protection of consumers in relation to advertising is intended to protect consumer information asymmetry when advertisements are misleading or false in any way, including presentation or relevant information, so that consumers may be induced or misled about the origin, nature, method of manufacture or distribution, characteristics, suitability for use, quality, quantity, price, terms of sale or acquisition and, in general, about the attributes, benefits, limitations or conditions of the products, services, facilities or transactions that are being marketed, or when advertisements are misleading about an agent's attributes, including everything that represents your business.

In addition, considering the impact that advertising can have on social behaviour, the Code also aims to protect consumers from

advertisements that are contrary to the principle of social fairness, avoid encouraging antisocial acts or illegal discrimination or other similar behaviour.

Other legislation relating to advertising regulation could be applied to the internet includes:

- the Law for the Repression of Unfair Competition (Legislative Decree No. 1,044);
- the Personal Data Protection Law (Law No. 29,733) and the Regulation (Supreme Decree No. 003-2013-JUS);
- Directive No. 005-2009/COD-INDECOPI on the operation of the registry of phone numbers and e-mail addresses excluded from being recipients of mass advertising;
- the Civil Code; and
- laws regulating particular activities (gambling, tobacco, alcoholic beverages, prescription drugs and unhealthy food (junk food)).

15 Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

Although there is no specific legislation on products or services advertised on the internet, there are some limitations given by the legislation mentioned above, for example, products or services that require government authorisation, such as gambling, prescription drugs, unhealthy food (junk food), and so on.

Financial services

16 Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

The Consumer Code regulates the advertising of financial services products, including via the internet.

The SBS regulates the advertising and selling of these products, including via the internet. This authority is in charge of securing better regulation of financial services.

Defamation

17 Are ISPs liable for content displayed on their sites?

ISPs can shift responsibility for the content on their platform to the users by using terms and conditions.

However, the ISP may be liable if it has previewed the information before publication to filter out illegal content; if the content turns out to be illegal and a third party has made a report on this, the provider is required to examine the case and check the illegality of the content and, if necessary, remove it to discharge liability.

18 Can an ISP shut down a web page containing defamatory material without court authorisation?

Although there is no specific rule that allows it, it is recommended that the ISP's right to terminate the contents is set in its terms and conditions.

The terms and conditions can even include a list of unacceptable content on the platform, without prejudice to whether there is any unforeseen situation, so it can decide whether the content is acceptable.

Intellectual property

19 Can a website owner link to third-party websites without permission?

The website owner may link to a third-party website without permission, provided that it does not infringe copyright, trademark or unfair competition laws.

20 Can a website owner use third-party content on its website without permission from the third-party content provider?

No, a website owner cannot use third-party content on its website without permission from the author or owner of the content, unless:

- the content is in the public domain;
- only a small part of the third-party content is being used, with indication of its author and source, and a link to the original content source quoted; or
- it is free-use content under any open licensing of copyright.

21 Can a website owner exploit the software used for a website by licensing the software to third parties?

There are no specific prohibitions. If the website owner is the copyright holder of the software or is entitled to sub-license the software, the website owner may license the software to third parties.

22 Are any liabilities incurred by links to third-party websites?

There are no special regulations on this matter, but general provisions may apply if a copyright, trademark or unfair competition infringement is committed by the link. Also, DL 822, article 39, says:

No authority or natural person or legal entity may authorise the use of a work or any other product protected by this Law, or assist in such use, if the user does not have the prior written authorisation of the owner of the relevant rights, save in the exceptional cases provided for by law. In the case of failure to comply, he or it shall be jointly liable.

On the other hand, article 1969 of the Civil Code provides that whoever causes harm to another by fraud or negligence is obliged to compensate them.

Data protection and privacy

23 How does the law in your jurisdiction define 'personal data'?

In Law No. 29,733, the Personal Data Protection Law, 'personal data' is defined as all information about a natural person who is identified or can be identified with tools reasonably used. On the other hand, in the Regulation, 'personal data' is defined as all numerical, alphabetical, graphic, photographic, acoustic or personal habits, or any other data related to individuals that identifies them or makes them identifiable through easily accessible methods.

24 Does a website owner have to register with any controlling body to process personal data? May a website provider sell personal data about website users to third parties?

Yes. The Personal Data Protection Law requires that the owner of the personal database report and register it with the administrative authority.

25 If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction? In particular, is there an opt-out or opt-in approach to the use of cookies or similar technologies?

Individuals' habits, even in online activities, are considered personal data and are therefore regulated and protected by the law on the protection of personal data.

In this context, the law requires that the owner of personal data must give an individual prior, informed, explicit and unequivocal consent (opt-in) for his or her inclusion in the website database.

26 If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

The territorial application of the Personal Data Protection Law is limited to personal data contained in a database whose processing is undertaken in national territory; but if the personal data is exported out of the territory (by any means, including technical aspects such as the servers being located outside the jurisdiction), in this case the owner of the database needs the consent of the owner of the personal data.

27 Does your jurisdiction have data breach notification laws?

The Personal Data Protection Law has not regulated data breach notifications. There is only an obligation to notify in the event of a violation of personal data.

Taxation

28 Is the sale of online products (for example, software downloaded directly from a website) subject to taxation?

Yes, the sale of products and services online made by a company incorporated and domiciled in Peru is taxed. However, the Peruvian Tax Code (article 33) indicates that the export of Peruvian goods or services to persons not domiciled in Peru, and provided that the good or service is used outside the territory of Peru, is not subject to VAT. Among the services benefiting from this exemption are the following:

- data processing and computer programs;
- design and software creation, generic and specific, and web design; and
- provision and operation of computer applications online.

On the other hand, article 15.3 of chapter 15 (Electronic Commerce) of the Trade Promotion Agreement between the United States and Peru, about digital products, provides that no party may apply customs duties, fees or other charges on or in connection with the importation or exportation of digital products by electronic transmission. To date this obligation has not been implemented.

29 What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

If products are sold or services rendered in Peru, even if this is done from a foreign country or server located outside Peru, then local tax should be paid.

This is because Peru's tax system is based on the principle of 'world income source', namely all income obtained by a person or company in Peru is subject to taxation, and all income obtained in Peru by a non-resident is also subject to local taxation.

30 When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

Individuals or entities with residence or domicile in Peru are obliged to register as local taxpayers with SUNAT. It is also possible, but entities with residence or domicile outside Peru are not obliged to register, if they made transactions in our country. Registration must be completed before starting taxable activities.

Domestic internet sales are taxed in accordance with the normal tax rules.

31 If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

Peruvian law regulates the procedure whereby goods exported are returned to the local provider in Peru. This procedure is designed to obtain recognition of the VAT levied on the importation.

However, in the case of e-commerce business to foreign consumers, because of the extent of the operation, the amount of tax and the cost of the postal or courier service, this procedure could be too complicated for it to be used.

Gambling

32 Is it permissible to operate an online betting or gaming business from the jurisdiction?

There is no particular legislation in Peru about online betting or gaming; gambling offline is already controlled by Law No. 28,945. There is no prohibition of online betting or gaming business, the only limitations being under specific laws, such as the protection of minors.

33 Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

As stated above, there are no limitations on online casinos and betting websites, so their use and operation is permitted; there is no specific legislation about minors' access to online gambling, although most online casinos and betting sites have age-related restrictions, mostly because of foreign legislation about it.

Most Peruvian gambling sites do request confirmation of age, most of the time related to the national identification number or credit card restrictions; in Peru the age restriction is over 18 years old because of the rule about capacity to enter into contracts included in the Civil Code. This approach is taken by the online casino operators themselves, not because of any specific law.

Outsourcing

34 What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

The principal issue for outsourcing in Peru is occupational, in the context of the work relationship between the principal company and the employees of the company that provides the contracted service.

35 What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, do the rules apply to all employees within the jurisdiction?

There is no right to consultation or compensation. The company that is providing the contracted service is only responsible for its own employees, but if the provider company does not have all its labour issues in order, its workers can petition the courts for legal benefits from the principal company.

Online publishing

36 When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability?

With websites that provide information or news, the limits of liability of the website provider are included in the terms and conditions of the website; when the website is managed by more than one author, the limits of responsibility are related to the specific terms for each site.

Responsibility for mistakes in information on this kind of site will depend on the nature of the information; a mistake could violate punitive laws related to privacy, personal honour, or image rights, or affect intellectual property rights of any kind.

The above applies in the case of information that is not related to a provider of products or services; with the latter, information should be taken as consumer-related information and is limited by the Consumer Defence and Protection Code (Law No. 29,571).

37 If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

In Peruvian legislation about information in general terms, there are limits to the constitutional right of freedom of information; the limitations are related to personal intimacy, banking secrecy and taxation, so if the database includes any of this information there will be limits on a third party to use or reproduce data from those databases.

The database, understood as a compilation of works, facts or data in retrievable form in a computer storage unit or otherwise, is also protected by Peruvian copyright law.

To be protected by copyright law, the database must have originality related to the selection of the elements that it contains and

the disposition or selection of the subject of the information; within these limits the author of the database could protect it from other people using or reproducing data and be protected by copyright law.

38 Are there marketing and advertising regulations affecting website providers?

Liability for information on a website that is about a provider of products or services is included in consumer protection legislation, specifically in the Consumer Defence and Protection Code (Law No. 29,571) that is applicable to all consumer relations, including services or products provided online, so if there is any information about a service or product that includes any mistake or false information, the service provider is responsible for it.

In particular, article 34 of the Code says that in all cases in which the supplier provides information through websites or other forms of dissemination, it must be clear, comprehensible, accurate and easily accessible in compliance with this Code and material laws. The indication to this source of information must be clear and explicit.

The following can also be apply in this area:

- Regulations under Directive No. 005-2009/COD-INDECOPI in relation to advertising by telephone and/or e-mail; and
- Law No. 28,493, which regulates the use of unsolicited commercial e-mail (spam).



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