

University of Capetown
Faculty of Law

**The information Super Cul de Sac:
Troubled Waters for
Shipping Jurisdiction**

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLMO in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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February 2002

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1. Introduction

It is estimated the paperwork associated with international freight transport may absorb between 7 and 10 per cent of the cost of trade and is now too cumbersome for the rapid and efficient movement of goods. Paper documentation, too, often trails behind the arrival of the goods which it documents.

EDI and e-commerce exist in the shipping milieu. The international maritime community has been at the forefront of taking advantage of new technology to simplify and heighten the efficiency of cross-border trades. Examples of this are electronic messaging, electronic bank transactions, electronic sea waybills and electronic bills of lading. Some fundamental legal difficulties have arisen through transacting international business in electronic form. Such issues include questions of jurisdiction in the event of disputes, applicable law governing the particular contract, reality of consent of the parties to the contract, and certain aspects pertaining to evidence

Electronic commerce, business conducted over the Internet and other computer networks, is growing explosively. The Internet is a global medium that is open across all frontiers, and once posted, a website is global from the outset. The capacity to market and sell products and services from a single site to an unlimited geographic market, and to do so at a low cost, is one of the great advantages flowing from on-line commerce. What is certain is that EDI cannot be ignored. It is also one of the major challenges it poses to businesses, consumers and policy-makers.

From a consumer's perspective, transacting with a business situated outside one's jurisdiction raises the concern that he/she may not benefit from the protection they have come to expect when purchasing something through more traditional means. Many businesses are opposed to the suggestion that they must be familiar with and expected to comply with a patchwork of regulatory schemes and varying requirements of all the jurisdictions in which their various clients or potential clients may be located.

For policy-makers, the challenge is therefore to restore a measure of certainty to the market place, and to do so in a way that properly balances the interests of consumers and businesses. It is these problems that this thesis tries to address.

2. History of the Internet

The Internet had its humble beginnings in 1969 in the United States. It was originally developed to meet certain strategic military objectives. The development of ARPAnet, the first inter-linked network of forty computers, which enabled the American Defence Department to simultaneously dispatch orders to all ballistic missile bases. It was named ARPAnet because it was a network creation of the Advanced Research Projects Agency within the Department of Defence. The basic principles that guided the development of the first network in the 1960's are still applicable today. In 1969, ARPANET heralded the beginning of large-scale computer-mediated communications and what would eventually be called the Internet.

It is doubtful the original developers of the Internet fully conceived the extent of the networked communities that would evolve from ARPAnet. Howard Rheingold (1993) notes that those involved with creating ARPAnet did have visions of groups using the network for educational purposes. They referred to these groups as interactive multi-access computer communities.

Less than forty years later, the use of the Internet has grown. As mentioned in a recent legal case, it is a place which is home to Tibetan monks and Icelandic fisherman (Thomas v. U.S, 1995). Individuals from around the globe meet and discuss critical issues of science, law and philosophy. Users form friendships that open up diverse cultures and social traditions.

Well over 100 million¹ people now have access to the Internet throughout the world, of which the majority are increasingly connecting from their workplace. Despite inception and most developments occurring in the US, Germany and the UK are fast-growing countries on the Internet. In fact 8 of the top 12 fastest growing countries, Internet hosts,

¹ These are figures put forward by Cardiff University in their article "What is the Internet" 2002 which can be obtained on the web at: <http://www.ecommerce.ac.uk/ecicr2.html>

are European. The global growth rate has more than doubled each year for the last 4 years and thousands continue to connect every month. Globally the number of host computers on the Internet has grown from just a few in 1989 to over 43 million in early 1999, connecting nearly 200 countries. Over 7 million unique domain names are now registered, with nearly 4.5 million of these (64%) commercial domains.

3. What is E-commerce

There is no common definition for E-commerce. However, clearly it comprises a broad scope of commercial transactions and related activities that a vendor and a buyer enter an individual contract to provide goods or services via electronic means². The European Commission has defined e-commerce as³ "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". The World Trade Organisation has defined E-commerce as⁴ "the production, distribution, marketing, sale or delivery of goods and services by electronic means".

Electronic Data Interchange (EDI) may be defined as⁵ "the replacement of paper documents relative to an administrative, commercial, transport or other business transaction by an electronic message structured to an agreed standard and passed from one computer to another without manual intervention."

There is little that doubt there that exists a need for a more efficient and speedier service that E-commerce can offer. This especially the case in shipping industry. One needs

² Baker & McKenzie, Doing E-commerce in Europe, 2001, at p1

³ in the EU Directive 98/48/EC on "Transparency" dated 20 July 1998.

⁴ In the WTO Declaration on Electronic Commerce, dated 25 Sept. 1998.

⁵ for further reference see the article of Matt Ash, Overview of EDI in the Maritime Sphere, 2001, at p1. This article can be found on the web at

http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm

only look at what had occurred in the case of "The Future Express"⁶ where the problems faced by banks in an international trade environment governed by paper bills of lading were highlighted. In this case the Bill of Lading were eventually negotiated to a bank (which had provided a letter of credit) a year after the goods were delivered. The reason why the bills were to be negotiated to the bank was to serve as security. Now what good are documents as security if the asset contained in the document has long since been delivered and disappeared. Clearly a speedier and more efficient means of transfer are vital in era a where transport has reduced the world to a small village.

The international business community has been seeking to dematerialise shipping documents for the past forty years⁷. The reasons for the need for paperless shipping documents are plentiful and well documented. Electronic documents offer compelling benefits to international traders: they are fast to issue, transmit and process. The speed of electronic documents eliminates late arrival of shipping documents, a persistent problem in international trade⁸. Moreover, electronic documents are amenable to automation. Automation reduces preparation time and eliminates the re-keying of data entry and the potential associated errors that are so debilitating to letters of credit⁹. Automation also reduces manual sorting, matching, filing, reconciling, and mailing tasks. Retention of electronic records is less expensive and more convenient than paper¹⁰. Furthermore, retrieved electronic information is easier and more efficient to analyse and interpolate than paper. Generally, digitisation offers time savings, cost effectiveness, efficiency, and convenience.

⁶ The Future Express [1992] 2 Lloyds Law Reports 79

⁷ Kurt Gronfors, *Towards Sea Waybills and Electronic Documents* 63 (1991). Gronfors indicated in 1991, when he wrote his book, that enormous amounts of work had been invested both nationally and internationally in the search for dematerialization of shipping documents for thirty years. A decade later efforts are continuing.

⁸ See The Future Express [1992] 2 Lloyds Law Reports 79

⁹ Errors in rekeying data may lead to discrepancies in presented documents and their rejection. It has been suggested that discrepancies are discovered in nearly one-half of all documentary presentations, and this is debilitating to documentary credit operations. For further reference see Emmanuel T. Laryea, "Paperless Shipping Documents: An Australian Perspective", 2001, at p1.

¹⁰ Which would be music to any nature lovers ears, especially when one takes into account how much paper actually goes into a Bill of Lading;

Today E-commerce is very common and just about anything can be bought over the web. E-commerce has even made its presence felt in the world of international shipping. There are number of services provided over the web including chartering, purchase of bunker fuel¹¹, selling marine products, booking of cargo space¹² and even for purposes of salvage sale¹³

Now a question with which we are posed is whether we need special rules to deal with this new mode of conducting commerce. Global electronic commerce could be greatly enhanced by having 'harmonious' law around the world dealing with jurisdiction and other aspects of the Internet and electronic commerce¹⁴. Global electronic commerce cries out for certainty and uniformity. The world needs a worldwide 'harmonious' legal infrastructure to support commercial activities over the Internet. The world needs a Lex Internet to reap the benefits of electronic commerce on a global basis¹⁵.

As will become apparent in due course, the million Rand question (which is exactly 0 SDR's today) is which country would have jurisdiction in a claim regarding e-commerce. Will it be the country of where the message was formulated and sent from (which is known as the country of origin rule) or is it the country where the message was sent to and received (which is known as the country of destination rule). The question of which rules apply in cross-border transactions is one of the most hotly debated issues in cyberspace.

4. A Separate Legal Regime?

¹¹ E.g. www.bunkerworld.com

¹² see www.maersk.com

¹³ see www.salvagesale.com

¹⁴ J.T. Westermeier, *The Journal of Information, Law and Technology*, 1998 (3), "Personal Jurisdiction: Today's Hot Issue in E-Commerce", at p13. This article can be obtained on the web at <http://elj.warwick.ac.uk/jilt/98-3/westermeier.html>

¹⁵ J.T. Westermeier, *ibid*, at p14

The Internet is owned by no one, there are no subscription fees, and no reliable records of whom is using the network, or of where they may be located¹⁶. These poses severe problems for a due process analysis based on territorial contacts; anomalous results may be expected because the network's structural indifference to geographic position is incongruous with the fundamental assumptions underlying traditional tests of jurisdiction.

The question is whether the global nature of the Internet naturally forms a separate legal arena. If a "natural" jurisdiction exists, then should special laws be enacted to govern the Internet? Should a Convention of Cyberspace be drafted similar to the separate international conventions governing the Law of the Sea and Admiralty Law? In essence, the question to be resolved is whether the Internet needs a separate set of laws or if current laws are adequate¹⁷. To answer these questions properly one must reflect on the technological nature of the Internet and the scientific traditions and philosophies that govern such technology.

Growth in transborder technology and commerce has forced U.S. courts to create complex ad-hoc legal theories to maintain jurisdiction over non-residents (Burk, May 18, 1995) while Europe has passed the controversial E-commerce Directive. However these two approaches differ in material respects. In addition to this there are numerous conventions in the pipeline, which also differ in certain material respects.

Forum shopping has obviously flourished. Here we have the service providers and the business, which conduct their affairs via the web establishing them in a country where the laws best suit them. The mere possibility that individuals might be able to escape the jurisdiction of one nation by relocating computer-mediated information and services to

¹⁶ D.L. Burk, "Jurisdiction in a World without Borders" at p9. The full article can be obtained on the web at: http://vjolt.student.virginia.edu/graphics/vol1/home_art3.html

¹⁷ For further reference see [J.M. Oberding T. Norderhaug](#), "A Separate Jurisdiction for Cyberspace?" The article can be found on the web at <http://www.ascusc.org/icmc/vol2/issue1/juris.html#jurisdiction>

another nation is an insufficient reason to create formally a separate jurisdiction for cyberlaw.

5. Need for certainty

One of the cornerstones of a legal system based on the rule of law¹⁸ is legal certainty. Jurisdictional uncertainty, and uncommonly aggressive assertions of jurisdiction, may result in circumstances such as the following¹⁹:

- i) Some enterprises may limit their markets and product offerings much more than they would if the resolution of disputes were more predictable. In such circumstances, consumers may be frustrated because attractive products or services, or more competitive prices for a given product or service are denied to them simply on the basis of their residence.
- ii) Some customers may be wary of "foreign", commercial websites, regardless of its selling limitations, because they do not feel assured that familiar rules and protections will apply or that they will have adequate remedies in the event of difficulties;
- iii) The inability to enforce foreign judgements is an additional complication. Current international laws and treaties do not routinely provide for effective enforcement options for judgements obtained in a consumer's country of residence against a merchant in a foreign jurisdiction. The question that poses itself is whether consumers are offered transparent and effective protection if they have the benefit of their laws and courts,

¹⁸ see section 1(c) of the Constitution of the Republic of South Africa, Act 108 of 1996;

¹⁹ For further reference see the Electronic Commerce Project (ECP)'s Ad hoc Task Force, "Jurisdiction and applicable law in electronic commerce Electronic Commerce", 2001. The article can be obtained on the web at:

http://www.iccwbo.org/home/statements_rules/statements/2001/jurisdiction_and_applicable_law.asp

but are still unable to enforce a judgement against a business located in a foreign jurisdiction? The answer is obviously no!

In spite of this uncertainty the internet continues to boom, although it is booming at a slower rate. The reason for the boom is simple, money. If there is a market someone will exploit it. It must be stressed that uncertainty is stunting the growth of the Internet and not preventing it altogether.

6. Types of Transactions

There are basically 2 types of e-commerce transactions that one must acquaint oneself with. The first is what is known as B2B transaction and the second is a B2C²⁰ transaction. The former is an abbreviation for business to business while the latter stands for business to consumer. A B2B transaction entails a transaction between 2 business. An example of a B2B transaction would be one like that employed by banks using the SWIFT system²¹.

A very well known example of B2C transactions will be Amazon.com. B2C usually involves on-line trades between a supplier of goods and or services and individuals, removing the requirement of the consumers' physical presence in the store to purchase the product, and being far more efficient than catalogue shopping. Instead, the customer enters the "cyberstore" to electronically browse the product on offer, and once a product is selected by the customer, the entire transaction is concluded electronically. The only physical aspect of the transaction is the packing, shipping and delivery of the product purchased.

²⁰ for further reference see the article of Matt Ash, Overview of EDI in the Maritime Sphere, 2001, at p1. This article can be found on the web at [HYPERLINK](http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm)

http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm
http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm

²¹ More will be said on SWIFT in the section on Bolero.

Why is the difference between B2B and B2C transactions important to this discussion? In the case of business-to-business (B2B) transactions across borders, there exist established conventions and solutions, which help guide such transactions²². For example, the sequences of contractual documents are generally standardised, and courts in most countries have addressed issues of form requirements. Contracting parties are usually more sophisticated and often incorporate choice of law and choice of forum clauses in their agreements. There are also well established arbitration and mediation options to avoid litigation in the courts of one party's country. This air of standardization does not exist however with B2C transactions.

In 2001 the Hague conference was held which heralded the Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters²³. In this convention all B2B (business to business) choice of forum contracts are enforced under the convention. This is true even for non- negotiated mass-market contracts. Under the most recent drafts of the convention, many consumer transactions, such as the purchase of a work related airline ticket from a web site, the sale of software to a school or the sale of a book to a library, is defined as a business to business transaction, which means that vendors of goods or services or publishers can eliminate the right to sue or be sued in the country where a person lives, and often engage in extensive forum shopping for the rules most favourable to the seller or publisher²⁴.

According to Love, if the treaty (as written) is widely adopted, it will cripple the Internet. The reason is fairly straightforward. The Hague framework begins with the notion that there will not be harmonisation of substantive law, only harmonisation of rules regarding jurisdiction and enforcement of laws. So it is a fundamental part of the Hague treaty that laws that are very different from each other will be enforced, across borders

²² For further reference see the section on SWIFT contained in Bolero below;

²³ The Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters 2001 article 4;

²⁴ . Love, What you should know about, The Hague Conference, 200, at p2. This article can be found on the web at: [HYPERLINK](#)

<http://www.cptech.org/ecom/jurisdiction/whatyoushouldknow.html>

<http://www.cptech.org/ecom/jurisdiction/whatyoushouldknow.html>

This will have a huge effect on national sovereignty, because any seller of any product can simply shift jurisdiction to a different country which has more favourable national laws, and also to deny the public the opportunity to seek redress or defend actions in the countries where they live. Under Article 28F a public policy exception is formulated. However this exception fails to protect the public²⁵. In these discussions, the Hague Negotiators frequently refer to the so-called public policy exception²⁶, which provides that judgements need not be enforced if:

“recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.”

This provision is of course quite important, but it should not be used to justify a convention that is fundamentally the wrong approach. Consequently a plaintiff need only find one country that is willing to enforce the judgement. Also, there are all sorts of creative ways that suits can bring in parties that are vulnerable to enforcement.

So even though B2C contracts are the new age transactions with the problem that it is less standardised and is more prone to public use, B2B is a poses just as many frustrating although different problems. This is especially so if people abuse the Internet for sake of quick get rich schemes and does not perform themselves in terms of the contracts. Everybody knows that there are certain elements in the shipping industry, which are notorious for such deeds and other unscrupulous deeds.

There is also the distinction between Direct and Indirect E-commerce transaction. Direct E-commerce Transactions occurs when²⁷ a vendor and a buyer not only conclude the contract over the Internet but also perform all their contractual obligations over the web. This occurs with the purchase of information e.g. weather information. Indirect e-commerce occurs when²⁸ a vendor and a buyer conclude a contract via the internet, but

²⁵ J. Love, *ibid*, at p4;

²⁶ which is contained in Art 28 of the Convention;

²⁷ Baker & Mackenzie, *Doing E-commerce in Europe*, 2001, at p3;

²⁸ Baker & McKenzie, *ibid*, at p3;

perform their contractual obligations (e.g. delivery, payment) by means other than the internet. The purchaser of bunkers, supplies for ships etc. will all fall into this category.

7. Traditional Rules of Jurisdiction

In the past principles of jurisdiction was based on country borders. Physical borders were of primary importance in determining legal rights and responsibilities. There has until now been a general correspondence between borders drawn in physical space (between nation states or other political entities) and borders in "law space"²⁹. If we were to superimpose a "law map" (delineating areas where different rules apply to particular behaviours) onto a political map of the world, the two maps would overlap to a significant degree. The clusters of homogenous applicable law and legal institutions would fit within existing physical borders, distinct from neighbouring homogenous clusters³⁰.

Physical borders are not simply arbitrary creations. Although they may be based on historical accident, geographic borders for law make sense in the real world. Their relationship to the development and enforcement of legal rules is logically based on a number of related considerations. These include³¹:

i) Power

Control over physical space, and the people and things located in that space, is a defining attribute of sovereignty. Law making requires some mechanism for law enforcement, which in turn depends (to a large extent) on the ability to exercise physical control over, and to impose coercive

²⁹ D.R. Johnson & D.G. Post, "Law And Borders--The Rise of Law in Cyberspace", 48 Stanford Law Review 1367 (1996), the full article can be found on the web at http://www.cli.org/X0025_LBFIN.html;

³⁰ D.R. Johnson & D.G. Post, *ibid*;

³¹ D.R. Johnson & D.G. Post, *ibid*;

sanctions on, law-violators³². What are the powers of states over the acts done in cyberspace where no physical borders exist?

ii) Effects

The correspondence between physical boundaries and boundaries in "law space" also reflect a deeply rooted relationship between physical proximity and the effects of any particular behaviour³³. This means that when one commits an act in one country the effects of such actions could be found in another. There is the classic example of shooting someone from across the border, which clearly illustrates this principle.

However in cyberspace where there is a constant flow of information and conclusion of contracts between individuals in various countries and one understand why effects of a transaction can well be multi-national.

iii) Legitimacy.

We generally accept the notion that the persons within a geographically defined border are the ultimate source of law-making authority for activities within that border. The "consent of the governed" implies that those subject to a set of laws must have a role in their formulation³⁴.

The problem here is that a state may make laws applicable to anyone who is outside the state and who has not given any authority or permission to be governed by such a state and to be subject to its laws³⁵.

iv) Notice.

³² D.R. Johnson & D.G. Post, *ibid*;

³³ D.R. Johnson & D.G. Post, "Law And Borders--The Rise of Law in Cyberspace", 48 *Stanford Law Review* 1367 (1996), the full article can be found on the web at http://www.cli.org/X0025_LBFIN.html;

³⁴ D.R. Johnson & D.G. Post, *ibid*;

³⁵ As will be seen below this is happening more and more often;

Physical boundaries are also appropriate for the delineation of "law space" in the physical world because they can give notice that the rules change when the boundaries are crossed. Proper boundaries have signposts that provide warning that we will be required, after crossing, to abide by different rules, and physical boundaries, lines on the geographical map, are generally well-equipped to serve this signpost function³⁶.

In cyberspace however there is sometimes no way for a web surfer to know that he has entered a new area of jurisdiction. There are no signs just as there are no borders.

Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location³⁷. The rise of the global computer network is destroying the link between geographical location and the traditional links for jurisdiction to be exercised validly.

The Net is almost entirely independent of physical location: Messages can be transmitted from any physical location to any other location without degradation, decay, or substantial delay, and without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another

8. Jurisdiction by Analogy

As my research into this topic continued I have encountered many analogies of jurisdiction in E-commerce contracts with that of mail, telephone and telex etc. It is for

³⁶ D.R. Johnson & D.G. Post, "Law And Borders--The Rise of Law in Cyberspace", at p49 Stanford Law Review 1367 (1996), the full article can be found on the web at http://www.cli.org/X0025_LBFIN.html

³⁷ D.R. Johnson & D.G. Post, *ibid*;

this reason that I find it appropriate to have a brief look at these comparisons especially in light of the fact that they are all in absentes.

a) Contracts by Mail

The basic principles of South African law of contracts provide that where an offeror expressly or tacitly authorises his offeree to make use of postal communications, the principle is accepted that the contract comes into existence the moment the letter of acceptance or telegram is posted at the post office³⁸. This is known as the expedition theory. Many equate EDI with mail and therefore believe the expedition theory may well be applicable.

However, there exists a significant difference between the ease and lack of cost involved in receiving mail through the Postal Service (even though there is a tendency for mail to disappear), and the complexities, ongoing expense, and uncertainties involved with receiving email. The expense includes access to a working computer and access to the Internet. The uncertainties include Internet service provider failure, use of a stale email address and junk mail filtering programs that may incorrectly filter out the message. Until the receipt of email reaches the same level of certainty as the mail, some care must be taken to assure that the consumer has at least the same expectation of actual receipt of email as for normal mail.³⁹ This is why the manner of acceptance is so important. If one chooses cyberspace as a medium then acknowledged of receipt of acceptance also comes into play⁴⁰

³⁸ Cape Explosives Works Ltd v SA Oil and Fat Industries (1) 1921 CPD 244 which was later confirmed by the then Appellate Division in Kergeulen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue 1939 AD 487. For further reference see R.H. Christie, "The Law of Contract", 2001, Butterworths, 4th Ed, p??

³⁹ "E-Sign and UETA: What Should States Do Now?" which can be found on the web at:

http://www.consumersunion.org/finance/e_sign.htm

⁴⁰ see below.

In *Maritz v. Cybergold*⁴¹, in analysing the defendant's contacts with the state, the court recognised that "the Internet is an entirely new means of information exchange, and analogies involving the use of mail and telephone are less than satisfactory . . ."

There are many complicating factors introduced by the technology of the Internet. For instance, if one sends e-mail to JohnDoe@hotmail.com, Mr. Doe could be located almost anywhere in the world, as Hotmail has subscribers throughout the world. If one sends e-mail to JohnDoe@hotmail.com, Mr. Doe could have implemented a "forward" file that forwards his mail from his computer in Capetown or anywhere in the world, or he can retrieve the e-mail message remotely from another location. If one sends e-mail to JohnDoe@alpha.c2.org (alpha.c2.org is a re-mailer designed to maintain the anonymity of those with accounts there), not only does one not know where Mr. Doe is located, but Mr. Doe has specifically taken steps to try to ensure that one does not know where he is located. As the District Court recognised in *ACLU v. Reno*⁴², "an e-mail address provides no authoritative information about the addressee, who may use an e-mail 'alias' or an anonymous remailer. With the possible exception of an e-mail to a known recipient, most content providers cannot determine the identity and age of every user accessing their material". Thus, except for e-mail sent to a known recipient, it may be difficult to say that e-mail distribution is a method by which a company "purposefully avails itself of the privilege of conducting activities within the [recipient's] Forum State."⁴³

Therefore it is clear to see why the expedition theory is inadequate for regarding the Internet. The main reason being the fact that the place where the acceptance is sent from is so arbitrary. The E-commerce directive states⁴⁴ that before a contract can validly be concluded the vendor must electronically send a acknowledgement of receipt of the

⁴¹ *Maritz v. Cybergold* 40 U.S.P.Q. 2d (BNA) 1729 (E.D. Mo. 1996) at 1734.

⁴² *ACLU v. Reno*, 929 881 E.D. Pa. 1996 Supp. at 845.F as found in King & Spalding, "Jurisdiction Over Commerce On The Internet", 1997, at p3. The article can be found on the web at: <http://www.kslaw.com/library/articles.asp?123>

⁴³ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). as found in King & Spalding, "Jurisdiction Over Commerce On The Internet", 1997, at p3. The article can be found on the web at: <http://www.kslaw.com/library/articles.asp?123>

⁴⁴ In Article 11(1) of the EU directive on Certain Legal aspects of information society services, in particular Electronic Commerce in the Internal Market, dated 8 June 2000;

order This acknowledged is deemed to be received when the buyer is able access it⁴⁵. This is a huge difference from our normal mail contracts⁴⁶ where the contract is deemed to conclude upon posting of a letter of acceptance.

The E-commerce is not unique in this respect. Most other forms of proposed legislation have similar provisions, including our very own Electronic Communications and Transactions Bill of 2001⁴⁷.

b) Contracts made by Telephone

Where contracts are made by telephone, such contracts are regarded as analogous to contracts made inter praesentes and the contract will be concluded when the offeror hears the acceptance⁴⁸. This is known as the information theory.

c) Comparison with E-commerce

Equating e-mail and other communication applications of the Internet with 'direct' and 'instantaneous' communications, such as the telephone, is at best simplistic. It is shown that differing opinions on when and where a contract is concluded abound where the parties communicate via electronic media.

Christie⁴⁹ is of the opinion when it comes to contracts made by telex, fax, e-mail or other electronic means of communication "attention must not be on the type of machine employed but on its effect". He further goes on to say that an "offeror who expressly or impliedly invites the offeree to reply by any method that does not put them in virtually the same position as if they are inter praesentes may be creating a situation analogous to the postal cases.

⁴⁵ In Article 11(1) of the EU directive, *ibid*;

⁴⁶ see below

⁴⁷ see below

⁴⁸ S v Henckert 1981 (3) SA 445 (A) at 451 (B).

⁴⁹ for further reference see R.H. Christie, *The Law of Contract*, 4th ed., 2001, Butterworths at p88.

Therefore what Christie is saying, if I understand him correctly is that if I were to email an offer to another then the contract will come into being as soon as the acceptance is e-mailed by this other person. It of course would not matter whether or I receive the e-mail of acceptance. This of course is hugely out of line with current international trends⁵⁰ and does not take the specific technology into account.

It seems as though no certainty exists. The following questions arise

- a) Should legal certainty be sought on the rules of contract formation?
- b) Should the expedition theory or the information theory apply to contracts concluded through the Internet or by the use of e-mail?

9. Personal Jurisdiction over Foreigners

The following principles become evident from the above. Courts first of all assert jurisdiction in civil matters on the basis of the geographical location of the parties. The importance of in personam or personal jurisdiction is reflected in both civil and common law regimes, which provide that the defendant's residence in the jurisdiction confers authority to its court in the absence of any other connecting factor between the territory and the dispute.

It has long been obvious, however, that this limited basis for competence is not enough. Human interaction has never respected state borders. Over the course of the 20th Century, as interstate travel and communication have become easier and more pervasive, the concept of "presence", with regard to personal jurisdiction, has been expanded to include contacts between foreign parties outside the forum and persons in

⁵⁰ See below where certain international conventions state that a acknowledgement of receipt of acceptance is necessary for conclusion of a contract;

the forum⁵¹. Increased physical mobility due to automobiles and other modern transportation placed personal jurisdiction under severe strain, as did disputes over "virtual" entities such as corporations that have no physical situs, and over "virtual" properties such as stocks and debts that similarly lack physical form⁵². This has led to courts regularly asserting jurisdiction over defendants outside their territory.

In *Madzimbamuto v Lardner-Burke No and Another*⁵³, the court said that 'Now the term 'personal jurisdiction' is familiar enough. It connotes a jurisdiction that a state has outside its territories over individuals, irrespective of the local situation of such individuals. It is thus to be distinguished from territorial jurisdiction, and from quasi-territorial jurisdiction, i.e., the jurisdiction which a state may claim over persons aboard ships wearing its flag.'

Historically, there has been a legislative presumption against the extra-territorial application of public law statutes, as a matter of statutory interpretation. This is based on a historical concern not to infringe on the sovereignty of other states by purporting to regulate conduct that occurs wholly within the boundaries of another jurisdiction. However, over the years the courts began to eschew rigid principles of territoriality. The modern approach recognises that governmental authorities have a legitimate interest in regulation and enforcement in relation to activities that take place abroad but have an unlawful consequence within their jurisdiction, as well as in activities that take place within their jurisdiction but have unlawful consequences elsewhere. This is the so-called "effects principle"⁵⁴.

⁵¹ for further reference see *International Shoe v. Washington*, 326 U.S. 310, 320 (1945) as contained in the article of Vatarian, "The Confluence of International, Federal, and State Jurisdiction over E-Commerce (Part II)", which can be found on the web at http://www.gcwf.com/articles/journal/jil_dec98_2.html

⁵² D.R. Johnson & D.G. Post, "Law And Borders--The Rise of Law in Cyberspace", at p50 *Stanford Law Review* 1367 (1996), the full article can be found on the web at http://www.cli.org/X0025_LBFIN.html

⁵³ *Madzimbamuto v Lardner-Burke No and Another* 1968 (2) SA 284 (RA) at p405

⁵⁴ see above

In the Canadian case of *R v Libman*⁵⁵, the Supreme Court ruled that "it is sufficient that there be a 'real and substantial link'" between the proscribed conduct and the jurisdiction seeking to apply and enforce its law.

Clearly, the "real and substantial link" test for the proper assertion of prescriptive jurisdiction will often result in more than one, and perhaps many, jurisdictions being capable of properly asserting authority over conduct that has effects in more than one jurisdiction. This is especially so on the web. When one considers how many different countries can be contacted within seconds then it is easy to fathom that many "real and substantial" links are possible. It is this fact that suggests the need for clearer prescriptive jurisdictional rules. More on this subject will be said later.

10. Admiralty Jurisdiction

Much has been said and written about the anomaly that is Admiralty Jurisdiction. There have been many outspoken critics on this separate regime of law. Just like most things in life Admiralty has both its merits and demerits, but to go into these would be to go beyond the scope of the thesis. South Africa passed the Admiralty and Jurisdiction Regulation Act⁵⁶ (Hereinafter to be known as The Act) in which states that⁵⁷:

"each provincial and local division, including a circuit local division, of the Supreme Court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner."

⁵⁵ *R. v. Libman*, [1985] 2 S.C.R. 178.

⁵⁶ Admiralty and Jurisdiction Regulation Act 105 of 1983

⁵⁷ Section 2 of The Admiralty and Jurisdiction Regulation Act 105 of 1983

This is very important to note that Admiralty jurisdiction could be exercised irrespective of the locus of the cause of action or the domicile of the parties. This is a very important point. It is already clear that certain similarities would start to develop with e-commerce as one goes along.

The maritime claims spoken of above⁵⁸ are elaborated on in section 1 of the Act and basically cover any matter which by virtue of its nature or subject matter is a marine or maritime matter⁵⁹ where any marine or maritime claim is treated as such for purposes of the Act.

In Admiralty Jurisdiction there exist 2 actions which need to be looked at. It is important to have a brief look at both since jurisdiction is exercised differently depending on which action one uses. These actions are:

- a) action in rem⁶⁰.
- b) an action in personam⁶¹;

11. Action in Rem

A maritime claim may be enforced by an action in rem. When this occurs then the rei itself is the defendant in the suit. This may only be done if⁶²:

- a) a claimant has a maritime lien over the property to be arrested; or

⁵⁸ see above on section 2 of The Admiralty and Jurisdiction Regulation Act 105 of 1983

⁵⁹ especially by virtue of the "catch-all" paragraphs section 1 (dd)-(ff) of the Admiralty and Jurisdiction Regulation Act 105 of 1983

⁶⁰ section 3(4) of the Admiralty and Jurisdiction Regulation Act 105 of 1983

⁶¹ section 3(1) of the Admiralty and Jurisdiction Regulation Act 105 of 1983

⁶² for further reference see an section 3(4) of the Admiralty and Jurisdiction Regulation Act 105 of 1983;

- b) if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned.

The former is known simply as a maritime lien while the latter is referred to as the "statutory right in rem"⁶³. These two rights of suit complement and expand the common law right of any plaintiff, peregrine or incola to sue a defendant in personam in appropriate circumstances. This is what differentiates Admiralty jurisdiction from that found at common law.

A statutory right in rem shall be instituted by the arrest⁶⁴ within the area of jurisdiction of the court concerned of property against respect of which the claim lies⁶⁵.

It is important to note that with a statutory right in rem the owner must be liable in personam for the debt and the property arrested. The property arrested must be in respect of which the cause of action concerned lies. Maritime liens differ in this respect in that a maritime lien sticks to the property like a barnacle to a ship and it does not matter if the ship is sold into new ownership, the maritime lien may still be exercised as against the ship. The only requirement of course being that a maritime lien may only be exercised against a ship in respect of which the claim lies.

The rei arrested is the defendant in the suit and in the absence of the owner intervention in the suit, satisfaction of the claim is limited to the property itself⁶⁶. In attachment procedure though the defendant is liable for the full claim.

12. Action in personam

⁶³ for further reference see J. Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Juta, 1999 at p21;

⁶⁴ as opposed to attachment in an action in personam;

⁶⁵ for further reference see an section 3(5) of the Admiralty and Jurisdiction Regulation Act 105 of 1983;

⁶⁶ for further reference see The Dictator [1892] P 304 as contained in J. Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Juta, 1999 at p21

A court will only exercise Admiralty jurisdiction in an action in personam under certain circumstances in terms of the Act. An action in personam may only be instituted against a person if⁶⁷:

- a) he is resident or carrying on business at any place in the Republic;
- b) whose property within the court's area of jurisdiction has been attached by the plaintiff or applicant, to found or to confirm jurisdiction;
- c) who has consented or submitted to the jurisdiction of the court;
- d) in respect of whom any court in the Republic has jurisdiction in terms of Chapter IV of the Insurance Act⁶⁸;
- e) in the case of a company, if the company has a registered office in the Republic.

On most occasions this action will be commenced by attachment of property of the defendant. This is why it this action is also referred to as "attachment" proceedings. Any property that belongs to the defendant may be attached. This could include a ship, a bank account, a building. It is even possible under certain circumstances for court to exercise Admiralty jurisdiction even though it is not anywhere near an ocean⁶⁹ e.g. the High court in Johannesburg may sit in Admiralty even though it is almost a thousand kilometres away from the ocean.

13. Why is this Relevant

The question is now posed what is the relevance of cyber law for Admiralty jurisdiction? Well in relation to the action in rem nothing really. This is because the very essence of

⁶⁷ section 3(2) of the Admiralty and Jurisdiction Regulation Act 105 of 1983

⁶⁸ The Insurance Act 27 of 1943;

⁶⁹ for further reference see an section 3(3) of the Admiralty and Jurisdiction Regulation Act 105 of 1983;

the action in rem remains the same i.e. the arrest of property specifically related to the cause of action⁷⁰. However in an action in personam where there is no mention of property specifically necessary to be arrested or attached and a different picture may well begin to form over the next ten years.

This is because actions in personam fall part of what is known as personal jurisdiction i.e. the exercise of personal jurisdiction over a party because certain grounds have been met⁷¹. The grounds for exercising Admiralty jurisdiction in an action in personam⁷² are similar to those found in the civil law. This makes sense since The Act borrowed these principles from the common law where it originated.

As will be seen below, there has been a trend in over the past decade or so to enhance personal jurisdiction when the Internet is involved. Therefore what we will be examine is how personal jurisdiction in Admiralty might be exercised when maritime transactions were done over the Internet.

14. South Africa

At this point, it is appropriate to mention that the new South African Sea Transport Documents Act⁷³ (hereinafter to be referred to as the Title to sue Act) specifically contemplates and provides for EDI. Although the Title to Sue Act concentrates on efforts to rectify shortcomings in the United Kingdom Bill of Lading Act of 1855 (which by force of legislative circumstance has governed the interpretation and operation of bills of lading in the South African maritime sphere), the Act breaks new ground in the EDI

⁷⁰ for further reference see above;

⁷¹ for further reference see above

⁷² for further reference see section 3(2) of the Admiralty and Jurisdiction Regulation Act 105 of 1983;

⁷³ Sea Transport Documents Act 65 of 2000

sphere by specifically recognising that sea transport documents might be held, transferred and/or negotiated by electronic means⁷⁴.

So now it seems as though the foundations have been laid for an electronic bill of lading. However there is a downside, as there usually is in this field of law. This catch is that the Sea transport Documents Act entrusts the Minister of Transport with the power to make regulations prescribing the circumstances and conditions in which document produced by an electronic system, is to be considered as a sea transport document⁷⁵. Now as a result all goods shipped under an electronic sea documents must now await these new regulations to be formulated by the Minister. Who knows how long this process will take.

Until those regulations have been issued, there cannot be any valid transfer of sea transport documents by electronic means under South African law, except where the parties have contractually agreed to the application of a specific matrix such as BOLERO or the UNCID Rules⁷⁶.

15 Forum non Conveniens

It does sometimes occur in law as well as in Admiralty that a court does not exercise jurisdiction in matter where it so clearly does have the authority to do so. This is usually due to the principle of forum non conveniens. This entails that there is a more appropriate forum to hear a matter. The Admiralty Act makes specific provision for this very situation⁷⁷. The Admiralty Act states that:⁷⁸:

⁷⁴ Section 3(1)(b) of the Sea Transport Documents Act states that a sea transport document may be transferred by the holder "through the use of a telecommunication system or an electronic or other information technology system".

⁷⁵ Section 9(1) of the Sea Transport Documents Act

⁷⁶ for further reference see the article of Matt Ash, Overview of EDI in the Maritime Sphere, 2001, at p9. This article can be found on the web at [HYPERLINK](#)

http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm

http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm

⁷⁷ in section 7(1) of the Admiralty and Jurisdiction Regulation Act 105 of 1983

"A court may decline to exercise its admiralty jurisdiction in any proceedings instituted or to be instituted, if it is of the opinion that any other court... will exercise jurisdiction in respect of the said proceedings and that it is more appropriate that the proceedings be adjudicated upon by any such other court..."

The Act goes further on to state⁷⁹ that it is possible to only stay proceedings if

"it is agreed by the parties concerned that the matter in dispute be referred to arbitration in the Republic or elsewhere, or if for any other sufficient reason the court is of the opinion that the proceedings should be stayed."

The question that now poses itself is when is it "appropriate" to decline jurisdiction in terms of the Act. For this we must refer to case law. In the English case of *The Spiliada*⁸⁰ the court held that even though the doctrine speaks of "conveniens" or convenient should be read as appropriate⁸¹. The court further goes on further on to propose a test for whether another forum is indeed more appropriate⁸². The test divides all the different considerations into a three-step process as follows:

- a) firstly the defendant will have to prove that there is another available forum that would exercise jurisdiction on the matter;
- b) Next the defendant must prove that this other forum is a more appropriate forum. The court will have to do this by taking into account the following connecting factors such as:
 - what law will be applied;
 - where the cause of action occurred

⁷⁸ in section 7(1)(a) of the Admiralty and Jurisdiction Regulation Act 105 of 1983

⁷⁹ in section 7(1)(a) of the Admiralty and Jurisdiction Regulation Act 105 of 1983

⁸⁰ *The Spiliada* [1987] 1 Lloyds Rep 1 (HL);

⁸¹ *The Spiliada*, ibid at p9;

⁸² *The Spiliada*, ibid, at p10;

- where the parties are situated
- where the witnesses are situated.

- c) The Plaintiff will then have to prove that circumstances exist which deem it appropriate for the court to exercise jurisdiction in the matter before them.

This test was then confirmed in the South African case of the Great Eagle⁸³ except that the court had erred in that it had inquired into the special circumstances prior to the connecting factors. Be that as it may the end result remains the same.

16. Electronic Communications Bill of 2001 & Excerpts of Other International Legislation

The reason why I wish to combine a discussion on the Electronic Communications Bill (hereinafter to be referred to as the Bill) and other pieces of foreign legislation, is because they are very similar and I wish to discuss them together so as to avoid duplication of the same provisions in other sections of the my thesis. The reason why so many pieces of legislation has similar provisions is because most used the UNCITRAL Model Law⁸⁴ (hereinafter to be called the Model Law) as a blueprint for there own domestic E-commerce statutes. Pieces of legislation which would be discussed here, other than the Model Law, include the EU directive on E-commerce⁸⁵ (hereinafter to be

⁸³ The Great Eagle 1992 (4) SA 313 (C);

⁸⁴Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) ARTICLE-BY-ARTICLE REMARKS", CONTENTS GENERAL ASSEMBLY RESOLUTION 51/162 OF 16 DECEMBER 1996. This article can be found on the web at:

<http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/art.1.html>

⁸⁵ EU directive on Certain Legal aspects of information society services, in particular Electronic Commerce in the Internal Market, dated 8 June 2000;

known as the E-commerce directive) and the American Uniform Electronic Transactions Act⁸⁶ (UETA). More will also be said on these later.

a) Recognition of EDI

Article 12 of the S.A. Bill contains the provisions on legal recognition of data and data messages⁸⁷. It states that⁸⁸ data messages shall not be denied legal effect solely on the grounds that it is wholly or partly in electronic form. This is of huge importance if e-commerce is to be conducted in an effective manner. The Uncitral Model Law (hereinafter to be known as the Model Law) has a similar provision in article 5 except that the article use the term "information" instead of "data" which essentially means the same.

b) Form

The Bill goes on to say that⁸⁹ data shall not be denied legal effect solely on the grounds that it is not contained in a data message but is merely referred to in such data message⁹⁰. Such recognition is acceptable under the laws of many States with respect to conventional paper communications, usually with some rules of law providing safeguards, for example rules on consumer protection⁹¹. The expression "incorporation by reference" is often used as a concise means of describing situations where a document refers generically to provisions which are detailed elsewhere, rather than reproducing them in full. In an electronic environment, incorporation by reference is often

⁸⁶ Uniform Electronic Transactions Act of 1999;

⁸⁷ a similar provision is contained section 7 of the Uniform Electronic Transactions Act of 1999;

⁸⁸ section 12(1) of the Electronic Communications Bill of 2001.

⁸⁹ section 12(2) of the Electronic Communications Bill of 2001.

⁹⁰ A similar provision is contained in art 15 BIS of the UNCITRAL MODEL LAW

⁹¹ Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) ARTICLE-BY-ARTICLE REMARKS", CONTENTS GENERAL ASSEMBLY RESOLUTION 51/162 OF 16 DECEMBER 1996. This article can be found on the web at:

<http://www.ius.uio.no/lm/un.electronic.commerce.model.law.1996/art.1.html>

regarded as essential to widespread use of electronic data interchange (EDI), electronic mail, digital certificates and other forms of electronic commerce.

The Bill goes on to address the issue of where Law requires a document to be in writing. The Bill states that⁹² a requirement under law that a document or information be in writing shall be satisfied if the document or information is:

- i) in the form of a data message, and
- ii) accessible in a manner usable for subsequent reference⁹³.

Gone are the days of huge rooms filled with files of paper, sections 12 and 13 see to that. This could lead to cost saving in the long run. Not only will storage cost be saved on but also savings on duplication, administration, transport and mailing could be made. This of course also makes it easier to legally recognise electronic shipping documents e.g. an electronic bill of lading. Even though, in principle, I do not have a problem with section 3 of the Bill, I cant help but wonder if it includes deeds (containing real rights to property) and other documents which need to be notarised or issued by court.

c) Original Form

Section 15 of the Bill states that where the law requires information to be presented or retained in its original form, that requirement shall be met by a data message if⁹⁴:

- i) there exists a reasonable assurance as to the integrity of the record from the time when it was first generated in its final form; and
- ii) where it is required that the record be presented, that record is capable of being displayed or produced to the person to whom it is to be presented.

If "original" were defined as a medium on which information was fixed for the first time, it would be impossible to speak of "original" data messages, since the addressee of a data

⁹² section 13 of the Electronic Communications Bill of 2001

⁹³ This is similar to art 6 of the UNCITRAL MODEL LAW.

⁹⁴ This is similar to art 8 of the UNCITRAL MODEL LAW.

message would always receive a copy thereof. However, section 15 of the Bill and article 8 of the Model Law should be put in a different context. The notion of "original" is useful since in practice many disputes relate to the question of originality of documents, and in electronic commerce the requirement for presentation of originals constitutes one of the main obstacles that this provision attempts to remove⁹⁵. This provision is pertinent to documents of title and negotiable instruments, in which the notion of uniqueness of an original is particularly relevant.

Various technical means are available to certify the contents of a data message to confirm its "originality"⁹⁶. Without this functional equivalent of originality, the sale of goods using electronic commerce would be hampered since the issuers of such documents would be required to retransmit their data message each and every time the goods are sold, or the parties would be forced to use paper documents to supplement the electronic commerce transaction.

Section 15 goes on to say that the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display⁹⁷. This is of course vital for shipping.

d) Contract

The Bill states that⁹⁸ that a contract shall not be denied legal effect or enforceability merely because it was concluded partly or in whole in the form of data messages. Article

⁹⁵ Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) ARTICLE-BY-ARTICLE REMARKS", CONTENTS GENERAL ASSEMBLY RESOLUTION 51/162 OF 16 DECEMBER 1996. This article can be found on the web at:

<http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/art.1.html>

⁹⁶ Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) ARTICLE-BY-ARTICLE REMARKS", CONTENTS GENERAL ASSEMBLY RESOLUTION 51/162 OF 16 DECEMBER 1996. This article can be found on the web at:

<http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/art.1.html>

⁹⁷ in section 15(3) of the Electronic Communications Bill of 2001;

⁹⁸ in section 20 of the Electronic Communications Bill of 2001;

11 of the Model Law⁹⁹ has a similar provision although it is worded differently. Both sections 20 of the Bill and article 11 of the Model Law are not intended to interfere with the law on formation of contracts. It rather hopes to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means¹⁰⁰. This article covers not merely the cases in which both the offer and the acceptance are communicated by electronic means but also cases in which only the offer or only the acceptance is communicated electronically.

e) Time & Place of Conclusion

As to the time and place of formation of contracts in cases where an offer or the acceptance of an offer is expressed by means of a data message, no specific rule has been included in the Model Law in order not to interfere with national law applicable to contract formation. The Bill however states that¹⁰¹ unless otherwise agreed, the contract shall be deemed to have been concluded at the time and place the acceptance is received. This is different from the expedition theory, which many initially believed to be applying to EDI¹⁰².

With regards to the Model Law an enacting State can exclude the application of article 11 in certain instances to be specified in the legislation enacting the Model Law¹⁰³. This is not out of the ordinary and this right to exclude was exercised in the European E-Commerce Directive¹⁰⁴.

⁹⁹ This provision is also included in the EU E-Commerce Directive in Article 8 and in UETA in section 7(a);

¹⁰⁰ Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, *ibid*;

¹⁰¹ in section 20(2) of the of the Electronic Communications Bill of 2001

¹⁰² for further reference see above;

¹⁰³ in article 11(2) of the UNCITRAL Model Law on Electronic Commerce (1996)

¹⁰⁴ as will be pointed out below;

With regards to time and place of dispatch and receipt the data message¹⁰⁵ the Bill states that unless agreed otherwise, a data message used in the formation a contract shall be presumed to have been sent by the originator when it enters an information system outside the control of the originator¹⁰⁶. If however the originator and addressee are in the same information system, the message is presumed to be sent when it becomes capable of being retrieved by the addressee.

Accordingly, the critical element when more than one system is involved is the loss of control by the sender. However, the structure of many message delivery systems is such that electronic records may actually never leave the control of the sender¹⁰⁷. For example, within a university or corporate setting, e-mail sent within the system to another faculty member is technically not out of the sender's control since it never leaves the organisation's server. Accordingly, to qualify as a sending, the e-mail must arrive at a point where the recipient has control. This section does not address the effect of an electronic record that is thereafter "pulled back," e.g., removed from a mailbox. The analog in the paper world would be removing a letter from a person's mailbox.

There are also provisions regarding receipt of the message¹⁰⁸. Unless the parties have otherwise agreed, a data message shall be presumed to have been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee. In such a situation, receipt is deemed to occur when the addressee retrieves the data message. By "designated information system", it is intended to cover a system that has been specifically designated by a party, for instance in the case where an offer expressly specifies the address to which acceptance should be sent.

¹⁰⁵ in section 21 of the of the Electronic Communications Bill of 2001 which is also contained in art 15 of the UNCITRAL Model Law on Electronic Commerce (1996) & s7(c) of UETA;

¹⁰⁶ in section 21(1) of the of the Electronic Communications Bill of 2001

¹⁰⁷ National Conference of Commissioners on Uniform State Laws, "Annual Conference Meeting in its one-hundred and eighth year, Preparatory notes and Comments", 1999 which can be found on the Web at:

<http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>

¹⁰⁸ in section 21(2) of the of the Electronic Communications Bill of 2001 & in section 15(b) of UETA

The mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems. The provision goes on to say that¹⁰⁹ unless otherwise agreed, a data message shall be presumed to have been sent from the originator's usual place of business and is deemed to have been received at the addressee's usual place of business. This is important since it can not always be determined from where a message has been sent and where it has been retrieved.

Section 21 of the Bill and article 15 of the Model Law results from the recognition that, for the operation of many existing rules of law, it is important to ascertain the time and place of receipt of information¹¹⁰. It is not uncommon for users of electronic commerce to communicate from one State to another without knowing the location of information systems through which communication is operated. In addition, the location of certain communication systems may change without either of the parties being aware of the change. This provision is thus intended to reflect the fact that the location of information systems is irrelevant and sets forth a more objective criterion, namely, the place of business of the parties. In that connection, it should be noted that article 15 is not intended to establish a conflict-of-laws rule¹¹¹.

Many people have multiple e-mail addresses for different purposes. The above subsection assures that recipients can designate the e-mail address or system to be used in a particular transaction. For example, the recipient retains the ability to designate a home e-mail for personal matters, work e-mail for official business. If A sends B a notice at his home which relates to business, it may not be deemed received if B designated his business address as the sole address for business purposes.

¹⁰⁹ in section 21(3) of the of the Electronic Communications Bill of 2001

¹¹⁰ Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) ARTICLE-BY-ARTICLE REMARKS", CONTENTS GENERAL ASSEMBLY RESOLUTION 51/162 OF 16 DECEMBER 1996, in para 100 This article can be found on the web at:

<http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/art.1.html>

¹¹¹ Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, *ibid*;

f) Acknowledgement of Receipt

A data message should not be considered to be dispatched if it merely reached the information system of the addressee but failed to enter it. It is for this reason that the novel approach of acknowledgement of receipt¹¹² has come about. Section 24 states that unless the parties have otherwise agreed no acknowledgement of any data message shall be necessary to give efficacy to the legal consequences of that message. This of course means that receipt is not necessary for a valid contract. A person would be ill advised if they did not demand acknowledgement. Acknowledgement of receipt does not cover the situation where it the message has not been opened or read.

g) Cooling Off Period

A "cooling of period" is also provided for in the Bill¹¹³ in terms of which a consumer shall be entitled to cancel without reason and without penalty any transaction related to the supply of goods within 7 days of the receipt of the good or in the case of a contract of services within 7 days of the conclusion of the contract . Certain exceptions are provided for but these are of no consequence for our purposes.

Finally the Bill provides that¹¹⁴ the protection provided to consumers under this Bill, shall apply irrespective of the legal system applicable to the contract in question. This seems to be in line with the European E-commerce Directive¹¹⁵ where the consumer protection laws of a state apply irrespective of registration of the website. This, I believe to be a step in the right direction.

¹¹² which has been included in section 24 of the of the Electronic Communications Bill of 2001, article 14 of the Model Law & in section 15(f) of the Uniform Electronic Transactions Act of 1999.

¹¹³ in section 40 of the of the Electronic Communications Bill of 2001

¹¹⁴ in section 43 of the of the Electronic Communications Bill of 2001

¹¹⁵ see below

17. UNCITRAL MODEL LAW

a) HISTORY AND BACKGROUND

The UNCITRAL Model Law on Electronic Commerce was adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1996 in furtherance of its mandate to promote the harmonisation and unification of international trade law, so as to remove unnecessary obstacles to international trade caused by inadequacies and divergences in the law affecting trade. The Model Law was prepared in response to a major change in the means by which communications are made between parties using computerised or other modern techniques in doing business. The Model Law is intended to serve as a model to countries¹¹⁶ for the evaluation and modernisation of certain aspects of their laws and practices in the field of commercial relationships involving the use of EDI, and for the establishment of relevant legislation where none presently exists.

As pointed out above, the Model Law was used as a blueprint in the South African Electronic Communications Bill¹¹⁷, the American UETA¹¹⁸ and the European E-commerce Directive¹¹⁹. The Model Law also has certain Provisions regarding specific areas in commerce¹²⁰. Part II Chapter I contain provisions specifically for Carriage of goods. In preparing the Model Law, the Commission noted that the carriage of goods was the context in which electronic communications were most likely to be used and in which a legal framework facilitating the use of such communications was most urgently needed¹²¹.

¹¹⁶ as has been the case with South Africa in trying formulating the Electronic Communications Bill of 2001.

¹¹⁷ Uniform Electronic Transactions Act of 1999;

¹¹⁸ for further reference see above;

¹¹⁹ for further reference see above;

¹²⁰ Part II of the UNCITRAL Model Law on Electronic Commerce (1996)

¹²¹ Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) ARTICLE-BY-ARTICLE REMARKS", CONTENTS GENERAL ASSEMBLY RESOLUTION 51/162 OF 16 DECEMBER 1996, in para 110. This article can be found on the web at:

b) Carriage of Goods

Articles 16 and 17 of the Model Law contain provisions that apply equally to non-negotiable transport documents and to transfer of rights in goods by way of transferable bills of lading. The principles embodied in articles 16 and 17 are applicable not only to maritime transport but also to transport of goods by other means, such as road, railroad and air transport.

Without derogating from the provisions of part one of this Law, this chapter applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but not limited to:

Article 16 establishes the scope of chapter I of part two of the Model Law, and is broadly drafted. It states that this chapter applies to any action in connection a contract of carriage of goods. It goes on to includes a variety of documents used in the context of the carriage of goods to which this chapter would apply, e.g. including, charter-parties, furnishing the marks, number, quantity or weight of goods; issuing a receipt for goods; notifying a person of terms and conditions of the contract; claiming delivery of goods¹²². The list provided is not a numerus clausus.

Article 17 of the Model Law goes on to say that where the law requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages¹²³. This applies whether the requirement therein is in the form of an obligation or whether

<http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/art.1.html>

¹²² Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996) ARTICLE-BY-ARTICLE REMARKS", CONTENTS GENERAL ASSEMBLY RESOLUTION 51/162 OF 16 DECEMBER 1996, in para 111. This article can be found on the web at:

<http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/art.1.html>

¹²³ in article 17(1) of the UNCITRAL Model Law on Electronic Commerce (1996);

the law simply provides consequences for failing either to carry out the action in writing or to use a paper document¹²⁴.

Section 17(3) of the Model Law states that if a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using EDI. There is a proviso in that a reliable method is used to render such data message or messages unique¹²⁵.

Basically Electronic Bills of Lading is given the green light by section 17(3). The proviso has obviously been inserted out of common sense and experience and is vital for the proper and effective use of Electronic Bills. Imagine the chaos that would result if there were multiple sets of "original" Electronic Bills of Lading, which are not unique and can all be used to obtain cargo.

18. Europe

a) Traditional

Traditionally in the European union the basic principle is that jurisdiction is exercised by the Member State in which the defendant is domiciled, regardless of his or her nationality. Domicile is determined in accordance with the domestic law of the Member State where the court has been approached. In the case of legal persons or firms, the country determines their domicile where they have their statutory seat, central administration or principal place of business¹²⁶.

¹²⁴ in article 17(2) of the UNCITRAL Model Law on Electronic Commerce (1996);

¹²⁵ in article 17(3) of the UNCITRAL Model Law on Electronic Commerce (1996);

¹²⁶ for further reference see the article of Matt Ash, Overview of EDI in the Maritime Sphere, 2001, at p9. This article can be found on the web at [HYPERLINK](#)

Prescriptive jurisdictional rules in Europe are defined by statute just as in the case of the U.S.A. and Canada¹²⁷, indeed all the more so, given the civil law tradition of most European states. In this regard effects within the sovereign territory of a state provide a basis for the assertion of prescriptive jurisdiction, as demonstrated by the French Yahoo case¹²⁸ in which one French court asserted French prescriptive jurisdiction over an online auction by Yahoo Inc. which was actually based and registered in the U.S.A. This is an example of where traditional rules were adapted to fill the holes in the Law made by the Internet. However not all holes can be filled in this manner as will be seen.

b) Cyberlaw

The European Union has been at the forefront of developing rules relating to jurisdictional issues in the context of e-commerce. Undoubtedly this is facilitated by the existence of a treaty-based regime integral to the development of the Single Market, a regime that, perforce, has long provided for resolution of jurisdictional matters. The spokesperson European Commission charged with the task of investigating e-commerce, Leonello Gabrici, said that a low level of consumer confidence is "the main thing holding up the development of e-commerce"¹²⁹. The proposed regulations are intended to assure consumers that they will have a remedy available in local courts, should a dispute arise with an Internet merchant.

c) EU E-commerce Directive

http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm

http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm

¹²⁷ This will be shown below.

¹²⁸ Licra v. Yahoo! Inc. (2000), Tribunal de Grande Instance, Paris

¹²⁹ More on this can be found in an article K. Regan, E-commerce Times, EU OK's E-Commerce Dispute Law, 1 Dec. 2000. This article can also be found on the web at

HYPERLINK <http://www.ecommercetimes.com/perl/story/?id=5635>

<http://www.ecommercetimes.com/perl/story/?id=5635>

In 2000 the European union issued the EU directive on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce in the Internal Market¹³⁰. This directive is also known as the E-commerce directive and under EU law all EU member states must promulgate law in their local law which is in line with this directive. The E-commerce directive states that¹³¹ member states must ensure any contract can be validly concluded electronically¹³². However certain exceptions are provided for¹³³ which include:

- i) contracts regarding real estate;
- ii) contracts involving notaries, public authorities, or the courts;
- iii) certain contracts of suretyship;
- iv) contracts governing family law or the law of succession.

The E-commerce directive states that the provider of information society services (which include activities of vendors¹³⁴) must comply with the applicable law in the Member State of the EU in which the service provider is established. By doing so the directive imposes a "country of origin rule". This concept forces e-businesses to address potential litigation in the Member State jurisdiction where the consumer resides.

Furthermore the Vendor will not be able to avoid the effects of this stipulation by simply saying that the laws of another country govern the contract. It may happen that vendors will wish to go offshore in search of less onerous legal restrictions¹³⁵.

¹³⁰ EU directive on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce in the Internal Market, dated 8 June 2000

¹³¹ In Article 9(1) of the EU directive on Certain Legal aspects of information society services, in particular Electronic Commerce in the Internal Market, dated 8 June 2000;

¹³² This is a standard provision and most pieces of legislation dealing with E-commerce would contain such provisions.

¹³³ In Article 3(4)(a) of the EU directive on Certain Legal aspects of information society services, in particular Electronic Commerce in the Internal Market, dated 8 June 2000;

¹³⁴ In Article 1 of the EU directive on Certain Legal aspects of information society services, in particular Electronic Commerce in the Internal Market, dated 8 June 2000;

¹³⁵ Baker & McKenzie, Doing E-commerce in Europe, 2001, at p6;

The effect of this is that the local law will regulate the following:

- i) the general framework of the website, its content, domain name, issues of public security and general liability for the website;
- ii) conclusion of a contract;
- iii) the performance of a contractual obligation;
- iv) taxation of the e-commerce transaction.

The E-commerce directive states that the Vendor's website shall be subject to the laws of a country where the vendor is established¹³⁶. This has been interpreted to mean where the vendor has a presence or "is effectively pursuing an economic activity using a fixed establishment for an indefinite period"¹³⁷. In principle it is not necessary for the vendor to comply with all the laws of all the jurisdictions which the website targets. The E-commerce directive goes on to state that EU states may restrict the freedom of websites to provide information society services for the following¹³⁸:

- i) public policy which include fighting discrimination, public health etc.;
- ii) public security including safeguarding national security;
- iii) consumer protection including investors

The restriction placed on consumer protection is the one that would be most important in the shipping industry. The other two would fall into the public law category and as a result would go beyond the scope of this thesis. Therefore a website established in Germany may have restrictions on consumer protection placed upon it by the Italian government if it targets Italian consumers. Although the country of origin rule is intended to simplify the question of applicable law a vendor cannot solely rely on the laws where it

¹³⁶ Article 3(1) of the EU directive on Certain Legal aspects of information society services, in particular Electronic Commerce in the Internal Market, dated 8 June 2000;

¹³⁷ Baker & McKenzie, *ibid*, at p16;

¹³⁸ Article 3(4) of the EU directive on Certain Legal aspects of information society services, in particular Electronic Commerce in the Internal Market, *ibid*;

is established. The vendor will have to ensure that his website conforms to the rules of all member states where he has presence with regard to the 3 above exceptions.

From the above it clear that the European system on E-commerce is a hybrid between a country of origin rule and a country of destination rule.

Christopher Boam has many reservations about this new directive. According to him¹³⁹ perhaps the most troubling development involving the Internet and international jurisdiction was the EU Directive", granting jurisdiction over consumer-based e-commerce transactions to the locus of the consumer. As stated before some observers claim that this jurisdictional approach seriously could stunt the growth of e-commerce and could lead to a damaging trade dispute with the United States. The legislation would allow disgruntled Internet shoppers to sue e-commerce firms in their own national courts, regardless of whether the company had "actively sought" to sell its product in that country.

The EU has already developed a complex legal framework in relation to E-commerce taking into consideration a number of issues but this framework is limited to the territory of the EU itself. AS for non-European countries or E-commerce activities addressing the European market from abroad, the greater part o f those issues currently remain unresolved.

19. United States of America

a) Jurisdiction in Personam

¹³⁹ for further reference see C.P. Boam, The Catholic University of America CommLaw Conspectus "The Internet, Information and the Culture of Regulatory Change: A Modern Renaissance", 2001, at p 17;

The exercise of determining whether a U.S. court has personal jurisdiction to hear a dispute resembles that used by S.A. courts, but is complicated by the overlay of the Due Process Clause of the 14th Amendment of the Constitution¹⁴⁰. In the U.S.A. traditionally, a court may only hear disputes and render judgements in actions involving a foreign party if the court has personal jurisdiction over that party. The starting point for jurisdiction over parties to a dispute is their presence in the forum. This continues to be a viable jurisdictional basis.

However it must be pointed out that civil proceedings in the United States, as is the case in South Africa, may proceed in the absence of the defendant, and result in a default judgement. The question of when it is permissible to proceed without the defendant's presence has generated a body of constitutional law related to procedural fairness and due process. This is a problem posed by e-commerce, especially in light of the fact that a business can be hailed into the jurisdiction of a foreign land merely because it has website that can be accessed from there.

In the U.S.A. there are two forms of personal jurisdiction: general and specific¹⁴¹. A court may assert "general" jurisdiction where the defendant is domiciled in the state or has "continuous and systematic" activities there¹⁴². Otherwise, a court must find grounds for

¹⁴⁰ For a more complete discussion of the rules governing forum in the U.S. and their impact on dispute related to the internet, see Barry Sookman, "Personal Jurisdiction and the Internet"; a paper presented at the Computer and Cyberspace Law Convention at the University of Dayton School of Law in July 1997. As contained in the article of the Ogilvy Renault Internet group 1998, Jurisdiction on the Internet, are Traditional Rules Enough? This article can be found on the web at [HYPERLINK http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm](http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm)

<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>

¹⁴¹ see Vartanian, "The Confluence of International, Federal, and State Jurisdiction over E-Commerce (Part II)", which can be found on the web at

http://www.gcwf.com/articles/journal/jil_dec98_2.htm

¹⁴² for further World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286; . As contained in the article of the Ogilvy Renault Internet group 1998, "Jurisdiction on the Internet, are Traditional Rules Enough?", on p4 This article can be found on the web at [HYPERLINK](http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm)

<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>

<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>

"specific" jurisdiction. This requires a finding of sufficient contact between the forum and the non-resident defendant. Specific jurisdiction is often asserted when a party's contacts are not continuous, systematic, and ongoing, permits a court to assert jurisdiction over parties to a dispute arising from the party's contacts with a state.

b) General Jurisdiction

In determining whether a court's assertion of general jurisdiction is proper, a court will analyse the nature of the defendant's contacts and business activities within the forum¹⁴³. A court may assert "general" jurisdiction where the defendant is domiciled in the state or has "continuous and systematic" activities there¹⁴⁴. This is sometimes referred to as the minimum contacts test. This entails that the defendant must have a minimum level of contact with the state before the court will exercise jurisdiction over the matter. However, as will be seen this test is inadequate for the cyberspace. Generally, if an entity maintains a corporate office in a forum from which it performs a variety of business activities, the entity will be subject to jurisdiction in that forum even if the office is temporary. However, mere purchases of products from a state, even if regularly occurring, are insufficient for an assertion of general jurisdiction over the purchaser.

Participants in Internet commerce may establish any of a number of contacts with a state through electronic banking and commerce. If financial institutions establish online accounts, business, advise customers, transfer money, conduct advertising or other business activities a website, courts may deem these activities to be contacts within any state whose residents interact with the financial institution. The more substantial an activity, in terms of the interaction with the citizens of a forum, the more likely that courts will find each particular activity a contact with that state. The quality and quantity

¹⁴³ for further reference see Vartanian, *ibid*;

¹⁴⁴ for further *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286; . As contained in the article of the Ogilvy Renault Internet group 1998, "Jurisdiction on the Internet, are Traditional Rules Enough?", on p4 This article can be found on the web at **HYPERLINK**

<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>

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of these contacts in turn determine whether the contacts with the state qualify as continuous and systematic, subjecting a participant in Internet commerce to that state's jurisdiction for any lawsuit¹⁴⁵.

In a 1996 case, *McDonough v. Fallon McElligott, Inc*¹⁴⁶, a federal district court in California considered four activities of a Minnesota advertising agency in determining the appropriateness of jurisdiction namely¹⁴⁷:

- i) hiring in-state independent contractors;
- ii) purchasing advertising space from California-based entities;
- iii) placing advertisements in California; and
- iv) maintaining a website.

Recognising the danger of asserting general jurisdiction over the advertising agency, because of its website and the possibility of failing to give reasonable effect to personal jurisdiction protections, the court held that use of the agency's website by citizens of the forum state cannot by itself establish jurisdiction. The court focused on the agency's lack of significant forum clients and the fact that no residents of the forum state actually purchased the products placed into the stream of commerce by the non-resident. The court found the purchase of advertisements, which were unrelated to the cause of action, insufficient to support an exercise of general jurisdiction. Considering these contacts in their entirety, the court found that they were not substantial, systematic, or continuous; and therefore did not support general jurisdiction over the agency.

¹⁴⁵ for further reference see Vartanian, *The Confluence of International, Federal, and State Jurisdiction over E-Commerce (Part II)*, at p2. This article can be found on the web at:

http://www.gcwf.com/articles/journal/jil_dec98_2.html

¹⁴⁶ *McDonough v. Fallon McElligott, Inc* No. 95-4037, 1996 U.S. Dist.

¹⁴⁷ As contained in Vartanian, *The Confluence of International, Federal, and State Jurisdiction over E-Commerce (Part II)*, at p2 http://www.gcwf.com/articles/journal/jil_dec98_2.html

c) Specific Jurisdiction

Participants in electronic commerce must be aware of the possibility of a court's assertion of specific jurisdiction over their activities which is exercised in a different manner to general jurisdiction. In order to determine if sufficient contact exists between the forum and the non-resident defendant, the court must analyse whether the exercise of its jurisdiction is consistent with "traditional notions of fair play and substantial justice". This is a very important part of the test since the minimum contact test on its own is wholly inadequate to meet the demands that cyberspace pose for it. An example of this is sometimes cast in terms of the reasonable expectation of the parties of having their disputes litigated in the particular forum¹⁴⁸.

Such was the case in the U.S. case of *Creative Technology, Ltd. v. Aztech System PTE, Ltd*¹⁴⁹. Both Creative and Aztech are Singapore corporations with U.S. subsidiaries. All design and manufacturing is performed in Singapore. Creative sued Aztech for copyright infringement in an U.S. court. Aztech countered with a lawsuit in Singapore and filed a motion to dismiss the U.S. lawsuit. The trial court granted Aztech's motion to dismiss based on the legal doctrine of *forum non conveniens*: that hearing the law suit in the court where the action was filed is inconvenient to the non-resident parties and there is an alternative court available.

To prevail on the motion, Aztech was required to prove that there was an adequate alternative location to hear the suit and that a balance of private and public factors required the court to dismiss the case (*Creative Technology, Ltd. v. Aztech System PTE, Ltd.*, 1995). The Appellate court affirmed the trial court's ruling due to the lack of

¹⁴⁸ for further reference see the American cases *International Shoe Co. v. Washington*, 326 U.S. 310 & *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 as contained in the article of the Ogilvy Renault Internet group 1998, "Jurisdiction on the Internet, are Traditional Rules Enough?" This article can be found on the web at [HYPERLINK](#)

<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>
<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>

¹⁴⁹ J.M. Oberding & T. Noderhaug, "A Separate Jurisdiction for Cyberspace?" at p2. The full article can be found on the web at <http://www.ascusc.org/jcmc/vol2/issue1/juris.html#jurisdiction>

convenience to the parties (as all witnesses were in Singapore) and despite the fact that Singapore laws was less favourable to Creative.

So what we have hear is 2 companies that in spite of their minimum contacts were not able to file suit in the U.S. due to the forum non conveniens doctrine.

With specific jurisdiction what must be looked is the quality of the contacts. Authors¹⁵⁰ and courts¹⁵¹ alike distinguish between 3 categories of contacts which is also sometimes referred to as a sliding scale. These categories are:

- i) Situations where the defendant clearly does business over the Internet. Courts have had no trouble exercising personal jurisdiction over non-resident defendants in this category because such business is consistent with systematic and continuous contacts' necessary for exercising general jurisdiction. This category, for example, involves the knowing and repeated transmission of computer files over the Internet or in other words, 'persistent' conduct.
- ii) The second category¹⁵² is the middle ground in the spectrum. It is occupied by cases where the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. This category is the most uncertain and therefore most troublesome.
- iii) The third category involves the posting of information or advertisements on the Web site that is accessible to users in foreign jurisdictions: but not enough by itself to subject non-resident defendants to personal

¹⁵⁰ J.T. Westermeier, The Journal of Information, Law and Technology, 1998 (3), "Personal Jurisdiction: Today's Hot Issue in E-Commerce", at p3. This article can be obtained on the web at <http://elj.warwick.ac.uk/jilt/98-3/westermeier.html>

¹⁵¹ as will be pointed out below.

¹⁵² J.T. Westermeier, The Journal of Information, Law and Technology, 1998 (3), "Personal Jurisdiction: Today's Hot Issue in E-Commerce", at p1. This article can be obtained on the web at <http://elj.warwick.ac.uk/jilt/98-3/westermeier.html>

jurisdiction. Most courts in the United States have not exercised personal jurisdiction based on the mere operation of a passive Web site or just posting information on a Web site, including general advertisements unless there is 'something more.' The 'something more' that courts have found, in exercising personal jurisdiction, has varied among courts. Generally, the level of 'activity' of a site has not had to rise to a very significant level before courts have exercised personal jurisdiction as long as the activity is focused at the forum where jurisdiction is sought.

According to Westermeier¹⁵³ most courts in the United States appear to have adopted and applied the categories to analyse personal jurisdiction questions involving the Internet. The problem is these three categories do not appear to be applied consistently. As the district court noted in *Transcript Corp. v. Doonan Trailer Corp*¹⁵⁴, "determining whether the minimum contacts for personal jurisdiction exist is not likely to be answered easily in black and white. Rather the greys will dominate and among the greys there will be innumerable shades".

United States courts have recognised the international implications of their rulings on personal jurisdiction based on Internet activities. For example, in *Weber v. Jolly Hotels*¹⁵⁵, the district court noted that personal jurisdiction is not exercised in the case of a mere passive web site, without more, because 'a finding of jurisdiction based on an Internet Web site would mean there would be nation-wide (indeed, world-wide) personal jurisdiction over anyone who establishes an Internet Web site.' In an Internet context there must be 'something more' than an Internet advertisement alone to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state.

¹⁵³ J.T. Westermeier, *ibid*, at p11;

¹⁵⁴ *Transcript Corp. v. Doonan Trailer Corp* 1997 U.S. Dist. LEXIS 18687 (N.D. Ill., Nov. 17, 1997) as found in J.T. Westermeier, *ibid*, at p11;

¹⁵⁵ *Weber v. Jolly Hotels*, 977 F. Supp. 327, 333 (D.N.J. 1997)

In the U.S. one must always consider the principle of Due Process. The assertion of specific jurisdiction does not violate the federal Due Process if¹⁵⁶

- i) party purposely avails itself of the privilege of conducting activities within the forum, rendering it reasonable for the party to anticipate being haled into court in the forum, and
- ii) the exercise of specific jurisdiction does not offend traditional notions of fair play and substantial justice.

In determining whether a foreign party purposefully availed itself of the benefits bestowed by the laws of the forum, a court inquires as to whether the foreign party could reasonably have anticipated being haled into that forum's courts. This anticipation is based on the extent that the foreign party's activities, sales, service, and business solicitations, or any manner in which they otherwise avail themselves of any of the benefits of the forum's laws, are calculated to reach the forum. The court will not only look to whether foreign parties regularly sell products to forum residents, but also to whether the parties indirectly, through others, serve or seek to serve the forum market. A consumer's unilateral actions to take a foreign party's products to a distant forum, although foreseeable, does not render the subsequent suit foreseeable.

However, by placing its products into the stream of commerce and expecting consumers in a forum to purchase those products, a corporation purposefully avails itself of that forum's laws. This is used as test that is often used to determine specific jurisdiction in the U.S. and is called the "purposeful availment" test. Under this rule, the court analyses whether the defendant has deliberately taken the opportunity to conduct activities in the forum and thereby obtain the benefits of the domestic law. If so, and assuming the exercise of jurisdiction is otherwise reasonable and fair, the court will be competent to hear a dispute arising from those activities. The purposeful availment test, and other rules used to establish specific jurisdiction, does not require that a defendant have a

¹⁵⁶ As contained in Vartanian, The Confluence of International, Federal, and State Jurisdiction over E-Commerce (Part II), at p3 http://www.gcwf.com/articles/journal/jil_dec98_2.html

physical presence in the forum. In the words of the U.S. Supreme Court, the defendant's conduct and connection with the forum must only be such that he "should reasonably anticipate being haled into court there"¹⁵⁷.

A participant in electronic commerce or banking may use "pull technology"¹⁵⁸ for its contractual relationships with others and incorporate a choice of law and forum clause¹⁵⁹ within the contract so as not to be haled into a foreign forum. In examining whether an assertion of specific jurisdiction comports with traditional notions of fair play and substantial justice, a court will consider its forum's interest in adjudicating the dispute. In particular, a court will focus on the foreign party's contacts and balance whether the forum's interest in deciding the dispute is greater than that of the foreign party's state. Although resolution of a dispute in a foreign forum may be inconvenient and may burden the foreign party's ability to call witnesses, such inconvenience does not necessarily rise to a constitutional dimension¹⁶⁰.

Whether a foreign party is subject to the specific jurisdiction of a court by virtue of its contacts via the Internet will have significant implications on the manner in which electronic banking and commerce disputes will be resolved. Because electronic commercial activities create forum contacts not based on physical presence within a forum, the contacts are more attenuated. In evaluating the forum contacts created by

¹⁵⁷ For an example of how it has been applied in a lawsuit involving internet issues, see *CompuServe Inc. v. Patterson*;

¹⁵⁸ Vartanian, *The Confluence of International, Federal, and State Jurisdiction over E-Commerce* (Part II), at p3 http://www.gcwf.com/articles/journal/jil_dec98_2.html defines "Pull" technology, such as a web browser, requires an Internet user to actively do something in order for the information to be transmitted from a foreign party's website to the user's computer. "Push" technology downloads data and other communications to a user's computer via the Internet without the user having requested the information, such as unsolicited e-mail communications and banner advertisements

¹⁵⁹ Which in itself causes many problems. For an example of this see *Minnesota (State of) v. Granite Gate Resorts, Inc.*, 568 N.W. 2d 715 (Minn. C.A. 1997) as found below;

¹⁶⁰ Vartanian, *The Confluence of International, Federal, and State Jurisdiction over E-Commerce* (Part II), at p4 http://www.gcwf.com/articles/journal/jil_dec98_2.html;

electronic interaction with customers, courts could decide that the customers created the contacts by reaching out to commercial or banking websites; or they could decide that the banks purposely directed their activities into the particular forum. Factors to be considered whether in the evaluation of the purposeful availment test include: was there regular advertisements; billing activity directed to forum consumers; the creation of special services appealing to forum residents; the absence of restrictions on electronic access; and efforts to comply with a forum's commercial laws.

d) Federal Legislation

In the U.S., prescriptive jurisdiction is essentially a matter of statute and its interpretation. In this regard, U.S. anti-trust laws provide a broad base for assertion of jurisdiction, which permit jurisdiction over foreign activities that have "a direct, substantial, and reasonably foreseeable effect" on commerce in the United States¹⁶¹. The general position in the United States in its foreign relations law is that a state has extra-territorial regulatory jurisdiction in relation to "conduct outside its territory that has or is intended to have substantial effects within its territory". This exercise of jurisdiction must be "reasonable"¹⁶². Under Federal Law the Uniform Electronic Transactions Act ("UETA")¹⁶³ was promulgated, of which over 20 states¹⁶⁴ have already incorporated in one form or another. Below follows a brief exposition of the relevant sections.

e) UETA

UETA also addresses the issue of transferable documents¹⁶⁵. UETA states that¹⁶⁶ transferable records may take the form of electronic messages. Paper negotiable instruments and documents are unique in the fact that a tangible token - a piece of paper - actually embodies intangible rights and obligations. The extreme difficulty of creating a

¹⁶¹ Sherman Act, 15 U.S.C. §6a (1994); Federal Trade Commission Act, U.S.C. §45(a)(3) (1994);

¹⁶² U.S. "Restatement (Third) of the Foreign Relations Law of the United States" §401(c);

¹⁶³ Uniform Electronic Transactions Act of 1999;

¹⁶⁴ figures as at the end of 2000;

¹⁶⁵ of which a well known e.g. would be our beloved Bill of Lading documents;

¹⁶⁶ in section 16 (a) of the Uniform Electronic Transactions Act of 1999;

unique electronic token which embodies the attributes of a paper negotiable document or instrument dictates that the rules relating to negotiable documents and instruments not be simply amended to allow the use of an electronic record for the requisite paper writing¹⁶⁷. However, the desirability of establishing rules by which business parties might be able to acquire some of the benefits of negotiability in an electronic environment is recognised by the inclusion of this section on Transferable Records.

Under this section acquisition of "control" over an electronic record serves as a substitute for "possession" in the paper analog in that. More precisely, "control" under Section 16 serves as the substitute for delivery, endorsement and possession of document of title¹⁶⁸. UETA allows control to be found so long as "a system employed for evidencing the transfer of interests in the transferable record reliably establishes the person claiming control as the person to which the transferable record was issued or transferred"¹⁶⁹. The key point is that a system, whether involving third party registry or technological safeguards, must be shown to reliably establish the identity of the person entitled to payment.

Strict requirements for such a system are set in UETA¹⁷⁰. The requirements set out in UETA were derived from the U.S. Uniform Commercial Code. The requirements are that the transferable record must be unique, identifiable, and except as specifically permitted, unalterable.

Of greatest importance in the system used is the ability to securely and demonstrably be able to transfer the record to others in a manner which assures that only one "holder" exists. The need for such certainty and security resulted in the very stringent standards for a system used for transferable and negotiable instruments. A system relying on a third party registry is likely the most effective way to satisfy these requirements. It must

¹⁶⁷ National Conference of Commissioners on Uniform State Laws, "Annual Conference Meeting in its one-hundred and eighth year, Preparatory notes and Comments", 1999 which can be found on the Web at:

<http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>

¹⁶⁸ National Conference of Commissioners on Uniform State Laws, *ibid*;

¹⁶⁹ in section 16(b) of the Uniform Electronic Transactions Act of 1999

¹⁷⁰ in section 16(c) of the Uniform Electronic Transactions Act of 1999;

however be pointed out that UETA only provides limited scope for the attainment of important rights derived from the concept of negotiability, in order to permit the development of systems that will satisfy its strict requirements for control¹⁷¹.

f) State Legislation

A number of U.S. states have attempted to assert prescriptive jurisdiction, as well as apply their laws, extra-territorially in relation to activity on the Internet. Some U.S. regulatory authorities, for instance, have taken the position that their jurisdiction is broad, covering anyone and any activity that results in information being made available to their residents¹⁷².

In the United States, two general pieces of legislation govern a court's assertion of personal jurisdiction over a foreign party: state long-arm statutes and the Due Process Clause of the Constitution¹⁷³. Long-arm statutes provide state courts with the authority to hale foreign parties into court. State long-arm powers cannot, however, exceed the constitutional limits of federal Due Process¹⁷⁴. Most states in the United States have

¹⁷¹ National Conference of Commissioners on Uniform State Laws, "Annual Conference Meeting in its one-hundred and eighth year, Preparatory notes and Comments", 1999 which can be found on the Web at:

<http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm>

¹⁷² In Minnesota, for instance, the state attorney-general's website provides a "Warning to All Internet Users and Providers," as follows: Persons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws;

¹⁷³ For further reference see FED. R. CIV. P. 4(k); *Wenz v. Memery Crystal*, 55 F.3d 1503 (10th Cir. 1995) for assertions of jurisdiction over non-resident defendants which require an examination of both the state long-arm statute and issues of due process as contained in Vartanian, *The Confluence of International, Federal, and State Jurisdiction over E-Commerce* (Part II), at p 1 http://www.gcwf.com/articles/journal/jil_dec98_2.html

¹⁷⁴ Federal Due Process, as used herein, refers to the protections offered under the due process clauses of the U.S. Constitutions, in particular the Fifth Amendment for federal actions and the Fourteenth Amendment for state actions. These protections have been

enacted 'long-arm' statutes. These statutes allow courts to 'reach out' and obtain jurisdiction over non-resident defendants where the defendant's contacts with the forum meet certain statutory defined requirements. Long-arm jurisdiction seeks to hold foreign defendants accountable for the consequences of their actions in other forums¹⁷⁵.

If a defendant's conduct is covered by a state's long-arm statute then the court must determine whether the exercise of jurisdiction comports with the due process requirements of the U.S. Constitution. The defendants must have sufficient minimum contacts with the forum to render the exercise of jurisdiction reasonably consistent with 'traditional notions of fair play and substantial justice'¹⁷⁶. According to Westermeier the minimum contacts analysis involves three parts:

- i) The non-resident defendant must do some act or consummate some transactions with the forum or perform some act by which he purposely avails himself of the privilege of conducting activities in the forum thereby invoking the benefits and protection of the forum;
- ii) The claims must arise out of or result from defendant's forum related activities;
- iii) There must be substantial enough connection or nexus between defendant's acts and the forum state to make the exercise of jurisdiction be reasonable.

This 3-part test has been confirmed in many leading U.S. cases as will be seen below. Long-arm statutes also affect a federal court's jurisdiction, for federal courts generally apply the state long-arm statute of the state in which the federal court sits to disputes involving foreign parties. Some long-arm statutes broadly define proper assertions of jurisdiction, permitting courts to interpret them as being coextensive with the limits of the

interpreted to mean that the exercise of jurisdiction must not be fundamentally unfair to a defendant. Also see above for further reference.

¹⁷⁵ J.T. Westermeier, *ibid*, at p1;

¹⁷⁶ J.T. Westermeier, *ibid*, p2.

14th Amendment Due Process Clause¹⁷⁷. Some long-arm statutes that reach to the extent of federal Due Process may nevertheless limit a state's assertion of jurisdiction to specific circumstances¹⁷⁸.

U.S. Constitution provides certain constraints on the states' when it comes to extra-territorial application of their laws. The "Due Process" clause in the Fourteenth Amendment provides that no state may:

"...make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹⁷⁹

Tassé & Henderson summarise the effect of these constitutional restraints as follows:

"The command of due process is essentially negative; it forbids a state from applying its own law, or even the law of another state, in situations where no reasonable basis exists for doing so.."

g) Case Law

¹⁷⁷ See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) finding that California's long-arm statute authorises jurisdiction "on any basis not inconsistent with the Constitution of this state or the United States", as contained in Vartanian, *The Confluence of International, Federal, and State Jurisdiction over E-Commerce (Part II)* at p1 http://www.gcwf.com/articles/journal/jil_dec98_2.html

¹⁷⁸ 15. See *Alton v. Wang*, 941 F. Supp. 66, 67-68 (W.D. Va. 1996) (finding that the Virginia long-arm statute extends to the limits of federal Due Process, but that the statute limits jurisdiction by only providing jurisdiction in specific circumstances). For example, the statute may provide for jurisdiction over foreign parties because of their forum activities or based on the effect that their actions outside of a state have on the state or its residents as contained in Vartanian, *ibid*;

¹⁷⁹ in article 1(4) of Fourteenth Amendment of the U.S. Constitution of 1788 which can be found on the web at: <http://www.law.emory.edu/FEDERAL/usconst/amend.html#14sec-1>;

There has been a veritable explosion of cyberspace litigation in the U.S. American courts have used various tests to determine whether they have jurisdiction over Internet disputes. Some courts have simply applied traditional rules, while others have tried to devise new tests to accommodate the peculiarities of the medium.

i) **Inset Systems Inc. v. Instruction Set Inc.**¹⁸⁰

Inset Systems Inc. ("Inset") was a software company based in Connecticut and Instruction Set Inc. ("Instruction") was a technology company based in Massachusetts. Inset sued in its home state for an injunction and damages based on the defendant's use of the Inset name as the title of its webpage and in its toll-free number ("1-800-US-INSET"). Instruction asked the court to decline jurisdiction on the grounds that it had no office or employees in Connecticut, and only conducted its affairs regularly in Massachusetts.

Under Connecticut's long-arm statute, its courts have specific jurisdiction over any non-resident defendant who repeatedly solicits business in the state, subject only to the due process requirements of the 14th Amendment of the U.S. Constitution. The court in this case found that Instruction's webpage was a solicitation of business which had been continuously in effect over the previous six months. Since there were about 10,000 internet users in the state who could have been exposed to this solicitation, the court concluded that it had specific jurisdiction.

The court further found that its assumption of jurisdiction did not offend the due process requirement of "minimum contacts" with the forum. Since the defendant had set up a webpage and a toll-free number which could be used by anyone in the U.S., including internet users in Connecticut, Instruction must have reasonably foreseen that it could be sued in the state's courts on the basis of its acts. The court also held that the defendant would not be greatly prejudiced by its decision because the distance between Connecticut and Massachusetts is not great, and it had already retained counsel in the state.

¹⁸⁰ Inset Systems Inc. v. Instruction Set Inc., 937 (D. Conn. 1996)

The actual result in this case does not seem terribly unjust given the proximity of the competing jurisdictions. The court's reasoning, however, must give pause to any website operator. The mere possibility of consulting a website from any particular territorial jurisdiction was deemed sufficient to give rise to a finding of business activity there¹⁸¹. No specific attempts to solicit business from citizens of Connecticut was necessary to ground competence. On the court's reasoning, a company operating a website and a toll-free number should reasonably anticipate being sued in the courts of any state. The only safeguard to over-reaching jurisdiction was the consideration of fair play, which was met by the court's conclusion that it would not greatly inconvenience Instruction to defend in the forum.

It obvious to see why most cyberlawyers and companies doing business over the internet are wishing upon all their stars that the precedent set by this court are not followed.

ii) Cybersell Inc. v. Cybersell Inc¹⁸²

This litigation involved an Arizona company and a Florida company with the same name, both offering consultation services for advertising on the Internet. The Arizona Company sued in its home state for infringement of its federally registered trademark "Cybersell". The defendant Florida Company moved for a dismissal based on the absence of jurisdiction of the Arizona court.

Applying the "purposeful availment" test, the Arizona court found that it was necessary to distinguish between "active" and "passive" websites. Passive sites only transmit information, and are not directed at persons in any particular territory. The court concluded that there must be something more to indicate that a website operator has purposefully directed his activity in a substantial way to the forum's residents. Examples of website attributes sufficient to trigger a finding of purposeful availment would include a chance to register a user name or be put on a mailing list, or the placement of a toll-free

¹⁸¹ Vartanian, The Confluence of International, Federal, and State Jurisdiction over E-Commerce (Part II) http://www.gcwf.com/articles/journal/jil_dec98_2.htm

¹⁸² Cybersell Inc. v. Cybersell Inc. (U.S.C.A., 9th Cir. 1997).

number or e-mail address to obtain further information. A large number of "hits" from users in any particular jurisdiction might also give rise to specific jurisdiction of its courts.

Based on these criteria, the U.S. Court of Appeals upheld the lower court's decision to dismiss the Arizona action for lack of personal jurisdiction over the Florida defendant. The court found that the defendant's website was essentially passive. The purpose of the site was not the direct transaction of business, but rather the advertising of services that could be obtained by means other than through the Internet.

This case provides a better test than that of the Inset case. The Ninth Circuit applied the three-part test¹⁸³, illustrated above, to determining district court may exercise specific jurisdiction over the non-resident Florida defendant.

There is a logical connection between the purpose of the website and the operator's reasonable expectation of the consequences that may flow from its use, including the possibility of being sued outside his home state. Making this distinction represents an improvement on the blanket approach of the Connecticut court in the Inset case.

Unfortunately, the court in Cybersell also held that specific jurisdiction can be based on the number of times a site is "hit" by users in a particular forum. This is not reasonable, since the use of the site is completely out of the control of the operator. The burden the test places on operators is very heavy, since it is well nigh impossible for an operator to selectively prevent the use of its website by users in any particular place. This means that even an operator who is aware of a high number of hits from certain users may face the unpalatable choice of risking prosecution in that place (even if the website does not target users there) or abandoning the medium altogether.

iii) Bensusan Restaurant Corp. v. King¹⁸⁴

¹⁸³ According to J.T. Westermeier, *The Journal of Information, Law and Technology*, 1998 (3), "Personal Jurisdiction: Today's Hot Issue in E-Commerce", at p4. This article can be obtained on the web at <http://elj.warwick.ac.uk/jilt/98-3/westermeier.html>

¹⁸⁴ *Bensusan Restaurant Corp. v. King*, 40 U.S.P.Q. (2d) 1519 (S.D.N.Y.)

The Plaintiff Corporation owned the internationally famous "Blue Note" night-club in New York City. The defendant was the owner of a night-club in Missouri called "The Blue Note", which catered to college students at the nearby university. The plaintiff sued in New York for trademark infringement and unfair competition on the basis of the defendant's website. It also asked the court to order the defendant to change the name of the club and to shut down the website, which contained a calendar of upcoming attractions, and a telephone number to call for further information. The Missouri Blue Note website originally contained a hyperlink to the New York "Blue Note" site, but it was removed when the plaintiff complained.

With respect to the site of the tort, the court held that all the acts complained of (the creation of the website, the use of the Blue Note name and the creation of the hyperlink) had taken place in Missouri at the instigation of Missouri residents. Jurisdiction over non-resident defendants based on the occurrence of damage in New York had to be restrictively interpreted. In this case, the defendant could not reasonably foresee that its acts could cause damage in New York, nor was it obtaining substantial income from inter-state commercial activity. The mere fact that the defendant hired nationally-known musicians to play, and that its student clientele might be not be uniquely Missouri residents, was not enough to attract jurisdiction.

The Ninth Circuit applied the three-part test¹⁸⁵ to determining whether a district court may exercise specific jurisdiction over the non-resident Florida defendant. The reasoning in the Bensusan case is appealing because the court looks beyond the potential effect of the Internet's use to examine its actual effect on the facts of this case¹⁸⁶. Although advertising of the Missouri club on the Internet reached into other jurisdictions, on the evidence the club was a local enterprise which did not threaten its namesake in New York. The found that it had no jurisdiction at all.

¹⁸⁵ see above;

¹⁸⁶ the Ogilvy Renault Internet group 1998, "Jurisdiction on the Internet, are Traditional Rules Enough?", at p7. This article can be found on the web at [HYPERLINK
http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm](http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm)
<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>

The court's rationale, however, is difficult to apply to other facts. Since the defendant business in Bensusan had a single, specific, geographical location, it was natural for the court to be sceptical about the impact of "national" advertising on either the Missouri club's revenues or those of the New York Blue Note. Many disputes involving the internet will not involve a business with one specific location.

There were also none of the hallmarks of "interactivity" on the website that complicated the analysis of jurisdiction in Cybersell and Inset. The Missouri club website had no toll-free number, tickets to shows could not be purchased on the internet, and there was no mechanism for registration of users. However had there been the result have been different? The factual situation would remain the same, and therefore the effects and damage felt in New York would remain the same also. However using the analysis of the courts in Inset and Cybersell, however, these elements might have been a justification for the exercise of jurisdiction by the New York court.

iv) State of Minnesota v. Granite Gate Resorts, Inc¹⁸⁷

Granite Gates Resorts was a Nevada company which advertised Wagernet, a forthcoming on-line sports betting service on the internet. The Wagernet website offered a toll-free number to call for further information, and invited Internet users to register to be included on a mailing list. Subscribers were also warned that they should check local laws with respect to restrictions on sports betting. The Wagernet site was actually operated by a company in Belize, and had webpage which explained the contract into which subscribers would enter. Under this contract, all lawsuits against Wagernet would have to be taken in the courts of Belize, but lawsuits against subscribers could be taken in the courts of their residence.

A consumer investigator for the Minnesota Attorney General's office telephoned the toll-free number on the site, identified himself as a Minnesota resident and asked about betting. He was told how to bet, and that it was legal. This was incorrect, since all forms of sports betting are illegal in Minnesota. On the basis of the website and the phone call,

¹⁸⁷ Minnesota (State of) v. Granite Gate Resorts, Inc., 568 N.W. 2d 715 (Minn. C.A. 1997);

the state sued Granite Gate for deceptive trade practices, false advertising and consumer fraud.

The Minnesota Court found that it had jurisdiction to proceed against Granite Gate, and the appeal court agreed. It based its competence on its long-arm statute, which provided that it had jurisdiction over a non-resident defendant so long as this did not offend due process considerations. The plaintiff hence had to show that the defendant had minimal contacts with the forum and that jurisdiction would not offend traditional notions of fair play and substantial justice. In the court's words, the defendant must have committed some act by which it "purposefully availed itself of the privilege of conducting activities within the state, thus invoking the benefits and protections of its laws".

To determine whether these tests were met, the Minnesota court examined five factors:

- a) **the quantity of contacts:** the court noted that computers located in Minnesota were among the 500 computers that most often accessed the defendant's website, and that the Wagemet mailing list included the name and address of at least one Minnesota resident. Minnesota residents were also identified as having used the toll-free number on the site.
- b) **the quality of contacts:** in the court's view, the defendant had targeted an American market by setting up a website in English and offering a U.S. phone number.
- c) **connection between the cause of action and the contacts:** the lawsuit was based on the information available on the website, which was intended for and received by Minnesota consumers.
- d) **the state's interest:** the court found this to be self-evident since, if the state had no interest, it could not uphold its consumer protection laws.
- e) **convenience of the parties:** according to the court, a company which maintained the right to sue in subscribers' home states could not complain when it was sued in those same states. In the court's words:

"'Foreign' corporations that seek business in Minnesota and reserve the right to sue Minnesotan customers in court here cannot claim inconvenience as an excuse to avoid personal jurisdiction here, particularly in light of the state's interest in regulating advertising and gambling."

This decision, like that in *Bensusan*, purports to apply traditional rules of jurisdiction on Internet activities. The results are mixed. It is hard to dispute that the state's interest was engaged once it was established that a Minnesota resident had been informed over the phone that he could legally participate in on-line sports betting, and that at least one Minnesota resident was on a mailing list.

The court's decision, however, was not based primarily on these factors, but on the features of the website¹⁸⁸. Once again, it was held that a website constitutes a deliberate "broadcast" everywhere, and that this inherent quality, as well as a toll-free number on the site, suffices to attract the jurisdiction of any state's court. As well, as in *Cybersell*, the court grounded jurisdiction in the number of hits from computers in the home forum, a factor beyond the control of the website operator. The warning on the website about checking local laws with respect to on-line betting was disregarded by the court. The inconvenience of litigating in a distant forum was dismissed on the sole ground that the defendant had reserved the right to sue in any subscriber's home state.

Given the difficulties already encountered by American courts, it is appropriate to ask whether traditional forum principles may be adapted to Internet disputes, or whether special rules should be developed for such jurisdictional conflicts. This is especially so in light of the fact that there was a choice of forum clause in on the site when the consumer closed the contract over the internet. We are now also posed with the problem of determining the status of such clauses in Internet jurisdiction.

¹⁸⁸ the Ogilvy Renault Internet group 1998, "Jurisdiction on the Internet, are Traditional Rules Enough?", at p9. This article can be found on the web at [HYPERLINK
http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm](http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm)
<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>

20. Electronic Bill of Lading and other Related Shipping Documents

The electronic bill of lading (EBL) is the functional equivalent of a conventional paper bill of lading, but according to Ash the legal principles on which the electronic bill rests are fundamentally different from those governing the conventional bill¹⁸⁹. This is simply because the electronic bill is not paper-based. To this end, the electronic bill of lading may not fit all the legal definitions for a conventional bill of lading¹⁹⁰. The South African E-commerce Bill might just change this with its recognition of electronic data messages¹⁹¹

Internet transactions are giving business evolution a radical twist, and their security merits close attention. Probably the best known organisation using digital security in the shipping industry is Bolero¹⁹².

¹⁸⁹ for further reference see the article of Matt Ash, Overview of EDI in the Maritime Sphere, 2001, at p4. This article can be found on the web at HYPERLINK

http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm

http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm

¹⁹⁰ - (UNCITRAL) has required that an agreement must be "legible" to allow for "reproduction", so that each party would "hold a copy of the same data", and requires that authentication of data must be by means of signature. The clear implication is that, in order for an international contract to comply with UNCITRAL such contract must be in written form. Various domestic legal systems also have this implication including South Africa, which incorporated the Hague-Visby Rules into its domestic law by enacting the Carriage of Goods by Sea Act. There appears to be no clarification of the Hague-Visby principles. Accordingly, a bill of lading properly so called would have to be embodied in a written document. For further reference see the article of Matt Ash, *ibid*;

¹⁹¹ for further reference see above;

¹⁹² Graham Harris, E-commerce in Shipping, 2000, p1; his article can be obtained on the internet at the following website:

HYPERLINK http://www.dnv.com/dnvframework/forum/articles/forum_2000_03_39.htm

http://www.dnv.com/dnvframework/forum/articles/forum_2000_03_39.htm

a) Bolero

Bolero is a scheme to replace paper in international trade with electronic messages sent by computer. It is intended to include such commercial documentation as invoices, certificates of quality and quantity, sale and purchase contracts, letters of credit and even bank security documentation.

To the carrier, the main advantage of the Bolero system over paper documentation is that the carrier will know immediately to whom he should deliver the goods at the discharge port. This should remove the need for delays at the discharge port, and also the need for letters of indemnity from the person to whom the goods are delivered.

Despite the fact that the adoption of e-commerce is still in its relative infancy the time is right for the application of e-commerce to the international movement of goods, especially now in light of all the legislation that is being proposed. People are used to the concept of working in a paperless environment in a way that was inconceivable even 10 years ago. Though some may for a while duplicate with paper some of the transactions, Bolero will still have an important role in speeding up documentary processes and providing a degree of certainty.

Ash defines conventional bill of lading functions, *inter alia*, as¹⁹³: "A document of title to the goods, which rights can be transferred from one party to another through the negotiation of the bill; A receipt issued by the carrier for the goods shipped; In many instances, an embodiment of the terms of the contract of carriage between the owner of the goods and the carrier".

The electronic bill of lading can and does function in very much the same way. However, rights and obligations under a conventional bill of lading arise from basic legal doctrines

¹⁹³ for further reference see the article of Matt Ash, Overview of EDI in the Maritime Sphere, 2001, at p4. This article can be found on the web at [_ HYPERLINK
http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm](http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm)
http://www.deneysreitz.co.za/dr_newsdesk_links/area_main_45.htm

that encompass paper-based documents. Such doctrines have been codified into convention and statute (for example the Hague-Visby Rules, the Hamburg Rules and the various domestic Carriage of Goods by Sea Acts. However the legal relationship between the parties to an electronic bill of lading is simply regulated under BOLERO by the Bolero Rule Book. It is this rule book by which the parties to the electronic bill of lading contractually agree to regulate their relationship as regards issues pertaining to receipt, contract of carriage and negotiability. According to Laryea¹⁹⁴ this is Bolero's answer to the doubts about the legal effectiveness of EBLs is to promulgate its own legal framework in the form of a contractually binding set of rules, the Bolero Rule Book, which all users of Bolero are required to sign. The BRB constitutes a multilateral contract between Bolero users and "provides a legal framework allowing users to replicate the legal results currently achieved in [the] paper environment."

More importantly, the rule book governs issues such as proper law of contract, court jurisdiction, reality of consent and aspects of evidence that are such thorny issues in e-commerce transactions that do not enjoy a similar regulatory framework.

The greatest degree of legal certainty would be achieved if the Rule Book were made subject to a single system of Law. The possible selection of English Law would be acceptable throughout European and common law countries and most commercial jurisdictions in Asia¹⁹⁵. There may be some problems however with regard to the U.S. or other countries that do not have reciprocal recognition of court judgements from England. In any event I do not believe that an exclusive jurisdiction clause such as this would be a viable option. It is for this reason that Rule Book now has a "non-exclusive jurisdiction clause"¹⁹⁶ subjecting disputes to English courts. The reason why it is "non-exclusive" is that the parties agree to it. They have they choice to choose a different jurisdiction since there is no mandatory imposed jurisdiction.

¹⁹⁴ Emmanuel T. Laryea, "Paperless Shipping Documents: An Australian Perspective", 2001, at p16;

¹⁹⁵ The Bolero Project Team, Legal Feasibility Overview, at p19;

¹⁹⁶ Rule 1.14.1 of the Bolero Rule Book;

The Hague Convention¹⁹⁷ only strengthens Bolero's position by stating that effect will be given to all choice of laws clauses in B2B transactions. It is for this reason that in spite of what courts might want to do, they must give effect to these clauses¹⁹⁸

b) The Future

According to Laryea¹⁹⁹ Bolero will likely become the world's platform for the exchange of electronic trade data generally and BBLs in particular. He goes on to give 4 reasons for this statement:

- i) Bolero has had the opportunity to analyse and avoid the flaws that inhibited its predecessors. Through SWIFT, representing the major international banks, and TTC, owned by the transport industry, Bolero already has thousands of users, with more members joining regularly. Bolero has also committed the "large companies with power of influence to engage and make sure that other people that they deal with - for example, the carriers they use, the people they go to for financial services - will adopt Bolero."²⁰⁰ The marketing strategy of Bolero is focused on the key players. As Laryea stated if the "shippers ... like Bolero and demand that it be used, their suppliers will follow." So far Bolero has succeeded in attracting sufficient support and interest.
- ii) The Bolero system has already survived its critical stages. Bolero has gone through its first and second growth phases and has now matured into its commercial phase. The first two phases covered five years of

¹⁹⁷ The Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters 2001 article 4;

¹⁹⁸ for further reference see above;

¹⁹⁹ According to Emmanuel T. Laryea, "Paperless Shipping Documents: An Australian Perspective", 2001, at p16;

²⁰⁰ According to Emmanuel T. Laryea, "Paperless Shipping Documents: An Australian Perspective", 2001, at p17;

extensive trials, analysis, adjustments and development. Over this period, Bolero has adjusted to address common problems. In contrast, SeaDocs collapsed in its first phase within one year of its establishment, while the CMI Rules never took off.

- iii) The playing field for EBL systems has changed dramatically in favour of electronic documentation. Electronic technology has developed tremendously in the fifteen years since SeaDocs and ten years since the CMI Rules. The need for electronic systems in place of paper is far stronger today than ten or fifteen years ago. There is now far more awareness of, and dependence upon, electronic technology. The availability of new techniques for electronic messaging security has raised user confidence and reliance on electronic systems.
- iv) Governments are beginning to legislate to remove legal barriers that hinder the adoption of electronic messaging systems, and give the ability to legally facilitate legal electronic messaging. Australia, for example, has enacted laws not only to promote electronic sea-transport documents, but electronic transactions in general. Singapore has enacted an electronic transaction law to facilitate the use of electronic systems in business. There are electronic transaction enabling laws in various states in the United States, and the U.S. federal government is considering the amendment of its carriage of goods laws to accommodate EBLs. Germany has enacted an electronic commerce enabling law. The United Kingdom has enacted an Electronic Communications Act (2000) (U.K.), and Canada, and many European countries are also considering electronic transactions laws. South Africa is trying to push through a Bill on electronic commerce²⁰¹. The effect of these changes is to create the needed legal certainty for electronic messaging, thereby engendering user confidence and promote adoption of electronic documentation systems.

One can also add that the Hague convention as well as all the other pieces of legislation in the pipeline only serves to strengthen Bolero's position.

²⁰¹ Electronic Communications and Transactions Bill of 2001

21. Future of the Traditional Procedure

Another question one must ask in light of the above is: What does this all mean in relation to the arrest and attachment of ships and property. Why would anyone want to arrest or attach a ship to establish jurisdiction if they can simply base in on the Internet?

I believe that there is still a future for the more traditional forms of establishing jurisdiction for a various number of reasons namely:

- i) It could be that the forum to which the Internet points as having jurisdiction is not a favourable forum to the plaintiff. There could be a number of reasons e.g. the forum has a lower package limitation, there is a problem with enforcing the order extra-territorially, etc.
- ii) The security for the claim provided by attachment and arrest is more secure than if one were to be proceeding on the basis of a contract concluded over the Internet. This is because there is a physical, tangible thing against which execution can be made.

However, should it occur in the future that one has the option on how to base jurisdiction, a careful analysis of all factors and consequences should be made so as to ensure the best result for one's client.

So instead of having Internet jurisdiction replacing the normal Admiralty jurisdiction, it rather be supplementing it.

22. Suggestions

A failure by the courts to account for the unique nature of the Internet may inhibit the Internet's commercial use, since the application of traditional rules without modification may lead to many injustices. For B2C and B2B e-commerce to reach its full potential, certainty and confidence is essential for both business and consumers when disputes arise between them on-line. Therefore, business seeks a predictable and stable framework for resolving these disputes. Such a framework should allow business to calculate cost, risk, competition, and prices. It should also guarantee that consumers have an easy and cost effective means of resolving disputes

South African shipping law is in a fortunate position in that we have a very good and complete statute in the Admiralty Jurisdiction Regulation Act²⁰² (The Admiralty Act). I am not suggesting that a separate system of law is necessary for Cyberlaw. Indeed I am suggesting quite the contrary. However, what is needed is a universal model for countries to base their Cyberlaw on. This process has started but needs much work and more uniformity. Cyberlaw jurists can definitely take a feather from the cap of shipping jurists in this respect.

The Admiralty Act contains a provision to which some refer to as the "ubiquitous section 6"²⁰³. In this section it states that the law of the republic will be supreme²⁰⁴. From this it is clear that consumer protection laws of South Africa will apply to shipping related websites no matter where they are registered.

The Admiralty Act goes on to say that choice of law clauses will also be given effect to²⁰⁵. Now this provision is formulated even wider than the Hague Convention²⁰⁶ where only the choice of laws contracts in B2B contracts would be valid. However in shipping one normally deals with B2B contracts so the problem so the conflict between the two pieces of legislation is minimal.

²⁰² Admiralty Jurisdiction Regulation Act 105 OF 1983

²⁰³ for further reference see J. Hare, Shipping Law & Admiralty Jurisdiction in South Africa, Juta, 1999 at p17

²⁰⁴ section 6(2) of Admiralty Jurisdiction Regulation Act 105 OF 1983

²⁰⁵ section 6(5) of Admiralty Jurisdiction Regulation Act 105 OF 1983

²⁰⁶ for further reference see above;

So the Admiralty Act provides much needed protection in the general sense in that consumer protection laws are applicable and choice of laws clauses would be upheld. But is this enough? I believe it is not. I believe South Africa must promulgate legislation that is a hybrid between the European E-commerce Directive²⁰⁷ and the approach followed by the American courts²⁰⁸.

The reason why I say this is because South Africa must adopt a country of origin approach. By so doing the place where the website is registered would regulate:

- i) the general framework of the website, its content, domain name, issues of public security and general liability for the website;
- ii) conclusion of a contract;
- iii) the performance of a contractual obligation;
- iv) taxation of the e-commerce transaction.

Exceptions are however necessary to ensure that the forum affected can apply certain laws. This would give effect to the Effects Principle²⁰⁹. These exceptions where the forum should be able to exercise jurisdiction are:

- i) public policy which include fighting discrimination, public health etc.;
- ii) public security including safeguarding national security;
- iii) consumer protection including investors

As was pointed out above, in terms of the Admiralty Act these laws would apply²¹⁰ but in the interests of certainty perhaps a more formal promulgation would be necessary. Especially when one considers that the Admiralty Act only covers maritime matters and not normal civil claims²¹¹.

²⁰⁷ EU directive on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce in the Internal Market, dated 8 June 2000

²⁰⁸ for future reference see above

²⁰⁹ for further reference see above;

²¹⁰ in terms of section 6(2) of the Admiralty Act. See above for further reference;

²¹¹ However to go into this would be to go beyond the scope of this thesis;

However I believe that the above should be tempered by the Due Process analysis of the U.S.²¹². Due Process entails that the assertion of jurisdiction does is not violated if²¹³

- i) party purposely avails itself of the privilege of conducting activities within the forum, rendering it reasonable for the party to anticipate being haled into court in the forum, and
- ii) the exercise of specific jurisdiction does not offend traditional notions of fair play and substantial justice.

In determining whether a foreign party purposefully availed itself of the benefits bestowed by the laws of the forum, a court inquires as to whether the foreign party could reasonably have anticipated being haled into that forum's courts. It is this test that must be added. If a party had not entered purposefully or negligently entered a market then it would be unfair to make it subject to the laws of such a state. If a website takes steps²¹⁴ to exclude a forum from its operation then I believe it would be unfair to make it subject to it. If this were not the case then a website would have to adhere to laws of the world.

²¹² Due Process Clause of the 14th Amendment of the Constitution. For further reference see above;

²¹³ As contained in Vartanian, The Confluence of International, Federal, and State Jurisdiction over E-Commerce (Part II), at p3 http://www.gcwf.com/articles/journal/jil_dec98_2.html

²¹⁴ see T. P. Vartanian, *ibid*, in para 102 states that:

"Participants in electronic commerce can take steps to minimize the risk of jurisdiction in a foreign forum by use of disclaimers or otherwise conveying intended geographic limitations of the entity's service area and by limiting the interactive nature of their electronic contacts with forum residents, limiting their non-Internet contacts with the forum, and as an extreme measure, restricting access via the forum or by forum residents."

23. Conclusion

The dematerialization of shipping documents in international trade is long overdue, as it affords the international business community enormous benefits. Accordingly, the law has had to develop rapidly, to understand and cater for concepts such as the electronic paperless contract.

Legal systems and rules are a reflection and expression of the fundamental values of a society, so to respect diversity of societies it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over the borders defining legal communities in our decentralised world legal order, there must also be a workable method of co-ordinating this diversity.

For e-commerce to reach its full potential, certainty and confidence is essential for both business and consumers when disputes arise between on-line contractants. Therefore, business seeks a predictable and stable framework for resolving these disputes. Such a framework should allow business to calculate cost, risk, competition, and prices. It should also guarantee that consumers have an easy and cost effective means of resolving disputes.

Premature conclusions that do not address practical realities and the unique circumstances of electronic commerce could create significant obstacles to the continued growth of electronic commerce, and would therefore disadvantage business as well as consumers.

As Wendell Holmes once said, "It cannot be helped, it is as it should be, that the law is behind the times."

Lawyers tend only to get involved in the disasters and forget that in the vast majority of cases goods are carried from A to B satisfactorily. Anything that reduces the paperwork and cost and speeds up the bureaucratic processes in such transport will be warmly welcomed.

The advent of computer-mediated communication has created a New World with new rules. The change in the presentation of information is not superficial but changes the culture and its institutions. The Gutenberg press resulted in the creation of many institutions including copyright law (Katsh, 1995). The key to change lies in understanding how a medium affects patterns in communication.

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