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ELECTRONIC COMMERCE: FORMATION OF CONTRACT UNDER MALAYSIAN LAW

BY

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ABSTRACT

The subject of contract formation is a fundamental component of the law of contract as all aspects of contractual performance are dependent on a contract being properly formed. The purpose of this Thesis is to examine how the novelties introduced by the Internet and other electronic media like Electronic Data Interchange (EDI) and electronic mails affect the existing legal principles concerning formation of contracts under the law of Malaysia. This Thesis argues that the existing law in Malaysia governing the formation of contracts is fraught with uncertainty when applied to the Internet and other electronic media. This Thesis submits that these lacunae in the law adversely affect the growth of electronic commerce in Malaysia and Parliament must take the initiative to speedily enact new statutory provisions to address the shortcomings identified in order to introduce more certainty into the law for the benefit of the business and legal communities.

This Thesis deals with the interaction of the electronic media with five aspects of contract formation, namely, the contractual capacity of sophisticated computers (in Chapter 2), the doctrine of offer and acceptance (in Chapter 3), the contractual incapacity of minors and persons of unsound mind (in Chapter 4), the requirement of writing for the purpose of contract formation (in Chapter 5) and the requirement of signature for the purpose of contract formation (also in Chapter 5). In addition to the foregoing, this Thesis argues against the abandonment of the existing proper law doctrine for ascertaining the law governing the formation of Internet based contracts, and asserts that lawyers and academics have sometimes exaggerated the difficulties of ascertaining

the governing law of an Internet based contract (in Chapter 6). For comparative purposes, this Thesis examines the statutes and other regulatory directives introduced in a number of Commonwealth nations and also nations with advanced electronic commerce economy (namely, Singapore, the United States, Hong Kong, the European Union and Australia) dealing with electronic commerce generally, and electronic contracts specifically (in Chapter 7). In addition to being the concluding chapter, Chapter 8 of this Thesis also discusses if electronic contracts and electronic commerce generally should best be regulated by statutory intervention, case law development or self-regulation.

Throughout this Thesis, a lot of attention is directed to the provisions found under the UNCITRAL Model Law of Electronic Commerce 1996, a copy whereof is reproduced in the Appendix of this Thesis for ease of reference. Although the UNCITRAL Model Law is an excellent precedent of provisions concerning electronic contracts and electronic commerce, this Thesis cautions against rigidly replicating these model provisions without fully comprehending the unique requirements of Malaysia.

The law as contained in this Thesis is that as of August 2003.

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This Thesis is an accumulation of research that lasted more than three long years, with countless hours spent in the company of books, law journals and law reports within the confines of libraries during many weekends. I would certainly have prematurely abandoned this project if not for the encouragement that I received from members of my family. I thank them for the same.

Loo Chun Boon
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Arbitral Decisions Referred To:

1. Extract of decision of the Arbitration Institute of the Stockholm Chamber of Commerce (Case No. 117/1999, Year 2001) available from www.unilex.info.

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BIBLIOGRAPHY

Chapter 1

Abu Bakar Munir, *Cyber Law: Policies and Challenges*, (Butterworths Asia Publication, 1999)

Anil, Samtani, *Electronic Commerce Law in Asia – A Case for Convergence*, Asia Business Law Review No.30 (October 2000) 50

Cronin, Michael, *Government in Cyberspace – What Jurisdiction?*, (1997) available at www.rmmb.co.nz/papers/cybergov.html.

Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999)

Endeshaw, Assafa, *Internet & E-Commerce Law*, (Prentice Hall Publications, 2001)

Gralla, Preston, *How the Internet Works*, (QUE Publication, 1999)

Gringas, Clive, *The Laws of the Internet*, (Butterworths Publication, 1997)

Ibrahim Ariff & Goh Cheng Chuan, *Multimedia Super Corridor*, (Leeds Publications, 1998)

Johnston, Handa & Morgan, *Cyber Law*, (Pelanduk Publications, 1998)

Kang, Jerry, *Privacy in Cyberspace Transactions*, 50 Stanford Law Review 1193 (1998) at pg. 1220

Koh, Clarkson & Morgan, *Criminal Law in Singapore & Malaysia*, (MLJ Publications, 1989)

Low, Kelvin & Loi, Kelry, *Links, Frames and Meta-tags: More Challenges for the Wild Wild Web*, Singapore Academy of Law Journal Vol 12 (March 2000) 51

Mahathir Mohamad, *Multimedia Super Corridor*, (Pelanduk Publications, 1998)

Matthan, Rahul, *The Law Relating to Computers and the Internet*, (Butterworths India Publication, 2000)

O'Daniel, Thomas, *Electronic Commerce*, (Pelanduk Publications, 2000)

Parikh, Vaibhav, *India's New Information Technology Law*, Asia Business Law Review No.32 (April 2001) 28

Perritt Jr. H.H, *Law and the Information Superhighway* (Wiley Law Publication, 1996)

Reed, Chris, *Computer Law,* (2nd Edition), (Blackstone Press Ltd, 1993)

Smith, Graham, *Internet Law & Regulation*, (FT Law &Tax, 1996)

Supriya Singh, *Electronic Commerce in the APEC Region*, (March 2000), available at http://www.dfat.gov.au/apec/ecom/CIRCIT1.html

The New Straits Times, February 8th 2001 issue, *The Internet is No Fad or Curiosity*

The Star, June 7th 2000 issue, *Big Earnings in E-commerce*

The Star, November 17th 2000 Issue, *Pos Malaysia: We Won't Provide After Sale Service*

The Star, November 18th 2000 issue, *Malaysians Latching on to E-commerce: Survey*

UN/EDIFACT Draft Directory at www.unece.org/trade/untdid/texts/

Wright, Benjamin, *Electronic Signatures – Making Electronic Signatures a Reality*, Computer Law & Security Report Vol. 15 no.6 of 1999, at pg. 401

*Internet for Everyone (*This local book does not state the name of its author(s) and the name of its publisher)

Description of EDI and Internet at www.itep.co.ae

Excerpt (short) dated June 9, 2003 of decision of Regional Court of Nuremberg-Fuerth, Germany on date of receipt of an e-mail; available from Baker & Mackenzie's website www.bmck.com/elaw/

Internet Usage Statistics in http://cyberatlas.internet.com (Author not stated)

Internet Usage Statistics in www.nua.com/surveys/ (Author not stated)

Chapter 2

Abichandani, R.K, *Pollock & Mulla on Indian Contract and Specific Relief Acts* (Volume 1, 11th Edition) (Tripathi)

Allen, Tom & Widdison, Robin, *Can Computers Make Contracts?*, (1996) available at www.dur.ac.uk/~dla0www/centre/hjolt.html#appel73

Alter, Steven, *Information Systems* (2nd Edition), (Benjamin Cummings Publication, 1996)

Bennion, Francis, *Statutory Interpretation*, (3rd Edition) (Butterworths Publication, 1997)

Ding, Julian, *E-Commerce Law & Practice,* (Sweet & Maxwell Asia, 1999)

Endeshaw, Assafa, *Internet & E-Commerce Law* (Prentice Hall Publication, 2001)

Grubb, Andrew & Furmston, Michael, *Butterworths Common Law Series - The Law of Contract*, (Butterworths Publication, 1999)

Johnston, Handa & Morgan, *Cyber Law*, (Pelanduk Publications, 1998)

Nicoll, C.C*, Can Computers Make Contracts?,* [1998] Journal of Business Law 35

Nimmer, R.T, *Electronic Contracting: Legal Issues*, Journal of Computer & Information Law (Vol.14) 211

Penrose, Roger, *The Emperor's New Mind – Concerning Computers, Minds, and the Laws of Physics*, (Oxford University Press, 1989)

Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998)

Reed, Chris, *Internet Law – Text & Materials*, (Butterworths Publications, 2000)

Sinnadurai, Visu, *Law of Contract – Volume 1* (Butterworths Publication, 2003) (3rd Edition)

Machines with Minds of Their Own, The Economist Technology Quarterly, (March 2001)

What We Talk About When We Talk about Persons: The Language of a Legal Fiction, Vol. 114 (2001) Harvard Law Review pg. 1745, (Author not stated)

Chapter 3

Chitty on Contract (27th Edition, 1994), Sweet & Maxwell Publication

Ding, Julian, *E-Commerce-Law & Practice*, (Sweet & Maxwell Asia Publication, 1999)

Downes, T. Anthony, *Textbook on Contract* (3rd Edition), (Blackstone Press Limited, 1993)

Edwards, Lilian & Waelde Charlotte, *Law & The Internet – A Framework for Electronic Commerce*, (Hart Publishing, 2000)

Fridman, GHL, *The Law of Contract* (Carswell Publication, 1976)

Furmston, Norisada & Poole, *Contract Formation & Letter of Intent*, (John Wiley & Sons Publications, 1997)

Gringas, Clive, *The Laws of the Internet*, (Butterworths Publication, 1997)

Halsbury's Law of England (4th Edition, Reissue) Volume 9(1)

Monaghan, Iain, *Electronic Commerce and the Law*, available at www.masons.com/library/books/ecommerce/E_COM.DOC

Owsia, Parviz, *Formation of Contract: A Comparative Study Under English, French, Islamic & Iranian Laws*, (Graham & Trotman, 1994)

Parris, John, *Making Commercial Contracts*, (BSP Professional Books, 1988)

Phang, Andrew, *Cheshire, Fifoot & Furmston's Law of Contract* (1st Singapore & Malaysia Student Edition), (Butterworths Asia, 1998)

Sinnadurai, Visu, *Law of Contract – Volume 1* (Butterworths Publication, 2003) (3rd Edition)

Smith, Graham, *Internet Law and Regulation*, (FT Law & Tax Publication, 1996)

Treitel, G.H, *The Law of Contract*, (7th Edition), (Sweet & Maxwell Publication, 1987)

Chapter 4

Abichandani, R.K, *Pollock & Mulla on Indian Contract and Specific Relief Acts* (Volume 1, 11th Edition) (Tripathi)

Ding, Julian, *E-Commerce: Law & Practice*, (Sweet & Maxwell Asia Publication, 1999)

Doshi, Varsha, *Restitutionary Remedies in Illegal Agreements* (Malayan Law Journal Publication, 1998)

Electronic Commerce Law, Asia Business Law Review (No. 27 January 2000 Issue) at pg. 43. This article is a collection of contribution of a number of authors from Australia, South Korea and Taiwan.

Phang, Andrew, *Cheshire, Fifoot & Furmston's Law of Contract* (2nd Singapore & Malaysia Edition)

Sinnadurai, Visu, *Law of Contract – Volume 1* (Butterworths Publication, 2003) (3rd Edition)

The New Straits Times, June 9th 2000 issue, *Survey: Children Fuelling Internet Growth*.

Treitel, G.H, *The Law of Contract*, (9th Edition) (Sweet & Maxwell Publications)

Winfield & Jolowicz on Tort (Sweet & Maxwell Publication, 13th Edition, 1990)

Young, Dean, *Electronic Commerce Law- Hong Kong*, Asia Business Law Review (No. 28 April 2000 Issue) at pg.39

Chapter 5

Ding, Julian, *E-Commerce: Law & Practice*, (Sweet & Maxwell Asia Publication, 1999)

Edwards, Lilian & Waelde Charlotte, *Law and the Internet – Regulating Cyberspace*, (Hart Publishing 1997)

Grubb, Andrew & Furmston, Michael, *Butterworths Common Law Series - The Law of Contract*, (Butterworths Publication, 1999)

Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract* (1st Singapore and Malaysian Student's Edition), (Butterworths Publication)

Reed, Chris, *Internet Law – Text & Materials*, (Butterworths Publication, 2000)

Rosenoer, Jonathan, *Cyber Law-The Law of the Internet*, (Springer Publication, 1997)

Shera, R & Jordan, L.M.L, *Electronic Commerce Law – New Zealand*, Asia Business Law Review, Issue No. 28 (April 2000) at pg. 42

Treitel, GH, *The Law of Contract*, (10th Edition, 1999) (Sweet & Maxwell Publications)

Wright, Benjamin, *Electronic Signatures – Making Electronic Signatures a Reality*, Computer Law & Security Report Vol. 15 no. 6 of 1999, at pg. 401

Chapter 6

Bonell, Michael, *The UNIDROIT Principles of International Commercial Contracts – Nature, Purposes and First Experiences in Practice*, available at www.unidroit.org/english/principles/pr-exper.htm

Burk, Dan, *Jurisdictions in a World Without Borders*, (Spring 1997) available at http://vjolt.student.virginia.edu

Burnstein, MR, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 Vanderbilt Journal of Transnational Law 75

Cronin, Michael & Jew, Bernadette, *Government in Cyberspace – What Jurisdiction?*, (1997) available at www.rmmb.co.nz/papers/cybergov.html

Dicey & Morris on Conflict of Laws, (Butterworths Publication) (11th Edition, 1987), (Volume 2)

Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999)

Goldsmith, Jack, *Against Cyberanarchy*, Volume 65 University of Chicago Law Review (1998) 1199

Hickling, RH & Wu, MA, *Conflict of Laws in Malaysia*, (Butterworths Asia Publication, 1995)

Hicks, Bill, *Choice of Law Issues in Cyberspace*, available in www.law.ttu.edu/cyberspc/jour13.htm#N_36.

Highet, Keith, *The Enigma of the Lex Mercatoria*, Volume 63 Tulane Law Review (1989), 613

Johnson, David & Post, David, *Law & Borders – The Rise of Law in Cyberspace*, 48 Stanford Law Review (1995 – 1996) pg. 1367.

Johnston, D., Handa, S., Morgan, C., *Cyber Law*, (Pelanduk Publications, 1998)

Low, Kelvin & Loi, Kelry, *Links, Frames and Meta-tags: More Challenges for the Wild Wild Web*, Singapore Academy of Law Journal Vol 12 (March 2000) 51

Morris, JHC, *The Conflict of Laws*, (Stevens & Sons Publication) (3rd Ed. 1984)

North, PM & Fawcett, JJ, *Cheshire & North's Private International Law*, (Butterworths Publication, 1992) (12th Edition)

Reidenberg, Joel, *Lex Informatica: The Formulation of Policy Rules Through Technology*, Volume 76 Texas Law Review (1998) 553

Trakman, Leon, *The Law Merchant: The Evolution of Commercial Law*, (Fred B. Rothman & Co. Publications, 1983)

Tudsbery F.C.T, *Law Merchant and the Common Law*, Volume 34 (1918) Law Quarterly Review 392

Valauskas, Edward J.,*Lex Networkia: Understanding the Internet Community,* available at www.firstmonday.dk/issues/issues4/valauskas

Zylva & Harrison, *International Commercial Arbitration – Developing Rules for the New Millennium* (Jordans Publication, 2000)

Chapter 7

Attorney General of Australia's News Release dated 14th March 2000, *Australia at the Forefront of the Information Economy*, available at www.law.gov.au

Carter, JW & Harland, DJ, *Contract Law in Australia* (3rd Edition), (Butterworths Publication, 1996)

Endeshaw, Assafa, *Internet & Electronic Commerce*, (Prentice Hall Publications, 2001)

Fisher, Michael, *Contract Law in Hong Kong*, (Sweet & Maxwell Publication, 1996) at pg.1

Gabriel, Henry, *The US Uniform Transactions Act: Substantive Provisions, Drafting History & Comparison to the UNCITRAL Model Law on Electronic Commerce*, available at www.unidroit.org

Lim, Wee Teck, *Electronic Commerce Law – Singapore*, Asia Business Law Review (No.29, July 2000) at pg. 37

Murray, Vick & Wortley, *Regulating E-Commerce: Formal Transactions in the Digital Age*, Volume 13 (No.2) (1999) International Review of Law & Computers Technology 127

Perillo, Joseph, *Corbin on Contracts*, (West Publishing Co., 1993)

Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract* (1st Singapore and Malaysian Student's Edition), (Butterworths Publication, 1998)

State-by-State comparison table of UETA enactment in the United States, available at www.bmck.com

Starke JG, Seddon NC & Ellinghaus, MP, *Cheshire & Fifoot's Law of Contract*, (6th Australian Edition), (Butterworths Publication, 1992)

The Sun, May 26 2003 Issue, *Law to Prevent E-Trade Fraud.*

Wu, Richard, *Electronic Transactions Ordinance – Building a Legal framework for E-commerce in Hong Kong*, 2000(1) The Journal of Information, Law & Technology (JILT) available at http://elj.warwick.ac.uk/jilt/00-1/wu.html

Young, Dean, *Electronic Commerce Law – Hong Kong*, Asia Business Law Review Volume No.28 (April 2000) at pg.39

Government of Singapore web-site www.ec.gov.sg/policy.html.

Malaysia Leads the World, Computer Law & Security Report Vol. 13 No.6 (1997) at pg. 480 (Author not named)

Chapter 8

Endeshaw, Assafa, *Internet and E-Commerce Law,* (Prentice Hall Publication, 2001)

Enos, Lori, *Asia Seeks E-Commerce Parity*, E-Commerce Times, November 27, 2000

Johnson, David & Post, David, *Law and Borders – The Rise of Law in Cyberspace,* Vol. 48 Stanford Law Review 1367

Murray, Vick & Wortley, *Regulating E-Commerce: Formal Transactions in the Digital Age*, Volume 13 (No.2) (1999) International Review of Law & Computers Technology 127

Supriya Singh, *Electronic Commerce in the APEC Region*, available at www.dfat.gov.au/apec/ecom/CIRCITI.html.

The Economist, June 10 2000 issue, *Regulating the Internet*, at pg.16

The Star, April 18 2001 Issue, *Moggie: New Cyber laws to Replace Outdated Ones*

The Star, November 21 2000 Issue, *Skills for Cyber Edge*

The Sun, May 26 2003 Issue, *Law to Prevent E-Trade Fraud,*

Valauskas, Edward, *Lex Networkia: Understanding the Internet Community*, available at www.firstmonday.dk/issues/issue4/valauskas.

Electronic Commerce – Discussion Paper by Australia, available at www.dfat.gov.au/apec/ecom/apec_ecom_diss160298.html (Author not named)

ASEAN E-Commerce Web-site at www.asean.or.id/ec/ov_ec.html (Author not named)

CHAPTER ONE

ELECTRONIC COMMERCE, THE LAW IN MALAYSIA & INTRODUCTION TO THIS THESIS

THE ISSUE MOTIVATING THIS THESIS

The late 1990's will be remembered in history as the years when the Internet overwhelmingly invaded our homes, schools, work-place and lives. Thus far, the public has largely embraced this invasion with open arms. From its humble beginning as a technological novelty confined to few universities and research organizations, the Internet is today a medium through which a large volume and variety of commercial transactions are initiated, performed and completed.[1]

As the developments of both statute law and the common law are often slow and reactive, the speed of the technological changes brought forth by the Internet and other electronic media leaves the commercial and legal communities guessing if the existing body of law is sufficient to deal with the continual novelties introduced by the same.[2] Some writers are of the view that lawyers, legislators and judges are now challenged with applying

[1] Please refer to pages 16-18 below for statistics on growth of the Internet.

[2] Anil, Samtani, *Electronic Commerce Law in Asia – A Case for Convergence*, Asia Business Law Review No.30 (October 2000) 50 at pp.50-51. The learned author of this article likened the inability of the law to catch up with the fast pace of technology development to the tale of the tortoise trying to keep up with the hare.

traditional legal concepts in the realm of this untamed new medium.[3] An author has correctly observed that:

> The law, especially the common law, as reflected by judicial decision making, is often by its very nature backward looking. It relies upon adapting past precedents to present day realities. The law is premised upon and reflects particular assumptions, values and beliefs that have evolved, in some cases, over centuries. Not surprisingly, these features of our legal system have meant that the law often "limps behind" modern technological developments for which past precedents, existing principles and underlying assumptions are no longer adequate. Some of the modern technologies which have challenged traditional contract law notions include fax, e-mail, telegraphy/telex and electronic fund transfer (EFT). Electronic Data Interchange (EDI) through which electronic commerce is to be carried out represents one of the most recent of these technologies.[4]

The question motivating this Thesis is whether the existing body of law in Malaysia[5] satisfactorily deals with all the issues affecting electronic commerce and creates an environment in which electronic commerce can be effected with certainty? This Thesis emphatically submits that it does not.[6] Specifically, this Thesis submits that one critical area of the law that merits more attention from both Parliament and the legal community in Malaysia is that which affects the formation of contracts made through the use of electronic media like Electronic Data Interchange ("EDI" hereinafter), the Internet and transmissions of electronic mails.[7]

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[3] Low, Kelvin & Loi, Kelry, *Links, Frames and Meta-tags: More Challenges for the Wild Wild Web*, Singapore Academy of Law Journal Vol 12 (March 2000) 51 at pg.51

[4] Abu Bakar Munir, *Cyber Law: Policies and Challenges*, (Butterworths Asia Publication, 1999) at pg. 206. The present writer has included the underlining as emphasis.

[5] This includes all new statutes and amendments enacted to date in Malaysia to deal with electronic commerce

[6] This is also the assertion of the present Prime Minister of Malaysia. See Mahathir Mohamad, *Multimedia Super Corridor*, (Pelanduk Publications, 1998) at pg.40

[7] As the title of this Thesis suggests, the chapters of this Thesis are solely concerned with issues relating to the formation of contracts made through the use of the Internet, EDI and electronic mails. It will be beyond the confine of this Thesis to discuss other issues like confidentiality of information over the Internet, cyber-crime or intellectual property right issues over the Internet, though the writer readily admits they are of equal (if not of more pressing) importance.

ELECTRONIC COMMERCE - DEFINITION

Despite the constant use of the expression "*electronic commerce*", this expression remains largely ill defined. Readers must be cautious and should not accept any one definition found in any publication as being authoritative, for the expression "*electronic commerce*" carries multiple different definitions, depending on whom the question is directed to.[8] Hence, any serious attempt to find a comprehensive and authoritative definition of "*electronic commerce*" shall be in vain. Likewise, there is still no universally accepted definition in law for this ubiquitous expression.

Various attempts to define "*electronic commerce*" have focused on the manner in which electronic commerce is effected. One such definition focuses upon the paperless nature of electronic commerce:

> The ability to communicate in an electronic form which a computer is able to recognize, reproduce and store meant that businesses were now poised to be conducted in a paperless environment. Hence, we now have the ability to conduct commercial activity, electronically. This is Electronic Commerce.[9]

This definition is undoubtedly too narrow and impractical. If this definition were to be followed to the letter, it means that any use of paper, however insignificant, shall disqualify an activity from being classified as electronic commerce.

Other authors or organizations have rightly chosen to adopt less rigid definitions. For example, "*electronic commerce*" has been defined as

[8] O'Daniel, Thomas, *Electronic Commerce*, (Pelanduk Publications, 2000), at pg. 1

commercial transactions, involving both organizations and individuals that are based upon the processing and transmission of electronic data that may include text, sound and visual images and that are carried out over open networks or closed networks.[10] "*Electronic commerce*" has also been defined generally as "*the process of electronically conducting all forms of business between entities in order to achieve the organization's objectives*".[11]

Although there is no single accepted definition of electronic commerce, it is clear what techniques shall normally qualify as electronic commerce. The expression "*electronic commerce*" includes the use of techniques such as electronic trading, electronic messaging and EDI. It also covers electronic fund transfer (EFT), electronic mail (e-mail), computer-to-fax (C-fax), electronic catalogues and bulletin board services, shared databases and directories, electronic news and information services, electronic payroll, electronic forms, the Internet and any other form of electronic data transmission, even older electronic technology such as the facsimile.[12]

This Thesis examines the issues affecting electronic commerce specifically in relation to the Internet (including the exchange of electronic mails) and EDI; these being (in the present writer's opinion) the two most commonly utilized media through which electronic commerce is executed. Hence, the

[9] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999) at pg. 4.
[10] This definition is the definition adopted by the OECD. Refer to www.oecd.org.
[11] This definition is the definition provided by Electronic Commerce Australia in its 1994 Annual Report. Refer to http://www-cec.buseco.monash.edu.au/links/ec_def.htm.
[12] Refer to http://www-cec.buseco.monash.edu.au/links/ec_def.htm

expression "*electronic commerce*" as used in this Thesis only includes the Internet (including the electronic mail feature of the same) and EDI enabled commerce,[13] and the contracts resulting from the use of the same. This Thesis adopts this narrower definition in order to focus more on the law affecting electronic commerce and electronic contracting, and to avoid the trap of dwelling too much and too often into the myriads of electronic commerce enabling technologies at the expense of the law.

Moreover, since the legal issues arising from the use of EDI and the Internet (which includes the exchange of electronic mails) could be different, readers shall inevitably find the arguments found in some Chapters of this Thesis to be more relevant to a specific electronic commerce enabling technology. For example, whilst Chapter 2 of this Thesis is more relevant to issues arising from or associated with the use of EDI, Chapter 3, 4, 5 and 6 of this Thesis are more relevant to contracts formed through the use of the Internet and exchange of electronic mails.

ELECTRONIC DATA INTERCHANGE (EDI)

(1) Definition of EDI

Like "*electronic commerce*", there is not one single authoritative definition for EDI. The UNICITRAL[14] Model Law of Electronic Commerce 1996 ("the UNCITRAL Model Law" hereinafter) defines EDI as electronic transfer from

[13] This narrower definition is in fact the definition adopted by the author of an article published under the auspices of the APEC. See Supriya Singh, *Electronic Commerce in the APEC Region*, (March

computer to computer of information using an agreed standard to structure the information.[15] EDI is also defined as the direct transfer of structured business data between computers by electronic means; that is, the paperless transfer of business "*documentation*".[16] EDI has also been described as follows:

> Electronic Data Interchange or EDI utilizes proprietary software to enable businesses and governmental agencies to communicate with one another and transfer information, thus replacing the standard paper documentation, such as invoices, with structured electronic messages.[17]

The key feature of EDI is that the electronic messages transmitted through EDI must be in a structured and standardized form. The EDI concept envisages the transfer of data in a fixed format that has been pre-determined and pre-agreed between the parties using EDI.[18] For this reason, EDI is frequently used when there is a need to transact on a frequent basis and where the process involved is not complicated and can be easily automated. These EDI messages are often sent and received without immediate human involvement. This Thesis discusses the legal consequences of agreements made by computers that function independently of direct human involvement in Chapter 2 hereunder.

2000), available at http://www.dfat.gov.au/apec/ecom/CIRCIT1.html

[14] United Nations Commission on International Trade Law

[15] Article 2(b) of UNCITRAL Model Law on Electronic Commerce 1996. See page (f) of the Appendix to this Thesis.

[16] This is the definition adopted in the UN/EDIFACT Draft Directory at www.unece.org/trade/untdid/texts/

[17] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia, 1999) at pp 30-31.

[18] For a good description of how EDI works, refer to www.itep.co.ae

EDI transactions are normally conducted on a business-to-business level over a private network, within a limited geographic area. EDI is seldom used for private non-commercial purpose because of the high costs required to establish the system.[19] As a private business-to-business network, EDI is therefore a closed environment, that is, it is not generally available to the public at large.[20] Being a closed network, the users of EDI normally have knowledge of each other's identity. Because of this, EDI is significantly different from electronic mail or the Internet that are available to all members of the public, most of whom do not know each other.

(2) EDI Trading Partner Agreement

In order for EDI to work smoothly, both the sender and the receiver must agree in advance on the format of the document that their respective computers will send and receive. These details are usually contained in a Trading Partner Agreement. The Trading Partner Agreement is a salient feature of every business in which EDI is utilized. At the minimum, the Trading Partner Agreement states the operational terms and conditions that govern *inter alia* the exchange of information that takes place between the parties' respective computer system. The terms and conditions of this agreement will also provide for a standardized format of information to be exchanged. It will also contain other terms and conditions that are designed

[19] Johnston, Handa & Morgan, *Cyber Law*, (Pelanduk Publications, 1998) at pp.31-32

[20] There are a number of service providers proving EDI platform for trading purposes to the public at large. For example, see the www.procurehere.com. However, their use are certainly not as prevalent as Internet based transactions available at privately run web-sites. Further, users of public EDI

primarily towards ensuring that the computers of the parties understand each other.

It is the above-stated standardization that makes possible the assembling, disassembling, and processing of the messages by the computers involved. Ideally, the Trading Partner Agreement should also record the parties' intention that their EDI transactions are accepted as valid and fully enforceable as conventional paper-ink contracts at least between the parties themselves. As a prudent measure, the Trading Partner Agreement should also state when and in what circumstances the transmission of an EDI message shall be treated as complete. In drafting the Trading Partner Agreement, the parties basically must ensure that all possible steps are taken so that EDI messages have the same degree of validity as a transaction made conventionally in a non-electronic medium.

(3) Illustration of EDI in Action

Using EDI, offer and acceptance (to purchase certain type of goods, for example) are exchanged without any immediate conscious human involvement immediately at the time of the exchange. The sending computer simply sends a message in a pre-determined format (as agreed in the Trading Partner Agreement between the parties) called a transaction set, which the receiving computer is able to recognize and process through a

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platforms very often have to register their identities with the service provider and to pay a fee for the use, requirements often not found in Internet based transactions.

computer program using the same format. If the message sent matches the terms the receiving computer has been programmed to accept, that latter accepting computer sends an acceptance message in an acceptance transaction set.[21] The accepting computer will normally then also send a message to its warehousing / logistic system to activate the delivery of the goods in question.

To illustrate, when the computer in a supermarket senses that the number of toothpaste cartons available on stock has dropped below a pre-programmed level, the computer would transmit a purchase order (without any immediate conscious human intervention) by EDI to a computer system of the toothpaste supplier of the supermarket. Once the computer system of the supplier receives the electronic purchase order and if the same matches the terms that it has been programmed to accept, the supplier's computer will send an acceptance message to the supermarket's computer. The latter computer normally also transmits a corresponding message to its delivery system to deliver the ordered quantity of toothpaste to the supermarket. The computers will normally also process the payment details by, for example, crediting and debiting each other's accounts.

For the avoidance of doubt, EDI can be used not just for the conclusion of commercial agreements. EDI systems are frequently used for the

[21] The EDI process quoted in this chapter is largely quoted from H.H Perritt Jr., *Law and the Information Superhighway* (Wiley Law Publications, 1996) at pg. 376.

transmission of simple information (in which case the sender does not intend the message to have any legal consequence, for example, communication of price and technical specifications) or the transmission of unilateral notices (like invoices and delivery orders).[22]

THE INTERNET & CYBERSPACE

(1) Introducing the Internet

The Internet is an international network that connects many thousands of networks and million of computers across the world for the purpose of communication, information sharing and commerce.[23] While EDI continues to be an important tool for electronic commerce, it is the exponential growth of the Internet in the last few years of the 1990s that has significantly contributed to the growth of electronic commerce. So dominant is the use of the Internet these days that increasingly, the expression "*electronic commerce*" is used synonymously as Internet commerce.[24]

The Internet contains infinite amount of information and is host to a vast variety of commercial and non-commercial activities such as advertising, publishing, direct sales, online auctions, entertainment or mere exchange of information. For commercial institutions, effectively applied Internet technology allows information to flow without delay or human intervention

[22] Reed, Chris, *Computer Law* (2nd Edition 1993), Blackstone Press Ltd, at pp. 258-259.
[23] See www.itep.co.ae
[24] Anil, Samtani, *Electronic Commerce Law in Asia – A Case for Convergence*, Asia Business Law Review No.30 (October 2000) 50 at pg.50

between functions such as sales, manufacturing, shipping, accounting and customer support.[25]

The Internet is different from EDI in that, unlike EDI, the Internet is an open system. Therefore, it is readily available to anyone with a personal computer, a modem and a telephone line. It is this simple accessibility that is the real advantage of the Internet.[26] In order to connect to the Internet, home computer users dial onto the server of an Internet Service Provider (ISP). For major organizations, this is achieved by connection to a dedicated line connected to a local area network (LAN). Once connected, the said computer has the ability to be connected to and communicate with any one or more of the millions of computers on the Internet around the world.

The Internet is not operated or controlled by any single person, group or organization.[27] However many organizations contribute their computing resources to maintain and update some parts of the Internet, for example IETF[28] and ICANN.[29] Interestingly, the Internet was initially conceived in the United States as a military application for long distance computing[30] but has

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[25] *The Internet is No Fad or Curiosity*, The New Straits Times, February 8th 2001 issue.
[26] Gringas, Clive, *The Laws of the Internet*, (Butterworths, 1997) at pg.3.
[27] Gralla, Preston, *How the Internet Works*, (QUE Publication, 1999), at pg. 2
[28] Abbreviation for the Internet Engineering Task Force, which is a large community of network designers focusing on the technical advancement of the Internet. It often proposes solutions to the technical problems related to the Internet.
[29] Abbreviation for Internet Corporation for Assigned Names and Numbers. This is a non-profit organization which has taken upon itself the role of administering Internet Protocol addresses and domain names.
[30] The US authorities were concerned about communication after a nuclear war. See *Internet for Everyone* at pp.4-11. This local book does not state the name of its author(s) and the name of its publisher.

now found applications in predominantly non-military environment, for example, (1) for electronic mailing, (2) for hosting discussion groups, (3) for long distance computing and (4) for file transfers.[31]

The electronic mail (e-mail) is perhaps the most heavily used feature of the Internet. Very simply, e-mail is a vehicle to send messages to anyone who is connected to the Internet or connected to a computer network that has a connection to the Internet.[32] The first e-mail message was sent in 1971 and the world's first public e-mail server Telenet was created in 1976.[33] But the real explosion in the use of e-mail took place in the mid to late 1990's.

Contrary to popular belief, e-mail messages are not instantaneous, unlike faxes and telephone calls.[34] An e-mail message is more like a posted letter, being sent to a pigeon-hole ready to be collected (or "*opened*" in computer lingo) and the same is not "delivered" until the intended recipient of the message opens the e-mail message.[35] An e-mail message is also not sent directly to the intended recipient but through an Internet service provider (ISP) or a series of Internet service providers that re-direct the e-mail message according to its address to the recipient.[36] This raises the

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[31] *Internet for Everyone* at pp.4-11. This local book does not state the name of its author(s) and the name of its publisher.
[32] Gralla, Preston, *How the Internet Works*, (QUE Publication, 1999), at pg. 85
[33] *Electronic Mail Celebrates 30 Years of Existence*, New Straits Times, January 31 2002 issue
[34] Gringas, Clive, *The Laws of the Internet*, (Butterworths, 1997) at pg.17.
[35] Gringas, Clive, *The Laws of the Internet*, (Butterworths, 1997) at pg. 18. In May 2002, it was decided by the Regional Court of Nuremberg-Fuerth that an e-mail was deemed to have been received on the day it reached an electronic mail-box and that upon receipt, the recipient would bear the risk of loss or delay due to such things as vacation or absence.
[36] In Malaysia, the Internet service provider is typically Jaring or Telekom Malaysia.

possibility of the e-mail message being lost or delayed without the knowledge of either or both the sender and the recipient. This Thesis shall discuss the implications of these features of e-mails vis-à-vis the doctrine of offer and acceptance in Chapter 3 hereunder.

The segment in the Internet that hosts discussion groups is often referred to as USENET, which is the largest electronic forum for discussion.[37] It is a world of news, debate and arguments, patronized by gossipy and news hungry people.[38] Long distance computing, which is the original inspiration of the Internet allows for example, searches to be conducted on a distant library whilst the file transfers feature of the Internet allows Internet users to access remote computers and to copy the files in the same.[39]

In addition to the four features highlighted above, the most obvious feature of the Internet is arguably the World Wide Web. The World Wide Web is the Internet's most rapidly growing mode. Text, pictures, video sequences, sound and animation can all be conveyed through the World Wide Web.[40] Information is placed in the World Wide Web in personalized sites known as Internet web-sites. The information is formatted using a common electronic

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[37] Gralla, Preston, *How the Internet Works*, (QUE Publication, 1999), at pg. 105.
[38] *Internet for Everyone* at pg.11. This local book does not state the name of its author(s) and the name of its publisher.
[39] *Internet for Everyone* at pp.11-12. This local book does not state the name of its author(s) and the name of its publisher
[40] Johnston, Handa & Morgan, *Cyber Law*, (Pelanduk Publications, 1998) at pp.22-23. See also description of the World Wide Web in www.itep.co.ae

language called Hypertext Markup Language (HTML),[41] and the owner of the Internet web-site is able to control how the information appears to the person accessing the same.

(2) Cyberspace & Cyberlaw

The word Internet is often interchangeably used with the expression "*Cyberspace*". The use of the word "*Cyberspace*" has also given rise to the use of the term "*Cyberlaw*".[42] Although the expression "*Cyberspace*" has no generally accepted meaning,[43] and simply refers to a virtual geography created by computers and networks; that is, the virtual world behind the computer screens.[44] The word is also a short-hand expression for the emerging Global Information Infrastructure that moves information from sender to receiver through some medium.[45] Once information is transported through Cyberspace, it is processed to provide some communicative functionality and the Internet is one of the vehicles that processes the information.[46]

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[41] Johnston, Handa & Morgan, *Cyber Law*, (Pelanduk Publications, 1998) at pp 23-24.
[42] See for example the speech of Prime Minister of Malaysia Dato' Seri Dr. Mahathir Mohamad published in the book, *Multimedia Super Corridor*, (Pelanduk Publications, 1998), at pp.40-42
[43] Michael Cronin, *Government in Cyberspace – What Jurisdiction?*, (1997) available at www.rmmb.co.nz/papers/cybergov.html.
[44] Clive Gringas, *The Laws of the Internet*, (Butterworths, 1997) at pg 381.
[45] Kang, Jerry, *Privacy in Cyberspace Transactions*, 50 Stanford Law Review 1193 (1998) at pg. 1220. See also Suri, Diwan & Kapoor, *Information Technology Laws*, (ILBS Publications, 2001) at pg. 251 where the authors succinctly defined Cyberspace as the aggregation of the Intranets, the Internet and the World Wide Web.
[46] Kang, Jerry, *Privacy in Cyberspace Transactions*, 50 Stanford Law Review 1193 (1998) at pp. 1220-1221.

From the foregoing definitions, the Internet is evidently not synonymous with Cyberspace. The present writer hereby submits the word "*Cyberspace*" is nothing more than a vague term of convenience to generally describe a global network of communication through use of computer technology. The Cyberspace has no generally accepted meaning as it is simply too ambiguous. Hence, this Thesis shall refrain from using this term, or the term "*Cyberlaw*" unless it is quoting another author's work *in verbatim*.[47]

(3) How the Internet works

As stated in the above sub-section, the Internet is a world-wide computer network of computers and computer networks. Information is sent across the Internet through a protocol called Transmission Control Protocol / Internet Protocol (individually "TCP" and "IP", collectively referred to as "TCP/IP"). The TCP first breaks information down to small packets[48] and numbers them sequentially for subsequent reassembly.[49] The IP is responsible for the addressing of each packet with its intended destination to ensure that the packets are sent to the right destination.[50]

Once sent, the packets travel through many levels of networks, computers and communication lines before arriving at the final destination; aided by a series of hardware, the most important of which are (1) the hubs, (2) the

[47] See Suri, Diwan & Kapoor, *Information Technology Laws*, (ILBS Publications, 2001) at pg.251 where the authors defined Cyberlaws as those laws that had been adapted or reinterpreted to govern or apply to transactions or interactions in the Cyberspace

[48] Gralla, Preston, *How the Internet Works*, (QUE Publication, 1999), at pg.9.

[49] Gralla, Preston, *How the Internet Works*, (QUE Publication, 1999), at pg.13.

bridges, (3) gateways, (4) repeaters and (5) routers. The foregoing hardware route the packets to the correct destinations and function as the glue that holds the Internet together.[51] Communication made through the use of the Internet is not instantaneous.[52] Therefore it should not be treated in the same manner as messages transmitted through the telephone or facsimile machine.[53]

(4) The Growth of the Internet Worldwide & in Malaysia

Electronic commerce is a fast growing field, and the business community is already conducting a vast array of transactions, including ordering, pricing, billing, payment and customer service through the use of electronic media like the Internet.[54] Experts estimated that the electronic commerce market in Malaysia would generate revenues exceeding RM3.8 billion by the year 2003.[55] According to a survey conducted in year 2000, electronic commerce was fast gaining wider acceptance among Malaysian Internet users with 21% of those surveyed said they had made purchases over the Internet.[56]

The growth of the Internet since its conception has been nothing but phenomenal. When the Internet (then known as the ARPANET) started in December 1969 in the United States, there were just four computers (or

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[50] Gralla, Preston, *How the Internet Works*, (QUE Publication, 1999), at pg. 13
[51] Gralla, Preston, *How the Internet Works*, (QUE Publication, 1999), at pp.9-11.
[52] Smith, Graham, *Internet Law & Regulation*, (FT Law &Tax, 1996) at pg.99.
[53] The consequence of the non-instantaneous manner in which messages are transmitted through the Internet shall be discussed in greater detail in Chapter 3 of this Thesis.
[54] *The Internet is No Fad or Curiosity*, The New Straits Times, February 8th 2001 issue.
[55] *Big Earnings in E-commerce*, The Star, June 7th 2000 issue.

nodes) in the network, and in 1972, there were just thirty-seven nodes.[57] According to available statistics, it was estimated that as of March 2002, 445 - 533 million people around the world would have access to the Internet, the majority of whom would be found in the United States, Japan and Europe.[58] It is also forecasted that Asia will have 170 million Internet users by the year 2005.[59] According to available statistics, as of March 2002, Malaysia would have 2 million Internet users, and Singapore with a population of only 4.3 million would have 1.3 million Internet users.[60] Recent surveys conducted in January 2002 found that a whopping 82.5% of Koreans Internet users visit electronic commerce sites, as did 71.1% of those in Hong Kong, 70.1% of users in Singapore and 60.5% of users in Taiwan.[61]

From the encouraging statistics provided above, the Internet will inevitably be a common facility available in every home, school and office in Malaysia in the immediate future. The growth of the Internet in Malaysia is also catalyzed by a number of healthy initiatives of the Malaysian Government. One of the most recent initiatives sees the introduction of the Computer Ownership Scheme in which members of the public could utilize their EPF[62]

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[56] See *The Star*, November 18th, 2000.
[57] *Internet for Everyone* at pg.6. This local book does not state the name of its author(s) and the name of its publisher
[58] See statistics in http://cyberatlas.internet.com. The author visited the site on 23 January 2003
[59] *Big Earnings in E-commerce*, The Star, June 7th 2000 issue.
[60] See statistics in http://cyberatlas.internet.com. The author visited the site on 23 January 2003
[61] See www.nua.com/surveys/.
[62] EPF is abbreviation for Employees' Provident Fund. It is the statutory pension fund body in Malaysia.

savings for the purchase of computers.[63] The formation of the Multimedia Super Corridor (MSC) by the Government of Malaysia in 1996 as a hub for electronic commerce activities[64] gives momentum to the growth of Internet based commerce in Malaysia.

The Internet is in fact not short of local Malaysian contents and interests. Various Internet web-sites that originate from Malaysia are found in the World Wide Web, although admittedly these are not as numerous as those originating from, say, the United States or Europe. For example, www.lelong.com.my that is an auction and trading web-site; www.vis.com.my that operates as an online bookstore; www.royalselangor.com that allows customers to purchase and send gifts over the Internet and www.jebsen.com.my that is an online travel guide to destinations within Malaysia. The Internet has also become the medium through which flowers are ordered (see for example www.leeflorist.com.my) and a place to look for jobs or to source for employees (see for example www.jobstreet.com.my). It is surely not possible to list all Malaysian Internet web-sites in this Thesis. The number of Internet web-sites from Malaysia will surely continue to grow as the use of the Internet as a platform for electronic commerce and other purposes catches on in this country.

(5) The Internet & Potential Legal Problems

[63] See *The Star*, November 17th 2000. Regrettably, this scheme has since end 2002 been suspended by EPF due to serious fraud in the withdrawal of the funds.

At the risk of over-simplification, the typical contracts formed over the Internet can be classified into three broad categories, namely, (1) contracts for sale of physical goods, (2) contracts for supply of digitized products like software or multimedia products and (3) contracts for supply of services and facilities.[65] All the above of course are not novelties, and are transactions frequently conducted using conventional non-electronic media. However, as the Internet is a recent revolutionary advancement in the field of information technology, it breeds its own unique set of legal issues not found in the real physical world. Despite the exponential growth in the use of the Internet and despite the many advantages offered by the Internet, the commercial community and consumers are generally wary of this new medium.[66] Arguably, the Internet may experience greater growth if the legal problems associated with this medium can be forthwith resolved.

To start with, the Internet creates the possibility of one party concluding contracts with a large number of other parties in multiple legal jurisdictions without each party ever knowing the exact identity of the other(s). The global reach of the Internet assures that contracts made through this medium are fraught with private international law issues.[67] The non-physical nature of the Internet and the speed of electronic communication create uncertainties in

[64] See Ibrahim Ariff & Goh Cheng Chuan, *Multimedia Super Corridor*, (Leeds Publications, 1998), at pp.90-91

[65] Smith, Graham, *Internet Law & Regulation*, (FT Law &Tax, 1996) at pp.94-95.

[66] O'Daniel, Thomas, *Electronic Commerce*, (Pelanduk Publications, 2000), at pg. 41

[67] Please refer to Chapter 6 of this Thesis for further discussions on this issue

respect of the time and place a contract is concluded.[68] The faceless nature of the Internet plus the ease with which contracts can be entered into through this medium also means that contracts could potentially be made by minors and persons suffering from unsound mind,[69] even a very intelligent chimpanzee. As the technology behind the Internet (and also EDI) allows the computer to process orders from customers without the immediate involvement and knowledge of the owner, agreements are often concluded without the latter's knowledge. Hence, the question will arise whether there is a valid contract at law under these circumstances.[70] The novelty of the features available in the Internet and the speed at which the Internet is evolving assures that no quick and easy solution can be derived to satisfactorily resolve the above problems.

THE UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE

(1) Objectives of the UNCITRAL Model Law on Electronic Commerce 1996

The growth of electronic commerce on a global basis means the potential legal implications associated with which would consequently also have a global reach. This has prompted the United Nations Commission on International Trade Law (UNCITRAL) to introduce the UNCITRAL Model Law on Electronic Commerce in 1996. The UNCITRAL Model Law was promulgated in furtherance of UNCITRAL's mandate to:

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[68] Please refer to Chapter 3 of this Thesis for further discussions on this issue
[69] Please refer to Chapter 4 of this Thesis for further discussions on this issue

> promote the harmonization 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.[71]

The UNCITRAL Model Law itself does not provide a specific definition of the expression "*electronic commerce*". The lack of a specific definition nonetheless brings about the advantageous results that the UNCITRAL Model Law is not restricted in its application to any specific medium and can be freely utilized despite any change or advancement in technology. In other words, the provisions of the Model Law are technology independent, that is, any change and advancement in electronic commerce technology will not reduce or obviate the application or relevance of the Model Law.

Turning to the Guide to the Enactment of the Model Law ("the Guide" hereinafter), this document explains that the expression "*electronic commerce*" would include the use of EDI, the Internet and even the use of telex and telecopy and that no communication technique is excluded from the scope of the UNCITRAL Model Law.[72] This explanation is clearly very wide; so long as the mode of communication incorporates an electronic feature, the same could reasonably be brought under the ambit of the Model Law.

The Model Law is a document that is very focused on its objectives. From the text of the UNCITRAL Model Law and the Guide, it is clear that the

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[70] Please refer to Chapter 2 of this Thesis for further discussions on this issue
[71] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, Paragraph 123.

drafters of the UNCITRAL Model Law intended the same to achieve the following three broad objectives:

(a) To offer national legislators a set of internationally acceptable rules as to how the legal obstacles arising from the use of electronic commerce may be removed in order to create a more secure legal environment for electronic commerce.[73] The UNCITRAL Model Law therefore acts as a set of legislative precedent that the legislature of a nation could refer to as model when drafting its national law affecting electronic commerce.

(b) To help remedy the disadvantages that stem from the fact that inadequate legislation at national level creates obstacles to international trade. It was the belief of the UNCITRAL that uncertainty in local legislations dealing with electronic commerce would contribute to limiting the extent local businesses could access the international markets.[74]

(c) To act as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to then use of electronic commerce.[75]

Although the Model Law is intended by its drafters to provide essential procedures and principles for facilitating the use of modern techniques for

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[72] Guide to Enactment of the UNCITRAL Model law on Electronic Commerce, Paragraphs 7-8.
[73] Guide to Enactment of the UNCITRAL Model law on Electronic Commerce, Paragraph 2. See also, Matthan, Rahul, *The Law Relating to Computers and the Internet*, (Butterworths India Publication, 2000) at pg. 182.
[74] Guide to Enactment of the UNCITRAL Model law on Electronic Commerce, Paragraph 4.

counterparts in the physical non-electronic world, thereby giving validity to the former. Hence, the UNCITRAL Model Law does not create any new substantive legal principle; it merely extends the existing general legal principles to the electronic media by fitting the mechanics of an electronic transaction within the scope of established legal rules and principles.[81]

Although it is far from being exhaustive and does not create any new legal principles, the UNCITRAL Model Law provides a sound starting point for the preparation of statutory provisions that deal with electronic commerce. For this reason, this Thesis takes the position that the Model Law should at all times be the focal point of every legislature that wishes to enact or amend the law concerning electronic commerce.[82] A copy of the UNCITRAL Model Law and the Guide is reproduced at the Appendix of this Thesis for ease of reference.

Building upon the fundamental principles laid down in the UNCITRAL Model Law, the UNCITRAL in 2001 introduced the *UNCITRAL Model Law on Electronic Signatures 2001*.[83] This new Model Law exclusively addresses the effective use of electronic signatures in an electronic environment and offers a practical linkage between the technical reliability of electronic

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[81] Anil, Samtani, *Electronic Commerce Law in Asia – A Case for Convergence*, Asia Business Law Review No.30 (October 2000) 50 at pg.55

[82] More discussions on whether the UNCITRAL Model Law should be followed are found under Chapter 8 of this Thesis.

[83] A copy of this UNCITRAL Model Law on Electronic Signatures 2001 can be downloaded from UNCITRAL's web-site www.uncitral.org

signatures and the legal effects of electronic signatures.[84] This Thesis shall deal with this UNCITRAL Model Law on Electronic Signatures 2001 in Chapter 5 hereunder.

(2) Structure of the UNCITRAL Model Law on Electronic Commerce 1996

The UNCITRAL Model Law is structured in the form of a statute and is divided into two parts. The first part comprises fifteen articles that deal with electronic commerce in general. These fifteen articles are in turn grouped into three chapters. Part two of the UNCITRAL Model Law deals specifically with electronic commerce in respect of carriage of goods in two articles that are grouped into a single chapter.

Chapter I of Part One of the UNCITRAL Model Law comprises four articles that set forth the general scope of the Model Law, including the definition of certain expressions,[85] the approach in interpreting the UNCITRAL Model Law[86] and establishes the principle of party autonomy that is found under Chapter III of Part One.[87] Chapter II of Part One may be regarded as a collection of exceptions to well established rules regarding the form of legal transactions.[88] The provisions grouped under Chapter II can be regarded as stating the minimum acceptable requirements in respect of the use of data

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[84] See Paragraph 4 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures 2001
[85] Article 2 Model Law.
[86] Article 3 Model Law.
[87] Article 4 Model Law.

messages[89] in electronic commerce. Chapter II of the UNCITRAL Model Law deals with novel principles such as the legal recognition of data messages,[90] incorporation of information in data messages,[91] how the requirement of writing is satisfied in respect of data messages,[92] the use of signature in respect of data messages,[93] how the requirements of presentation and retention in original form are satisfied in respect of data messages,[94] the admissibility and evidential weight of data messages[95] and the retention of data messages.[96]

The provisions of Chapter III of Part One of the UNCITRAL Model Law may be used as the basis for concluding agreements and to supplement the terms of agreements in cases of gaps or omissions in contractual stipulations. Further or in the alternative, the provisions of this chapter may be regarded as provisions that set the basic standard for situations where data messages are exchanged without a previous agreement being entered into.[97] Specifically, the provisions of Chapter III deal with the issues that concern the formation and validity of contracts,[98] the recognition by parties of

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[88] Guide to Enactment of the UNCITRAL Model law on Electronic Commerce, Paragraph 21.
[89] The expression "*data message*" is defined in Article 2 of the Model Law as information generated, sent, received or stored by electronic, optical or similar means including but not limited to electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
[90] Article 5 Model Law.
[91] Article 5 *bis*.Model Law
[92] Article 6 Model law
[93] Article 7 Model Law
[94] Article 8 Model Law
[95] Article 9 Model Law
[96] Article 10 Model Law
[97] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, Paragraph 20.
[98] Article 11 Model Law

declaration of will or other statement in the form of a data message,[99] the attribution of data messages,[100] that is, the circumstances in which a data message can be said to have originated from a sender, the acknowledgement of receipt[101] and how the time and place of dispatch and receipt of data messages can be determined.[102]

As stated above, Part Two of the UNCITRAL Model Law deals with electronic commerce specifically in respect of carriage of goods. Towards this, Article 16 of the UNCITRAL Model Law sets forth the scope of Part Two whilst Article 17 describes the circumstances in which transport documents in the form of data messages can be used. Carriage of goods was specifically selected for inclusion into the UNCITRAL Model Law as the UNCITRAL was of the opinion that carriage of goods was an area in which electronic communications would be actively used and in which a legal framework facilitating the use of such communications was most urgently needed.[103]

(3) Nations in the Asia Pacific Adopting the UNCITRAL Model Law

The UNCITRAL Model Law forms the basis of the electronic commerce law introduced by the legislatures of a number of countries in the Asia Pacific region. For example, the UNCITRAL Model Law was adopted in Singapore

[99] Article 12 Model Law
[100] Article 13 Model law
[101] Article 14 Model Law
[102] Article 15 Model Law
[103] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, Paragraph 110.

in its Electronic Transactions Act 1998, in Australia in its Electronic Transactions Act 1999 and in Hong Kong in the Electronic Transactions Ordinance 2000. In addition, the Model Law also forms the basis for the Uniform Electronic Transactions Act 1999 of the United States.[104] The Model Law was also adopted in the Philippines, South Korea[105] and the Information Technology Act 2000 of India.[106]

The legislatures of these countries each modified the provisions found under the Model Law to varying degrees in order to suit their individual national requirements. Hence, none of the above statutes are exactly identical with each other in terms of scope, wordings as well as the structure and arrangement of the key provisions. Nonetheless, the influence of the UNCITRAL Model Law on each of the above statutes is unmistakable. The present writer predicts that judicial decisions and interpretation of any one of the above countries on the national electronic commerce statute concerned shall have enormous impact and shall attract considerable interest from academics and legal practitioners of other countries having similar statutes. Further, in view of the strong influence of the Model Law in each of these statutes, the Guide that accompanies the Model Law provides an excellent readily available guide to the interpretation of these statutes.

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[104] This Thesis shall discuss the provisions found in the aforementioned foreign statutes of Hong Kong, Australia, Singapore and the United States in Chapter 7

[105] See Anil, Samtani, *Electronic Commerce Law in Asia – A Case for Convergence*, Asia Business Law Review No.30 (October 2000) 50 at pp.55-56

[106] The Information technology Act 2000 came into effect on 17 October 2000, making India the 12th country in the world to enact electronic commerce enabling legislation. An overview of this Act can

PRESENT LEGISLATIVE FRAMEWORK IN MALAYSIA ON ELECTRONIC COMMERCE

(1) The Existing "Cyberlaws" of Malaysia

The present legislative framework for the regulation of information technology, electronic commerce and the usage of computers in Malaysia is arguably still in the formative stage. Admittedly, the Malaysian Government has shown encouraging initiative and is taking a proactive step in updating the statutes to regulate these novel areas. In 1997, the Parliament of Malaysia introduced the Digital Signature Act 1997 (Act 562), the Computer Crimes Act 1997 (Act 563), the Telemedicine Act 1997 (Act 564). The Communications and Multimedia Act 1998 was enacted in the following year.[107] In addition, amendments were also effected to the Interpretation Acts 1948 & 1967 and the Companies Act 1965 to streamline these statutes to changes brought forth by the electronic media. Earlier in 1993, the Evidence (Amendment) Act 1993 had made sweeping amendments to the Evidence Act 1950 (Act 56). Sub-sections (2) to (9) below provide an overview of the aforesaid statutory enactments.

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be found in Parikh, Vaibhav, *India's New Information Technology Law*, Asia Business Law Review No.32 (April 2001) 28

[107] The Digital Signatures Act, the Computer Crimes Act, the Telemedicine Act and the Communications and Multimedia Act are often informally referred to and grouped together as the Cyberlaw statutes of Malaysia. This Thesis submits that this informal classification can be misleading as the use of electronic media and the foregoing statutes themselves do not preclude the continual application like the Contracts Act and the Evidence Act for example.

(2) The Digital Signature Act 1997 (Act 562)[108]

The Digital Signature Act 1997 establishes the regulatory framework concerning the use and validity of digital signatures in Malaysia. The preamble of the Digital Signature Act states that its purpose is to "*make provision for, and to regulate the use of, digital signatures and to provide for matter connected therewith.*" This Act is divided into seven Parts and comprises ninety-three sections. The majority of the provisions found in the Act are highly administrative in nature. The primary concern of the Act is to empower the Malaysian Communications and Multimedia Commission ("the Commission")[109] to issue licences and monitor the activities of licensed Certification Authorities. Very briefly, the licensed Certification Authorities are parties licensed by the Commission to issue authentication certificates to subscribers for the use of digital signatures[110] and to create public and private keys for the use of the subscribers.[111]

In order to appreciate the objectives of this Act, it is essential to first comprehend the nature and mechanics of a digital signature. At the broadest level, a digital signature is a form of electronic encryption. The basis for the use of digital signatures lies in the utilization of a pair of electronic keys commonly described as the "*private key*" and "*public key*". Both these

[108] This Act was amended by the Digital Signature (Amendment) Act 2001 (Act No. A1121), that came into effect on 1 November 2001. The amendments effected were principally to substitute the word "Controller" with "Commission", meaning, the Malaysian Communications and Multimedia Commission.

[109] Digital Signature Act, Section 3(1), as amended by the Digital Signatures (Amendment) Act 2001.

[110] Digital Signature Act, Section 6

[111] See Part IV of the Digital Signature Act generally, Section 29(1) in particular

expressions are defined under Section 2 of the Digital Signature Act. A "*private key*" is defined as the key of a key pair used to create a digital signature and "*public key*" means the key of a key pair used to verify a digital signature.

The exact mechanics behind the operation of a digital signature are complex. Basically, the sender and the recipient each has a public key and a private key. Public keys are distributed widely by the parties, but private keys are kept secret by each. When a sender (Party A) wishes to send an electronic message to Party B, the former first encrypts the electronic documents to be sent using Party B's public key and Party A's private key. The doubly encrypted electronic document is then transmitted to Party B who first decrypts the message using Party A's public key and then further decrypts the resulting message using Party B's private key. Using these 2 pairs of keys, Party A is assured that only Party B and Party B alone is able to access the electronic message and Party B is assured that the message is sent by Party A.[112]

Each digital signature is sufficiently unique and is interwoven with the document that contains it so the signature cannot be "cut and pasted" into another document[113] like an electronic signature that is no more than an

[112] For a pictorial summary of how digital signatures work, reference can be made to www.youdzone.com/signature.html. The present visited this site on 27 January 2003.
[113] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia, 1999) at pg.202

electronic reproduction of the handwritten signature.[114] Hence, the primary objective of using digital signature is not to evidence the commitment or agreement of a party to a contract, but rather as a measure of security and privacy. For this reason, a digital signature should not be equated in all instances with a conventional handwritten signature.[115] The use of the expression "*digital signature*" is therefore a misnomer, as it bears no resemblance to a handwritten signature.[116]

Nonetheless, the Digital Signature Act unreservedly equates the purpose for which a digital signature is used to that of a traditional handwritten signature. In this regard, Section 62(2)(a) of the Act states that a document signed with a digital signature in accordance with the Act is as legally binding as a document signed with a handwritten signature, an affixed thumb print or any other mark. Further to the foregoing, the Act also extends the use of digital signature to the concept of writing. Section 64(1) of the Act provides that a message[117] is as valid, enforceable and effective as if it has been written on paper if it bears in its entirety a digital signature that is valid and recognized by the Act.

[114] The difference between a digital signature and electronic signature is discussed in better detail in Chapter 5 of this Thesis.
[115] Wright, Benjamin, *Electronic Signatures – Making Electronic Signatures a Reality*, Computer Law & Security Report Vol. 15 no.6 of 1999, at pg. 401.
[116] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia, 1999) at pp. 202-203
[117] The word "*message*" is defined under Section 2 of the Digital Signature Act as a digital representation of information.

The immediate effect of both Section 62(2) and Section 64(1) are clearly very wide. From these two sections, it is highly arguable that where the law requires a contract to be in writing and signed in order to be valid, these requirements are satisfied if the electronic document that contains the contract is protected by the use of a digital signature that is recognized by the Digital Signature Act. Chapter 5 of this Thesis shall deal with these two sections of the Digital Signature Act in greater detail.

Save for Sections 62 and 64 highlighted above, the Digital Signature Act contributes little to the subject how digital signatures are to be utilized in the formation of contracts electronically. In particular, nothing on the mechanics of offer and acceptance and capacity to contract are to be found under this Act.

(3) The Computer Crimes Act 1997 (Act 563)

In enacting the Computer Crimes Act 1997, Parliament of Malaysia was clearly of the view that the Penal Code (being a document from the 19th Century)[118] was insufficient to deal with offences committed or perpetrated through the use of computers. The preamble of this Act states that its objective is "*to provide for offences relating to the misuse of computers*". This Act was specifically enacted to counter (1) unauthorized access to

[118] The precursor of the Penal Code of Malaysia is the Penal Code of the Straits Settlement that was enacted by the Legislative Council of the Straits Settlement in 1871. See Koh, Clarkson & Morgan, *Criminal Law in Singapore & Malaysia*, (MLJ Publications, 1989) at pp.4-5

computer material;[119] (2) unauthorized modification of contents of any computer;[120](3) wrongful communication which is defined as communicating directly or indirectly a number, code, password or other means of access to a computer to any person other than a person to whom he is duly authorized to communicate;[121] and (4) the abetments and attempts of the above stated offences.[122] As the title of this Act plainly indicates, it is essentially a criminal law penal statute that seeks to supplement the provisions of the Penal Code in respect of crime committed relating to the misuse of computers.[123] The provisions found under this Act has no direct application to the subject of electronic contracts and the formation thereof.

In view of the global reach of communications using computer technology, this Act has been given extra-territorial application. Section 9(1) of this Act provides that the Act covers offences committed by any person whether within or outside the jurisdiction of Malaysia, and if the offence under the Act was committed outside Malaysia, the offender may be dealt with as if the offence was committed within Malaysia. Section 9(2) sets the scope for the necessary nexus of the offence to Malaysia by limiting the application of the Act to instances where "*the computer, program or data was in Malaysia or capable of being connected to or sent to or used by or with a computer in Malaysia at the material time*". In this regard, it is hereby submitted that the

[119] Sections 3 and 4, Computer Crimes Act
[120] Section 5, Computer Crimes Act
[121] Section 6, Computer Crimes Act
[122] Section 7, Computer Crimes Act

Act could have cast the net too wide by the use of the words "*...capable of being connected to or sent to or used by or with a computer in Malaysia at the material time.*" This is so since the Internet and electronic mail allows data in the digital form to be easily transmitted to any location in the world including Malaysia so long as the electronic mail address in Malaysia is known. Hence, despite the limitation sets forth by Section 9(2), this Act has potential application even where the offence has negligible or no real connection to Malaysia. The exact scope of the extra-territorial application of this Act would only be known when the same is judicially considered by the Courts in Malaysia.

(4) Telemedicine Act 1997 (Act 564)

Of all the statutes enacted by Parliament in the past years to deal with the electronic media, this is probably the least known and least referred to statute. The preamble of this Act states that the objective of this Act is to provide for the regulation and control of the practice of telemedicine and for the matters connected therewith. Section 2 of the Act defines "*telemedicine*" as the practice of medicine using audio, visual and data communication. "*Telemedicine*" hence essentially can be described as the practice of the science of healing and prevention of disease from afar. Like the Computer Crimes Act, this Act has no direct application to the subject of electronic contracts and the formation thereof.

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[123] See for example, Section 4(1)(a) of the Computer Crimes Act that adopts the definition under the Penal Code for offences involving fraud or dishonesty or which causes injury.

This Act *inter alia* stipulates the qualification requirement of a person who is entitled to practice telemedicine in Malaysia,[124] the mode of application to the Malaysian Medical Council for the issuance of a licence to practice telemedicine[125] and the penalties for practicing telemedicine without a valid licence[126]. This Act further provides for the requirement to seek the patient's written consent before the registered medical practitioner practices telemedicine in relation to the patient.[127]

(5) Communications and Multimedia Act 1998 (Act 588)

In recognition of the convergence of the communications and multimedia industry and the technology relating to these fields, the Parliament of Malaysia enacted the Communications and Multimedia Act 1998.[128] The primary objectives of this Act are to promote national policy objectives for the communications and multimedia industry[129] and to establish a licensing and regulatory framework in support of national policy objectives for the communication and multimedia industry.[130]

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[124] Section 3(1) Telemedicine Act 1997
[125] Section 4 Telemedicine Act 1997
[126] Section 3(3) Telemedicine Act 1997
[127] Section 5 Telemedicine Act 1997
[128] This is clear from the preamble of the Communications and Multimedia Act which states it is an Act to provide for and to regulate the converging communications and multimedia industries, and incidental matters.
[129] Communications & Multimedia Act 1998, Section 3(1)(a)
[130] Communications & Multimedia Act 1998, Section 3(1)(b)

This Act further provides[131] *inter alia* that subject to such exceptions as may be determined by the Minister by order published in the Government Gazette, no person shall own or provide any network facility[132], provide any network services[133] or provide any application services except under and in accordance with the terms and conditions of a valid individual licence[134] or a class licence[135] granted under this Act. The Act also provides[136] that a licensee shall not provide any facility or service except in accordance with the conditions of the licence granted to the licensee or the conditions of a class licence to which the licensee is subject.

As a whole, the contents of this Act are purely administrative in nature and do not create any new substantive law in respect of electronic commerce. This Act has no direct application and makes no contribution whatsoever to the subject of electronic contracts and the formation thereof.

(6) Evidence (Amendment) Act 1993 (Act A851)

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[131] Communications & Multimedia Act 1998, Section 126(1)
[132] The expression "*network facilities*" is defined under Section 6 of the Act as any element or combination of elements of physical infrastructure used principally for or in connection with the provision of network services but does not include customer equipment.
[133] The expression "*network service*" is defined under Section 6 of the Act as a service for carrying communications by means of guided and / or unguided electromagnetic radiation.
[134] The expression "*individual licence*" is defined under Section 6 of the Act as a licence for a specified person to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject.
[135] The expression "*class licence*" is defined under Section 6 of the Act as a licence for any or all persons to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject.
[136] Section 127(3) of the Act.

The impact of the use of computer on the law of evidence has not escaped the attention of the courts. In the English decisions of *R. v. Minors* and *R. v. Harper*[137] Steyn J. observed prophetically that:

> The law of evidence must be adapted to the realities of contemporary business practice. Mainframe computers, minicomputers and microcomputers play a pervasive role in our society. Often the only record of a transaction, which nobody can be expected to remember will be in the memory of a computer. The versatility, power and frequency of use of computers will increase.[138]

In 1993, the Parliament of Malaysia introduced substantial amendments to the Evidence Act 1950 through the Evidence (Amendment) Act 1993. Consequently, under the new Section 90A(1) of the Evidence Act 1950, documents produced by computers in its ordinary use, or a statement contained therein is admissible as evidence in any civil or criminal proceeding, whether or not the person tendering the evidence is the maker of such document or statement. The breadth of Section 90A(1) is qualified by Section 90A(2) and Section 90A(3).

The application of Section 90A was recently considered by the High Court in Kangar in *PP. v. Ong Cheng Heong.*[139] In this case, Vincent Ng J. observed that Section 90A(2) in essence, implied that a document which derived its existence solely through the production of a computer, could only be tendered to the court by or through a certificate signed by the person who is responsible for the management of that computer. In addition, the person who signed the certificate would be opened for cross-examination by the

[137] [1989] 2 All E.R 208
[138] [1989] 2 All E.R 208 at pg.210

other party.[140] Pursuant to Section 90A of the Evidence Act, a set of EDI transaction records produced by computer for example, is admissible as evidence of any fact stated therein if it was produced by the computer in the course of ordinary use. The fact that the document was produced by the computer in the course of its ordinary use will have to be certified by say, the person responsible for the management of the operation of the computer in question or for the conduct of the activities for which the computer was used. This Thesis shall discuss Section 90A of the Evidence Act in greater detail in Chapter 5 below.

In addition to the above, the word "*document*" as used in the Evidence Act 1950 was amended to read:-

> any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, sound track or other device whatsoever, by means of any sound recording, or any electronic, magnetic, mechanical or other recording whatsoever and howsoever made, or any sounds, electronic impulses, or any other data whatsoever.[141]

From the foregoing new definition, electronic transmissions and data stored in a computer can clearly be classified as "*document*" as they are matters expressed or described in the storage system of the computer by means of electronic and / or magnetic recording and / or electronic impulses.

In dealing with Section 90(A) of the Evidence Act, it is fundamental that a clear distinction is drawn between the issue of contract formation and

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[139] [1998] 6 MLJ 678
[140] [1998] 6 MLJ 678 at pp.694-695

admissibility as evidence. The former concerns the formation of the contract itself (that is, whether the contract is properly formed), whilst the latter concerns whether certain information pertaining to the contract can be admitted as evidence or otherwise in the courts. On the basis of this distinction, Section 90(A) clearly makes no contribution to the subject of contract formation. This section deals solely with the issue of admissibility of evidence in the form of computer generated documents, not with issue concerning satisfying the formality of an agreement or a document.[142]

(7) Interpretation (Amendment) Act 1997 (Act A996)

Pursuant to the Interpretation (Amendment) Act 1997, the expression "*writing*" or "*written*" as appeared in Section 3 of the Interpretation Act 1948 & 1967 were amended; and the expression is now defined to include type-writing, printing, lithography, photography, *electronic storage* or transmission or any other method of recording information or fixing information in a form capable of being preserved. As the statute law of Malaysia requires certain species of contract to be in writing or evidenced by writing in order to be valid, this provision potentially has an enormous impact on the subject of contract formation. Chapter 5 of this Thesis deals with this provision more comprehensively.

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[141] Section 3, Evidence Act 1950.

[142] The fact that Section 90A only deals with the issue of admissibility of evidence is also judicially recognized. See *Gnanasegaran v. PP* [1997] 3 MLJ 1 at pg. 11 in which the Court of Appeal of Malaysia stated that Section 90A had been added to the Evidence Act in 1993 in order to provide for the admissions of computer produced documents and statements. The Court also stated that the subsections of Section 90A should be read together as they formed one whole provision for the

The Interpretation (Amendment) Act 1997 also introduces the new Section 62A which reads:-

> Section 62A
> Where under any written law any information is permitted or required to be given or kept or maintained, and no means or medium is specified, such information may be given or kept or maintained by electronic means and on electronic medium if the identity of the person giving the information or the source of any information or the source of any information given by such means is capable of being determined or verified, and if sufficient precautionary measures have been applied to prevent unauthorized access to any information recorded or fixed by such means or on such medium.

This above new section thus paves the way for records to be kept and maintained in electronic format unless the specific legislation compelling its keeping and maintenance provides otherwise. Like Section 90A of the Evidence Act, it clearly makes no contribution to the subject of contract formation as it deals only with the issue of keeping and maintenance of information in the electronic medium.

(8) Companies (Amendment) (No.2) Act 1997 (Act A1022)

The Companies Act 1965 was amended pursuant to the Companies (Amendment) (No.2) Act 1997 to *inter alia* enable the filing of statutory forms and documents with the Registrar of Companies to be done electronically.[143]The validity and admissibility in evidence of documents that have been so electronically filed are also assured under the new provisions of this Act. Section 11(A)(7) of the Companies Act now specifically provides

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admissibility of documents produced by computers. Another recent case on Section 90A is *Bank Utama (M) Berhad v. Cascade Travel & Tours Sdn Bhd* [2000] 4 MLJ 582

[143] Section 11A of Companies Act 1965

that a copy of or an extract from any document electronically filed or lodged with the Registrar of Companies supplied or issued by the said Registrar and certified to be a true copy thereof or extract therefrom under the hand and seal of the Registrar is admissible in evidence in any proceedings as of equal validity as the original; document. However, it must be highlighted that the ability to file documents electronically is only available to persons who have registered themselves to the service provided by the Registrar of Companies.[144]

As a whole and not surprisingly, these new amendments to the Companies Act makes no contribution whatsoever to the subject of electronic contracts and the formation thereof.

(9) Summary and Analysis

From the foregoing discussion on the present legislative framework in Malaysia dealing with the electronic media, this Thesis argues that the subjects of electronic contracts and the formation thereof have been largely neglected or omitted by the Malaysian Parliament. None of the recent statutory enactments focus specifically on these subjects. Hence, these fundamental issues must consequently continue to be dealt with under the regime of the Contracts Act 1950.

[144] Section 11A(3) Companies Act 1965

The Contracts Act 1950 is an old statute, with roots in the Contracts Act of India that was enacted in the 19th century.[145] Moreover, at the time of the writing of this Thesis, the Parliament of Malaysia has yet to introduce any amendment to the Contracts Act 1950 to deal with the novelties of electronic commerce and electronic contracts. This Thesis argues that this omission or neglect is detrimental to the development of electronic commerce in Malaysia, and in turn forms the basis of this Thesis.

STRUCTURE AND OBJECTIVE OF THIS THESIS

(1) The Arrangement of Chapters

This Thesis comprises eight Chapters including the present. Chapters 2, 3, 4, 5, 6 and 7 each discusses a distinct issue relating to the formation of contracts made through the use of the Internet, electronic mails and EDI. Chapter 8 is the concluding chapter. The issues discussed in this Thesis are arranged as follows:

(a) The Contracts Act of Malaysia requires the human actor to play an active role in the process of contract formation. In this connection, what is the status of agreements made by sophisticated computers without any immediate human intervention? What happens if the intentions of an intelligent computer are different from the intentions of the human actor that owns or operates it? Chapter 2 of this Thesis discusses these issues, focusing on the

[145] See for instance, *Chemsource (M) Sdn Bhd v. Udanis Mohammad Nor* [2001] 6 CLJ 79 at 103

Contracts Act 1950 and seeks guidance from the UNCITRAL Model Law and the Uniform Electronic Transactions Act 1999 of the United States.

(b) Do the existing principles of establishing *consensus ad idem* and doctrine of offer and acceptance require any modification in respect of an agreement made through the use of the Internet or electronic mail? This issue is dealt with in Chapter 3 of this Thesis.

(c) Chapter 4 of this Thesis deals with specific issues concerning the capacity to contract when the contract is made entirely through the use of the Internet or exchange of electronic mails. This is a critical issue in view of the fact that contracts made through the use of these media are often made between parties who have absolutely no knowledge whatsoever of each others' identity.

(d) Traditional contract law presupposes the use of ink and paper or at least a verbal agreement and that the Internet eliminates all that.[146] The law of Malaysia continues to require certain species of contract to be in writing in order for the same to be enforceable. Hence, do agreements made through the use of the Internet or electronic mails satisfy the legal requirement of writing? Similarly, what are the limits in the use of electronic and digital signatures? To what extent does the law consider them as acceptable

[146] Abu Bakar Munir, *Cyber Law: Policies and Challenges*, (Butterworths Asia Publication, 1999) at pg. 234.

substitutes to traditional handwritten signatures? These issues are comprehensively discussed under Chapter 5 of this Thesis.

(e) If the terms and conditions of a contract made through the use of the Internet do not expressly state the law that is to govern issues concerning the formation thereof, how is the governing law to be determined? Are traditional conflict of laws doctrine of finding the putative proper law of the contract still valid or should issues of formation of contracts be governed by a law that applies exclusively to the Internet, hence obviating the need to be concerned about conflict of laws? These issues are discussed in Chapter 6 of the Thesis.

(f) In Chapter 7 of the Thesis, the present writer discusses the recent legislative developments in the United States, Singapore, Australia, Hong Kong and the European Union in respect of the law of electronic commerce and the subject of contract formation in particular.

(g) Chapter 8 is the concluding chapter of this Thesis and contains a summary of the recommendations made herein.

This Thesis has been prepared primarily through library research and through research on the Internet. The present writer must highlight that materials concerning the law of contract in Malaysia in relation to the use of the Internet and other electronic media are still relatively few. Nonetheless, the handful of existing textbooks published by local Malaysian authors on

this subject has been most helpful to the writing of this Thesis. Although the Internet is a good source of materials, the same unfortunately frequently deal exclusively with the law of the United States.

This Thesis frequently draws parallels from existing case law authorities dealing with non-electronic contracts that emanate from Malaysia and other common law jurisdictions and applies these to the contractual issues that arise from the use of electronic media. The foregoing approach may be challenged and criticized on the ground that contracts made through the electronic media (and the Internet in particular) require a different approach as compared to a conventional non-electronic contract. Nonetheless, this Thesis submits that this approach is the only possible starting point to any analysis of novel issues that arise from the use of the electronic media. Moreover, it must be observed that even the UNCITRAL Model Law based much of its contents on the functional equivalence approach of drawing parallels between transactions made in the electronic media and physical non-electronic transactions and give legal validity to the former.

(2) What this Thesis Hopes to Contribute

This Thesis hopes to demonstrate that the existing body of law in Malaysia concerning the formation of contracts requires modification in varying degree in order to be able to properly regulate contracts made through the use of EDI, the Internet and electronic mails. In effecting the modification, this Thesis argues that what is required is not just legislative amendments and

new enactments but changes to the mind-set of the legal community (lawyers and judges) as well.

However, this Thesis also demonstrates that in some instances, the difficulties caused by the Internet and other electronic media have been exaggerated by lawyers and academics and that the difficulties caused by the use of these media does not call for the total abandonment of existing legal principles. Hence, this Thesis hopes to provide a balanced analysis of the existing framework of laws concerning the formation of contracts in respect of their compatibility to the novelties associated with recent advancements in electronic communication. Further to the above, this Thesis hopes to advance the law of contract in Malaysia and to become a starting reference point for future research into the law concerning electronic commerce in general and electronic contracts in particular in Malaysia.

CHAPTER TWO

ENFORCEABILITY OF AGREEMENTS MADE BY COMPUTERS AUTONOMOUSLY

GROWTH OF ARTIFICIAL INTELLIGENCE

(1) The Focus of this Chapter

This Chapter seeks to answer the following questions, namely; (a) does the contract law of Malaysia necessitate the human actor to assume an active role in the process of contract formation, failing which the resulting agreement shall be unenforceable?; and (b) can sophisticated computers assume the active role in contract formation? For the purpose of this Chapter, the expression "*active role*" refers to a situation in which the contracting party concerned is actually present at the time when the agreement is made, and is actively involved in the decision making process leading to the concluding of the agreement by exercising its cognitive ability.

The focus of this Chapter is not so much on machines and computers that are mere tools and equipment of their human owners or computers that blindly obey the instructions of the human actor in a pre-programmed manner. Instead, the focus is on machines and computers that have the abilities to think and to make decisions autonomously; that is, machines and computers that are equipped with sophisticated cognitive attributes. The sophisticated cognitive ability of these machines and computers enable them to assume active roles in the process of contract formation, with their human

owners relegated to becoming the passive party. The contents of this Chapter may sound futuristic, but they are not pure science fiction. Although machines and computers have yet to attain the level of cognitive ability that is at par with humans, the gap is closing. Humankind's continuous desire for speed and efficiency ensures the continuous growth in the use and development of artificial intelligence and sophisticated computers. So sophisticated are some computers nowadays that they can, under certain circumstances and according to predetermined criteria, emulate human decisions.[1]

For example, in the last few years, it has been witnessed that computers are able to play chess at grandmaster level, solve complicated mathematical problems that challenge even expert human mathematicians, construct accurate three dimensional representations from two-dimensional satellite photos and control guided missiles and airplanes accurately.[2] Computers and robots have substituted humans in many factory assembly lines. A new technology named Evolvable Hardware (EHW) could actually learn and improve itself, as was recently reported:

> The difference is that unlike Deep Blue,[3] EHW continually crops and refines its search algorithm – the sequence of logical steps it takes to find a solution. It selects the best and tries that. And it does this on its own accord, not according to some programmed set of instructions.
>
> Conventional wisdom has long held that a machine's abilities are limited by the imagination of its creators. But over the past few years, the pioneers of EHW have

[1] Nicoll, C.C, *Can Computers Make Contracts?*, [1998] JBL 35 at pg 35
[2] Alter, Steven, *Information Systems* (2nd Edition), (Benjamin Cummings Publication, 1996) at pg. 528
[3] Deep Blue is the name of the supercomputer created by IBM that defeated world chess grandmaster Garry Kasparov in a series of highly publicized chess matches in 1997

> succeeded in building devices that can tune themselves autonomously to perform better. In some cases, the mechanical progeny appear to outstrip even their creators' abilities. In the field of circuit design, for instance, EHW is coming up with creative solutions to problems that have defied human beings for decades.[4]

The EHW is an example that certain machines can be made to learn to be smarter – surpassing even humans in some of the most intellectually demanding of tasks.

(2) Computers, Artificial Intelligence and Contract Formation

The subject of contract law is not free from incursion by sophisticated computers. Electronic Data Interchange (EDI) represents the most common present day example where computers are being used to make agreements without any immediate active human involvement. Fully functional EDI systems avoid almost all form of human interventions altogether.[5] Many Internet web sites also provide the requisite platform and facilities for commercial transactions to be concluded by members of the public or by subscribers in an automated fashion. One of the best known examples is www.amazon.com that allows customers to purchase CDs, books and other items in an automated fashion over the Internet.[6] The following two hypothetical examples illustrate the matter in greater clarity:

> *Illustration 1* - Imagine a supermarket that maintains its stock level by an automated system, whereby if the stock of a certain item in its inventory drops below a certain level, the said automated system will instantaneously and without any immediate and conscious human intervention, send an electronic purchase order using EDI to the computer of its supplier. The computer of its supplier recognizes the format and parameters of the electronic transmission and

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[4] *Machines with Minds of Their Own*, The Economist Technology Quarterly, (March 2001), at pg.37
[5] Johnston, Handa & Morgan, *Cyber Law*, (Pelanduk Publications, 1998) at pg.31
[6] See further examples cited in Reed, Chris, *Internet Law – Text & Materials*, (Butterworths Publications, 2000) at pp. 180-181

automatically gives an electronic acceptance reply to the sender computer. At the same time, an electronic message is sent to its delivery department to initiate the delivery (and hence the performance) of the just concluded agreement of sale. No humans are involved in the sending of the offer to purchase and the acceptance of the said offer. Both the management of the supermarket and the supplier would not have known of the sale and purchase of a certain item immediately before the same is completed by the computers.

Illustration 2 - Imagine a situation whereby a customer places an order through the use of the Internet. The messages on the Internet web-site that are generated by a computer automatically, lead the customer to a step-by-step instructions on the screen, culminating in the customer clicking the *"I Agree"* button on the screen which signals his agreement to the seller's terms and conditions of sale that are found on the Internet web-site. The seller's computer automatically sends a notice to the customer that informs him that his order has been accepted and is being processed. Further, the seller's computer informs the customer the goods ordered shall be delivered to him as per the agreement concluded. The seller has no knowledge of this agreement at the time the same is concluded.

In both the above illustrations, the human actors are either totally absent from the process of contract formation (as in the case of the use of EDI in Illustration 1 above) or partially so (as in the case of the use of the Internet in Illustration 2 above). In both cases, the computers contribute very significantly to the process of contract formation.

The role of the computer is rapidly evolving from that of passive cipher to that of active participant in some trading processes.[7] Machines and computers are slowly and continually assuming an increasingly more dominant role in the process of contract formation, thereby relegating the human actor from being an active player to a passive onlooker. The introduction of the now ubiquitous vending machine for example, removes the necessity for the human actor to be physically present at the time and place a transaction takes place. The more advanced EDI and Internet

systems that came later enable more complicated transactions to be concluded without the immediate presence and involvement of the human actor. In the near future, more sophisticated computer programs shall surely allow machines and computers to assume more roles that are presently solely undertaken by human beings.

The absence of the human actor whether partially or totally in the process of contract formation however, challenges the most fundamental principles of contract law. At common law, the assumption is that a contract is undertaken (or not) based on decisions or actions of an individual (that is, a live person), either on his own behalf or as an agent for another.[8] The requirement of conscious human involvement in the making of offer and the acceptance of which, forms the cornerstone of the law of contract, otherwise the oft cited phrase "*consensus ad idem*" will be meaningless.[9] The requirement of conscious human involvement at the time of the making of a contract forms the basis of the doctrine of mistake, duress, undue influence and the concept of misrepresentation. It is also found in the principle that the terms of a contract must be brought to the knowledge of the other party before the conclusion of the same[10] and the requirement that unusual and onerous

[7] Allen, Tom & Widdison, Robin, *Can Computers Make Contracts?*, (1996) available at www.dur.ac.uk/~dla0www/centre/hjolt.html#appel73
[8] RT Nimmer, *Electronic Contracting: Legal Issues*, Journal of Computer & Information Law (Vol.14) pp.211-267 at 212.
[9] Reed, Chris, *Internet Law – Text & Materials*, (Butterworths Publications, 2000) at pg.181
[10] See for example, *Olley v. Marlborough Court Ltd* [1949]1KB 532

terms must be highlighted to the other contracting party, otherwise he is not bound.[11] The list goes on.

REQUIREMENT OF HUMAN ACTOR UNDER CONTRACTS ACT

(1) Human Actor Alone Can Assume the Active Role[12]

This Thesis begins its examination with Section 2 of the Contracts Act that establishes the mechanics of contract formation. Although the Contracts Act uses the expression "*proposal*" instead of "*offer*" that is normally used in English common law, it is hereby submitted that both expressions are synonymous.[13] Section 2 reads as follows:

> Section 2
> In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context -
>
> (a) when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal;
>
> (b) when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise;
>
> (c) the person making the proposal is called the "promisor" and the person accepting the proposal is called the "promisee";
>
> (d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;
>
> (e) every promise and every set of promises, forming the consideration for each other, is an agreement;
>
> (f) promises which form the consideration or part of the consideration for each other are called reciprocal promises;
>
> (g) an agreement not enforceable by law is said to be void;

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[11] See for example, *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433

[12] See definition of "active role" at page 48 above.

[13] This is also the opinion of Prof. V. Sinnadurai. See Sinnadurai, Visu, *Law of Contract* (Volume 1) (Butterworths Publication, 2003) (3rd Edition) at pg. 34; and Sinnadurai, Visu, *Law of Contract in Malaysia and Singapore*, (Butterworths Publication, 1987) (2nd Edition) at pg.23

(h) an agreement enforceable by law is a contract;

(i) an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract; and

(j) a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

The reader's attention is referred to the continual use of "*person*" in Section 2. It is important to note that the drafters of the Contracts Act did not choose a more neutral word like "*party*" instead of "*person*". The reader's attention is also referred to the definitions of "*consideration*" under Sub-Section 2(d), and "*agreement*" under Sub-Section 2(e). Sub-Section 2(d) uses the words "*desire*" and "*abstain*" that are clearly qualities to be found among humans only. As these words describe emotions, they are not words commonly associated with machines and computers.

From the foregoing, it is fundamentally obvious that the Act only intends humans (and humans only) to possess the requisite capacity to make agreements. That is, in the absence of humans playing the active role[14] in the process of contract formation, an agreement cannot be formed in the manner prescribed under the Contracts Act. The simple absence of the human actor in the process of contract formation is sufficient to defeat any finding that an agreement has been formed. Likewise, since computers and machines do not possess the requisite contractual capacity under the regime

[14] See definition of "active role" at Page 48 above

of the Contracts Act, they cannot assume the active role *in lieu* of the human actors.

Other provisions found under the Contracts Act are consistent with and squarely support the foregoing assertion, most notably Section 11. Section 11 deals with the personal incapacity of a contracting party in 3 distinct circumstances, all of which can only be attributed to humans and only to humans; (1) incapacity because of infancy, (2) incapacity arising from unsoundness of mind and (3) incapacity arising from other disqualification by personal law.[15] The concept of "*sound mind*" as explained in Section 12(1) further supports the assertion that only humans can make contracts. These 2 sections read as follows:

> Section 11
> Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.
>
> Section 12(1)
> A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest.

By referring to the human attribute of infancy and soundness of mind, the drafters of the Contracts Act clearly intended the human actor to assume the active role[16] in the communication of offer and acceptance by being immediately present during the said process, and to have the mental capacity to take active part in the decision making process.

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[15] See Chapter 4 of this Thesis, which focuses on the contractual incapacity of minors and persons suffering from unsoundness of mind.
[16] See definition of "active role" at page 48 above

Another distinct example of human attribute is found under Section 4 of the Contracts Act that links the process of offer and acceptance to the knowledge of the person making the contract. Until the day the law recognizes that computer programs and data obtained by a computer can be classified as "*knowledge*" vis-à-vis the computer, it is hereby submitted that knowledge can only be treated as a human faculty. Section 4 of the Contracts Act reads as follows:

> Section 4
> (1) The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.
> (2) The communication of an acceptance is complete -
> (a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; and
> (b) as against the acceptor, when it comes to the knowledge of the proposer.
> (3) The communication of a revocation is complete -
> (a) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; and
> (b) as against the person to whom it is made, when it comes to his knowledge.

The Contracts Act also refers to other attributes that are distinctly found only in human beings, like the concept of free consent found under Sections 10 and 13 of the Contracts Act. These provisions read as follows:

> Section 10(1)
> All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
>
> Section 13
> Two or more persons are said to consent when they agree upon the same thing in the same sense.

The requirement of knowledge (under Section 4), free consent (under Section 10), age of majority (under Section 11) and soundness of mind

(under Section 12) are all attributes that are exclusively associated with humans. They all point to the inescapable conclusion that under the Contracts Act, the human actor must always be present to play the active role when the contract is formed. It is impermissible under the regime of the Contracts Act to relegate the active role to machines and computers, however sophisticated they may be. In other words, in order to have an agreement as defined under Section 2(e) of the Act, the agreement cannot be made by computers playing the active role. The absence of human actors is certainly fatal to the successful formation of a contract under the Act.

(2) Can Intelligent Computers be Agents of the Human Actor?

Can the above commercially undesirable result be circumvented, by asserting that the intelligent computers are in fact agents of the human actors, thereby allowing the computers to assume the active role in contract formation and the human actor to assume the passive role? The relevant provisions under the Contracts Act that deal with the qualification of an agent are found under Sections 135 and 137 of the Contracts Act and they read as follows:

> Section 135
> An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".
>
> Section 137
> As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

From the above provisions, it is evident that the law of agency as contained under the Contracts Act again requires an agent to be a human actor with the requisite human attributes. These provisions of the Contracts Act again refer to the word "*person*" and stipulate the necessity of the agent having reached the age of majority and having soundness of mind. It is implicit that an agent must also be a natural human being. Hence, although the Contracts Act allows a principal to appoint an agent and allows the agent to assume the active role for *inter alia* the purpose of contract formation, the agent must be human. A computer, although intelligent and sophisticated, cannot assume the role of an agent.

(3) No Agreement if Computer Assumes the Active Role

From the above discussion, the inevitable conclusion is that only humans can assume the active role in the process of contract formation under the Contracts Act. In the event a sophisticated computer with near human cognitive ability is used for the purpose of contract formation, an agreement as defined under Section 2(e) of the Act can never be formed. Moreover, as the Contracts Act was enacted long before the invention of sophisticated computers,[17] Parliament could not have intended that sophisticated machines and computer systems could independently enter into contracts on behalf of their human owners.[18] When the Act was enacted, Parliament did

[17] See page 69 below for the legislative origin of the Contracts Act of Malaysia

[18] Ding, Julian, *E-Commerce Law & Practice,* (Sweet & Maxwell Asia, 1999) at pg. 47. Mr. Ding further observed that the automatic response by a computer system could not be equated with human intention needed to make a decision. Mr. Ding also doubted there would be *consensus ad idem* in such circumstances

not have the opportunity or necessity to deliberate upon this issue. Hence, the rigidity of the Contracts Act cannot be circumvented by imputing a legislative intention to the contrary.[19]

CASE LAW AUTHORITIES ON CONTRACTS MADE BY MACHINES

(1) Cases Enforcing Computer Made Contracts

There are nonetheless case law authorities where the courts had shown the readiness to accept the idea that in law, computers or machines can enter into agreements without any direct and immediate involvement of their human owners. In these decisions, it should be noted that the courts had treated the computers or machines concerned as mere extensions of their human owners. This approach is arguably the correct one to take, as the computers / machines that appeared in these cases were largely tools and equipment of their human owners; machines that blindly obey the instructions of the human actor in a pre-programmed manner.

One of the earliest cases touching upon artificial intelligence is *McCaughn, Collector of Internal Revenue v. American Meter Co.*,[20] a decision of the Court of Appeal (3rd Circuit) of the United States. In this case, the Court had to decide whether the defendant taxpayer's gas meter qualified as an "*automatic slot-vending machine*". In the course of its reasoning, the Court

[19] The rule of statutory interpretation allows statutory language to be modified according to developments in technology. But this rule still will not permit agreements to be made by machines and computers. See discussions in pages 72 to 80 hereunder.
[20] 67 F. (2d) 148, per Buffington Circuit Judge

suggested *obiter dicta* that a machine had the capacity to conclude and perform a contract of sale. The Court without any reservation observed:

> Without the agency of either party, the device automatically receives the money from the buyer and holds it for the seller, automatically measures the product, automatically delivers it to the buyer. The sale is effected by a slot which receives the coin of the buyer; by gravity takes it out of the control of the buyer; and by gravity puts it in control of the seller; and at the same time releases the bargained amount of gas and delivers it to the buyer. The contract, sale, delivery and payment are all effected by mechanism, automatically and without any working human agency.....The fact show that the device in question works automatically, that it is a machine, that it is a selling machine, a product delivery machine, and a price collecting machine; that it does away with human control, agency, work and exercise of will power.[21]

The rationale of the Court in the above decision was clear. That is, although a machine functioned independently of any human involvement, it was nonetheless capable of concluding and performing a contract of sale that would be binding on its human owners. The fact that no human actors were present at the time of the making of the same did not seem to trouble the Court in any manner. Considering that this case was decided in 1933, the liberal approach adopted by the Court was far ahead of its time.

In yet another American decision, *State Farm Mutual Automobile Insurance Company v. Bockhorst*,[22] the Court of Appeal (10th Circuit) of the United States had to decide whether material non-disclosure was waived when a computer issued a retrospective renewal notice of an insurance policy. The Court found the plaintiff insurance company's reinstatement of the defendant's insurance policy through the latter's computer system was the direct result of the errors and oversights of the insurance company's human

[21] 67 F. (2d) 148 at pp.148-149, per Buffington Circuit Judge. The present writer has included the underlines as emphasis.

agents and employees. The Court in this case, without referring to *McCaughn, Collector of Internal Revenue v. American Meter Co.*[23] observed that:

> Holding a company responsible for the actions of its computer does not exhibit a distaste for modern business practices as State Farm asserts. A computer operates only in accordance with the information and directions supplied by its human programmers. If the computer does not think like a man, it is man's fault. The reinstatement of Bockhorst's policy was the direct result of the errors and oversights of State Farm's human agents and employees. The fact that the actual processing of the policy was carried out by an unimaginative mechanical device can have no effect on the company's responsibilities for those errors and oversights.[24]

The mistaken computerized reinstatement of the defendant's insurance policy by the insurance company was held by the Court to be valid, although the insurance company had intended otherwise. In *State Farm Mutual Automobile Insurance Company v. Bockhorst*[25] the Court premised its decision upon the finding that the computer in question was nothing more than a tool, that is, an extension of the employees and agents of the insurance company to which the computer belonged. The computer in question could only perform pre-programmed mechanical tasks.[26] Any shortcoming exhibited by the computer in question was hence directly attributable to the errors and oversights of the employees and agents of the said insurance company.

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[22] 453 F.2d 533 (1972)
[23] 67 F. (2d) 148
[24] 453 F.2d 533 (1972) at pp. 536-537. The present writer added the underline as emphasis.
[25] 453 F.2d 533 (1972)
[26] This is clear as the Court stated that the computer was "*an unimaginative mechanical device*".

The same rationale was applied in *Thornton v. Shoe Lane Parking Ltd,*[27] in which the Court of Appeal of England had to decide whether an exemption clause found on a parking ticket that had been dispensed by an automatic ticket-dispensing machine was enforceable. In the course of the judgment, Lord Denning MR considered the functions of the ticket-dispensing machine and observed as follows:

> The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he puts the money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts the money into the slot.[28]

Like the Court in *State Farm Mutual Automobile Insurance Company v. Bockhorst,*[29] Lord Denning MR treated the ticket-dispensing machine as nothing more than an extension of the defendant proprietor company. To the Court, the ticket-dispensing machine had assumed the *persona* of its proprietor. Although no human actor acting on behalf of the proprietor of the parking lot was physically present to deal with the customer at the time of the making of the offer and acceptance, the Court was evidently of the view that the pre-programmed albeit mechanical actions of the machine were adequate to complete the formation process of the contract in question. The

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[27] [1971] 2 QB 163
[28] [1971] 2 QB 163 at pg.169. The present writer has included the underlines as emphasis.
[29] 453 F.2d 533 (1972)

absence of any human actor at the time of the making of the contract did not trouble the esteemed members of this Court of Appeal.[30]

Lastly, in a Privy Council decision emanating from New Zealand *Databank Systems Ltd v. Commissioner of Inland Revenue,*[31] the Court again had the opportunity to decide on the role computers played in the conclusion of commercial transactions. In this decision, the Court again recognized that computers had the capacity to make contracts independently of human involvement and to bind their human owners. In respect of the use of computers to execute electronic fund transfers, Lord Templeman expressed the opinion that:

> In the old days the functions of clerks were an integral part of the various activities required by the banks in order that the banks might supply financial services. Now the computer and other services provided by Databank replace the clerks and form an integral part of the supply by the banks of financial services to their customers.....The most spectacular development illustrates the operation of the Act of 1985. Under the EFTPOS system (electronic funds transfer at point of sale) the purchaser, for example of petrol from a garage, tenders his bank card as a means of completing the contract between the garage and the purchaser for the sale and purchase or the petrol. The bank-card and the details of the petrol supplied are presented to the computer and constitute a cheque as defined by the Act of 1985. If the computer has been instructed by the bank that the bank is willing to honour that cheque, the computer debits the price of the petrol to the customer's bank account and credits the price to the bank account of the garage with any of the banks which are parties to the agreement, thus completing the contract between the purchaser and the garage for the sale and purchase or petrol. The computer may also provide a receipt for the purchaser and adjusts the records of the sales and stocks of petrol of the garage.[32]

(2) Analysis of Above Cases

[30] The Court of Appeal in this case was presided upon by Lord Denning MR, Megaw LJ and Sir Gordon Willmer

[31] [1990] 3 NZLR 385

[32] [1990] 3 NZLR 385 at pp.391-392. The present writer has included the underlines as emphasis.

The above decisions of the American and English courts can be explained under the context of the Contracts Act in the following manner. That is, although a mechanical device does not have the attribute to, for example, possess knowledge (as required under Section 4 of the Act), or to give free consent (as required under Section 10 of the Act) and possess the soundness of mind (as required under Section 12 of the Act), this device is deemed to have assumed these qualities of the human actors that own or operate it. Hence, the "*agreements*" made by these machines are agreements as defined under Section 2(e), as they are deemed to be agreements made by the human actors that own or operate these machines.

All the above four cases possess one common feature, namely, they all dealt with computers and machines that were mere equipment or tool of the human actors that own or operate them. To adopt the words of the Court in *State Farm Mutual Automobile Insurance Company v. Bockhorst,*[33] the computers in all the above cases were only "*unimaginative mechanical devices.*" These machines and computers did not possess the cognitive attribute that would have allowed them to make decisions on their own, free from the rigid programmed parameters of their human owners. The Courts in all the above cases did not have to deal with a situation in which the computer or machine in question had sophisticated cognitive ability. The machines that the above decisions dealt with were not sophisticated computers that are programmed not only to negotiate details such as price,

quantity and dates of delivery and payment, but also to decide whether to reject or accept an offer without reference to any human trader.[34] In other words, the computers and machines in the above cases did not assume the active role as defined at the beginning of this Chapter.[35] Consequently, the courts in these cases were correct to treat them as mere extensions of their owners, and any action or decision of these computers and machines was rightly the action and decision of the human actors that own and operate them.

(3) Divergence of Intentions and Intelligent Computers

It is hereby submitted that the final decision of the Courts in the above cases would have been different if the computers in question were able to make decisions on their own, hence creating the possibility of they having intentions that are different from those of their human owners. Let us imagine a variation to the facts of *Thornton v. Shoe Lane Parking Ltd*[36] as follows:-

> Illustration
> Suppose the proprietor of the car park has installed a sophisticated computer program to the ticket dispensing machine to enable the former to be able to deny access to individuals with blonde hair. That is, if the driver has blonde hair, the ticket dispensing machine will refuse to make an offer to the driver (by issuing a ticket). Let us further imagine a situation whereby a person who has black hair naturally, but has dyed his hair blonde, drives up to the machine. The machine is able to detect that the driver has black hair naturally, and issues a ticket to the driver, against the wishes of the owner. Is there a binding contract between the driver and the owner of the car park as there is obviously no *consensus ad idem* between them in the circumstances?

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[33] 453 F.2d 533 (1972) at pg.537
[34] Allen, Tom & Widdison, Robin, *Can Computers Make Contracts?*, (1996) available at www.dur.ac.uk/~dla0www/centre/hjolt.html#appel73
[35] See definition of "active role" at page 48 above

Although the Contracts Act is silent on the requirement of intention to create legal relationship, there is no doubt that a critical foundation of a valid contract under Malaysian law is that parties must have the requisite intention to enter into a legally binding relationship.[37] From the above illustration, as machines cease to become mere unimaginative mechanical devices, and start to have sophisticated cognitive abilities to assume the active role in the process of contract formation, the possibility of the intentions of the machines diverging from those of the human actors that operate or own them become real.[38] In such circumstances, any attempt to equate them (as was done for machines that are unimaginative devices) will be fraught with artificiality and may lead to injustice.

Since *consensus ad idem* requires the objective intentions of the contracting parties to coincide,[39] any divergence of the intention of the intelligent computer from the intention the human actor that owns it shall produce the most undesirable consequences for the other contracting party. The law must determine whether the objective intention of the other contracting party

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[36] [1971] 2 QB 163

[37] Sinnadurai, Visu, *Law of Contract* (Volume 1) (Butterworths Publication, 2003) (3rd Edition) at pg. 49, and Sinnadurai, Visu, *Law of Contract in Malaysia and Singapore*, (Butterworths Publication, 1987) (2nd Edition) at pg.26

[38] It is trite law that intention of the parties must be assessed objectively rather than subjectively. See for instance *Smith v. Hughes* (1871) LR 6 QB 597, *Storer v. Manchester City Council* [1974] 3 All ER 824 and *Overseas Union Bank v. Lew Keh Lam* [1999] 3 SLR 393

[39] See for example *Paal Wilson & Co. v. Partenreederei Hannah Blumenthal ("The Hannah Blumenthal")* [1983] 1 Lloyd's Law Reports 103 at pp.115-116 (per Lord Diplock); see also Grubb,

must coincide with the objective intention of the intelligent computer, or whether it must coincide with the objective intention of the human actor that operates the computer.

(4) Possible Solutions to Resolve Difference of Intentions

Where there is a difference in the intention of an intelligent computer and the intention of the human actor who operates it, the intention of the human actor shall prevail under the scheme of the Contracts Act. This is so as the Act does not allow a computer to play the active role in contract formation. However, common sense and commercial certainty dictate that in a situation whereby the intention of the computer is different from that of its owners, the intention of the other contracting party must, when assessed objectively, coincide with the intention of the intelligent computer. The intention of the human actor that owns or operates the computer should ideally be inconsequential. This can be rationalized on the basis that the other contracting party dealt and possibly conducted his negotiation *bona fide* with the intelligent computer in the absence of the human actor.

The above rationale is also well supported by the doctrine of estoppel[40] and the cases concerning apparent authority under the law of agency.[41]

Andrew & Furmston, Michael, *Butterworths Common Law Series - The Law of Contract*, (Butterworths Publication, 1999) at pg.285

[40] See for example *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. In this case, the Federal Court of Malaysia held that the circumstances in which the doctrine of estoppel could operate were endless (at pg. 344) and that all that a representee needed to do was to produce sufficient evidence so that an inference might fairly be drawn that he had been influenced by the conducts of the representor (pg.347). Hence, in order to enforce an agreement made

Nonetheless, it must be emphasized that as the law surrounding the doctrine of estoppel arises largely from case law authorities, it lacks the degree of certainty as the ingredients of the doctrine of estoppel can evolve over time. Further, it must be noted that it is questionable to refer to the law of agency because, as highlighted above, a computer can never assume the role of an agent under the Contracts Act, no matter how intelligent it may be.

The above problem can of course be resolved if the Contracts Act recognizes that computers can assume the active role in the process of contract formation. That is, although an intelligent computer expresses a diverging intention from that of the human actor that owns or operates it, and an agreement is reached between the computer and the other contracting party, such an agreement is nonetheless recognized as an agreement under Section 2(e) of the Act. There are numerous advantages flowing from this approach. Firstly, this proposed solution dispels any concern that a party may have that the human actor that operates and owns the computer that he has *bona fide* dealt with, will repudiate the agreements made by the said computer on the ground that the computer was not acting in accordance with the instructions of the human actor when it made the agreements. Secondly,

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by an intelligent computer, the other contracting party could simply produce evidence to show that he was influenced by the fact that the contracting party had allowed his intelligent computer to deal with him in the ordinary course of business without any qualification. Hence, the contracting party would be estopped from asserting that his intentions were different from the intentions of his computer, which must prevail.

[41] See for example *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 where a company was held liable for the acts of one of its directors because it had permitted the director to rum the company, thereby representing to all persons dealing with the director that the director had the authority to bind the company. Hence, by allowing his intelligent computer to make

this proposed solution also compels owners of the intelligent computers to exercise more care in deploying and maintaining the computers in question for the purpose of contract formation.

MORE LIBERAL INTERPRETATION OF CONTRACTS ACT

(1) Literal Interpretation of the Contracts Act

For the sake of completeness, this Thesis shall now consider if the rules of statutory interpretation permit a more liberal interpretation of the provisions found under the Contracts Act so that computers may assume the active role in the process of contract formation, in lieu of the human owner. At the core of the problem is the antiquity of the Contracts Act itself. The Contracts Act was adopted from the Indian Contracts Act 1872,[42] which in turn is an instrument drafted in the 2nd half of the 19th century, well before the advent of artificial intelligence and computers. Another challenge arises from the frequent use of the word "*person*" in the Act that strongly reinforces the notion that only humans can assume the active role in the process of contract formation.

As the Privy Council observed in *Ooi Boon Leong v. Citibank NA*[43] the Contracts Act, although only described as an Act, was "*intended to codify the law of contract as regards those aspects of contract law which are*

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contracts with third parties without any qualification, the owner of the computer would be bound by the acts of his computers, even though his intentions were different from those of his computer.

[42] See *Chemsource (M) Sdn Bhd v. Udanis Mohammad Nor* [2001] 6 CLJ 79 at 103. See also, Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998) at pp. 38-39.

grouped under the Act's nine definitive headings".[44] In the premises, when construing the words found in the Contracts Act, one must first examine the language of the relevant provision in its natural meaning and not to strain for an interpretation that either reasserts or alters the pre-existing law.[45] It is trite law that in interpreting a code, recourse must always be had in the first instance to the language of the code itself.[46] In other words, in construing the provisions of the Contracts Act, one must determine the literal meaning of the same by considering the wording of the Contracts Act alone, without consideration of other interpretative criteria.[47]

Moreover, the literal construction will still be the prevailing approach even if the Contracts Act is not to be treated as a code. It is an established principle that courts will adopt a literal approach to statutory interpretation where the words used in the statute concerned are clear and unequivocal, and this approach will be adopted however unfair the result might be. In *Punca Klasik*

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[43] [1984] 1 MLJ 222 at pg. 224 (per Lord Brightman).

[44] There seems to be a diverging of opinions on this issue between two very eminent authors on contract law. Whilst Andrew Phang was of the view that the Contracts Act was a code (see Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998) at pg. 38), Prof. Sinnadurai expressed his reservation that as the Contracts Act did not deal with every aspect of the law of contract, it was not intended to be a code (see See Sinnadurai, Visu, *Law of Contract* (Volume 1) (Butterworths Publication, 2003) (3rd Edition) at pg.17; and Sinnadurai, Visu, *Law of Contract in Malaysia and Singapore*, (Butterworths Publication, 1987) (2nd Edition) at pg.14). This Thesis will take the (perhaps paradoxical) position that the Contracts Act is a code, *but only an incomplete code* in view of the statement of Lord Brightman in *Ooi Boon Leong v. Citibank* cited above, and the position taken by the learned authors of *Pollock & Mulla on Indian Contract and Specific Relief Acts* (Volume 1, 11th Edition) (Tripathi) at pp.5-6 that "to the extent it [the Contracts Act of India, which is almost identical with the Malaysian Contracts Act] deal with a subject, it is exhaustive upon the same and is not permissible to import the principles of English law *dehors* the statutory provisions".

[45] *R v. Smurthwaite* [1994] 1 All ER 898 at pg. 902 (per Lord Taylor CJ).

[46] Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998) at pg. 38.

Sdn Bhd v. Abdul Aziz bin Abdul Hamid & Ors.[48] the High Court of Johor Bahru (per James Foong J) observed that:-

> The function of this court is not to rewrite statute and to give it another meaning when there is a clear and unequivocal provision in the enactment. However harsh the result may be, the court of law has to follow what is enacted by Parliament. [49]

The above observation of the High Court is supported by an earlier decision of the Federal Court of Malaysia, *Kumpulan Kamuning Sdn Bhd v. Rajoo & 200 Ors,*[50] in which Mohamed Azmi FJ observed that the words used in Regulation 8 of the Employment (Termination & Lay-Off Benefits) Regulations 1980 was not ambiguous and their meaning was plain. Consequently the Federal Court was of the view that the strict and literal approach should be adopted.[51]

This Thesis hereby submits the word "*person*" used in the Contracts Act is clear and unequivocal. Although the Contracts Act does not provide a definition for the word "*person*", the said word means exactly what it reads in its literal or natural meaning; that is, a natural person in the form of a human being, or in its statutorily extended meaning, a legal person in the form of corporate or unincorporated entity. This latter definition is the result of Section 66 of the Interpretation Acts 1948 & 1967 that reads as follows:-

> Section 66
> "*person*" and "*party*" includes any body or persons, corporate or unincorporated;

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[47] Bennion, Francis, *Statutory Interpretation*, (3rd Edition) (Butterworths Publication, 1997) at pg. 666
[48] [1994] 1 MLJ 136
[49] [1994] 1 MLJ 136 at pg. 143
[50] [1983] 2 MLJ 400
[51] See generally [1983] 2 MLJ 400 at pg. 404

From Section 66, the drafters of the Interpretation Acts clearly only intended to extend the meaning of "*person*" to include body of persons in the plural sense, and that such body (whether in a corporate or unincorporated form) must still act through the agency of natural humans. This Thesis submits Section 66 of the Interpretation Act cannot be read to include machines and computers with the capability to act autonomously. It is unlikely that the Parliament could have intended the expressions "*person*" and "*party*" would include intelligent and fully automated machine such as a computer as this section under the Interpretation Acts was introduced well before the appearance of these devices.[52]

(2) "Person" and Technological Developments

Nonetheless, there are considerable case law authorities that demonstrate the readiness of the courts in certain circumstances to depart from the literal construction of a statute and to treat the statutory language as modified accordingly in respect of developments in technology. The challenge is to persuade the Courts in Malaysia that although the Contracts Act was enacted well before the advent of artificial intelligence and computers, the words found under the Act should be extended to take into account the technological changes since the enactment of the Contracts Act. Despite the difficulties existing under the scheme of the Contracts Act (as highlighted

[52] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia, 1999) at pg. 47

above), could the Courts in Malaysia be readily persuaded by these case law authorities to extend the definition of the word "*person*" in the Contracts Act to include computers and automated machines?

This Thesis begins its analysis with *Chappel & Co. Ltd v. Associated Radio Co. of Australia Ltd.*[53] In this case, the Supreme Court of Victoria held that the radio broadcast was captured under the expression "*performance in public*" under the Copyright Act 1912 which was enacted before the advent of radio broadcast. The Court (per Cussen J) held that:-

> Finally it was suggested that at the time of the passing of the Copyright Act 1912 acoustic representations by means of broadcasting were unknown, and could not have been contemplated. The correctness of the suggestion may be doubted.....[I]t was not disputed that if things not known at the time of the coming into operation of an Act fall on a fair construction within its words, they should be held to be included. The things such as motor cars, now held to be included in the word "vehicle", afford a good illustration. [54]

Similarly, in *Chapman v. Kirke,*[55] the Court in England had to decide whether or not the tram car was a stage carriage in order for an offence to be founded under Section 48 of the Stage Carriages Act 1832. It was argued by the appellant's lawyers that the term "*stage carriage*" would not include electric tram cars which had not been invented in 1832when the statute in question was enacted.[56] Nonetheless, the Court (per Lord Goddard CJ) was prepared to decide that there was no doubt that a vehicle which proceeded from stage to stage at regular, or more or less regular intervals, and carried

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[53] [1925] VLR 350
[54] [1925] VLR 350 at pg. 361
[55] [1948] 2 KB 450
[56] [1948] 2 KB 450 at pg. 453

passengers who paid separate fares, was a stage coach or a stage carriage within the meaning of Section 48 of the said Act.[57]

In *The Council of the Shire of Lake Macquarie v. Aberdare County Council*[58] the High Court of Australia had to decide *inter alia* whether liquid petroleum gas was "*gas*" under the Local Government Act 1919-1969. In deciding that liquid petroleum gas was "*gas*" under the said Act, the High Court (per Barwick CJ) observed that:-

> The appellant's argument is that gas in Section 418(1) par.(b) and in the Governor's proclamation of 1958 means and is confined to coal gas. This result is said to follow from a consideration of earlier statutes in which it is submitted the word "gas" means only coal gas. In this connexion, we were referred to the Municipal Gas Act of 1884 (48 Vict. C.20), the Municipalities Act of 1897, particularly Part XV thereof and the Local Government Act 1906, Section 109.....[N]o doubt in 1906, gas denoted coal gas, because no other form of gas for lighting and heating was in common use. Nonetheless, the connotation of the word "gas" may not be so described. The Act here speaks of "gas" not of "coal gas". In my opinion, it thus selects the genus, and not any particular species of gas. I can see no reason why, whilst the connotation of the "gas" will be fixed, it denotation cannot change with changing technologies.[59]

In *Lockheed-Arabia v. Owen,*[60] the Court of Appeal of England had to decide whether the terms of Section 8 of the Criminal Procedure Act 1865 were wide enough to allow an expression of opinion based on a facsimile reproduction of disputed writing to be given in evidence. The contention arose as facsimile reproductions were not known in 1865 when the said statute was enacted. In answering the above question in the affirmative, the Court (per Mann LJ) made the following observations:-

> The legislators in 1854 knew of the daguerreotype and their successors in 1865 knew of photography. Neither could have foreseen the facsimile reproduction which now we

[57] [1948] 2 KB 450 at pg. 454
[58] (1970) 123 CLR 327
[59] (1970) 123 CLR 327 at pp. 330 - 331
[60] [1993] QB 806

> both suffer and enjoy and which doubtless will be the subject of yet further improvement. The legislative language can accommodate an expression of opinion based upon a facsimile of a disputed writing and I think there is no reason why the court should hold such an opinion to be inadmissible. An ongoing statute ought to be read so as to accommodate technological change. [61]

The above approach is also evident in *R v. Ireland*[62] in which it was decided that the making of telephone calls followed by silence was capable of amounting to an assault under Section 47 of the Persons Act 1861. This was so despite the fact that the telephone was not in use as yet when this statute was enacted. In examining the early cases on assault, the court (per Swinton Thomas LJ) was of the opinion that these early cases pre-dated the invention of telephone and that the court must apply the law to conditions as they were in the 20th century.[63]

Finally, in *R v. Fellows,*[64] the Court of Appeal of England had to decide whether computer data could be classified as photographs under the Protection of Children Act 1978. In concluding that computer data could be classified as photograph under the said Act, the court (per Evans LJ) stated[65]:-

> There remains the basic question whether the 1978 Act should properly be interpreted so as to include a form of technology which, we are prepared to assume, was either not anticipated or was in its infancy when the Act was passed.....It is difficult to read the inclusion of Section 7(5) as restricting the scope of the general definitions in Sections 1 and 7(2), and these definitions are wide enough, in our judgment, to include later as well as contemporary forms of copies of photographs.

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[61] [1993] QB 806 at pg.814
[62] [1997] 1 All ER 112
[63] [1997] 1 All ER 112 at pg. 115
[64] [1997] 2 All ER 548
[65] [1997] 2 All ER 548 at pg. 557

The above train of authorities shows that the courts are generally not shy to extend the words used in a statute to accommodate technological changes since the said statute was enacted, in order to uphold justice.

There are nonetheless instances in which the courts had refused to adopt such an approach and had refused to extend the definitions of certain words. In *Kingston Wharves Ltd v. Reynolds Jamaica Mines Ltd*[66] the Privy Council had to decide whether 18,000lb powered tractors were "*carriages*" within the meaning of the Wharfage Law 1895. The Privy Council decided in the negative and made the following observations:-

> A "carriage" in its widest sense can be said to be something used for carrying persons, goods or something else. Their Lordships do not think the word "carriage" in the Law should be given this wide meaning having regard to the provisions of the Law and the schedules thereto, regarded as a whole. But even if this word is given this wide meaning, their Lordships are of the view that a tractor cannot be said to be a carriage. The only thing it carries is the driver, but the purpose for which a tractor is used is not the purpose of carrying a driver. Their Lordships do not think that that which carries a driver for the purpose of driving it can for that sole reason be said to be a carriage.[67]

Subsequently, in *Ilford Corporation v. Betterclean (Seven Kings) Ltd*[68] the Court had to deal with Section 47 of the Shops Act 1950 which required a shop to be "*closed for the serving of customers*" on a Sunday. The defendants operated a launderette and they used coin operated machines only in their premises. No staff was present to serve any customers of the defendants. The Court came to the conclusion that the words "*the serving of customers*" meant the personal service of customers and refused to extend

[66] [1959] AC 187
[67] [1959] AC 187 at pg. 195
[68] [1965] 2 QB 222

the words to include a situation where the customers were using coin operated washing machines without being attended by any staff of the defendants. The Court (per Lord Parker CJ) had the following to say:-

> On the one hand it was said that "for the serving of customers" meant for the personal serving of customers; on the other hand it was contended that a shop is open for the serving of customers when persons can go into that shop and obtain the goods they want.....and while there was no attempt in that case to define what was meant by "personal serving of customers", it is quite clear that that expression is used in contradistinction to the case of a person being served by going into a shop and getting what he wants. [69]

The Court in this case devoted a lot of attention to determine what the expression "*personal service*" meant.[70] The Court in this case was unwilling to extend the expression "*personal serving of customers*" to a case where the customer simply went into a shop and got what he or she wanted through the use of coin operated washing machines as there were no persons to serve the said customer. The Court in this case was of the view that the coin operated washing machines were not "*persons*" no matter how automated they might be.[71]

How can the decisions of *Kingston Wharves Ltd v. Reynolds Jamaica Mines Ltd*[72] and *Ilford Corporation v. Betterclean (Seven Kings) Ltd*[73] be reconciled with the decisions cited earlier in which the courts were prepared to extend the definition of words found in certain statutes to accommodate subsequent

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[69] [1965] 2 QB 222 at pp. 228 - 229
[70] [1965] 2 QB 222 at pp. 229-230
[71] [1965] 2 QB 222 at pg. 229. Supporters of the argument that machines and computers have no capacity to make contracts may cite this case as authority that the courts are generally reluctant to equate machines to human beings.
[72] [1959] AC 187
[73] [1965] 2 QB 222

technological advancements? It is submitted that courts were only prepared to extend the definition of words in a particular statute to matters and things not known or anticipated at the time of the coming into operation of the said statute if, on a fair construction of the words of the statute, these matters or things should be included.[74] In other words, courts are prepared to accept the argument that the denotation of a word or words might change with changing technologies. For example, the word "*vehicles*" in a 19th century statute could be extended in the 20th century to include an airplane as it cannot be denied that an airplane is a form of vehicle on a fair construction of the word.

What is also clear from the above cases is that courts are not prepared to extend the words found in statutes to a matter or thing beyond the scope of the original enactment. For example, it is highly unlikely that courts will ever agree to say that the word "*vehicle*" in a 19th century statute will also include the other 20th century invention, namely the television just because it takes us figuratively to places beyond one's living rooms. The Privy Council in *Kingston Wharves Ltd v. Reynolds Jamaica Mines Ltd*[75] was, for this reason, unprepared to hold that tractors were "*carriages*" as a tractor could carry nothing other than its driver. To hold otherwise would be a total departure from the word "*carriage*" itself. For the same reason, in *Ilford Corporation v.*

[74] Adopting the words of Cussen J. in *Chappel & Co. Ltd v. Associated Radio Co. of Australia Ltd* [1925] VLR 350 at 361.
[75] [1959] AC 187

Betterclean (Seven Seas) Ltd[76] the Court was unprepared to extend "*personal service*" to a situation where no humans were present to attend to customers.

(3) How Will the Malaysian Courts Decide?

What can be concluded from the above authorities with regards to the Contracts Act? Will the Courts in Malaysia take into account the recent advancements made in the field of artificial intelligence and construe the expression "*person*" within the meaning of Section 2 of the Contracts Act to include computers and machines capable of making agreements autonomously? This Thesis hereby submits from the authority of the above cited decisions, the Courts in Malaysia will be unwilling to extend the definition of the expression "*person*" to such degree for the following reasons:-

(a) On a fair and literal construction of the word "*person*" as used in the Contracts Act, it cannot be argued that computers and fully automated machine can be included in the definition of the word; and

(b) In order to extend the definition of the word "*person*" as used in the Contracts Act, the Courts will still have to find that the notions of knowledge and free consent as required under Section 4 and Section 10 of the Contracts Act apply to computers and automated

[76] [1965] 2 QB 222

machines in the same manner as to humans. Further, the Court will have difficulty in reconciling the requirements under Sections 11 and 12 of the Contracts Act (pertaining to age of majority and soundness of mind) to computers and automated machines.

Concluding from the above discussion, this Thesis submits that the Courts in Malaysia will in all likelihood decide that the word "*person*" as used in Section 2 of the Contracts Act does not include computers, however intelligent they may be. The rules of statutory interpretation are helpless to extend the meaning of the word "*person*" to include intelligent computers. It is hereby submitted that the Courts in Malaysia cannot and will not decide in any other manner as the word "*person*" as used in the Contracts Act is both clear and unequivocal. The scheme of the Contracts Act that makes reference *inter alia* to the requirement of consent and knowledge further restricts the discretion of the Courts to decide in any other manner. It is an inevitable conclusion that the overall scheme of the Contracts Act precludes the enforceability of agreements in which computers played the active role in its formation.

THE NEED FOR LEGISLATIVE REFORM

(1) Practical Precautions to be Adopted by Contracting Parties

In a situation where parties trade with each other on a frequent or recurring basis with their respective computers playing the active role in the process of contract formation, they could first enter into a separate agreement that

recognize the enforceability of such agreements made by their computers autonomously. It is a well established principle that parties can by agreement vary the legal consequences spelt out by the Contracts Act.[77] A normal clause that parties must insert into their agreement[78] to facilitate EDI transactions will read as follows:

> The parties hereby agree that an enforceable binding contract is created between themselves each time an electronic message of the information system of Party A is accepted by the information system of Party B under this Agreement notwithstanding no individual representing either Party was aware of or reviewed the electronic message.

From the above clause, each party is bound by the agreements that its intelligent computer has entered into on its behalf, notwithstanding the fact that it may actually disagree with the decisions or discretions of the said computer in making the agreement. The above clause is useful as it enables parties to trade at a higher level of commercial certainty. Until the Courts in Malaysia or Parliament unequivocally pronounce that computers can assume the active role in the process of contract formation regardless of the restrictions found under the Contracts Act, the above clause is arguably the best precaution that contracting parties should adopt in order to ensure the enforceability of agreements made using sophisticated computers.

(2) Why is Legislative Reform Preferred?

[77] *Ooi Boon Leong v. Citibank NA* [1984] 1 MLJ 222 at pp.225-226. The Privy Council in this case stated that Section 1(2) of the Contracts Act did not say that contracting parties were unable by agreement to vary the legal consequences spelt out by the Act. That is, Section 1(2) has no effect on the freedom of contracting parties to decide upon what terms they desire to contract.

[78] The Trading Partner Agreement. See page 7 of Chapter 1 of this Thesis.

Although parties can safeguard the enforceability of contracts made through the use of their respective computers by expressly providing for the same in a separate agreement, Parliament must speedily introduce legislative reform to clear all doubts arising from issue. Often, contractual parties could inadvertently omit the inclusion of the saving clause in their agreements. In fact, studies have revealed that having a separate agreement as suggested above is not popular and merchants appear content to trade without this safe-guard.[79] Moreover, the method suggested above is only viable if the parties trade with each other frequently and on a recurring basis.

It is also important to recognize that this problem cannot be resolved by the Courts in Malaysia alone as the present issue also involves elements of morality and philosophy that the positivist Courts of Malaysia may be unwilling or unable to explore and debate comprehensively. It has been written that:

> The question of whether a mechanical device could ever be said to think – perhaps even to experience feelings, or to have a mind – is not really a new one. But it has been given a new impetus, even an urgency, by the advent of modern computer technology. The question touches upon deep issues of philosophy. What does it mean to think or to feel? What is a mind? Do minds really exist? Assuming that they do, to what extent are minds functionally dependent upon the physical structures with which they are associated? Might minds be able to exist quite independently of such structures? Or are they simply the functionings of (appropriate kinds of) physical structure? In any case, is it necessary that the relevant structures be biological in nature (brain), or might minds equally well be associated with pieces of electronic equipment? Are minds subject to the laws of physics? What indeed are the laws of physics? [80]

On the question of morality, the same author wrote:-

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[79] Nicoll, C.C, *Can Computers Make Contracts?*, [1998] JBL 35 at pg.44

> For example, if the manufacturers are correct in their strongest claims, namely that their device is a thinking, feeling, sensitive, understanding, conscious being, then our purchasing of the device will involve us in moral responsibilities. It certainly should do so if the manufacturers are to be believed! Simply to operate the computer to satisfy our needs without regard to its own sensibilities would be reprehensible. That would be morally no different from maltreating a slave.[81]

Leaving the problem unattended until deliberated upon by the Courts in Malaysia is fundamentally unsatisfactory for lack of urgency and certainty. For this reason, Parliament must play a more proactive role in resolving this problem. Inevitably, any extension of the word "*person*" under the Contracts Act to include a non-human should attract much debate,[82] and Parliament is the perfect forum for this purpose, since it is able to explore and debate all issues in depth, unlike the Judiciary, which may be unwilling to dwell upon public policy issues, being conscious of its limitation to make law. The task that Parliament faces is to find the right precedent for this new principle that computers can play the active role in the process of contract formation.

(3) Article 11 of the UNCITRAL Model Law

The UNCITRAL Model Law on Electronic Commerce provides a good starting point for enacting fresh provisions to regulate electronic contracts. The UNCITRAL Model Law has been significantly adopted by (or has been influential in) a number of nations in the Asia Pacific region, including the

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[80] Penrose, Roger, *The Emperor's New Mind – Concerning Computers, Minds, and the Laws of Physics*, (Oxford University Press, 1989) at pp. 3-4

[81] Penrose, Roger, *The Emperor's New Mind – Concerning Computers, Minds, and the Laws of Physics*, (Oxford University Press, 1989) at pg.8

[82] See for example the experience in America in; *What We Talk About When We Talk about Persons: The Language of a Legal Fiction,* Vol. 114 (2001) Harvard Law Review pg. 1745. The author of this article discussed the difficulties and challenges faced by the courts in the United States in extending the definition of "person" to cover slaves, unborn fetus and corporations. The author observed that in

United States, Australia, Singapore, Hong Kong, India and New Zealand.[83] The UNCITRAL Model Law and the Guide that accompanies the same contain a whole range of precedent and explanatory notes respectively that are immensely useful for the preparation of any statute focusing on electronic commerce.[84]

For the purpose of this Chapter, the relevant provision of the UNCITRAL Model Law to which reference will be made is Article 11. Article 11(1) of the UNCITRAL Model Law, which is titled "*Formation and validity of contracts*" reads as follows:

> Article 11(1)
> In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

The expression "*data message*" is earlier defined in Article 2(a) of the UNCITRAL Model Law to mean "*information generated, sent, received or stored by electronic, optical or similar means including but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.*" The importance of Article 11 is not apparent unless reference is also made to Paragraph 76 of the Guide to Enactment of the UNCITRAL Model ("the Guide" hereinafter). Paragraph 76 states as follows:

> Paragraph 76

America, "the concept of "person" is fraught with deep ambiguity and significant tension, and the problem extends far beyond the standard interpretive difficulties" (at pg.1768)

[83] Endeshaw, Assafa, *Internet & E-Commerce Law* (Prentice Hall Publication, 2001), at pp297-337.

[84] The UNCITRAL Model Law and the Guide have been reproduced in the Appendix herein.

> Article 11 is not intended to interfere with the law on formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed. In certain countries, a provision along the lines of paragraph (1) might be regarded as merely stating the obvious, namely that an offer and an acceptance, as any other expression of will, can be communicated by any means, including data messages. However, the provision is needed in view of the remaining uncertainties in a considerable number of countries as to whether contracts can validly be concluded by electronic means. Such uncertainties may stem from the fact that, in certain cases, the data messages expressing offer and acceptance are generated by computers without immediate human intervention, thus raising doubts as to the expression of intent by the parties. Another reason for such uncertainties is inherent in the mode of communication and results from absence of a paper document.[85]

It is evident from the above explanatory notes that one of the primary objectives of Article 11 of the UNCITRAL Model Law is to recognize the enforceability of contracts made by computers playing the active role, although this is not explicitly clear from a literal construction of Article 11 as a whole. Hence, unless otherwise stated by either party,[86] the acceptance of any offer sent by a computer without any immediate human intervention will give rise to an enforceable contract in law, provided of course that other essential aspects of contract formation (like offer and acceptance, consideration, intention to create legal relation and capacity to contract) are also satisfied. Neither party can plead the absence of human will or intention at the time during which the offer and acceptance are made as grounds to defeat the finding of a valid contract. Although the drafters of the UNCITRAL Model Law only had EDI and other traditional electronic commerce like electronic mails in mind when preparing Article 11, both Article 11(1) and the

[85] The underlines were added by the present author for emphasis.
[86] Refer to the use of the words "...*unless otherwise agreed by the parties*..." in Article 11(1) of the UNCITRAL Model Law.

words of Paragraph 76 are broad enough to encompass contracts made by computers with more sophisticated cognitive abilities.

In addition, it is to be noted that Article 11(1) equally applies, regardless whether human involvement is partially or wholly absent. Support for this view is again found in the Guide. Paragraph 78 of the Guide reads:

> Paragraph 78
> Paragraph (1) 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....

This Thesis hereby submits that Article 11 of the UNCITRAL Model Law provides a good starting point in the quest to find a suitable precedent for a provision that would give legal recognition to contracts made by computers assuming the active role. This Article of the Model Law provides a legislative provision of acceptable international standards in respect of electronic contracting that the Parliament of Malaysia should take advantage of.[87]

The wording of Article 11 could however be improved to make it explicitly clear that contracts made by computers autonomously are enforceable. Such a provision would act as a catalyst to the legal community at large to recognize that contracts can be made by computers playing the active role. The need for a clearer provision cannot be over emphasized in the case of

[87] It must be stressed here that the new statutes enacted in Singapore, Australia, and Hong Kong all borrowed substantially from the provisions found in the UNCITRAL Model Law. These will be discussed in Chapter 7 of this Thesis below.

Malaysia, in view of the rigid wordings[88] and scheme[89] of the Contracts Act in requiring the human actor to play the active role in the process of contract formation at all material times.

(3) Uniform Electronic Transactions Act 1999 of the United States

Although the Uniform Electronic Transactions Act 1999 of the United States[90] ("UETA 1999" hereinafter) is often described to have followed the UNCITRAL Model Law, this Act seems to have departed from the UNCITRAL Model Law on this crucial subject. The UETA 1999 provides perhaps the best example of the wordings that a statutory provision shall adopt in dealing with contracts made by computers autonomously. First and foremost, Section 2 of the UETA 1999 provides the following definitions with far reaching consequences:

> Section 2
> (2) "*Automated transaction*" means a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract or fulfilling an obligation required by the transaction.
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> (6) "*Electronic agent*" means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual.

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[88] Refer to the discussion above in this Chapter on the frequent use of the word "*person*" under the Contracts Act

[89] Refer to the discussion above in this Chapter on the concepts of knowledge, age of majority and soundness of mind under the Contracts Act

[90] As of December 4, 2002, this Act has been enacted into the state legislation of 41 states in the United States. See further discussion on the history and structure of this Act in Chapter 7 of this Thesis

It is clear from the above definition that "*electronic agent*" is wide enough to encompass both traditional electronic commerce media like EDI as well as the more advanced computers with sophisticated cognitive abilities that can assume the active role in the process of contract formation. The crucial section on this subject is Section 14, the critical subsections of which read as follows:

> Section 14
> In an automated transaction, the following rules apply:
> (1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements;
> (2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

Unlike the UNCITRAL Model Law, the UETA 1999 sets forth unequivocally the principle that agreements made in whole or in part by computers, without any immediate human intervention, are nonetheless enforceable. The above provisions found under the UETA 1999 are excellent precedents that the Parliament of Malaysia could adopt in giving recognitions to contracts made by computers and other intelligent machine. This new provision could take the form of a separate section altogether under the Contracts Act, or more preferably, in a separate statute with specific focus on electronic contracts.

SUMMARY AND ANALYSIS OF THIS CHAPTER

The Contracts Act of Malaysia requires the human actor to assume the active role for the purpose of contract formation. Consequently all agreements made by sophisticated computers assuming the active role are

not agreements recognized under the Contracts Act, and are for this reason unenforceable. This rigid position under the Contracts Act is a source of considerable uncertainty when intelligent computers with sophisticated cognitive abilities are one day used for the purpose of contract formation. In a situation where the intention of a sophisticated computer and that of its human owner differs, the question shall arise whether the intention of the human actor shall prevail over the intention of the computer for the purpose of contract formation. To give precedence to the intention of the human actor in such a situation is fraught with artificiality and shall inevitably lead to injustice, especially for a third party that has dealt *bona fide* with the intelligent computer.

This Thesis argues that a more liberal statutory framework is required to modify the antiquated provisions of the Contracts Act so that computers can assume the active role in the process of contract formation. In introducing the legislative reforms required, the Parliament of Malaysia could first refer to Article 11 of the UNCITRAL Model Laws which provides a sound starting point for this purpose.

However, it must be noted that the words used in Article 11 of the UNCITRAL Model Law are themselves not explicitly unequivocal in dealing with automated transactions. A better worded example is found in the UETA 1999. In this connection, Section 14 of the UETA 1999 is an excellent precedent dealing with the subject of contracts entered into by and between

computers acting without any human intervention. This new provision that Parliament should enact could take the form of a separate section altogether under the Contracts Act, or more preferably, in a separate statute specifically dealing with electronic contracts.

CHAPTER THREE

DOCTRINE OF OFFER - ACCEPTANCE & THE INTERNET

OBJECTIVE OF THIS CHAPTER

This Chapter critically examines the difficulties that arise from the use of the traditional offer-acceptance doctrine for the finding of *consensus ad idem* for contracts that are made entirely through the use of the Internet and exchange of electronic mails. This Chapter recommends the appropriate solutions for the difficulties highlighted. In this Chapter, this Thesis shall also discuss the alternative approaches to finding the existence of a contract, and shall examine if these alternatives are superior to the traditional offer and acceptance doctrine when applied to the medium of the Internet and exchange of electronic mails.

TEST OF OFFER & ACCEPTANCE

The foundation of every contract is an agreement, which in turn is the product of an offer and an acceptance of the said offer.[1] The offer and acceptance doctrine is nothing more than a tool to ascertain if there is *consensus ad idem* between parties who are privy to a contract. The modern doctrine of offer and acceptance in both civil law and common law is a rather late phenomenon,[2] but it has found its way to the laws of both Malaysia and Singapore through the introduction of English law. Consequently, it has long

[1] Downes, T. Anthony, *Textbook on Contract* (3rd Edition), (Blackstone Press Limited, 1993) at pg.58
[2] Owsia, Parviz, *Formation of Contract: A Comparative Study Under English, French, Islamic & Iranian Laws*, (Graham & Trotman, 1994), at pg.309

been usual to utilize this doctrine in the laws of contract of both Malaysia and Singapore.[3] The fundamental importance of the offer and acceptance doctrine under the English law of contract is reflected by the statement found in *Chitty on Contracts* (27th Edition) to the effect that:

> The normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other.[4]

The above statement was echoed by Professor Treitel in *The Law of Contract* (7th Edition), in which the venerable professor of English contract law observed that:

> The first requisite of a contract is that the parties should have reached agreement. Generally speaking, an agreement is made when one party accepts an offer made by the other.[5]

A close examination of the law reports will plainly show that the offer and acceptance doctrine is indisputably the predominant test utilized by both judges and lawyers alike throughout the Commonwealth to ascertain the presence of *consensus ad idem* that leads to the formation of a contract. Just to cite a few examples, this doctrine was applied in *Harvey v. Facey*[6] a decision of the Privy Council emanating from Jamaica to determine whether an exchange of telegram messages gave rise to a contract. The Court of Appeal of New Zealand adopted this doctrine in *Boulder Consolidated Ltd v.*

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[3] Andrew Phang, *Cheshire, Fifoot & Furmston's Law of Contract* (1st Singapore & Malaysia Student Edition), Butterworths Asia, 1998 at pg. 75

[4] *Chitty on Contract* (27th Edition, 1994), Sweet & Maxwell Publication, at pg. 89.

[5] Treitel, G.H, *The Law of Contract*, (7th Edition, 1987), Sweet & Maxwell Publication at pg. 7.

[6] [1893] AC 552

Tangaere.[7] Similarly, the Court of Appeal of Saskatchewan, Canada adopted this doctrine in *Acme Grain Co. v. Wenaus*.[8]

In Malaysia, the offer and acceptance doctrine is conveniently codified under Sections 2(a) and 2(b) of the Contracts Act. Under the regime of the Contracts Act, an "*offer*" is referred to as a "*proposal*".[9] Sections 2(a) and 2(b) of the Contracts Act read as follows:

> Section 2(a)
> When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of the other to do the act or abstinence, he is said to make a proposal.
> Section 2(b)
> When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal when accepted becomes a promise.

There are numerous reported decisions in which this doctrine was adopted by the Courts in Malaysia. The Malaysian Federal Court adopted this doctrine in *Preston Corporation Sdn Bhd v. Edward Leong*.[10] More recently, the doctrine was adopted in *inter alia, Malayan Flour Mills Bhd v. Saw Eng Chee (Administrator of the Estate of Saw Cheng Chor, deceased)*,[11] a decision of the High Court of Ipoh. In this latter case, Kang Hwee Gee J made the following observation concerning the doctrine:-

> In deciding whether there is a concluded contract in a given case, the Court will have to examine all the circumstances to see if a party may be assumed to have made a firm offer and if the other may likewise to be taken to have accepted the offer – a situation often referred to as a meeting of the mind upon a common purpose or *consensus ad idem*.[12]

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[7] [1980] 1 NZLR 560
[8] (1917) 36 DLR 347
[9] It can be assumed that these expressions are synonymous. See Sinnadurai, Visu, *Law of Contract* (Volume 1) (Butterworths Publication, 2003) (3rd Edition) at pg. 34; and Sinnadurai, Visu, *Law of Contract in Malaysia and Singapore*, (Butterworths Publication, 1987) (2nd Edition) at pg.23
[10] [1982] 2 MLJ 22
[11] [1997] 1 MLJ 763
[12] [1997] 1 MLJ 772

Recently, the Court of Appeal of Malaysia in *Eckhardt Marine GmbH v. Sheriff Mahkamah Tinggi Malaya & Ors*[13] also observed that:

> First, the general approach that is to be adopted by a court in determining whether there is an agreement concluded between the parties is to see whether there is a definite offer made by one party, which has been accepted by the other.[14]

The strong tendency to refer to the offer and acceptance doctrine strongly suggests that judges and lawyers in the Commonwealth shall continue to turn to this test when faced with the task of finding *consensus ad idem* in respect of an electronic contract that was made entirely through the use of the Internet or exchange of electronic mails, for instance. This is so despite the fact that there are other tests available to establish the existence of a valid contract.[15] As regards the law of contract of Malaysia, it may even be argued that the offer and acceptance doctrine is the *only* test that may be adopted, in view of the fact that the same is codified under Section 2 of the Contracts Act, to the obvious exclusion of other tests.

The dominant position of the offer and acceptance doctrine in connection to electronic contracts is also assured, because the UNCITRAL Model Law on Electronic Commerce 1996 itself expresses the formation of contract through the mechanics of offer and acceptance. Article 11(1) of the UNCITRAL Model Law reads as follows:

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[13] [2001] 3 CLJ 864

[14] [2001] 3 CLJ 864 at 867

[15] See the last section of this Chapter (at pagess 122-131) for discussion on the other approaches available.

Article 11(1)
In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

Despite the expected wide usage of the offer and acceptance doctrine for the purpose of examining electronic contracts, the novelties of the Internet inevitably pose a number of difficulties to the application of this test. Although these difficulties are not insurmountable, they require us to critically re-think the basis of this commonly adopted doctrine.

OFFER & ACCEPTANCE: OFFER

(1) The Constitution of an Offer

Under the Contracts Act, the definition of an offer can be derived from the words of Section 2(a) itself; that is, an offer (proposal) is the signifying by one person to another of the former's willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act of abstinence. In *Preston Corporation Sdn Bhd v. Edward Leong* the Federal Court of Malaysia (per Salleh Abbas FJ) without referring to Section 2 of the Contracts Act, defined "*offer*" in the following simple words:

> An offer is an intimidation of willingness by an offeror to enter into a legally binding contract. Its terms either expressly or impliedly must indicate that it is to become binding on the offeror as soon as it has been accepted by the offeree.[16]

The definition of an offer provided by the Contracts Act and the Federal Court above are not any different from its usual definition under English Law.

[16] [1982] 2 MLJ 22 at pg.23, per Salleh Abbas FJ (as he then was).

Under English Law, an offer is defined as an expression by one person or group of persons or by agents on his behalf, made to another of his willingness to be bound to a contract with that other on terms either certain or capable of being rendered certain.[17] An offer takes effect from the time it is received by the offeree.[18]

Not unlike the position under English Law, under the Contracts Act, the offeror must communicate the offer to the offeree. This is evident from Section 2(a) itself. The Contracts Act also stipulates the exact time when the communication of the offer is complete, that is, when it comes to the knowledge of the person to whom it is made (that being the offeree).[19] It is also trite law that an offer can both be express or implied.[20] It can therefore be summarized that the vital building blocks of a valid offer, whether under English Law or under the Contracts Act of Malaysia are:

(1) an expression or intimidation, whether express or implied flowing from the offeror to the offeree;

(2) the expression or intimidation refers to the willingness and intention of the offeror to enter into a legally binding contract; and

(3) the terms of the offer must expressly or impliedly indicate that it is to become binding on the offeror as soon as it has been accepted by the offeree.

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[17] Volume 9(1) *Halsbury's Law of England* (4th Edition, Reissue) Para 632

[18] See Treitel, G.H, *The Law of Contract*, (7th Edition, 1987), (Sweet & Maxwell Pub.) at pg. 13. For the position under the Contracts Act, see Section 4(1).

[19] Section 4(1) Contracts Act

[20] Volume 9(1) *Halsbury's Law of England* (4th Edition, Reissue) Para 618.

These constituent elements of an offer are evidently independent of the medium through which the offer is communicated by the offeror. That is, all communications of an offer made by an offeror must satisfy the above basic conditions, regardless whether the offeror is communicating with the offeree verbally, by way of post, or through the Internet.

(2) Problem of Distinction between Offer and Invitation to Treat on the Internet

One of the most commonly discussed problems that have arisen with the use of the Internet, is the issue of distinguishing between an invitation to treat and an offer.[21] Under English contract law, a rigid distinction is drawn between an offer and an invitation to treat, or an invitation for offer. An invitation to treat is a mere declaration of willingness to enter into negotiations.[22] A generally accepted example of an invitation to treat is a normal shop display.[23] Whilst an offer, once accepted will give rise to a contract that is enforceable at law, the affirmative reaction of a party to an invitation to treat will not give rise to an agreement but will only result in the making of an offer at the most.[24]

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[21] Monaghan, Iain, Electronic Commerce and the Law, available at www.masons.com/library/books/ecommerce/E_COM.DOC at paragraph 4.3.
[22] Volume 9(1) *Halsbury's Law of England* (4th Edition Reissue) Para 633
[23] See for example, *Pharmaceutical Society of Great Britain v. Boots Cash Chemists Ltd* [1953] 1 QB 401, which is one of the leading cases in this subject.
[24] Andrew Phang, *Cheshire, Fifoot & Furmston's Law of Contract* (1st Singapore & Malaysia Student Edition), Butterworths Asia, 1998 at pp. 76 - 81

Although the Contracts Act does not define "*invitation to treat*" or allude to the same, the distinction between "*offer*" and "*invitation to treat*" equally applies under the law of Malaysia. The Court of Appeal of Malaysia in its recent decision *Sime UEP Properties Limited v. Woon Nyoke Lin*[25] applied this distinction and found that an advertisement placed by the defendant's agent was nothing more than an invitation to treat.[26] Much earlier, in *Abdul Rashid Abdul Majid v. Island Golf Properties Sdn Bhd*[27] the High Court of Malaya found the plaintiff's application for club membership as merely a "*preliminary step*", and the offer comes from the Defendant after considering the Plaintiff's application.[28] Although the learned judge in this case did not use the expression "*invitation to treat*", it is hereby submitted that the expression "*preliminary step*" referred to in this case was synonymous with the same as it preceded the making of an offer.

Like an advertisement billboard, the Internet allows the seller of a product to advertise the product and further, allows a customer to examine virtually and to obtain more details of the product in question. This latter feature allows the information and contents of the Internet web-site to function as a shop display in a conventional shop or supermarket. In addition to the foregoing, the Internet also acts like a sale counter by providing the unique and novel ability of allowing the customer to conclude the purchase of the product

[25] [2002] 3 CLJ 719
[26] [2002] 3 CLJ 719 at pg.731
[27] [1989] 3 MLJ 376
[28] [1989] 3 MLJ 376 at pg.378

entirely through the Internet.[29] Therefore, the Internet in effect fuses the advertising, the shop display and sale counter into one single location.[30]

This fusion is problematic as statements made in an advertisement, a shop display and what transpires at a sale counter attract different legal considerations as regards contract formation. For example, the mainstream view is that a shop display is an invitation to treat and not an offer and that the mechanics of offer and acceptance only took place at the sale counter.[31] Having a shop display, advertisement and a sale counter in a single location causes confusion and uncertainty to the customer as to the real intent of the seller. Depending on the design of the Internet web-site, a customer will not always be able to easily decide if the Internet seller is making an offer which is open for acceptance, or if the seller is merely advertising his goods and / or services or displaying the same as he would in a shop display.

(3) Unconvincing Case Law Authorities

The foregoing problem arising from the fusion of the shop display, advertisement and sale counter is further exacerbated by the fact that the rationales found in case law authorities that distinguish offer from invitation to treat are often not entirely convincing.[32] This arises because the distinction between offers and invitations to treat are at times tenuous and

[29] Ding, Julian, *E-Commerce-Law & Practice*, (Sweet & Maxwell Asia Publication, 1999) at pg. 48
[30] Gringas, Clive, *The Laws of the Internet*, (Butterworths Publication) 1997, at pg.14.
[31] See discussion below on case law authority on shop display as being merely invitation to treat

often, the distinction is only found upon looking at the whole individual factual matrix of each case.[33]

In a conventional transaction in a non-electronic medium, the rationale of treating a shop display as merely an invitation to treat is best expressed in the judgment of Somervell L.J who delivered the leading judgment in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists Ltd.*[34] According to the learned judge in this case, if the shop display were to be treated as an offer, it will give rise to the illogical and unreasonable conclusion that:

> ...once an article has been placed in the receptacle the customer himself is bound and would have no right, without paying for the first article, to substitute an article which he saw later of a similar kind and which he perhaps preferred.[35]

The above finding that a shop display was only an invitation to treat was repeated without any obvious hesitation in *Fisher v. Bell*[36] in which the Court observed that:

> (I)t is clear, that according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract.[37]

Pharmaceutical Society of Great Britain v. Boots Cash Chemists Ltd[38] and *Fisher v. Bell*[39] represent the mainstream view that exposing goods to the

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[32] Note that recently, the Court of Appeal of Malaysia in *Eckhardt Marine GmbH v. Sheriff Mahkamah Tinggi Malaya* [2001] 3 CLJ 864 at pg. 868 had emphasized that the case law authorities on this subject could only be treated as guidelines and not firm principles of law.

[33] Downes, T. Anthony, *Textbook on Contract* (3rd Edition), (Blackstone Press Limited, 1993) at pg.62

[34] [1953] 1 QB 401

[35] [1953] 1 QB 401 at pg. 406.

[36] [1960] 3 All ER 731

general public in a shop display is not an offer to sell but merely an invitation to members of the public to offer to purchase the goods in question. Basically, the courts' view in both these cases was that a customer was not bound by any contract when he removed any goods off the shelf or shop display. Likewise, in *R v. Bermuda Holdings Ltd*,[40] the Supreme Court of British Columbia held that the display of a used car with the sign "*for sale*" was nonetheless only an invitation to treat, and not an offer to sell.

Admittedly, the rationale of the courts in the above cases was not entirely convincing. For example, it could be held that the shop display is a revocable offer but there is no acceptance until the customer does an unequivocal act of presenting the goods at the cash-desk.[41] As negotiation on prices and other terms associated with the sale of an article are common, the shop display could also be considered as an offer that is open to counter-offers by the customer, and acceptance by the vendor himself finally. What is evident is that lawyers and judges can analyze the problem of the shop display from countless angles, and come to conclusions that are divergent from the decided cases.

In respect of advertisements, the position is also not any clearer. In general, the law of contract draws a distinction between an advertisement promoting

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[37] [1960] 3 All ER 731 at pg. 733
[38] [1953] 1 QB 401
[39] [1960] 3 All ER 731
[40] (1970) 9 DLR (3d) 595
[41] Treitel, G.H, *The Law of Contract*, (7th Edition, 1987), Sweet & Maxwell Publication, at pg 10.

a unilateral contract (for example an advertisement for the return of lost property), and an advertisement promoting a bilateral contract (for example, an advertisement that goods are for sale or to be sold by tender).[42] In the former, the advertisement is an offer, whist in the latter, the advertisement is an invitation to treat. In the oft-cited *Carlill v. Carbolic Smoke Ball Co.*,[43] the Court of Appeal of England found that an advertisement that the defendant had inserted undertaking to indemnify any person who contracted influenza after having used a smoke ball made by the defendant was an offer. The nature of the contract in this case was clearly unilateral. The foregoing case is to be contrasted with *Partridge v. Crittenden*[44] in which the contract in question was clearly bilateral in nature. In this latter case, the Court decided that the said advertisement was only an invitation to treat.

The above cases are in contradiction to the following decisions in which the courts seemed to have accepted that an advertisement of a contract that was bilateral in nature as an offer. In *De la Bere v. CA Pearson Ltd,*[45] the Court found an advertisement by the defendant to provide financial advice amounted to making an offer and that a contract was formed when the plaintiff accepted the offer and asked for advice. Likewise, in *Goldthorpe v. Logan*[46], the Ontario Court of Appeal decided that an advertisement by the defendant stating that she would remove hair safely and permanently by

[42] Treitel, G.H, *The Law of Contract*, (7th Edition, 1987), (Sweet & Maxwell Pub.) at pp. 10-11.
[43] [1893] 1 QB 256
[44] [1968] 1 WLR 1204
[45] [1908] 1 KB 280
[46] [1943] 2 DLR 519

electrolysis constituted an offer made to the public in general.[47] In *Thornton v. Shoe Lane Parking Ltd,*[48] the Court of Appeal of England was of the view that the notice at the entrance of a parking facility constituted an offer that the driver accepted when he drove up to the entrance and accepted the ticket from the ticket machine.

It seems therefore that although, as a general rule, an advertisement concerning a unilateral contract would constitute an offer and an advertisement of a bilateral contract would constitute an invitation to treat, the line separating both is at best tenuous and would depend on the whole factual matrix of the case. For this reason, it actually serves no useful purpose by attempting to reconcile all the cases on this subject since the question is one of intention of the parties in each case.[49]

(4) Proposed Rule of Contract Interpretation for the Internet

The problem of distinguishing an offer from an invitation to treat is greatly magnified in an Internet based transaction. As mentioned earlier, the Internet fuses the advertising, the shop display and sale counter into one single location.[50]Moreover, Internet based transactions are often concluded at a great distance, and made between parties who possess little prior knowledge of each other. For this reason, the purchaser is often not able to

[47] The editorial note to this case at [1943] 2 DLR 519 criticized the holding that the advertisement constituted an offer as unnecessary.
[48] [1971] 2 QB 163
[49] Treitel, G.H, *The Law of Contract*, (7th Edition, 1987), (Sweet & Maxwell Pub.) at pg. 11

make immediate enquiry on the true intentions of the seller, on the goods displayed or on the advertisement as he would have if he is in a real shop.

The impersonal nature of an Internet based transaction also means the seller is not able to evaluate whether the purchaser has the intention to make the purchase contract, or is simply fishing for information. This uncertainty gives a customer who has clicked on the "*I Agree*" button on the screen the opportunity to repudiate the contract by pleading that all he wanted from the Internet web-site was more information on a products and had no intention of purchasing the same. Likewise, a seller who faces a shortage of stock could assert that there was no valid contract concluded because he had not made a valid offer and the contents of his Internet web-site are meant to be invitation to treats only to solicit offers from users.

To avoid any uncertainty on the true intention and purpose of the contents of an Internet web-site, there is of course no substitute for careful Internet web-site design. A careful and precise choice of the words and web page lay-out used on the Internet web-site will result in ambiguities being avoided or at least minimized. Ideally, the Internet web-site owner should clearly demarcate the advertising section of his Internet web-site from the shop display and also from the section that permits the user to make his on-line purchases. However, as most frequent Internet users would readily

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[50]Gringas, Clive, *The Laws of the Internet*, (Butterworths Publication) 1997, at pg.14. Also, see pages 98-99 above of this Thesis.

acknowledge, well structured web-pages design are more the exception than the rule. It is hereby submitted that, like a non-electronic transaction,[51] the question whether the contents of the Internet web-site are meant to be an offer or merely an invitation to treat is to be answered only after objectively examining the whole individual factual matrix of each case, for example, the design of the Internet web-site, the words used, the goods or services being sold, etc.

It is nevertheless possible that the true intention and purpose of the contents of the Internet web-site could not be ascertained even after objectively looking at the whole factual matrix. In such circumstances, it is submitted that all uncertainties and ambiguities found in an Internet web-site must be construed against the seller who operates the web-site. That is, if the court is unable to objectively decide after examining all relevant factual matrix whether a specific message on an Internet web-site is an offer or just an invitation to treat, the court shall resolve the uncertainty by construing against the seller who conducts his business through the Internet web-site. Hence if it is unclear whether a specific message or combination of messages on the Internet web-site is an offer or an invitation to treat, and if the Internet web-site owner is asserting that his message was intended to be an offer, the court shall decide otherwise in favor of the customer.

[51] Downes, T. Anthony, *Textbook on Contract* (3rd Edition), (Blackstone Press Limited, 1993) at Pg.62

The aforesaid rule of construction is fair as the seller has full control in the design and composition of his Internet web-site and would have designed the same in his favour. The terms and conditions of sale are often not negotiable and are drafted by the seller, and are always heavily in favour of the seller. The customer is simply a passive party in the transaction who has in most circumstances no choice but to comply with the instructions and the terms and conditions of the seller. The above suggested rule of construction is not totally alien to the common law and is supported by a number of old authorities on interpretation of contracts. For example, in *Burton v. English*, Brett MR was of the opinion that:

> The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made.[52]

In a later decision dealing with the construction of an insurance contract, *Houghton v. Trafalgar Insurance Co. Ltd*, Sommervell LJ stated that:-

> If there is any ambiguity, since it is the defendants' clause, the ambiguity will be resolved in favour of the assured.[53]

Recently, in *Tan Guat Lan & Anor v. Aetna Universal Insurance Sdn Bhd*,[54] the High Court of Malaysia held that since the insurance policy contract in question was made out in the defendant's standard form, the *contra proferentum* rule should apply and the particular item found in the same should be construed against the defendant.[55] Likewise, in the recent

[52] (1883) 12 QBD 218
[53] [1954] 1 QB 247
[54] [2003] 5 CLJ 384
[55] [2003] 5 CLJ 384 at pg.396

decision *Loh Bee Tuan v. Shing Yin Construction & Ors*,[56] the Malaysian High Court was prepared to hold that since the 4th defendant (as the plaintiff's solicitor) had prepared the sale and purchase agreement, any ambiguity found therein should be read against the 4th defendant.[57]

Dissenters will be quick to argue that the above decisions deal with terms in a contract, and not with the distinction between an offer an invitation to treat. Nonetheless, it must be emphasized that the suggested rule of construction is fair as the seller has assumed the risk in choosing and has enjoyed the technological advantage to trade through the Internet. Policy-wise, this rule of construction will also provide the impetus for sellers that conduct their business entirely through the Internet to carefully design their Internet web-sites so that the intention behind each statement is clear and is not misleading. The aforesaid rule of contract construction could be extended to resolve other ambiguities that emerge from any representation made by the seller in his Internet web-site, such as, the construction of ambiguous words, unclear prices and imprecise methods of concluding a sale through the web-site.

In this connection, the Parliament of Malaysia must take the initiative to enact the necessary statutory provisions to provide for the above rule of contract construction to eradicate the uncertainty that presently still

[56] [2002] 3 CLJ 39
[57] [2002] 3 CLJ 39 at pp.54-55

surrounds this subject. Such provisions shall be advantageous to the growth of electronic commerce in general as they encourage sellers to design or choose the design of their Internet web-site carefully so as not to mislead the purchaser. A carefully designed and worded Internet web-site shall also benefit the seller as it reduces the possibility of disagreement with its purchasers.

OFFER AND ACCEPTANCE: ACCEPTANCE

(1) Time of Acceptance – The Established Principles

The time at which acceptance takes effect against the offeror signifies the end of the offer and acceptance process. This is the time when *consensus ad idem* is said to have been established between the parties. For a cross-border transaction, the time of acceptance shall also determine the jurisdiction in which the acceptance (and hence the agreement) is made, [58] this being one of the critical factors to establish the law governing the transaction if none has been expressly specified by the parties.[59] It is also important to be able to establish when exactly an acceptance takes effect against the offeror, as the offeror has the right to revoke his offer at any time before the acceptance takes effect.

[58] See *Entores Ltd v. Miles Far East Corporation* [1955] 2 All ER 493 at pp. 495-496.
[59] See Chapter 6 of this Thesis on conflict of laws issues affecting the formation of contracts over the Internet.

As a general rule, acceptance takes effect upon it being communicated to the offeror.[60] From established case law authorities under English Law, we know that acceptance is communicated to the offeror either at the fictional time of posting[61] or the time of receipt,[62] depending on the choice of medium. The former is often referred to as the "Postal Rule". The most skeletal definition of the Postal Rule under English law states that where the use of the postal service is within the contemplation of the parties or within ordinary usage of mankind, the acceptance of an offer by post is complete when the letter of acceptance is posted and not when the same is received by the offeror.[63] Nonetheless, the application of the Postal Rule is not mandatory in law. There are at least 3 important exceptions to its application; (1) where the parties have agreed that the rule shall not apply, (2) where the express terms of the offer specify that the acceptance must reach the offeror and (3) if its application would produce manifest inconvenience and absurdity.[64]

Under the Contracts Act of Malaysia, the time a communication of acceptance takes effect against the offeror and the offeree is provided under Section 4(2), which reads as follows:

Section 4(2)

[60] *Howell Securities Ltd. v. Hughes* [1974] 1All ER 161 at pg.163 (per Russell LJ); *The Leonidas D* [1985] 1WLR 925 at pg. 937. See also Furmston, Norisada & Poole, *Contract Formation & Letter of Intent*, (John Wiley & Sons Publications, 1997) at pp. 53-54

[61] See for example, *Henthorn v. Fraser* [1892] 2 Ch. 27 and *Howell Securities Ltd. v. Hughes* [1974] 1All ER 161

[62] See for example, *Entores Ltd v. Miles Far East Corporation* [1955] 2 QB 327 and *Brinkibon v. Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1982] 2 WLR 265

[63] GH Treitel, *The Law of Contract*, (Sweet & Maxwell, 7th Edition) at pg.20

[64] *Holwell Securities v. Hughes* [1974] 1All ER 161 at pg.166.

> The communication of an acceptance is complete-
> (a) as against the proposer, when its is put in a course of transmission to him, as to be out of the power of the acceptor; and
> (b) as against the acceptor, when it comes to the knowledge of the proposer.

The phrase "*out of the power of the acceptor*" in Section 4(2)(a) of the Contracts Act entails a situation whereby the offeree is unable to revoke the acceptance in any event.[65] Although the Contracts Act does not use the terminology "*Postal Rule*", illustration (b) to Section 4 of the Contracts Act clearly demonstrates the mechanics of the Postal Rule. Hence, it may be argued that Section 4(2) actually codifies the principles of the "Postal Rule". Illustration (b) of Section 4 of the Contracts Act reads as follows:

> Illustration (b)
> B accepts A's proposal by a letter sent by post. The communication of the acceptance is complete as against A, when the letter is posted; as against B, when the letter is received by A.

The argument that Section 4(2) is a codification of the Postal Rule is also supported by the findings of the Court in *Ignatius v. Bell.*[66] More recently, this argument was also forwarded by the learned author of a publication on the law of electronic commerce in Malaysia.[67]

It is inescapable that discussions on the Postal Rule will lead to the discussions on the distinction drawn under English law in relation to instantaneous and non-instantaneous communications. As regards

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[65] Phang, Andrew, *Cheshire, Fifoot & Furmston's Law of Contract* (1st Singapore & Malaysian Student Edition) at pp.101
[66] (1913) 2 FMSLR 115 at pg.117
[67] Julian Ding, *E-Commerce:Law & Practice*, (Sweet & Maxwell, Asia 1999) at pg.51. See also Phang, Andrew, *Cheshire, Fifoot & Furmston's Law of Contract* (1st Singapore & Malaysian Student Edition) at pg. 99.

instantaneous communication, English law of contract stipulates that acceptance takes place when the acceptance is received by the offeror, not when the same is sent by the offeree. This distinction was highlighted by the Court of Appeal in England (per Denning LJ) in the case of *Entores Ltd v. Miles Far East Corporation*[68] in which the Court observed that:-

> My conclusion is that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received.[69]

The above observation of the English Court of Appeal was subsequently approved and applied by the House of Lords in *Brinkibon v. Stahag Stahl und Stahlwarenhandelsgesellschaft mbH.*[70]

As regards the Contracts Act, Section 4(2)(a) of the same does not refer to the distinction between instantaneous and non-instantaneous communication of acceptance. In fact, it may be argued that the Contracts Act is absolutely not concerned with this distinction undertaken by the English Courts. Nonetheless, the Court of Appeal of Malaysia in *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd*[71], without referring to Section 4(2)(a) of the Contracts Act, was prepared to apply the above discussed distinction, relying on the authority of *Entores Ltd v. Miles Far East Corporation*[72] and *Brinkibon v. Stahag Stahl und*

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[68] [1955] 2 All ER 493
[69] [1955] 2 All ER 493 at pp. 495-496.
[70] [1982] 2 WLR 265
[71] [1997] 2 MLJ 621
[72] [1955] 2 All ER 493

Stahlwarenhandelsgesellschaft mbH[73] above. Hence, it appears this distinction is part of the law in Malaysia. How should we reconcile *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd*[74] with Section 4(2)(a) of the Contracts Act? One possible solution is of course to argue that pursuant to Section 4(2)(a), in respect of a communication of acceptance by instantaneous means, the same is out of the power of the acceptor (offeree) when the same is received by the proposer (offeror). On the other hand, a communication of acceptance by post is out of the power of the acceptor when the same is posted.

(2) Time of Acceptance & the Electronic Media

The application of the traditional concept of acceptance to the Internet and the electronic media is especially troublesome. The Internet and EDI are both without any real physical property, being composed of nothing more than electrons, electro-magnetic waves and fields. Communication through these media is also channeled at exceedingly high speed before reaching its destination through numerous routers and servers, each probably located at great distance from each other. In these media, the exact time at which the communication of an acceptance is complete is a contentious issue without a firm answer.[75] Let us consider the following hypothetical illustrations to highlight the how the problem may surface:

> Illustration (a): A customer sees an offer for the sale of an article that he prefers over an Internet web-site. The instructions on the said Internet web-site state that

[73] [1982] 2 WLR 265
[74] [1997] 2 MLJ 621
[75] Smith, Graham, *Internet Law and Regulation*, (FT Law & Tax Publication, 1996) at pp. 98-100.

he should provide his e-mail address (so that the seller can contact him to inform him of the progress of the purchase and the delivery thereof). The instructions also state that he should click on the "*I Agree*" button on the screen if he accepts the offer to purchase the article and the terms and conditions of the sale. The customer obediently provides his e-mail address and clicks onto the "*I Agree*" button on the screen as instructed. A short while later, he receives an automated e-mail message from the information system of the seller that thanks the customer for his acceptance and informs him that his order is being processed and the goods which the user ordered shall be dispatched to him shortly. Let us imagine however that this customer does not receive an e-mail message from the automated information system of the seller as he is supposed to. Let us imagine that he in fact receives nothing at all from the seller and on the following day, he finds a message on the same Internet web-site which states that the goods (in which he is interested and has ordered) are out of production and that the goods have been taken off the sale list. The Internet web-site further informs the that the said offer has been revoked from the day before. The customer contacts the seller and informs that he accepted the offer contained in the Internet web-site the day before and that the latter must fulfill his obligation to deliver as there is a binding contract, to which the seller denies. The seller claims that he has not received the customer's acceptance. The seller argues that since he has not received the customer's acceptance, there is no contract formed before or at the time he revokes his offer. The customer however asserts that the contract is formed when he clicks on the "*I Agree*" button as instructed, regardless whether the seller receives the communication of his acceptance or not. The customer cites Section 4(2) of the Contracts Act to support his argument.

Illustration (b): Let us imagine a situation whereby Party A accepts an offer made by Party B by way of electronic mail. Without the knowledge or default of either Party A or Party B, Party A's message of acceptance is lost whilst being transmitted. After Party A sends the message of acceptance but before either party discovers the message is lost, Party B informs Party A that his offer has been revoked. Party A asserts that there is already an existing contract between them that Party B must perform. Party B denies the existence of the contract as he has revoked the offer and never received the message of acceptance.

Section 4(2) of the Contracts Act is unable to resolve the problems illustrated above, as it does not provide as whether the communication of acceptance by acceptance is complete against the offeror; that is, whether this takes place when the acceptor transmits his acceptance, or when the electronic message is received and is read by the offeror. The published literature on electronic commerce under English law are often overly concerned with the argument whether communication through the use of the Internet or the EDI is instantaneous or non-instantaneous, or if the Postal Rule is applicable in these media. It has been argued by various learned authors that the Internet

(including electronic mail transmission) cannot be regarded as being analogous to the telephone or telex system, and that the rules on instantaneous communications should not apply as the messages are in all likelihood first sent to the intermediate servers of the service providers.[76] There has also been similar discussion on Electronic Data Interchange (EDI). It has been said that the messages in an EDI environment may be sent over networks and equipment owned by several parties or a value added network (VAN) provided by a third party, in which cases the delivery may be near instantaneous (not absolutely instantaneous) or may take several hours.[77]

In the context of Contracts Act, this Thesis hereby submits that it is wholly unnecessary to consider whether such electronic communication is instantaneous or otherwise as is the case under English law.[78] As stated above, the Contracts Act is not at all concerned whether the communication of acceptance is instantaneous or otherwise. Section 4(2)(a) simply adopts the test whether the communication is put in a course of transmission so that it is out of the power of the acceptor. The legal community in Malaysia should instead be more concerned with the phrase "*put in a course of transmission, so as to be out of the power*" as used in Section 4(2)(a) of the Contracts Act. Establishing what this phrase means in the context of an

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[76] Smith, Graham, *Internet Law and Regulation*, (FT Law & Tax Publication, 1996) at pg. 99; and Gringas, Clive, *The Laws of the Internet*, (Butterworths Publication) 1997, at pg. 17.
[77] Monaghan, Iain, Electronic Commerce and the Law, available at www.masons.com/library/books/ecommerce/E_COM.DOC at paragraph 5.6.

agreement made through the Internet and electronic mail would allow us to determine the exact time a communication of acceptance is complete against the offeror.

As the Contracts Act is a creature of the 19th Century, Section 4(2)(a) as it presently stands is wholly unable to deal with the concept of acceptance made through electronic media like the Internet. The Parliament of Malaysia must quickly intervene to fill this lacuna in the law. The challenge now is to relate the principle contained under Section 4(2)(a) of the Contracts Act to the mechanics of electronic communications that occurs through the use of routers, servers and information systems in general. This could be achieved by linking the mechanics of Section 4(2)(a) to the concept advocated by Article 15 of the UNCITRAL Model Law. In fact, the drafters of the UNCITRAL Model Law themselves have the intention that the national legislature of the country concerned should combine the existing national law on contract formation with the underlying principles of Article 15 to dispel the uncertainty as to the time and place of formation of contracts in cases where the offer or the acceptance are exchanged electronically.[79]

(3) Article 15 of the UNCITRAL Model Law

Article 15 of the UNCITRAL Model Law provides a set of parameters to ascertain the time and place of dispatch and receipt of electronic messages.

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[78] See Edwards, Lilian & Waelde, Charlotte, *Law & The Internet – A Framework for Electronic Commerce*, (Hart Publishing, 2000) at pp.22-26

The relevant paragraphs are Article 15(1) and Article 15(2) that read as follows:

Article 15

(1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined a s follows:

(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

(i) at the time when the data message enters the designated information system; or

(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

By linking Article 15(1) to Section 4(2)(a) of the Contracts Act, we shall have a new provision that basically states that the communication of acceptance is out of the power of the acceptor when it enters an information system outside the control of the acceptor. Hence, a communication of acceptance is complete against the offeror under Section 4(2)(a) when upon it being put into a course of transmission, it enters an information system outside the control of the acceptor[80] Obviously, the "*information system outside the control of the acceptor*" can be the information system of the offeror, himself, but more likely, of an independent third party through which the message is routed or saved before entering the information system of the offeror.

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[79] Guide to Enactment of UNCITRAL Model Law on Electronic Commerce, Paragraph 78

[80] For the sake of completion, it must be noted that Article 15(2) can be read with Section 4(1) and Section 4(2)(b) of the Contracts Act in order to ascertain both the time an offer is complete and the time an acceptance is complete against the acceptor. That is, an offer that is communicated electronically comes to the knowledge of the acceptor when it enters an information system of the acceptor or designated by the acceptor. Similarly, an acceptance transmitted electronically comes to the knowledge of the proposer when it enters an information system of the proposer or designated by

Applying the above principles, acceptance is complete against the offeror when the electronic message leaves the acceptor's information system, and enters into (for example) a gateway, router or information system that is operated by the independent third party before entering the offeror's information system. On the other hand, if there is no independent third party involved and the message is transmitted straight from the information system of the acceptor to the offeror, acceptance is complete against the offeror when it enters the said information system of the offeror.

For the purpose of defining the phrase "*enters an information system*", it must be noted that the UNCITRAL Model Law explains that an electronic message enters an information system at the time when it becomes available for processing within that information system.[81] It follows from the foregoing that where an electronic message fails to enter an information system because the same has malfunctioned, the communication of acceptance is not complete for the purpose of Section 4(2)(a) of the Contracts Act.[82]

The above-suggested solution is advantageous as it obviates the need to consider if communications through the Internet or electronic mails or EDI are instantaneous or not, thereby fits into the regime of the existing Section

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the proposer. It is also obvious that Article 15(1) and 15(2) can also be utilized to expand upon Section 4(3) of the Contracts Act on revocation in the similar manner.

4 of the Contracts Act that, unlike English law, does not draw such a distinction. The adoption of Article 15 would amount to a mere expansion or elaboration of the existing Section 4, without the need to overturn existing principles of law on this subject. Moreover, this solution is technology independent, and is not affected by any technological evolution in the future.

The new provision suggested above could be included into the Contracts Act after Section 4(3) as a separate provision dealing with electronic contracts. Alternatively, and more preferably, this new provision could form part of a new statute dealing electronic contracts. Many countries have incorporated Article 15 of the UNCITRAL Model Law into their national statutes dealing with electronic commerce.[83] It must however be stated that none of these countries have sufficiently linked the mechanics advocated under Article 15 directly to ascertain when the process of offer and acceptance is completed.

(4) Weakness of Article 15

Although the underlying scheme of Article 15 of the UNCITRAL Model Law provides a sound foundation to ascertain when an acceptance is complete against the offeror (as well as the time an offer is complete under Section 4(1)), some care must be observed should the Parliament decide to adopt the same as model. One of the most glaring weaknesses of Article 15 is that it does not attempt to deal with a situation whereby the electronic

[81] Guide to Enactment of UNCITRAL Model Law on Electronic Commerce, Paragraph 103
[82] Guide to Enactment of UNCITRAL Model Law on Electronic Commerce, Paragraph 104

transmission of either the offeror or the offeree that is incomplete, unintelligible or is simply unusable. It is an affront to common sense and practice of trade if such a transmission qualifies as an offer or acceptance.

Hence, any new provision enacted by the Parliament upon the model of Article 15 of the UNCITRAL Model Law must make it explicitly unequivocal that this provision shall only come into operation where the electronic communication (whether of an offer or acceptance) is objectively intelligible, complete and usable by the other party. By expressly excluding incomplete, unintelligible and unusable electronic transmissions from its application, the new provision avoids having to deal with these issues and places the onus on the users to ensure that their electronic transmissions are complete, intelligible and usable to be able to take advantage of the new provision.

(5) Article 11 of the EU Directive on Electronic Commerce 1998

European Parliament and Council Directive on Certain Aspects of Electronic Commerce in the Internal Market of 18th November 1998 ("the EU Directive 1998" hereinafter) is a set of directives that aims to provide uniform rules for electronic commerce for Member States within the European Union. [84] Part of this document deals with the subject of electronic contracts and the formation thereof. In this relation, Article 11 of the same states:

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[83] See Chapter 7 below on discussions on the statutes of Singapore, United States, Australia, Hong Kong and the European Union.

[84] The present member states are Belgium, Denmark, Germany, Greece, Spain, France, Republic of Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden and the United Kingdom.

Article 11

(1) The Member States shall lay down in their legislation that, save where otherwise agreed by professional persons, in cases where a recipient,[85] in accepting a service provider's [86]offer, is required to give his consent through technological means, such as clicking on an icon, the following principles shall apply:

(a) the contract is concluded when the recipient of the service has received from the service provider, electronically, an acknowledgment of receipt of the recipient's acceptance, and has confirmed receipt of the acknowledgment of receipt;

(b) acknowledgment of receipt is deemed to be received and confirmation is deemed to have been given when the parties to whom they are addressed are able to access them;

(c) acknowledgment of receipt by the service provider and confirmation of the service recipient shall be sent as quickly as possible.

(2) Member States shall lay down in their legislation that, save where otherwise agreed by professional persons, the service provider shall make available to the recipient of the service appropriate means allowing him to identify and correct handling errors.

Under the scheme of Article 11(1)(a) above, the receipt of the offeree's communication of acceptance is not the last step to the conclusion of an agreement. Instead, the agreement is concluded upon the offeree receiving from the offeror, an acknowledgment of receipt electronically AND the offeree confirming the receipt of the acknowledgment of receipt. This provision hence does away with the conceptual requirement of electronic communication entering an information system outside the control of the offeree (as is the case under Article 15 of the UNCITRAL Model Law), and instead places the obligation on each party to actually sending an acknowledgment of receipt and a confirmation thereof.

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[85] Article 2 of the EU Directive 1998 defines "*recipient of the service*" as any natural or legal person who for professional ends or otherwise uses an Information Society service, in particular for the purposes of seeking information, or making it accessible. This definition covers all persons that make purchases of goods or services over the Internet.

[86] Article 2 of the EU Directive 1998 defines "*service provider*" as any natural or legal person providing an Information Society service.

Article 11 of the EU Directive 1998 provides a relatively straightforward procedure to ascertain the time at which an agreement is said to have been concluded by requiring each contracting party to give acknowledgment of receipts of acceptance and confirmation of the same. Like Article 15 of the UNCITRAL Model Law, it is also not at all concerned whether the communication of acceptance is instantaneous or not. The above provision is also fair to both the service provider (the Internet vendor / offeror) as well as the recipient of the service (the purchaser / offeree) as it lays down a system involving acknowledgment of receipts and measures for the latter to make corrections on errors.

Nonetheless, this provision is not without any weakness. Article 11is only able to deal with the formation of simple straightforward agreements and is unsuited for agreements involving complicated offer and acceptance scenarios, and prolonged negotiations or contracts made by more than two parties. Moreover, it is a well-known fact that the formation of contracts often cannot be analyzed in accordance with the rules of offer and acceptance.[87] It is therefore uncertain how Article 11 will be successfully utilized in these situations. Should the Parliament decide to adopt Article 11 as precedent (instead of Article 15 of the UNCITRAL Model Law), it must ensure that these issues are adequately resolved.

ALTERNATIVE TESTS

(1) Origin & Weaknesses of Offer & Acceptance Test

In the preceding sections this Thesis only discusses the mechanics of contract formation in the electronic media using the offer and acceptance doctrine. Although the problems that would arise when this well tested doctrine is applied to an electronic contract are not irresolvable, the question remains whether the offer and acceptance doctrine is the only available test to establish the basis of a concluded contract.

Despite the prevailing use of the test of offer and acceptance under English law, English law did not adopt this doctrine until at the earliest the late eighteenth century. The offer and acceptance test only became established as a component of the English classical theory of contract through a series of legal writings and judicial decisions in the course of the nineteenth century, although this doctrine had been a feature under French Law as early as the 18th Century.[88] The French jurist, Pothier's (1699–1772) "*Treatise on the Law of Obligations*" was particularly instrumental in introducing the concept of *consensus ad idem* and the underlying test of offer and acceptance into English contract law.[89]

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[87] This is discussed in detail in the section of this Chapter below. As for case law authorities, see generally, *New Zealand Shipping Co. Ltd v. AM Satterthwaite & Co. Ltd* [1975] AC 154 and *Gibson v. Manchester City Council* [1978] 2 All ER 583.

[88] Owsia, Parviz, *Formation of Contract: A Comparative Study Under English, French, Islamic & Iranian Laws*, (Graham & Trotman, 1994), at pp. 309 & 319

[89] Parris, John, *Making Commercial Contracts*, (BSP Professional Books, 1988), at pp 7-8

Despite the seemingly vital necessity for the finding of offer and acceptance in the formation of a contract, sometimes it is difficult to discover these ingredients without some straining of the facts.[90] In *New Zealand Shipping Co. Ltd v. AM Satterthwaite & Co. Ltd*, Lord Wilberforce correctly observed that there are examples:-

> which shows that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes practical approach, often at the cost of forcing facts to fit uneasily into the marked slot of offer, acceptance and consideration.[91]

The inadequacy of the offer and acceptance test was also critically and unkindly highlighted by the Court of Appeal of England (per Lord Denning MR) in *Port Sudan Cotton Co. v. Govindaswamy Chettiar & Co.* in which his Lordship said:-

> I do not much like the analysis in textbooks of enquiring whether there was an offer and acceptance or a counter-offer and so forth.[92]

The offer and acceptance test doctrine is most suited as regards a contract having the following qualities: (1) the agreement concerned is made between only 2 parties; (2) the parties' respective expressions are capable of being reduced to propositions each determinable by a given point of time; and (3) the propositions so reduced sequentially follow each other to produce a contract.[93] If any one of the above conditions is absent, the test would have to be strained beyond its traditional limits to accommodate the

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[90] Fridman, GHL, *Law of Contract*, (Carswell Publication) at pg.25, commenting on the common law position in Canada

[91] [1975] AC 154 at 167

[92] [1977] 2 Lloyd's Report 5 at pg. 10

[93] Owsia, Parviz, *Formation of Contract: A Comparative Study Under English, French, Islamic & Iranian Laws*, (Graham & Trotman, 1994), at pg. 322.

situation. Most notably, the mechanics of the offer and acceptance test do not fit easily into two broad categories of contracts. The first category concerns multi-partite contracts involving more than two parties, made whether directly between the parties or through their respective agents. The second broad category relates to bi-partite contracts but (1) where the pre-contractual negotiations are contained in a long series of correspondence or documents hence making it unrealistic or impossible analyzed in terms of offer and acceptance; and (2) where the agreement is to be inferred from simultaneous expressions of the parties to the contract. [94]

(2) *Gibson v. Manchester City Council*

In *Gibson v. Manchester City Council,*[95] the Court of Appeal of England had to decide whether there was a concluded contract between the parties from a series of correspondence exchanged. In refusing to adopt the offer and acceptance test, Lord Denning MR took the following course of reasoning:-

> We have had much discussion as to whether Mr. Gibson's letter of 18th March 1971 was a new offer or whether it was an acceptance of the previous offer which had been made. I do not like detailed analysis on such a point. To my mind it is a mistake to think that all contracts can be analyzed into the form of offer and acceptance. I know in some of the textbooks it has been the custom to do so; but as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. [96]

The above approach taken by Lord Denning has its advantages. Firstly, this approach is well suited in respect of agreements made after prolonged and

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[94] Owsia, Parviz, *Formation of Contract: A Comparative Study Under English, French, Islamic & Iranian Laws*, (Graham & Trotman, 1994), at pp. 323-336

[95] [1978] 2 All ER 583

complicated negotiation. Secondly, this approach is also well suited for multi-partite contracts involving more than two contracting parties. It is worth noting that agreements made through the use of the Internet are in most cases bi-partite (involving only the seller and the customer). They also seldom involve prolonged negotiations. Hence, where the Internet web-site is well designed to separate the advertising section from the section where the sale agreement is to be concluded, the agreement can often be easily analyzed using the offer and acceptance test.

Nonetheless, in view of the phenomenal growth in then use of the Internet as a medium for commercial transactions and the technology associated therewith, it is wholly possible that in the near future, the Internet can be used as a platform for multi-partite agreements. For example, the Internet could be used as the medium through which a party could arrange for syndicated financial loan from a consortium of banks, in which case the agreement could not be satisfactorily analyzed using the conventional offer and acceptance test. In such circumstances, it shall be necessary to refer to Lord Denning MR's alternative approach in *Gibson v. Manchester City Council,*[97] that is, by examining the correspondence as a whole and the conduct of the parties to see whether the parties have come to an agreement on everything that was material.

[96] [1978] 2 All ER 583 at 586. The present author has included the underlines as emphasis.
[97] [1978] 2 All ER 583 at 586

Despite its attractiveness, the foregoing approach of Lord Denning MR attracted the criticism of the House of Lords upon appeal. Lord Diplock stated as follows:

> My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another is not one of these. I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied on as constituting the contract sued on and as seeing whether on their true construction there is to be found in them a contractual offer by the council to sell the house to Mr. Gibson and an acceptance of that offer by Mr. Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error.[98]

It should be noted from the above excerpt that although Lord Diplock rejected Lord Denning's approach, he conceded that there might be certain types of contracts that might not be properly analyzed using the offer and acceptance doctrine.[99] The above approach of the House of Lords was favoured by the Federal Court of Malaysia in *The Ka Wah Bank v. Nadinusa Sdn Bhd,*[100]and more recently, by the Court of Appeal of Malaysia in *Eckhardt Marine GmbH v. Sheriff Mahkamah Tinggi Malaya & Ors.*[101] Nonetheless, there are also recent Malaysian High Court decisions that have cited Lord Denning's approach with approval; for example in *Ahmad Zani Japar v. TL Offshore Sdn Bhd*[102]and *Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd.*[103]

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[98] [1979] 1 All ER 972 at pg. 974

[99] This anomaly was recently noted by the High Court of Malaya in *Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd* [2002] 5 CLJ 391 at pp. 412-413.

[100] [1998] 2 MLJ 350 at pp.366-367

[101] [2001] 3 CLJ 864 at pp.867 - 868

[102] [2002] 5 CLJ 201 at pg. 270

Advocates of Lord Denning's alternative approach will be quick to point out that the same only attracted the criticism of Lord Diplock and possibly Lord Keith of Kinkel and Lord Fraser of Tullybelton who adopted and concurred with the reasoning of Lord Diplock. The other Law Lords (Lord Russell and Lord Edmund-Davies) refrained from openly criticizing the approach of Lord Denning MR. The absence of direct criticism from all the Law Lords leads to the conclusion that although Lord Denning's alternative test was criticized by one Law Lord, it has not in principle been rejected in total by the House of Lords.[104] Hence, the test favoured by Lord Denning may have its application when it is absolutely impossible to find *consensus ad idem* using the offer and acceptance doctrine.

(3) Doctrine of Promissory or Equitable Estoppel

In *Central London Property Trust Ltd v. High Trees Home Ltd*[105] and in *Combe v. Combe,*[106] we learnt that promissory estoppel could only be used as a shield and not a sword. Further, we also learnt that promissory estoppel could only be used in the context of an existing contractual relationship. These restrictions are arguably no longer rigorously adhered to. Nowadays, a contract can be founded upon the foundation of promissory estoppel. In

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[103] [2002] 5 CLJ 391 at pp. 412-413

[104] Owsia, Parviz, *Formation of Contract: A Comparative Study Under English, French, Islamic & Iranian Laws*, (Graham & Trotman, 1994), at pg. 333.

[105] [1947] KB 130

[106] [1951] 2 KB 215.

Walton's Stores (Interstate) Ltd v. Maher,[107] the High Court of Australia (per Brennan J) held:-

> The object of equitable estoppel is not to compel the party bound to fulfill the assumption or expectation; it is to avoid the detriment which would be suffered if the assumption or expectation goes unfulfilled. This should allay the concern that a general application of the doctrine would make non-contractual promises enforceable. A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations, with the knowledge or intention that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting, and thereby would suffer detriment if the promisor were not to fulfil the promise. With these elements, equitable estoppel resembles a contract, with the action or inaction of the promisee taking the place of consideration.

The above approach of the Australian High Court is a bold departure from the approach of preceding cases. Under this new approach, an enforceable legal relationship in the form of promissory or equitable estoppel can arise based on a promise even if the promise is non-contractual in nature.[108] The relationship of the parties closely resembles a contractual one, and the vital element that forms the basis of this relationship is not whether there is an offer and an acceptance of the same, but very simply, the reliance upon a promise to the detriment of one party. For example, where after a long and complicated negotiation, a purchaser has led an Internet seller to perform certain services in reliance of the purchaser's promise to pay for the same; the purchaser in such circumstances is precluded from denying the existence of a contract between them and the Internet seller can enforce his promise to pay for the services.

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[107] 76 ALR 513

Nevertheless, the requirement of the promisor making a promise and reliance on the said promise by the promisee to the detriment of the latter, makes the application of promissory estoppel more limited as compared to Lord Denning's alternative approach in *Gibson v. Manchester City Council*[109] discussed above. As the High Court of Malaysia has observed in *Lebbey Sdn Bhd v. Chong Wooi Leong & Anor*,[110] regardless of whether promissory estoppel may be used as a sword or only as a shield, there remains a limit to the application of this doctrine, in that the first question remains, whether there was a promise made by the promisor upon which the promisee has acted upon.

Moreover, it is unclear whether the Courts in Malaysia will be prepared to adopt the bold and more liberal approach of the Australian High Court in *Walton's Stores (Interstate) Ltd v. Maher*.[111] In the recent decision *Re Gan Wee Kuan, ex parte Bank Bumiputra Malaysia Bhd*,[112] the High Court of Malaysia stressed that the doctrine of promissory estoppel had no application where there was no underlying contractual relationship between the parties.[113] Lastly, it should also be noted that the doctrine of promissory estoppel is also not too well suited for a multi-partite contract with that involves more than two parties with each party making a separate set of

[108] See Andrew Phang, *Cheshire, Fifoot & Furmston's Law of Contract* (1st Singapore & Malaysia Student Edition), Butterworths Asia, 1998 at pp.156-157.
[109] [1978] 2 All ER 583 at 586.
[110] [1998] 1 CLJ 1072 at pg.1077
[111] 76 ALR 513
[112] [2002 5 CLJ 113
[113] [2002] 5 CLJ 113 at pg.121

promises to each other. Nonetheless, this Thesis submits that this doctrine remains a viable alternative to the offer and acceptance doctrine under the correct set of circumstances.

(4) Which Approach is More Well Suited for Internet Based Contracts?

Currently, Internet based contracts are still relatively simple and straight-forward, that is, they often only involve two parties and do not require prolonged and complicated negotiations. Hence, it would seem that the offer and acceptance doctrine remains most suitable for analyzing the mechanics of contract formation in respect of Internet based transactions.

Nonetheless, it is unadvisable to simply and completely write off the other methods highlighted above. As each separate approach has its own strengths and weaknesses, it is generally not advisable to rigidly adhere to any one approach when we attempt to ascertain the existence of a concluded contract, regardless whether the agreement is made over the Internet or through conventional non-electronic media. Hence, as regards an agreement involving more than two parties, the offer and acceptance will not be an appropriate tool and it will be more advisable to use the approach advocated by Lord Denning in *Gibson v. Manchester City Council.*[114] In respect of a contract made after prolonged complicated negotiations, the

[114] [1978] 2 All ER 583 at 586

approach in *Gibson* and the doctrine of promissory estoppel may also prove to be superior to the doctrine of offer and acceptance.

SUMMARY AND ANALYSIS OF THIS CHAPTER

The offer and acceptance doctrine is undoubtedly the prevailing test utilized by judges, lawyers and laymen alike to finding *consensus ad idem* in a conventional agreement made in the paper-ink medium. Despite the expectation this doctrine shall be widely utilized for analyzing electronic contracts, the novelties of the Internet inevitably pose a number of difficulties to the application of this test. Although these difficulties are not irresolvable, they require us to critically re-think the basis of this commonly adopted test.

Firstly, the Internet compounds the difficulty of distinguishing an offer from invitation to treat. Relying on the fact that the seller has full control in the design and composition of his Internet web-site, and would have designed the same in his favor, this Thesis recommends that all uncertainties in this respect must be construed against the seller. This opinion is indirectly supported by a number of English and local case law authorities. Policy wise, this suggestion is also sound as it encourages the seller to carefully design his Internet web-site in order not to confuse his potential customers.

Secondly, the Internet and EDI are both without any real physical property, being composed of nothing more than electro-magnetic waves and fields. Communication through these media also channeled at exceedingly high

speed before reaching its destination through numerous routers and servers, each probably located at great distance from each other. In these media, the exact time at which the communication of an acceptance is complete is a contentious issue without a firm answer. In connection to this problem, this Thesis submits that in the context of the Contracts Act, and unlike the position under English law, it is unnecessary to consider whether the mode of communication is instantaneous or otherwise. Section 4(2)(a) of the Contracts Act can be utilized to determine the time of acceptance using the Internet when read with Article 15(1) of the UNCITRAL Model Law. In this connection, this Thesis recommends that the Parliament of Malaysia enacts an equivalent of Article 15(1) to complement Section 4(2)(a) of the Contracts Act. Alternatively, the Parliament may wish to refer to Article 11 of the EU Directive 1998 for guidance.

Finally, whilst acknowledging that the offer and acceptance doctrine is the dominant test in finding *consensus ad idem*, it must be highlighted that this doctrine has its severe limitations and that these limitations have been noted by both academics and judges alike. The use of the Internet as a platform for the making of a growing variety of transactions virtually assures that the applicability of the offer and acceptance test would be seriously tested in the near future. The legal community must not adhere rigidly to this doctrine at all times and must be prepared to depart from the same when the application of the same is clearly inappropriate. In such circumstances, lawyers and judges must be prepared to utilize the alternative approach

advocated by Lord Denning in *Gibson v. Manchester City Council*[115] or the doctrine of equitable estoppel as modified by the High Court of Australia in *Walton's Stores (Interstate) Ltd v. Maher.*[116]

[115] [1978] 2 All ER 583 at 586
[116] 76 ALR 513

CHAPTER FOUR

CAPACITY TO CONTRACT & THE INTERNET

OBJECTIVE OF THIS CHAPTER

(1) The Internet & Contracts Made at a Distance

This Chapter critically examines the issues concerning contractual capacity when the Internet is used exclusively as the medium through which a contract is made. As discussed in the previous Chapters of this Thesis, the Internet is currently being utilized as a medium through which a vast variety of commercial transactions are being completed, and the variety shall surely continue to grow. Currently, the Internet is not merely utilized to sell inexpensive items such as books, compact discs, computer software, electronic consumer products but also luxurious articles like watches,[1] jewelry,[2] and antiques.[3] The Internet also allows its users to participate in auctions[4] and even to borrow money from an authorized moneylender.[5] A local Malaysian Internet web-site has already made it possible to apply for car loans through the Internet.[6]

One important feature of the Internet is that it allows parties to enter into agreements at a distance, without the parties ever knowing the real identity of each other. This imperfect knowledge of the identity of the other

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[1] See for example, www.timefactors.com or www.poljot.com.
[2] See for example, www.jewelrymall.com.
[3] See for example, www.tias.com.
[4] See for example, www.ebay.com
[5] See for example, www.moneylender.com and www.noblefund.com.hk
[6] See www.autoworld.com.my.

The absence of capacity to contract poses a real risk to both the credit card companies and the merchant who sells his products or services through the Internet exclusively. On this subject, an author commenting on the electronic commerce law of Hong Kong wrote:

> The issue of capacity remains a universal problem for those wishing to enter into cyberspace contracts. In Hong Kong the age of contractual capacity is 18, although the usual exceptions apply to contracts involving necessaries and those that are re-affirmed on attaining majority.....Unfortunately for credit card companies, but fortunately for consumers, most products purchased over the Internet are paid for with credit card, so the risk of contractual capacity being absent tends to fall on the credit card company, which then has to resort to its charge back rights against the merchant.[9]

(2) The Requirement of Capacity to Contract

It is a well-established principle of contract law that three classes of individuals do not possess the capacity to enter into a contract. They are (1) minors, (2) persons suffering from unsoundness of mind and (3) persons suffering from drunkenness. Flowing from this fundamental principle, even if all the building blocks that constitute an agreement are present (those being, the presence of a valid offer and a valid acceptance that are supported by legal consideration and intention to create legal relation), the incapacity of one or both the contracting parties shall defeat an otherwise valid contract and render the same unenforceable.[10]

As regards a minor, the reason underlying his incapacity in law to contract is that the law must protect him against his inexperience, which may enable an

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[9] Young, Dean, *Electronic Commerce Law- Hong Kong*, Asia Business Law Review (No. 28 April 2000 Issue) at pp.39-40. The present author has included the underlines as emphasis.

adult to take advantage of him, or to induce him into a contract that though fair, is simply improvident.[11] As for a person suffering from unsoundness of mind or a person suffering from drunkenness, the reason for his incapacity to contract is obvious. That is, the abnormal weakness of his mind prevents him from understanding the terms of the contract or forming a rational judgment as to its effect on his interests.[12]

As can be seen from the excerpts above, the capacity or incapacity of a party to enter into a contract is a major source of concern for Internet based commerce. For instance, if a minor or a person suffering from unsound mind clicks onto the "*I Agree*" or "*I Accept*" button on the screen as instructed, there is simply no way for the Internet seller to discover the former's incapacity in law to enter into the contract with him. While a vendor in our real physical world is able to immediately refuse to negotiate or enter into any agreement with a minor or a person suffering from unsoundness of mind, a vendor who conducts his transactions entirely through the Internet does not have the same advantage. The age, height, colour of the hair and many other qualities of the person at the other end of the Internet are factors not immediately and easily (and sometimes impossible) determined. In the Internet, all persons are faceless and featureless with only their names, user

[10] As this Thesis shall highlight below, the position in Malaysia pursuant to the Contracts Act is that a contract made by a minor is void. This position can be different under the common law, under which the general rule is that a contract made by a minor is voidable at his option.
[11] Treitel, G.H, *The Law of Contract*, (9th Edition) at pg.494.
[12] Refer to Section 12(1) and the illustrations of Section 12 of the Contracts Act

identification passwords and e-mail addresses to distinguish one from another.

Admittedly, the problem of contractual incapacity also exists in our real physical world and is not exclusive in the realm of the Internet. For example, a contract can be concluded through the use of the post, telex or fax, without both contracting parties ever meeting each other or hearing the other party's voice. Nonetheless, the ease that commercial transactions can be conducted through the Internet and the ease of access to Internet resources makes the problems more real and widespread as compared to transactions conducted through post, telex or fax. Moreover, it is hereby submitted that in the rush to get into the electronic commerce arena, many commercial parties and their lawyers could have overlooked this fundamental principle of contract law.

The fact that children are contributing significantly to Internet based transactions cannot be dismissed. Surveys conducted in the United States showed that the growth of the Internet was largely fuelled by children and that there was an estimated 25 million children in the United States that were linked onto the Internet.[13] Although there is no known equivalent survey on the situation in Malaysia, the picture ought to be largely identical. The dominance of children in the use of the Internet and the Internet's vast

[13] *Survey: Children Fuelling Internet Growth*, The New Straits Times, June 9th 2000 issue.

potential as a commercial medium necessitate an unequivocal and fair regulatory framework to deal with agreements made by minors through this medium.

The problem highlighted above is not purely academic and unreal. Imagine a situation in which a minor makes an on-line purchase of a license to use computer software from a seller that conducts his business entirely through the Internet. The seller does not realize that he is in fact licensing the use of his software to a minor. As part of the purchase, the seller has supplied the minor with confidential and proprietary information in connection to the use of the software with the restrictive covenant that the minor shall observe the confidentiality obligations that accompany the sale. Can the minor refuse to observe the confidentiality clause by pleading his minority and claim that the contract of sale is void?

On the same factual matrix, can a person suffering from unsoundness of mind at the time the contract of sale is made, refuse to observe the confidentiality clause by pleading his incapacity of mind? Let us also imagine a situation wherein a minor obtains a monetary loan from an authorized moneylender over the Internet by fraudulently misrepresenting his age and subsequently refuses to honor the repayment of the same to the said moneylender. Can the moneylender recover the money from the minor? What if the loan is procured by a person who suffers from unsoundness of mind? Can he refuse to repay the loan to the moneylender by pleading his

incapacity at the time of making the money-lending contract through the Internet?

AGREEMENTS MADE BY MINORS

(1) Agreements Made by Minors under Contracts Act

Under the common law, agreements made by minors attract special attention from the courts. In *McBride v. Appleton,*[14] Laidlaw JA of the Ontario Court of Appeal observed:

> The contract of an infant is considered in law as different from the contracts of other persons. The law exercises, as it were, a guardianship of the infant, using its power in some cases to nullify completely contractual transactions with an infant, and in some cases giving the privilege to the infant of saying during his infancy, and for a reasonable time thereafter, that he will not be bound by a contract to which he is a party.....The general rule is that an infant is not, except in certain cases, liable on contracts made by him.[15]

The above observation of the Ontario Court of Appeal that a contract made by a minor must be treated differently is equally correct under the law of contract in Malaysia with only slight modification. In Malaysia, the definition of a minor is not in dispute. Section 2 of the Age of Majority Act 1971 (Act 21) which repealed the Act of Majority Act 1961 states that the minority of all males and females shall cease and determine within Malaysia at the age of eighteen years and every such male and female attaining that age shall be of the age of majority. Hence, a person who is of the age of eighteen or above has the capacity to enter into a contract if he or she is also of sound

[14] [1946] 2 DLR 16
[15] [1946] 2 DLR 16 at pg.24

mind. Conversely, a person under the age of eighteen would not possess the requisite capacity to enter into a contract under the Contracts Act.

The relevant provisions under the Contracts Act that deal with agreements made by minors are found in the first limb (of the three) in Section 11 and Section 69. Section 11 reads:

> Section 11
> Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Section 69 of the Contracts Act deals with the liability of the minor for necessaries supplied to him. Although Section 69 of the Contracts Act does not refer to the competency (as in Section 11) but the capability of entering into a contract, the distinction, if any, is not material.[16] Section 69 reads as follows:

> Section 69
> If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Section 11 is silent on the effect of an agreement entered into by a minor.[17] This issue was judicially considered in *Government of Malaysia v. Gurcharan*

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[16] Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998) at pg. 522. The learned author states that Section 69 of the Contracts Act is a codification of the English law principles relating contracts for necessaries involving minors. The Court in *Government of Malaysia v. Gurcharan Singh* [1971]1MLJ211 also did not draw any distinction between the words "*competent*" as opposed to "*incapable*" used in Sections 11 and 69 respectively.

[17] Doshi, Varsha, *Restitutionary Remedies in Illegal Agreements* (Malayan Law Journal Publication, 1998) at pg. 132

Singh & Ors.[18] In this case, the Court, following the Privy Council decision emanating from India *Mohori Bibee v. Dhurmodas Ghose,*[19]decided without any hesitation that as regards Section 11, an infant's contract is void under the Contracts Act, and that such contracts were not merely voidable as was the case under English law.[20] The Court in *Gurcharan Singh* held that since an infant was totally incompetent and incapable of entering into a contract, the consequence would be that there was no contract on which he could be sued.[21] The finding of the learned judge in this case was therefore consistent with an earlier local decision *Tan Hee Juan v. Teh Boon Keat & Anor,*[22] in which the Court had decided that a contract for the transfer of land made by a minor was void under Section 11 of the Contracts Act. As regards Section 69, the Court in *Gurcharan Singh* further observed that this section was a codification of the English law principle wherein the liability of an minor for necessaries supplied to him was an obligation that the law imposed on the infant to make a fair payment in respect of needs satisfied. In the premises, the basis for any claim for necessaries against the minor is not founded under the law of contract.[23]

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[18] [1971] 1 MLJ 211

[19] (1903) LR Ind. App. 114

[20] The principle that a contract made by a minor under the Contracts Act is void was applied in among others, *Leha bt. Jusoh v. Awang Johari b. Hashim* [1978] 1 MLJ 202, and *Mohd. Ali Jahn b. Yusop Sahibjahn & Anor v. Zaleha bt Mat Zin & Anor* [1995] 1 CLJ 533, both not citing *Gurcharan Singh* above. Gurcharan Singh was followed in *Long Pines Enterprise Sdn Bhd v. Beeran Kutty Yusof* [1999] 1CLJ 278 at pp. 287-288, although it must be noted that this latter case was not one dealing with Section 11 of the Contracts Act.

[21] [1971] 1 MLJ 211at pg.212-213

[22] [1934] MLJ 96

[23] [1971] 1 MLJ 211 at pg. 213

The decision of the Court in *Gurcharan Singh* is of paramount importance because it affirms the following two principles of Malaysian contract law as regards the contractual incapacity of minors:

(1) First, an agreement made by a minor is void in every sense of the word, and not merely voidable. The consequence of this would be that there was no contract upon which the minor could sue and to be sued.

(2) Second, Section 69 of the Contracts Act is a codification of the English law principle relating to payment for necessaries; hence the basis for any claim for necessaries against the infant is not founded in contract.

Together, these principles have significant consequences to transactions executed entirely through the use of the Internet.

(2) Effect of Void Contract & the Internet

(a) *A Minor Cannot Be Sued Under The Contract*

Following the decision of *Gurcharan Singh*, if a seller has supplied goods that are not classified as necessaries to a minor, he cannot sue the minor for the price of such goods as the contract of sale in question is totally void. The effect of a contract being void can have serious negative consequences for a seller who conducts all transactions entirely through the use of the Internet. As illustrated earlier in this Chapter, confidential or proprietary information of the Internet seller could have been transmitted to the minor as an ancillary to the sale of an article. If the contract governing the sale is void as a result of

the incapacity of the minor, the minor is not bound by any restrictive covenants found under the contract of sale. The minor is thereby not precluded from misusing the confidential and proprietary information of the seller and the seller in fact does not possess any protection under contract law for his confidential and proprietary information.

A seller who conducts his business entirely through the Internet is therefore faced with an enormous risk. First, he is not able to accurately ascertain the identity and age of the person to whom he wishes to sell his products. Second, if he sells to the purchaser in reliance of his belief or limited knowledge of the identity and age of the said purchaser, he has no cause of action or remedy in contract against the purchaser if the latter is a minor. He cannot prevent the purchaser from misusing his products. Unless the seller takes sufficient precaution in the manner in which he sells his products through the Internet, he is evidently in a "lose-lose" situation. The Internet in such circumstances is nothing more than a legal trap for unsuspecting sellers who have place too much reliance on this new medium.

(b) *Applicability Of Section 66 Of Contracts Act*

The absence of any remedy under a contract that is void necessitates an examination if the seller can rely on any other causes of action in law that may be available to him. The root of the seller's predicament is that the contract is void because of the purchaser's minority. Assuming that the seller had no prior knowledge of the minority of the purchaser and / or where he

had entered into the contract of sale on the misrepresentation of the purchaser in respect of the latter's age, what remedy does the Contracts Act provide in respect of a contract that is void? In this connection, reference is made to Section 66 of the Contracts Act.

Section 66 provides restitutionary relief to a party to a void contract in certain defined circumstances[24] although it must be highlighted that this section does not create a separate cause of action on its own.[25] This section provides:

> Section 66
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The basis of this section is none other than the doctrine *restitutio in intergrum.*[26] Section 66 contains the principle of restitution after the benefit has been received, and the agreement is then discovered to be void or becomes void. From the words of Section 66, this section shall NOT apply to any one of the following 2 situations:

(i) where the benefit or advantage is received *after* the agreement is discovered to be void. This restriction is obvious, in view of the use

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[24] Doshi, Varsha, *Restitutionary Remedies in Illegal Agreements* (Malayan Law Journal Publication, 1998) at pg. 117

[25] *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Limited* [1998] 2 CLJ 75 at pg.95. Note the Federal Court of Malaysia's observation that Section 66 only confers a discretionary remedy in the nature of restitution to be exercised by the court within the ambit of the section and within the principles of the law of contract (per Mohd. Azmi FCJ).

[26] R.K Abichandani, *Pollock & Mulla on Indian Contract and Specific Relief Acts* (Volume 1, 11th Edition) (Tripathi), at pp 700-701. Note also the observation made in Sinnadurai, Visu, *Law of Contract* (Volume 1) (Butterworths Publication, 2003) (3rd Edition) at pg. 497; and Sinnadurai, Visu,

of the words "who *has* received" in Section 66 itself; which clearly excludes benefits received after the time the agreement has been discovered to be void; or

(ii) where at the time the agreement was entered into, *both* parties knew that the object of the agreement was illegal[27] or that the agreement was void. This restriction is implicit from the use of the words "*discovered to be void*" and "*becomes void*" thereby making the applicability of Section 66 dependent on *any* of these 2 events occurring *after* the parties have entered into the contract with either or both of them having the assumption or belief that the same was valid and enforceable.[28] Relating this restriction to an agreement in which at least one party is a minor, no relief under Section 66 can be granted to either party if *both* parties had full knowledge of the minority at the time when the agreement was entered into. It is evident that the legislature only intended that Section 66 would not apply to a situation in which *both* parties had the knowledge of the incapacity, as the word "*discovered*" suggests that at least one of the parties was unaware of the incapacity at the time the agreement was made.

Law of Contract in Malaysia and Singapore, (Butterworths Publication, 1987) (2nd Edition) at pg.465 to the effect that Section 66 is a wide provision which has no direct parallel under English law.

[27] Doshi, Varsha, *Restitutionary Remedies in Illegal Agreements* (Malayan Law Journal Publication, 1998) at pp. 125-126.

[28] See *Soh Eng Keng v. Lim Chin Wah* [1979] 2 MLJ 91 at pg.92 (per Wan Yahya J).

Pursuant to item (ii) above, the crucial test to determine the applicability of Section 66 is whether either or both the parties were aware of the illegality or unenforceability of the agreement at the time the agreement was made. Section 66 does not grant any relief to either party of a void contract if *both* the parties had full knowledge of the illegality or enforceability at the time when the contract was entered into. However, if either or both parties were unaware of the illegality or unenforceability, the application of Section 66 shall not be prejudiced.[29] This interpretation of Section 66 is surely correct, as the section only states "*discovered to be void*" (hence it is possible to read this phrase more liberally as "*discovered to be void by either party*" as well as "*discovered to be void by both parties*"), instead of a more rigid "*discovered to be void by both parties*" (in which case it shall be necessary to prove both parties had no awareness of the illegality or unenforceability at the time the agreement was made). It must be highlighted that if Section 66 had used the words, "*discovered to be void by both parties*", then Section 66 would definitely not apply to a situation covered under Section 11, as the minor must surely have awareness of his own age and therefore status as a minor in law.

The leading decision in Malaysia on Section 66 is the Privy Council decision *Menaka v. Lum Kum Chum.*[30] In this case, the Privy Council, applying

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[29] See Sinnadurai, Visu, *Law of Contract* (Volume 1) (Butterworths Publication, 2003) (3rd Edition) at pg. 501. Note Prof. Sinnadurai's succinct observations that "Though restitution under section 66 is usually sought by one party to the contract who was not aware of the illegality, relief may be granted to both the parties to the illegal contract if neither of them was aware of the illegality."

[30] [1977] 1 MLJ 91

Section 66, upheld the Federal Court's decision for the restoration to the appellant of the principal sum of $20,000 less $600 being interest that the respondent had earlier paid to the appellant.[31] It should however be highlighted that the Privy Council in this case was dealing with the Moneylenders Ordinance 1951 and not a question of incapacity of minor to contract under Section 11 of the Contracts Act.

Then, in *Ahmad bin Udoh v.Ng Aik Chong* [32] the Federal Court of Malaysia held that an agreement "*discovered to be void*" for the purpose of Section 66 of the Contracts Act includes an agreement that *was void in that sense from its inception*. Again, it must be highlighted that the Federal Court in this case was concerned with Sections 24 and 25 of the Contracts Act instead of Section 11. Nonetheless, this remains an important decision for the purpose of this Chapter. From the rationale behind this case, it can logically be concluded that if the expression an agreement "*discovered to be void*" for the purpose of Section 66 of the Contracts Act includes an agreement that was void in that sense from its inception, then Section 66 would equally apply in respect of an agreement made by minor(s) that is void from inception by reason of Section 11 of the Contracts Act.

[31] [1977] 1 MLJ 91 at pg.94

[32] [1970] 1 MLJ 82. Note that this case was cited favourably by the Court recently in *Kejuruteraan Elektrik Usahamaju Sdn Bhd v. Zilatmas (M) Sdn Bhd* [2001] 5 CLJ 563 at pp. 575-576. But as this latter decision was one dealing with a summary judgment application, the Court did not deliberate in detailed the rationale behind this earliere decision.

It is however regretted the issue whether Section 66 is applicable to a situation covered by Section 11 of the Contracts Act remains largely unsettled in Malaysia. Upon reviewing a number of decisions from India, the learned author of a recent local publication is of the opinion that an adult who has received a benefit from a minor *would not be caught under Section 66* to restore the benefit or to pay compensation for the benefit to the minor and that a minor cannot similarly be held liable under Section 66.[33] In other words, Section 66 of the Contracts Act has no application to Section 11. The reason provided thereof was simply that, since Section 66 of the Contracts Act starts from the basis of there being an agreement or contract between competent parties, therefore it has no application to a case in which there can never be any contract as in cases of agreements entered into by minors.[34] The foregoing observation was repeated by the learned author of a respected textbook on the contract law of India[35] as regards Section 65 of the Indian Contracts Act (that is *in pari materia* with Section 66 of the Contracts Act of Malaysia), citing as authority the Privy Council decision in *Mohori Bibee v. Dhurmodas Ghose.*[36]

The above observations of the learned authors would however run contrary to the decision of the Federal Court of Malaysia in *Leha bte Jusoh v. Awang*

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[33] Doshi, Varsha, *Restitutionary Remedies in Illegal Agreements* (Malayan Law Journal Publication, 1998) at pg. 132. The author nonetheless noted that the result was probably not intended by the legislature that only desired to protect the interests of the minor.

[34] Doshi, Varsha, *Restitutionary Remedies in Illegal Agreements* (Malayan Law Journal Publication, 1998) at pg. 132.

[35] R.K Abichandani, *Pollock & Mulla on Indian Contract and Specific Relief Acts* (Volume 1, 11th Edition) (Tripathi), at pg. 714.

Johari bin Hashim[37]. In this case, the Federal Court, pursuant to Section 66, ordered the repayment of $5,000 being the purchase price of a property to the respondent (who had been a minor when the agreement was made) and that the respondent should vacate the lands occupied by him.[38] In addition, the above observations of the learned authors run contrary to another decision of the Federal Court of Malaysia in *Ahmad bin Udoh v.Ng Aik Chong*[39] as highlighted above in which it was decided that the expression "*discovered to be void*" for the purpose of Section 66 includes an agreement that was void in that sense *from its inception*.

For the purpose of this Thesis, the present writer would take the position that Section 66 is applicable to an agreement entered into by minor(s) and that the decision of the Federal Court in *Leha bte Jusoh v. Awang Johari bin Hashim*[40] above reflects the correct interpretation of Section 66.[41] The present writer's opinion is based upon the fact that a literal reading of Section 66 does not indicate any restriction in its application to Section 11. Further, it is worth highlighting that the Malaysian Federal Court in *Leha bte Jusoh v. Awang Johari bin Hashim*[42] cited with approval *Mohori Bibee v.*

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[36] (1903) LR Ind. App. 114
[37] [1978] 1 MLJ 202
[38] [1978] 1 MLJ 202 at pg. 203.
[39] [1970] 1 MLJ 82
[40] [1978] 1 MLJ 202
[41] Note the observation made in See Sinnadurai, Visu, *Law of Contract* (Volume 1) (Butterworths Publication, 2003) (3rd Edition) at pp.368-369; and Sinnadurai, Visu, *Law of Contract in Malaysia and Singapore*, (Butterworths Publication, 1987) (2nd Edition) at pp.352-353 that the views that section 65 of the Indian Contracts Act (which is identical to Section 66 of the Malaysian Contracts Act) has no application to cases to agreements made by minors, have been much criticized.
[42] [1978] 1 MLJ 202

Dhurmodas Ghose,[43] hence would surely have taken cognizance of the Privy Council's rationale in the latter decision.

Moreover, the present writer submits that the use of the phrase "*when an agreement is discovered to be void, or when a contract becomes void*" in Section 66 unequivocally indicates that this Section applies to a contract that that is void from inception (like a contract made by a minor) and a contract that becomes void after its inception. Otherwise it makes no sense to distinguish between a situation where a contract is "*discovered to be void*" from a contract that "*becomes void*". In addition, from the phrase "*discovered to be void*", this Thesis argues that it is not material to consider the time from which the contract becomes void, as long as it happened before both parties realized they had entered into a void contract. This Thesis respectfully argues that the reasons cited by the above learned authors to support the inapplicability of Section 66 to Section 11 are artificial and do not fit well into the words of Section 66 itself.

(c) *Section 66 Applied To Agreements Made Through The Internet And Its Limitations*

From a literal reading of Section 66, a minor who has entered into an agreement of sale through the Internet is bound to return whatever goods he received from the Internet seller. Likewise, the seller is bound to return

[43] (1903) LR Ind. App. 114

whatever money he received from the minor pursuant to the agreement to purchase. This will be consistent with the decision of the Federal Court in *Leha bte Jusoh* above. On the same basis, from a literal reading of Section 66, a minor who had received any loan of money that he had applied for and obtained through the Internet, is bound to return the same to the lender, provided that the minor has yet to spend it or if the money can be traced.[44] There are nonetheless two notable limitations to an action under Section 66 since the basis of Section 66 is *restitutio in intergrum*. Logically, these limitations apply equally regardless whether the agreement was made through the Internet or any other media.

Firstly, if the minor and / or the party with whom he made the agreement cannot be restored to the *status quo ante*, in all likelihood, the Court will not make an order for restitution. Support for this view can be found in the English case *Valentini v. Canali*[45] which dealt with an agreement which was void under Section 1 of the Infants' Relief Act 1874 applicable in England at that time. In this case, the plaintiff while being a minor agreed to become a tenant of the defendant's house and had agreed to pay a certain amount of money on account of the furniture. It was not disputed that the minor / plaintiff occupied the premises in question and used the furniture. The minor's / plaintiff's action for the recovery of the sum of money that he had paid to the defendant failed. Lord Coleridge, who delivered the main speech

[44] Authority for this restriction can be found in *R. Leslie v. Sheill,* which will be discussed in greater length below.

in the decision observed that when a minor had paid for something and consumed and used it, it would be the grossest violation of natural justice if he would be able to recover the money which he had paid to the defendant as he could no longer restore his benefits to the defendant and place the latter in the same position as if there had been no such transaction.[46]

By analogy, if a minor purchased goods through the Internet and used or consumed the same to the extent that he could no longer return the same to the seller, he or his guardian would possess no right to recover the money that the minor had paid to the former under Section 66 by pleading minority. The above limitation against restitution will however also operate against the party who contracted with a minor, in particular in respect of money received by a minor through a money-lending agreement. It is a well-founded principle of law that an action for money had and received does not lie against a minor who had borrowed money from a claimant if the minor had spent it. Authority for the above proposition of law can be found in *R. Leslie v. Sheill*[47] in which the Court of Appeal of England held that the Plaintiff moneylenders' action against an infant for money had and received failed against a plea of infancy by the defendant borrower. In this case, the minor had obtained a loan by fraudulently misrepresenting that he was of full age. The infant in this case (and in most cases of action for money had and received) had used the money and any order by the Court to restore the borrower to the *status quo*

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[45] (1889) 24 QBD 166
[46] (1889) 24 QBD 166 at pg.167

ante would result in the enforcement of a contract void from its inception by reason of the borrower's minority. Lord Sumner observed in this case that:-

> ...the money was paid over in order to be used as the defendant's own and he has so used it and , I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract.[48]

Hence, an authorized moneylender that has lent money to a minor through the Internet will not be able to recover the sum so borrowed under Section 66 of the Contracts Act if the minor has spent the money. This is so even if the loan has been obtained through the fraudulent misrepresenting of the minor. *A fortiori*, if no element of fraudulent misrepresentation is present, the lender will also not be able to recover from minor in a similar situation.

The second limitation to an action for *restitutio in intergrum* is that such a claim will only succeed where there is a total failure of consideration. Support for this view is found in *Pearce v. Brain,*[49] which followed *Valentini v. Canali* above. In *Pearce v. Brain,*[50] the plaintiff who was a minor exchanged his motorcycle and sidecar for the defendant's motor-car. The motor-car the minor obtained subsequently broke down after the minor had used it for a short period of time. The plaintiff minor subsequently made a claim for the return of his motor cycle and sidecar or its value by pleading his minority which would result in the contract of exchange being void under Section 1 of

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[47] [1914] 3 KB 607
[48] [1914] 3 KB 607 at pg.619. The present author included the underlines for emphasis.
[49] [1929] 2 KB 310
[50] [1929] 2 KB 310

the Infants' Relief Act 1874 applicable in England at that material time. The plaintiff's action failed, as there was no total failure of consideration, having enjoyed the benefits of the contract. The Court in this case observed that money paid under a void contract could not also be recovered unless there was a total failure of consideration, and that in this respect, there was no distinction between an action for the return for a chattel and recovery of money under a void contract.[51]

It should be highlighted that although the court in *Pearce v. Brain*[52] repeatedly referred to and followed the decision of *Valentini v. Canali*[53] the requirement of total failure of consideration was never stated as a necessary ingredient for a claim for the restitution of goods or money in the latter case. This Thesis will therefore argue that the same is an additional requirement for *restitutio in intergrum*. Hence, as an analogy from the above reasoning, a minor is not allowed to claim for the refund of any purchase price for any article he purchased through the Internet under Section 66 if he has benefited from the article. For the same reason, a seller who has derived any benefit from a sale made to a minor (whether through the Internet or otherwise) shall be precluded from making a claim successfully under Section 66.

(d) <u>*Section 71 of the Contracts Act*</u>

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[51] [1929] 2 KB 310 at pg.314 – 315
[52] [1929] 2 KB 310

In addition to Section 66, for completeness, reference must be briefly made to Section 71 of the Contracts Act that provides:

> Section 71
> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the things so done or delivered.

The scope of Section 71 was recently considered by the Malaysian High Court in *Jone Theseira v. Eileen Tan Ee Lian & Anor.*[54] in which the Court observed that the underlying principles of Section 71 were grounded on restitution, and not on the existence of a contract; hence the normal constituents of a valid contract namely consensus ad idem, consideration and intention to create legal relation are all irrelevant.[55] The Court further observed that in order to establish a claim under Section 71, the claimant would need to simply satisfy 4 conditions, that is, (1) the claimant's act was lawful, (2) the claimant's action was done for another person, (3) the claimant's action was not intended to be done gratuitously, and (4) the other person enjoyed the benefit of the claimant's act or delivery.

Based on the above principles, it may be argued that a seller who sold and delivered goods or services through the Internet to a minor can first plead that there was never a contract between himself and the minor, but that the minor must nonetheless compensate him or to restore the benefits so delivered to the minor under Section 71 of the Contracts Act. Although it has

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[53] (1889) 24 QBD 166
[54] [2003] 5 CLJ 171
[55] [2003] 5 CLJ 171 at pg.175

been said that the scope off Section 71 is wider than that under English common law,[56] this Thesis hereby submits the Courts in Malaysia is unlikely to allow a claim under this Section 71 to succeed against a minor when a similar claim made under the provisions of the contract concerned and / or Section 66 has failed. The present writer's submission is based on the rationale that to allow a claim under Section 71 to succeed when a claim under the terms of the contract has failed on account of Section 11 of the Contracts Act, would open a roundabout way to enforce a contract that was void in law.[57] Likewise, to allow a claim under Section 71 to succeed when relief is not granted under Section 66 would simply render Section 66 superfluous, which was surely not intended by Parliament when these provisions were first enacted. Hence, the limitations found under Section 66 discussed above must equally also apply whether directly or indirectly, when a claim is framed under Section 71.

(3) Liability of Minor under Law of Tort

Internet web-sites that solicit orders from the public often contain a clause through which the purchaser declares that he / she is not prohibited from making the purchase by the governing law. The usefulness of such a clause is doubtful, for if the contract is held to be void because of the incapacity of the minor who made the purchase, this clause, being a part of the contract in

[56] See R.K Abichandani, *Pollock & Mulla on Indian Contract and Specific Relief Acts* (Volume 1, 11th Edition) (Tripathi), at pg.749 and Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998) at pp.721-722.

question, is also void against the minor. As this Thesis has argued above, the consequence of a contract being void can be serious for a seller that conducts all transactions through the use of the Internet. In view of the uncertainty of the application of Section 66 of the Contracts Act to an agreement made with a minor, and compounded by the limitation of Section 66 (even if it is applicable), the question then arises as whether the seller has any cause of action against the minor under the law of tort to circumvent a contract that is void.

Under the law of tort, there is no defence for incapacity of minority. Authority for this proposition can be found in the English decision of *Gorely v. Codd*[58] in which it was decided that a boy of 16 years old (still a minor under the law of England) had been negligent when he accidentally shot the plaintiff. Nonetheless, it is also a well-established principle in law that a minor is not answerable for a tort *directly connected with any contract* upon which no action will lie against him.[59] Hence, if a minor who received confidential information on the design of certain products which he had purchased through the Internet decided to act against an express prohibition in the contract of sale on disclosure, thereby disseminating the confidential and proprietary information to the public, no action could be brought against him

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[57] See the rationale of the English court in *R. Leslie v. Sheill* [1914] 3 KB 607 discussed in the following section of this Chapter.
[58] [1967] 1 WLR 19
[59] Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998) at pg. 528. The authors of *Winfield & Jolowicz on Tort* (Sweet & Maxwell Publication, 13th Edition, 1990) expressed their dissatisfaction with this rule (at pg. 671).

for breach of confidentiality whether under the contract (which was void) and under the tort of breach of confidence.

To aggravate the difficulties that are faced by the seller, a minor cannot be made liable for fraudulently representing his age thereby inducing a party into making a contract with the said minor. In the local case *R. Natesan v. K.Thanaletchumi & Anor,*[60] the Court without any hesitation found that even if a minor had induced another to enter into an agreement by falsely representing that she was of full age, the minor was not estopped from avoiding the agreement by pleading her minority.[61]The result of this case is in line with the position under English law. In *R.Leslie Limited v. Sheil*[62], the Court of Appeal of England held that a minor could not be sued in the tort of deceit for inducing an adult to lend him money by fraudulent misrepresentations as to his age. In his speech, Lord Sumner observed that as a rule no action of deceit could be made against a minor[63]; if the action was allowed, the Court observed that it would open a roundabout way to enforce a contract that was void in law.

Hence, from the above-cited authorities, it is clear that the established position in law is that a minor is immune from any action commenced under

[60] (1952) 18 MLJ 1
[61] The position that the Court suggested at the end of the case that the contract in question was voidable instead of void was admittedly not sustainable by the later decision of *Gurcharan Singh*. It must be highlighted however that this case involves an agreement made on 28th March 1950, which is prior to the introduction of the Contracts Act on 23rd May 1950.
[62] [1914] 3 KB 607
[63] [1914] 3 KB 607 at pg.612

the law of tort by a seller to circumvent the restrictions under the law of contract. This immunity prevents the indirect enforcement of a void contract against the minor. In respect of an agreement made through the Internet, sellers who conduct their sales entirely through the Internet shall surely consider this immunity as being commercially unfavorable. In order to be certain that the purchaser is not a minor, the Internet seller shall have to adopt other means of identifying the purchaser. For example, the seller could require the purchaser to fax photocopies of the buyer's identity card or driver's licence to the seller before the contract can be concluded. All these shall substantially slow down the process of Internet based commerce.

(4) Definition of "*Necessaries*" and Burden of Proof

The above-stated difficulties faced by an Internet based seller are further compounded by the fluid definition of "*necessaries*" as well as having the burden to prove the same. Under English law, minors are obliged to pay for necessaries that have been supplied to him. In Malaysia, as stated above, this principle is codified under Section 69 of the Contracts Act.[64] An unequivocal definition for the word "*necessaries*" is therefore of importance so that both the seller and the minor know the consequence of their transaction. For example, if a minor decides to purchase a software through the Internet, it will be to his interest to find out if what he is purchasing are classified as "*necessaries*" and that he has a liability to pay for the same and he cannot plead his minority as a defense against any claim. For the seller,

he would like to know if what he is selling are classified as "*necessaries*" because if they are not so classified, he would take additional precaution not to sell the same to any minor.

Under English common law, necessaries are not confined to necessities. Necessaries would include such articles and services that are fit to maintain the particular person in the station of life in which he moves,[65] though the definition excludes mere luxuries.[66] The Contracts Act is unfortunately silent on the definition of "*necessaries*". The Court in *Gurcharan Singh* observed that the question whether an article supplied is a necessary for the minor concerned is a mixed question of law and fact. The Court also observed that the word "*necessaries*" must be given a broad construction and each case should be decided on the factual matrix surrounding it.[67] The Court in this case also observed that the word "*necessaries*" should be accorded a general construction, namely, it should be given its full and natural meaning.[68] It is evident from *Gurcharan Singh* that the word "*necessaries*" is a relative and fluid expression, dependant on the social, and condition of the minor in question, and is an ever-changing concept in accordance with the passage of time.

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[64] *Government of Malaysia v. Gurcharan Singh & Ors* [1971] 1 MLJ 211 at pg. 213.
[65] See discussion in the old case *Peters v. Fleming* (1840) 6 M&W 42 at pp.45-47
[66] Treitel, GH *The Law of Contract* (9th Edition, Sweet & Maxwell) at pg.495
[67] [1971] 1 MLJ 211 at pg.214-216
[68] [1971] 1 MLJ 211 at pg.217

In connection to the foregoing, it is hereby submitted that the courts in Malaysia are unlikely to allow a restitution claim framed under Section 71 of the Contracts Act by a seller who supplied goods or services to a minor if the goods or services are not normally classified as necessaries. To allow a such claim under Section 71 to succeed when a claim under Section 69 has failed would simply render Section 69 superfluous, which was surely not intended by Parliament when these provisions were first enacted. Hence, the limitations found under Section 69 must equally also apply whether directly or indirectly, when a claim is framed under Section 71.

Under English common law, the onus of proving that the goods supplied to the minor are necessaries lies on the seller.[69] This would seem to be the position as well in Malaysia under the Section 103 of the Evidence Act 1950, which reads as follows:-

> Section 103
> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Hence, as the seller would be interested to have the court believe that the goods that he has supplied to a minor is classified as "*necessaries*" and that the minor must pay for the same, the burden is on him to prove the same is classified as "*necessaries*". For this reason, the seller is exposed not just to the risk of entering into a void contract with a minor with whom he possibly has had no prior contacts, but also the unreasonable burden to prove, when

[69] Treitel, GH *The Law of Contract* (9th Edition, Sweet & Maxwell) at pg.496

the minor is in default, that what he has supplied constitutes necessaries suited to the minor's condition of life. Such a burden of proof is unreasonable for a seller that conducts his business entirely through the Internet because:

(1) The seller in most circumstances does not possess the opportunity to make any prior accurate determination whether he is supplying to a minor or otherwise; and

(2) Even if the seller is able to discover that the purchaser is in fact a minor, he is not able to make any prior intelligent decision whether his right in law is protected on the basis that the goods being supplied are in fact necessities to the minor, because he has no reliable and accurate knowledge of the minor's condition in life.

(5) Conclusion and Recommendations

From the foregoing review, the following can be concluded:

(a) A contract entered into by a minor is void under the Contracts Act. As a consequence of a contract being void, the parties to the said void contract cannot sue or be sued under the same;

(b) Section 66 of the Contracts Act provides for restitutionary relief to a party to a void agreement. However, it is unsettled whether Section 66 applies in respect of a contract that is found to be void under Section 11 of the Contracts Act. Nonetheless, local authorities like *Leha bte Jusoh v. Awang Johari bin Hashim*[70] indicate that local courts are prepared to apply Section 66 to a

situation of a contract found to be void under Section 11. A literal construction of Section 66 also points to the conclusion that this section applies to a contract made by a minor that is void from inception;

(c) Assuming that Section 66 is applicable, the applicability of Section 66 is nonetheless restricted to circumstances where (1) one party can be put into the *status quo ante* and (2) there must be total failure of consideration. Sellers that sell entirely through the Internet could rely on these two exceptions to defeat any restitutionary claim from minors under Section 66. Nonetheless, the above exceptions could also be relied upon by a minor to defeat any claim instituted by the seller who had supplied the minor goods or services. For example, a minor could rely on the above first mentioned exception to defeat a claim of a moneylender under Section 66 if the minor had spent the money received;

(d) A minor can never be made answerable for a tort that is directly connected with any contract upon which no action will lie against him.[71] So, if a purchaser who is a minor commits the tort of breach of confidence in respect of confidential information supplied to him in connection to a contract of sale made through the Internet, the seller has no cause of action in tort against the minor;

[70] [1978] 1 MLJ 202

(e) Further, a minor cannot be made liable for fraudulently representing his age, thereby inducing the other party to enter into a contract with the minor. Hence, if a seller that sells through the Internet is induced into a contract of sale by a minor who fraudulently represented his age, the former has no cause of action in tort of deceit against the latter. Pursuant to this principle, a declaration made by a minor that he / she has the requisite legal capacity to make a contract has no legal consequence;

(f) In addition to the above immunity of the minor, a person who contracted with a minor also has the burden to prove that what he has supplied to the minor is classified as "*necessaries*". The definition of "*necessaries*" is fluid, depending on the minor's condition in life, a factor which the seller (who conducts his business entirely through the Internet) will not possess any means of determining prior to entering into the said contract; and

(g) That Section 71 of the Contracts Act cannot be used to circumvent the obstacles found under Sections 66 and 69 discussed above.

Although most of the problems cited above are also present in the real physical world, the use of the Internet has highlighted these problems and made them more acute than before. It is also evident from the above summary that the existing position of the law favours the minor considerably.

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[71]Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998) at pg.528

It is wholly insufficient for the Internet seller to ask for a declaration that states the purchaser has the requisite legal capacity if the purchaser is a minor. The resulting contract of sale remains void and the seller has no cause of action against the minor for making the fraudulent misrepresentation as to his legal capacity. More seriously, as the definition of "*necessaries*" is fluid and uncertain, the seller would not be able to assess the real risk before performing any transaction.

Although the impact of the problem cited above could be minimized by advances made in technology, such as the use of digital signatures issued by a valid certification authority,[72] this solution is unsatisfactory as the new technology may not be readily available to all Internet users and hence inequitable.[73] Some quarters may choose to argue that the seller assumes the risk by inviting the public to conduct their transactions entirely through the Internet. This latter argument is also unsatisfactory, as it does not provide a cure for a patent imperfection and lacunae in the law relating to minors when the same is applied to a contract made through the Internet. This latter argument cannot also be advanced too far as it implies that

[72]The seller could stipulate that the contract is only binding if the buyer uses a valid digital signature and that the contracting party is the proprietor of the digital signature. This latter measure is however dependant on the fact that the certification authority only issues digital signatures to persons who are not minors. For example, Digicert Sdn Bhd, which is a certification authority based in Malaysia, only issues digital signatures to persons above 18 years old. If this precaution is not exercised, the digital signature will therefore not be effective evidence of a persons' capacity to contract.

[73] It must be noted that Digicert Sdn Bhd charges a fee for the issuance of digital certificates. Hence the service is not free.

technology must adapt itself to an old principle of law[74] instead of the law evolving to keep abreast with advancements made in technology.

The Parliament of Malaysia must step forth to resolve the above-cited problems in order to create a more certain legal environment for the conduct of Internet based commerce. As part of the resolution requires a prior examination of the social pattern of the Malaysian public, it is hereby submitted the Malaysian Court is not the best forum to address this problem adequately and speedily. In connection to the above, this Thesis will recommend legislative reform in the following areas, namely:

(a) *Reducing The Age Of Minority In Respect Of Internet Based Contracts*

This should be the first and most essential reform to be considered by Parliament. Pursuant to this exercise, Parliament must examine the average age of Internet users and its possible future trend in Malaysia. In other words, if it is found that the average age of Internet users is far below eighteen (as is presently provided under the Age of Minority Act 1971), Parliament must seriously consider reducing the age of minority accordingly in Malaysia for the purpose of Internet based contracts. This will ensure fewer individuals who have entered into contracts using the Internet will be

[74] As stated in Chapter 2, the Contracts Act of Malaysia is based on the Contracts Act of India which is a statute introduced in the 19th century.

able to escape contractual responsibilities by pleading the defense of minority under Section 11 of the Contracts Act.

(b) *Burden On Minor To Declare His Minority*

Once the new age of minority has been established, the existing law concerning the validity of contract must be amended to the effect that contracts made with minors over the Internet are enforceable unless the minor proves that the person with whom he contracted was aware of his incapacity at the time of the making of the contract. It is essential that the burden of proof must lie with the minor exclusively. The incapacity of the minor under the governing law is known to him himself, and it is usually impossible or possibly very costly for the Internet seller to discover or attempt to discover the said incapacity. Hence, so long as the minor does not declare to the seller of his incapacity when he is so asked, or misrepresented his capacity, or if the seller in good faith has no reason to suspect or know of his incapacity, the resulting contract shall be valid and enforceable as though it was made between parties with the requisite capacity in law.

Admittedly, the above proposal shall be a reversal of the position adopted by the courts in *R.Leslie Limited v. Sheil*[75] and *R. Natesan v. K.Thanaletchumi & Anor*[76] discussed above and in fact, contrary to the basis of Section 11 of

[75] [1914] 3 KB 607
[76] (1952) 18 MLJ 1

the Contracts Act. Nonetheless, this Thesis argues that in respect of the Internet, this proposal constitutes a fairer and more practical position as compared to the existing principle as the vendor is contracting with numerous purchasers whom he has had no prior contacts. This Thesis further submits that the positions adopted by the courts in *R.Leslie Limited v. Sheil*[77] and *R. Natesan v. K.Thanaletchumi & Anor*[78] as discussed above could be criticized and should not be followed as the decisions of these cases did not discourage the making of fraudulent misrepresentation and could be interpreted as judicial cognizance of deceit by minors.

(c) Burden Of Proof For Necessaries

It would be an impossible task to list down legislatively the products and services which would be included in the expression "*necessaries*" as the number of possibilities and permutation are simply too numerous and varied. As stated above, under Section 103 of the Evidence Act, the burden of proof that any goods supplied are necessaries will be on the seller. On a balance of convenience, as regards Internet based transactions, the burden should be on the party asserting the contract is void to also prove that the articles supplied thereunder *are not necessaries*. Under this revised position, if a minor asserts that a contract of sale made through the Internet is void, he shall also have to prove that any goods or services that have been supplied

[77] [1914] 3 KB 607
[78] (1952) 18 MLJ 1

to him thereunder are not necessaries and hence he has no liability under Section 69 to make payment for the same.

(6) The UNCITRAL Model Law on Electronic Commerce

The UNCITRAL Model Law on Electronic Commerce makes no direct reference to the problem concerning the capacity of minors to enter into agreements through the use of the Internet. The articles of the UNCITRAL Model Law seem to presume that the parties making the contract already possess the legal capacity to do so and do not interfere with the existing legal principles concerning the capacity of minors to contract under local law. This is reflected in the explanation to Article 11 of the UNCITRAL Model Law that states that Article 11 (which deals with formation and validity of contracts) is not intended to interfere with the existing law on formation of contracts.[79] This position is to be expected, otherwise the drafters of the UNCITRAL Model Law would have to grapple with the law concerning contractual incapacity of numerous countries.

In view of the silence of the UNCITRAL Model Law, the Parliament of Malaysia does not really have any precedent model to refer to as guidance. It must be noted that if the Parliament of Malaysia enacts any provisions to deal with incapacity to contract and the Internet, the same would be a

[79] Guide to Enactment of UNCITRAL Model Law on Electronic Commerce (1996), Paragraph 76.

relatively unique legislative feature as the statutes of many nations[80] that are modeled after the UNCITRAL Model Law are all silent on this subject. These new enactments can be included into the existing framework of the Contracts Act, or more preferably, into a new statute dealing with electronic contracts exclusively.

AGREEMENTS MADE BY PERSON OF UNSOUND MIND & SUFFERING FROM DRUNKENNESS

(1) Sections 11, 12 and 69 of Contracts Act

In addition to agreements made by minors, the Contracts Act also deals with the contractual incapacity of a person of unsound mind under Sections 11 and 12. Section 12(1) defines a person of sound mind for the purpose of making a contract as someone who, at the time when he makes the contract, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. Very importantly, Section 12 allows a person who is usually of unsound mind to make a contract when he is of sound mind,[81] and that a person who is usually of sound mind but occasionally of unsound mind may not make a contract when he is of unsound mind.[82]

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[80] The Electronic Transactions Act 1998 of Singapore, the Uniform Electronic Transactions Act 1999 of the United States, the Electronic Transactions Act 1999 of Australia and the Hong Kong Electronic Transactions Ordinance 2000 are all silent on this subject.
[81] Contracts Act, Section 12(2)
[82] Contracts Act, Section 12(3).

Hence, pursuant to Section 12, the mental capacity of a person to enter into a contract is not solely dependant on the usual sanity or insanity of the contracting party, but more specifically, his or her sanity at the *exact time* when the contract was made. The expression "*unsound mind*" as used in Section 12 also includes drunkenness in view of illustration (b) to this section which provides that "a sane man, who is delirious from fever, *or who is so drunk* that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness last".

Moreover, it is important to highlight that there is no general acceptable degree of sanity for the purpose of contractual capacity. Whether a person has the requisite level of sanity is wholly dependent on the facts of each case. In the recent decision *Chemsource (M) Sdn Bhd v. Udanis Mohammad Nor*,[83] the High Court of Malaysia went to the extent to caution that no court of law could readily fix a special standard of sanity that is required for all transactions. From case law authorities, the established principle in law is that the courts will not simply look at the mental capacity of the parties, but also *the type of transaction* in order to decide whether the party who pleads insanity really had the mental capacity or otherwise to enter into the type of transaction concerned.[84]

[83] [2001] 6 CLJ 79 at 91
[84] See *Chemsource (M) Sdn Bhd v. Udanis Mohammad Nor*, [2001] 6 CLJ 79 at 91

In many respects, the problems that the Internet creates as regards an agreement made by a minor, also surface in agreements made by persons suffering from unsoundness of mind. Hence, parties that contract entirely through the use of the Internet face a real risk that the other party could be suffering from unsoundness of mind at the time the contract is made. The incapacity of a person suffering from unsoundness of mind to make a contract is probably more problematic compared to the incapacity of a minor. For whilst the Internet seller could determine the age of the person with whom he is contracting by insisting that the purchaser produces his identity card for example, or through the use of digital signatures (as explained above), these precautions are wholly insufficient against a purchaser who is suffering from unsoundness of mind.

(2) Status and Effect of Agreement Made by Person of Unsound Mind

Under English law, an agreement made by a person of unsound mind is not void but merely voidable at his option.[85] The position is however different in Malaysia under the Contracts Act. Like an agreement made by a minor, an agreement made by a person suffering from unsoundness of mind is void pursuant to Section 11 of the Contracts Act. Authority for this position is found in *Sim Kon Sang Peter v. Datin Shim Tok Keng*[86] in which the High Court of Tawau observed that any contract made by a person of unsound

[85] Treitel, GH *The Law of Contract* (7th Edition, Sweet & Maxwell) at pg.435
[86] [1994] 2 MLJ 517

mind was void and not merely voidable (as under English Law) pursuant to Section 11 of the Contracts Act.[87] This result is therefore consistent with the decision of the Madras High Court in *Machaima v. Usman Beari*[88] that held that a contract entered into by a person when he was a lunatic was void under Section 11 of the Indian Contracts Act (identical with Section 11 of the Malaysian Contracts Act).[89]

An agreement that is entered into by a person of unsound mind is void under Section 11 regardless whether the other contracting party is aware of the former's insanity or otherwise at the time of the making of the contract. Hence, a seller that conducts his business entirely through the Internet (and therefore have no way to determine if his customers possess the mental capacity to make a contract) cannot plead his ignorance of the buyer's incapacity or lack of knowledge thereof as a defence.

Both Sections 11 and 12 must be read with Section 69 of the Contracts Act that (as stated above) incorporates the common law principle that a minor or lunatic is liable for necessaries supplied to him. There is no doubt Section 69 is applicable to the supply of necessaries to a person suffering from an unsound mind in view of the fact that both the illustrations to Section 69 refer to necessaries being supplied to a mentally disordered person. On the question of burden of proof as to what supplied constituted necessaries,

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[87] [1994] 2 MLJ 517, at pg.526.
[88] (1907) 17 Madras Law Journal 78.

Section 103 of the Evidence Act 1950 of Malaysia (as quoted above) dictates that the burden of proof lies on the person asserting that what was supplied constituted necessaries. The seller who conducts his business entirely through the Internet and who had supplied goods or services to a person of unsound mind at the time the agreement was made would therefore have the burden to prove that what was supplied constituted necessaries. Like a contract made with a minor, the definition of "*necessaries*" is also fluid, depending on the recipient's condition in life, a factor which the Internet seller will not have any means of determining prior to entering the contract.

(3) Liability in Tort

As the contract entered into by a person of unsound mind is void and unenforceable under Section 11, the question also arises whether he could be made liable for a tort committed if the tort is directly connected to the void contract. For example, where the contract for the supply of a software through the Internet is void under Section 11 because of the purchaser's insanity, is the purchaser nonetheless liable for any wrongful breach of confidential information (in connection to the use of the software) that was committed whilst he was suffering from the said insanity? There does not seem to be any decisions in Malaysia on this point. Flowing from the reasoning that imposing a tortuous liability on a minor would amount to

[89] (1907) 17 Madras Law Journal 78 at pp. 78-79.

enforcing a void contract in a roundabout way,[90] the present writer submits that it is highly arguable that a person suffering from unsoundness of mind is immune from any action framed in tort as well if the tort is directly connected to the contract.

The above however does not seem to be the conclusion of the English courts that require the finding of involuntariness in order to escape tortuous liability. In *Morriss v. Marsden,*[91] the plaintiff sued the defendant for assault and battery. The Court in this case found that the defendant's mind was so disturbed by his disease at the time of the assault and battery that he did not know what he was doing was wrong, *but* that the assault was a *voluntary* act on his part. For this reason, the Court found the defendant liable. The Court also indicated that had the defendant's disease been so severe that his act was not a voluntary one at all, the defendant would not have been liable.[92] Further, in *Roberts v. Ramsbottom*[93], the Court found the defendant liable although the defendant was suffering from temporary impairment of mental ability at the time of the commission of the tortuous act because the defendant had retained some control (although imperfect). The Court further observed that his illness would have provided a defence if it had rendered him an automation.

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[90] See *R.Leslie Limited v. Sheil* [1914] 3 KB 607 at pg. 612; and Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998) at pg. 528.
[91] [1952] 1 All ER 925.
[92] [1952] 1 All ER 925 at pg. 927.

As both *Morriss v. Marsden*[94] and *Roberts v. Ramsbottom*[95] were not dealing with tortuous acts directly relating to a contract, it is highly arguable that little weight should be accorded to these cases. The position that the court in Malaysia will likely to adopt would be that a person cannot be held liable for a tort that is directly relating to a contract that is void and committed whilst he was suffering from an unsound mind. In the absence of any judicial determination or subsequent legislative enactment, the answer to this issue at best remains clouded in uncertainty.

(4) Conclusion and Recommendations

From the foregoing review of the present state of the law in respect of the incapacity of a person suffering from unsoundness of mind to contract under the law of Malaysia, it can be concluded that:

(a) A contract entered into by a person of unsound mind is void under Section 11 of the Contracts Act. Hence, like a contract entered into by a minor through the Internet, a contract entered into by a person of unsound mind over the Internet cannot be enforced. That is, an Internet seller has no cause of action under the law of contract against the person suffering from unsound mind; and

(b) A person of unsound mind is not answerable for a tort directly connected with any contract upon which no action will lie against

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[93] [1980] 1 WLR 823
[94] [1952] 1 All ER 925.
[95] [1980] 1 WLR 823

him[96] if the same is committed during his insanity. Hence, if a person of unsound mind commits the tort of breach of confidence in respect of confidential information supplied to him in connection to a contract of sale over the Internet, the seller has no cause of action in tort against him. Admittedly, this position remains uncertain so long as the position is not confirmed judicially or legislatively.

In addition to the above immunity to any cause of action in tort, a person who contracted with him also has the burden to prove that what the he has supplied to the person of unsound mind is classified as "*necessaries*". The definition of "*necessaries*" is also fluid, depending on the recipient's condition in life, a factor which the seller will not possess any means of determining prior to entering the contract. The present writer would again conclude that the existing law concerning the contractual incapacity of a person of unsound mind largely favors the purchaser to the grave disadvantage of the Internet seller.

On the basis of the same principles concerning contracts made by minors, the present writer therefore recommends that on a balance of convenience, fresh legislative enactments must be implemented to: (1) require the person alleging that the contract was unenforceable because of his unsoundness of mind to prove that the other contracting party was aware (and had taken

[96]Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract*, (1st Singapore and Malaysia Students' Edition) (Butterworths Publication, 1998) at pg.528

unfair advantage) of his unsoundness of mind at the time of the making of the contract[97] before finding the contract as void; and (2) require the person asserting the contract as void to prove that the articles supplied are not necessaries. The abovementioned reforms would create a more equitable distribution of risks and responsibilities between the Internet seller and the purchaser and further, promotes confidence in the use of the Internet as an open medium to effect commercial transactions. It is again regretted that the UNCITRAL Model Law does not make any direct reference to the problems associated with an agreement entered into by a person suffering from unsoundness of mind or drunkenness.

SUMMARY AND ANALYSIS OF THIS CHAPTER

The above review of the existing position under the Contracts Act as regards agreements entered into by a minor or person suffering from unsoundness of mind shows that the same favors the minor and the person of unsound mind considerably. The impersonal quality of the Internet that allows contracts to be made between persons who are total strangers and at great distance, extends this advantage to a degree that is absolutely inequitable for the Internet seller. This serious imbalance is not conducive for the future growth of Internet based commerce and a better compromise must be

[97] Note that this position will be consistent with the established position under English law as laid down in *Imperial Loan Company Ltd v. Stone* (1892) 1 QB 599 at pg.601 (per Lord Esher MR) which states that: "*When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not*

established speedily. Such a compromise would need to take into account the following two conflicting considerations:

(1) A person should not be liable on his contracts if he is incapable of intelligent consent at the time of the making of the contract because of his age or unsoundness of mind; but

(2) A minor or person of unsound mind must not be allowed to take advantage of his incapacity in law to cause hardship to the Internet seller.

It is hereby submitted that the above-suggested reforms to the law would create a more equitable distribution of risks and responsibilities between a seller who sells through the Internet and his customer.

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to be capable of understanding what he was about" [The present writer has included the underlines as emphasis].

CHAPTER FIVE

WRITTEN CONTRACTS, SIGNATURES AND THE ELECTRONIC MEDIA

THE REQUIREMENT OF WRITING

(1) Contracts that Must be Made or Evidenced in Writing

The purpose of this Chapter is to examine the question whether and in what circumstances a contract that is made through the use of the electronic media like the Internet satisfies the formality of writing, and closely related to which, the requirement of signature. The reduction of the terms and conditions of a contract into writing, or having these terms evidenced by a written note or memorandum is inextricably linked to the subject of contract formation. So closely linked is the requirement of writing to the issue of contract formation that one commonly held misapprehension about the law of contract among lay persons is that a contract must be in writing in order to be valid and enforceable.[1]

At this juncture, it must be stressed that the common law in general does not preclude the enforceability of a contract that is not made or evidenced in writing. It is trite law that a contract can be made in writing, verbally or a combination of both, or implied through the conduct of the parties.[2] As long

[1] Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract* (1st Singapore and Malaysian Student's Edition), (Butterworths Publication), at pg. 270.

[2] This common law position is often replicated in a number of statutes. For example, Section 5(2) of the Sale of Goods Act 1957 (Act 382) of Malaysia states that a contract of sale may be made in writing, or word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

as the basic building blocks of a valid contract are present, the common law does not require contracts to be concluded in any particular form. That is, an agreement that is intended to be legally binding, and that is supported by consideration, that satisfies the requirements of offer and acceptance, is generally enforceable as a contract at common law.[3]

The above general rule is modified by a number of statutory provisions that require particular types of contracts either to be made or evidenced in writing. Whether a contract must be made in writing or merely evidenced in writing is totally dependent on the statutory provision regulating the same. The consequences of non-compliance are also dependent on the statutory provision concerned; normally non-compliance shall result in the contract concerned being declared as void, unenforceable or can be enforced only with the order or leave of the court.[4]

Of all the statutes requiring contracts to be made or evidenced in writing, the most well known is perhaps the English Statute of Frauds 1677 which lays down the formal requirements of writing for a range of contractual instruments.[5] Likewise, the statute law of Malaysia contains various provisions that make it a legal necessity to have a contract made or

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[3] Grubb, Andrew & Furmston, Michael, *Butterworths Common Law Series - The Law of Contract*, (Butterworths Publication, 1999) at pg. 389

[4] Treitel, GH, *The Law of Contract*, (10th Edition, 1999), at pp. 162-170.

[5] The Statute of Frauds 1677 has no application in West Malaysia. Parts of the statute are nonetheless applicable in East Malaysia. This statute is still valid in Singapore. See Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract* (1st Singapore and Malaysian Student's Edition), (Butterworths Publication), at pg. 270 generally.

evidenced in writing. For example, Section 16(1) of the Moneylenders Act 1951 (Act 400) as amended by the Moneylenders (Amendment) Act 2003[6] implicitly requires all money-lending agreements to be made in writing. This section states that no money-lending agreement shall be enforceable unless the agreement has been signed by all parties to the agreement, and that a copy of the said agreement duly stamped is delivered to the borrower by the moneylender before the money is lent. The requirement that this agreement must be signed, stamped and delivered to the borrower clearly indicates the said agreement must be made in writing. The un-amended version of this same section was more explicit in stating the requirement that money-lending agreements must be evidenced in writing:

> No contract for the repayment by a borrower or his agent of money lent to him or to any agent on his behalf by a moneylender or his agent after the commencement of this Act or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract, shall be enforceable unless a note or memorandum in writing of the contract in the English language or National language be signed by the parties to the contract or their respective agents or, in the case of a loan to a partnership firm, by a partner in or agent of the firm, and unless a copy thereof authenticated by the lender or his agent be delivered to the borrower or his agent or, in the case of a loan to a partnership firm, to a partner in or agent of the firm, before the money is lent, and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not so signed before the money was lent or before the security was given, as the case may be.[7]

Other well known examples under the Malaysian statute law include the Arbitration Act 1952, which provides that an agreement to refer any dispute

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[6] Moneylenders (Amendment) Act 2003 [Act A1193], first read in the Parliament on 27 March 2003, and received Royal Assent on 12 May 2003. As of the date of the writing of this Thesis, this Amending Act is still not in force.

[7] The present writer included the underline as emphasis.

for arbitration must be made in writing.[8] Likewise, a contract of marine insurance must be evidenced in writing pursuant to Section 22 of the U.K Marine Insurance Act[9] which is the legislation governing marine insurance in Malaysia pursuant to Section 5(1) of the Civil Law Act 1956.[10] The requirement of writing is also found in Section 4A of the Hire Purchase Act 1967 (Act 212). This section provides that a hire purchase agreement in respect of any goods specified in the First Schedule of the Hire Purchase Act shall be made in writing,[11] failing which, the hire purchase agreement is void.[12] Further, under the Bill of Exchange Act 1949 (Act 204) in order to qualify as a bill of exchange, the said instruction must be made in writing.[13]

The requirement of writing is also present under the statute law of Singapore. In Singapore, a contract of guarantee must be in writing in order to be enforceable,[14] although it must be highlighted that a contract of guarantee can be made whether verbally or in writing under the Contracts Act of Malaysia.[15] One further example is the assignment of copyright that

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[8] Refer to Section 2 of the Arbitration Act 1952 that defines "*arbitration agreement*" as a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

[9] This Section reads; "*Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may be executed and issued at the time when the contract is concluded or afterwards*".

[10] See *Leong Brothers v. Jerneh Insurance Corp. Sdn Bhd* [1991] 1 MLJ 102 at pg.103 (per Wan Adnan J.)

[11] Section 4A(1) Hire Purchase Act 1967

[12] Section 4A(2) Hire Purchase Act 1967

[13] Section 3 Bill of Exchange Act 1949.

[14] See Section 6(b) of Civil Law Act, Singapore (Cap.43).

[15] See Section 79 of Contracts Act 1950.

must be made in writing both under the Copyright Act 1987 (Act 332) of Malaysia[16] and the Copyright Act 1987 (Cap. 63) of Singapore.[17]

It is not the purpose of this Chapter to examine how the requirement of writing is satisfied in each statute or the consequence of non-compliance for each instance. As stated earlier, this Chapter is primarily concerned with the issue whether and in what circumstances a contract made through the use of electronic media like the Internet, will satisfy the legal formality of writing. The electronic media like the Internet and electronic mails, from their fundamental properties, are immensely different from traditional paper-ink medium. Firstly, electronic media are less permanent compared to the paper-ink medium. Secondly, electronic media are susceptible to manipulation, alteration and forgery by third parties without leaving an audit trail.[18] In short, the crux of the problem lies in the extreme lack of permanence of electronic media compared to traditional paper-ink medium.

Since electronic media like the Electronic Data Interchange (EDI) have been in common use for almost two decades, it is a surprise to find that the foregoing issue remains largely unresolved in a number of jurisdictions. This issue still arises even in the advance legal and economic environment of the

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[16] See Section 27(3) Copyright Act 1987 which reads: No assignment of copyright and no licence to do an act the doing of which is controlled by copyright shall have effect unless it is in writing.
[17] See Section 194(3) Copyright Act 1987 (Cap.63) of Singapore which reads: No assignment of copyright (whether total or partial) shall have effect unless it is in writing signed by or on behalf of the assignor.
[18] Ding, Julian, *E-Commerce: Law & Practice*, (Sweet & Maxwell Asia Publication, 1999) at pg. 104.

United States. A learned author commenting on the law of the United States recently wrote:

> Can an electronic document satisfy the formal requirements of a signed writing? At this time, there is no clear answer. A number of compelling arguments have been made in support of the validity of wholly electronic agreements, but courts have not resolved the issue.[19]

The above uncertainty is echoed by the writers of a recent article commenting on the law of New Zealand. These authors observed:

> It is important to note that New Zealand law requires certain types of contracts to be in writing, such as hire purchase agreements, contracts for sale of land and contracts of guarantee. Currently it is unclear whether contracts formed by electronic means will be in writing for these purposes.[20]

As this Thesis argues hereunder, the issue whether a contract made through the electronic media satisfies the requirement of writing is equally uncertain under the law of Malaysia, and the Parliament of Malaysia must adopt urgent measures to resolve this lacuna in the law.

(2) Definition of Writing under Section 3 of Interpretation Acts

In 1997, the Parliament of Malaysia extended the definition of "*writing*" under the Interpretation Acts 1948 & 1967 to include writing made electronically. The amended Section 3 now reads:-

> Section 3
> [Writing] includes type-writing, printing, lithography, photography, electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved.[21]

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[19] Rosenoer, Jonathan, *Cyber Law-The Law of the Internet*, (Springer Publication, 1997) at pg.237.
[20] Shera, R & Jordan, L.M.L, *Electronic Commerce Law – New Zealand*, Asia Business Law Review, Issue No. 28 (April 2000) at pg. 42.
[21] This new amendment was introduced in 1997 pursuant to Section 5(1)(e) of Amendment Act A996/97. The present writer has included the underlines as emphasis.

The explanatory notes of the Parliamentary Bill that gave rise to the above-mentioned amendment states that the amendment to the definition "*writing*" was proposed to facilitate the use of electronic means in the recording of information,[22]but nothing further.

Pursuant to the above definition under the Interpretation Acts, the terms and conditions of a contract that are sent through the electronic mail and stored electronically would qualify as writing. An electronic message that is transmitted through the Internet and subsequently stored electronically shall likewise qualify as writing. Pursuant to the foregoing definition, a contract that is finally concluded electronically and stored as such, without any reproduction on paper, qualifies as a contract made "*in writing*". The only conditions that the electronic message and transmission must satisfy in order to qualify as writing under this Section are (1) there must be storage in the electronic form and (2) it must be in a form capable of being preserved.[23] The effectiveness of this new definition is yet largely untested before the Malaysian Courts, but as this Thesis shall argue in the section hereinafter, there is much room for improvement in respect of the sufficiency of the definition.

(3) Definition of Writing under Section 2 of Digital Signature Act

[22] See Clause 10 of proposed Parliamentary Bill No. DR 18/97 that was first read on 28 April 1997
[23] Ding, *Julian, E-Commerce – Law & Practice*, (Sweet & Maxwell Asia, 1999) at pg. 127

The above definition of "*writing*" and "*written*" under the Interpretation Acts is almost identical to the definition provided under Section 2(1) of the Digital Signature Act 1997 that reads as follows:

> Section 2(1)
> "*writing*" or "*written*" includes any handwriting, typewriting, printing, electronic storage or transmission, or any other method of recording information or fixing information in a form capable of being preserved.

Hence, under the scheme of Section 2(1) of the Digital Signature Act 1997, an electronic message and transmission also qualifies as writing as long as there is storage in the electronic form and it is in a form capable of being preserved. However, it must be observed that the above definition under Section 2(1) has minimal consequences under the scheme of the Digital Signature Act 1997. The key provision under this Act is found at Section 64 of the same, which reads as follows:

> Section 64
> (1) A message shall be as valid, enforceable and effective as if it had been written on paper if-
> (a) it bears in its entirety a digital signature; and
> (b) that digital signature is verified by the public key listed in a certificate which-
> i. was issued by a licensed certification authority; and
> ii. was valid at the time the digital signature was created.
> (2) Nothing in this Act shall preclude any message, document or record from being considered written or in writing under any other applicable law.

The word "*message*" as appeared under Section 64 is defined liberally under Section 2(1) of the Act as "*a digital representation of information*". It is hereby submitted that this definition is sufficiently wide to include a contract in electronic format. Pursuant to Section 64, an electronic contract that bears in its entirety a digital signature that is valid under the Digital Signature Act 1997, shall for this reason qualify as a contract made in writing.

Hence, the Digital Signature Act 1997 does not merely provide a definition for writing in the electronic media; it stipulates the overall property that a document must assume in order for the writing contained therein to qualify as "*writing*" in law. Under this Act, an electronic message that contains a digital signature (that is basically a form of encryption) in its entirety has the same status in law as if it is written on paper. It will be seen in the sub-section below that this concept of "*writing*" introduced by the Digital Signature Act 1997 departs from the traditional concept of writing under common law[24] as it links the quality of writing to the overall level of protection the document is subject to.

Although this concept of writing introduced by Section 64 is novel and innovative, it has limited application as only an electronic message that is encrypted by a digital signature in its entirety shall qualify as writing. Moreover, the digital signature in question must be a valid digital signature under the Act. An electronic document signed by a normal electronic signature that does not qualify as digital signature under the Act would not have the same effect. The linking of the use of digital signature to the concept of writing in the electronic media also produces an inequitable result, as this new technology may not be readily available to all Internet

[24] Please refer to discussion on the common law concept of writing at pages 198-201 of this Thesis below.

users.[25] Hence, although the Parliament of Malaysia had recognized the importance of giving electronic writing the same status as writing made onto paper, the method it adopted in the form of Section 64 of the Digital Signature Act only provides a partial solution to the overall challenge.

(4) Other Relevant Provisions

Section 3 of the Interpretation Acts 1948 & 1967 and Section 64 of the Digital Signature Act 1997 are not the only provisions that deal with the concept of writing and the electronic media in the statute books of Malaysia. In addition to these, there are for instance, Section 62A of the Interpretation Acts 1948 & 1967, and Section 90A of the Companies Act. Although these other provisions are innovative and the Parliament should be applauded for enacting them, these provisions unfortunately do not focus on the subject of contract formation and the requirement of contract made in writing.

Much care must be exercised when dealing with Section 62A of the Interpretation Acts and Section 90A of the Evidence Act (and provisions similar to them) as these provisions do not squarely deal with the subject of contract formation. This is evident from the wordings of Section 62A of the Interpretation Acts which reads:

> Section 62A
> Where under any written law any information is permitted or required to be given or kept or maintained, and no means or medium is specified, such information may be given or kept or maintained by electronic means and on electronic medium if the

[25] One of the first Certification Authorities in Malaysia is Digicert Sdn Bhd; website: www.digicert.com.my. Digicert Sdn Bhd charges a fee for the issuance of digital certificates. Hence the service is not free and available to all parties equally.

> identity of the person giving the information or the source of any information given by such means is capable of being determined or verified, and if sufficient precautionary measures have been applied to prevent unauthorized access to any information recorded or fixed by such means or on such medium.[26]

Section 62A is a new section included in year 1997 into the previous version of the Act. The explanatory notes of the Parliamentary Bill that gave rise to the above Section 62A states that this new section was introduced to facilitate the use of electronic means.[27] Moving to the Evidence Act 1950 (Act 56) of Malaysia, it must be noted that this Act does not provide a definition for the word "*writing*" but Section 90A(1) of the same states:

> Section 90A(1)
> In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or such statement.

Sections 90(A)(2), 90(A)(3) and 90(A)(4) concern the issuance and validity of a certificate that certifies that a document has been produced by a particular computer in the course of its ordinary use. Section 90(A)(5) refers to circumstances in which a document may be generated by the said computer. Section 90(A)(6) deals with admissibility of a document generated by a computer after the commencement of court proceedings or investigation. Section 90(A)(7) states the exceptions to admissibility under Section 90(A).

The above provisions do not focus on the subject of contract formation. It is fundamental that a clear distinction is drawn between the issue of formality

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[26] This provision was introduced in 1997 pursuant to Section 12 of Amendment Act A996/97.
[27] See Section 10 of proposed Parliamentary Bill No. DR 18/97, first read on 28th April 1997.

of a contract and admissibility as evidence at all times. The former concerns the validity of the contract itself (i.e; whether it has been properly formed), whilst the latter concerns whether certain information pertaining to the contract can be used as evidence or otherwise in the courts. On the basis of this fundamental distinction, Section 62A of the Interpretation Act and Section 90(A) of the Evidence Act do not provide any assistance to answer the question whether and in what circumstances a contract made through the use of the electronic media (like the Internet) will satisfy the formality of writing. They deal solely with the issue of admissibility of evidence in the form of documents generated by computers and nothing further.[28]

(5) Weaknesses of Definition of Writing under Interpretation Acts

The limitations of Section 64 of the Digital Signature Act 1997, and the inapplicability of Section 62A of the Interpretation Acts 1948 & 1967 as well as Section 90A of the Evidence Act mean that the only comprehensive definition of "*writing*" is found under Section 3 of the Interpretation Acts.

However, as stated above, the amended definition of "*writing*" under Section 3 of the Interpretation Acts (and therefore Section 2(1) of the Digital Signature Act as they are both almost identical) has much room for improvement. Firstly, the words of this new definition are patently inadequate in many respects. The only caveats attached to this definition are that (i) the

[28] The fact that Section 90A only deals with the issue of admissibility of evidence is also judicially recognized. See *Gnanasegaran v. PP* [1997] 3 MLJ 1 at pg. 11 in which the Court of Appeal of

form that is used must be stored electronically and (ii) is capable of being preserved. The expressions "*electronic storage*" and "*capable of being preserved*" found in Section 3 are both too brief and ambiguous especially in respect of the electronic media.

In enacting this new definition of "*writing*" under the Interpretation Acts, the Parliament of Malaysia had underestimated the unique properties of the electronic media, like the internet. Unlike paper or parchment of skin or papyrus scroll or clay table upon which mankind has recorded his languages and arts for ages, data and messages in the electronic media and the electronic media itself have no real or physical qualities. They merely exist as electromagnetic properties and are wholly intangible. To start with, electronic writing cannot be touched or stored in a cupboard or drawer. They have no physical properties that are found in paper, tablets, photographs, photocopies and other traditional media, hence it is unhelpful to draw an exact analogy with these traditional media.

Ironically, it is these traditional media that lawmakers must turn their attention to when formulating the principles to deal with the electronic media. The key question that Parliament must ask is: what are the qualities of a document in writing that are not found in information that are not in writing? The answer to the foregoing must be that a document in writing, can be

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Malaysia stated that Section 90A had been added to the Evidence Act in 1993 in order to provide for the admissions of computer produced documents and statements.

stored, accessed and re-used. That is, information written on a piece of paper can be stored, and one can access this piece of paper again in the future to refer to the same information.

On the basis of the foregoing, the law dealing with writing in the electronic media must provide that in order to qualify as writing, the electronic information or data must be stored in a form that can be easily accessed and re-used, like taking out a contract made in the paper-ink medium from a drawer. This inevitably means that the software both for the storage and accessing the information should be readily available in the present and in the period for which the information will be stored. It is useless if only the information comprising the terms and conditions of the contract is preserved if they are preserved in a form that renders it inaccessible to both humans and the computers.[29]

From the foregoing discussion, it may be concluded that the new definition of "*writing*" under the Interpretation Acts 1948 & 1967 seems to have raised as many questions as it tries to solve, when the same is applied to a contract made electronically. Many of these questions do not have immediate answers. For example, does a contract that is made and stored in electronic form qualify as contract in writing if the text of the contract is wholly stored in an electronic file but the software or hardware for accessing the said file is

no longer available for use, or if the software or hardware concerned is not generally available? Further, is electronic writing allowed in respect of all contracts that by law must be made in writing, or are there exceptions where the contract is of extreme importance, hence requiring a more permanent medium? The absence of unambiguous statutory definition for the word "*writing*" in relation to electronic contract formation leads results in the Courts, lawyers and the commercial community in Malaysia not having an unequivocal and consistent set of guidelines to determine the circumstances in which a contract made through the Internet or other electronic messages can qualify as contract in writing.

It is apparent that Parliament had adopted a simple and minimalist solution by enacting a provision to state that the definition of "*writing*" would henceforth include writing made and stored in the electronic media. Ideally, the process should not have been that straightforward. As the requirement of written contract is found in many different statutes of Malaysia, the definition of "*writing*" cannot be extended without careful prior consideration on its impact on each statute. The Parliament of Malaysia must weigh the pros and cons that the extension of the definition shall bring to the contract(s) regulated by each statute. The Parliament of Malaysia must consider all public policies as well as the commercial issues that could make this extension of definition counter-productive, or contrary to the intent of each of

[29] For example, documents prepared and stored using software like "WordStar" in the late 1980's, and earlier versions of "Word Perfect" made in the 1980's and early 1990's are largely inaccessible

the statute concerned. Finally, when the definition of "*writing*" is extended in the Interpretation Acts to include writing in the electronic media, the Parliament would have to provide a list of statutes to which the new definition shall not apply.

For example, even if the Parliament of Malaysia finds that the requirement of writing under Section 2 of the Arbitration Act is satisfied in respect of an agreement made using electronic media, this finding does not immediately lead to the same conclusion that an agreement made through the electronic media is acceptable in respect of an assignment of copyright under the Copyright Act. This is so because arguably, an agreement for assignment of copyright is not merely an agreement to act in a certain manner when a contingency occurs like an agreement to refer to arbitration. An agreement for the assignment of copyright eventually results in the transfer of an intangible proprietary right from one party to another and cannot therefore be judged by the same standard. For this reason, it should continue to be made in the traditional pen and paper medium in order to acquire a higher degree of permanence as compared to the electronic media.

Likewise, although a contract for the repayment of a simple monetary debt of say RM10,000 can be evidenced by an electronic contract made through the electronic media to the satisfaction of all parties concerned, the same cannot

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nowadays.

be said in respect of a multi-million Ringgit syndicated loan with complicated and extensive conditions. Such exceptions and limitations in the application of the new definition would also have to be listed in the proviso that should accompany the definition of "*writing*".

In summary, the Malaysian Parliament must exercise a high degree of care when it attempts to extend the definition of "*writing*". Otherwise, the results could be counter-productive as regards certain species of contracts. It is inevitable that the Parliament must examine the effect of such extension upon each statute concerned. The task is unavoidably laborious and time consuming. Further, this task is made more complicated because the statutes themselves do not normally assist in explaining why contracts made thereunder must be in writing. None of the Malaysian statutes mentioned above stipulate the reason for which contracts must be made or evidenced in writing. These statutes are all remarkably silent in this respect. This silence necessitates the Parliament to carefully examine the policy behind each statute through the Hansard records, academic opinions and the decisions of the Courts, not just in Malaysia, but in the jurisdiction(s) from which these statutes were imported if they are not indigenous to Malaysia. Again, though laborious, the above efforts cannot and should not be circumvented in order to ensure that the extension of the definition of "*writing*" shall not be counter-productive.

The Interpretation Acts do not list any statute to which this new definition of "*writing*" will not apply. The records of parliamentary debates relating to this amendment in 1997 also do not contain any extensive argument on the possible difficulties of extending this definition to certain statutes.[30] In other words, the Parliament of Malaysia seemed to have circumvented the whole due diligence exercise that was discussed above prior to enacting this new definition. For this reason, this new definition arguably applies to all classes of contracts that are statutorily required to be made or evidenced in writing. Judges and lawyers in Malaysia are regrettably left to ponder the full effect of Section 3 of the Interpretation Acts.

(6) The Meaning of "*Writing*" at Common Law

Turning to the common law for guidance, it must be highlighted that although there are numerous authorities from the Courts of both Malaysia and other jurisdictions in the Commonwealth that decided whether a particular contract satisfied the formal requirement of writing in a particular statute, there are surprisingly few authorities that decided upon the general definition of "*writing*" itself, as well as on the suitability and permanence of the medium on which the writing was made.

On the meaning of "*contract in writing*", reference can be made to the decision of the English Court of Appeal in *In re New Eberhardt Company* -

[30] See record of Parliamentary debates in the Dewan Rakyat of April 1997. The Parliament at that period was largely occupied with discussions on electronic signatures and computer crimes.

Ex parte Menzies.[31] In this case, the Court had to decide whether there was a contract in writing made between the contracting parties that had been registered pursuant to Section 25 of the Companies Act 1867. In the course of the judgment, the Court (per Fry LJ) noted, *obiter dicta* and without referring to Section 25 of the Companies Act 1867, that a contract in writing meant that without going beyond the writing, it could be seen the existence of a contract between the contracting parties.[32] The above definition seems to refer to a contract that is made totally in writing as opposed to a contract that is partially in writing and partially made verbally. It must be noted that this decision is not entirely helpful to the present discussion, as it pays no attention to the permanence of the medium on which the writing was made.

A more helpful case is the 1826 decision of the English Court, *Geary v. Physic.*[33] Although this case was decided long before the emergence of the Internet and electronic communication, it is nonetheless instructive to the present issue whether electronic messages are writings in the eyes of the courts. In *Geary v Physic,*[34] a promissory note was made in pencil and for this reason was challenged in Court as being unenforceable on the basis that writing made in pencil was not writing recognized at common law. It was argued before the Court that writing made with a pencil was easily altered or obliterated and therefore, where the law required a contract to be in writing, it ought to be in writing made with materials least subject to alteration.

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[31] (1889) Ch.D 118
[32] (1889) Ch.D 118 at 130

The Court in this case nonetheless held that writing made in pencil was writing within the meaning of that term at common law as well as the custom of merchants. The Court (per Abbott CJ) observed that there was no authority for saying that where the law required a contract to be in writing, that writing must be in ink. Moreover, there was no authority to show that a contract that the law required to be in writing must be written in any particular mode, or upon any particular material.[35] The Court further observed that the imperfection of writing in pencil would prevent it from being generally adopted, but where the writing in pencil was not obliterated and able to be proved, the writing in pencil was writing within the meaning at common law.[36] Readers will surely note that this common law concept of writing is distinctly different from the concept of writing introduced by Section 64 of the Digital Signature Act 1997 as it does not focus on the level of protection the document is subject to.[37]

Like a contract written in pencil, a contract that is produced and stored in electronic media is also highly susceptible to unauthorized alterations and obliterations. This is why the rationale behind *Geary v Physic*[38] is relevant as regards a contract made through the use of the Internet or the exchange of

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[33] 108 ER 87.
[34] 108 ER 87
[35] 108 ER 87 at pg. 88.
[36] 108 ER 87 at pp. 88-89
[37] See pages 188-190 of this Thesis above.
[38] 108 ER 87

electronic mail. One can rely upon *Geary v Physic*[39] for the principle that although a contract is written in a medium that lacks permanence and that is susceptible to erasure (for example, made electronically), the said contract is not precluded, for those reasons alone, from qualifying as a written contract.

Although instructive, the decision of the Court in *Geary v Physic*[40] is not satisfactorily comprehensive and has its limitation. As the Court in that case was considering a tangible medium of writing (pencil on paper), the decision is hence inadequate when the same is extrapolated to intangible media such as the Internet or electronic mail messages or the EDI. As highlighted above, the issues of storage and subsequent access are of prime importance in respect of the electronic media, and *Geary v Physic*[41] unfortunately did not focus on these issues.

(7) UNCITRAL Model Law on Electronic Commerce

On the basis of the above analysis, this Thesis argues that as the law presently stands in Malaysia, there does not exist a set of comprehensive statutory provisions whereby the concept of "*writing*" in respect of the electronic media is adequately defined and explained. This Thesis argues that the law in Malaysia concerning the requirement of writing as regards an electronic contract is shrouded with substantial uncertainty. Judges and lawyers shall also discover that the common law provides an inadequate

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[39] 108 ER 87
[40] 108 ER 87

guide on this issue. Rather than to wait for the courts (whether here in Malaysia or in another common law jurisdiction) to establish the test for the determination of this issue, it is submitted that the Malaysian Parliament must take the initiative to resolve this uncertainty immediately. Towards achieving this, the Parliament of Malaysia could refer to the UNCITRAL Model Law on Electronic Commerce 1996 ('the UNCITRAL Model Law" hereinafter) for guidance.

The requirement of writing under various national laws was a major concern for the drafters of the UNCITRAL Model Law.[42] In preparing the Article dealing with the requirement of writing, the drafters of the UNCITRAL Model Law adopted the "*functional equivalent approach*", which is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques.[43] The drafters of the UNCITRAL Model Law admitted that a data message generated and stored electronically, in itself could not be regarded as an equivalent of a paper document as the former was of a different nature and would not perform all conceivable functions of a paper document.[44]

To resolve the various difficulties encountered, the drafters of the Model Law examined the different qualitative level of the functions of a document made

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[41] 108 ER 87
[42] See Paragraph 15, Guide to the UNCITRAL Model Law on Electronic Commerce (1996).

in writing and adopted the approach that the requirement of writing should be considered at the lowest level.[45] That is, a document is said to be in writing if the information contained therein is accessible so as to be usable subsequently, without giving any weight to its evidential quality, including the question of authenticity and reliability.[46] As regards the requirement of writing for the purpose contract formation, this approach is correct as it stresses the fundamental distinction between the issue of formality of contract and admissibility of the terms thereof as evidence.

The final results of the findings of the drafters of the Model Law are contained in Article 6 of the UNCITRAL Model Law, which reads as follows:

> Article 6
> (1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.
> (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.
> (3) The provisions of this article do not apply to the following: [...].

Article 6 therefore defines the basic standard to be met by a data message[47] in order for it to be classified in law as information retained or presented "*in*

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[43] See Paragraph 16, Guide to the UNCITRAL Model Law on Electronic Commerce (1996).
[44] See Paragraph 17, Guide to the UNCITRAL Model Law on Electronic Commerce (1996).
[45] See Paragraphs 48 and 49, Guide to the UNCITRAL Model Law on Electronic Commerce (1996).
[46] The intention of the drafters of the UNCITRAL Model Law is succinctly explained in the final sentence of Paragraph 49 of the Guide to the UNCITRAL Model Law on Electronic Commerce 1996 which reads: "In general notions such as "evidence" and "intent of the parties to bind themselves" are to be tied to the more general issues of reliability and authentication of the data and should not be included in the definition of "writing". See page (y) of the Appendix to this Thesis.
[47] "*Data message*" is defined in the UNCITRAL Model Law as information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. See Article 2 of the Model Law.

writing".[48] Indirectly Article 6(1) also provides an acceptable definition of "*contract made in writing*" with reference to the electronic media, that is, so long as the terms of the contract in electronic form are accessible so as to be usable for subsequent reference, the contract qualifies as a contract in writing in law. The drafters of the UNCITRAL Model Law also explained that the use of the word "*accessible*" was intended to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained.[49] The drafters also explained the word "*usable*" was not intended to cover only human use but also computer processing.[50] This resolves the issues of storage, access and availability of hardware and software discussed hereinabove.

One important feature of Article 6 is that it allows the legislative body to exclude the application of this provision to certain statutes where electronic writing is found to be inadequate and that the traditional paper ink medium is mandatory. This is found under Paragraph (3) of Article 6. On this, the drafters of the UNCITRAL Model Law explained:

> An enacting State may wish to exclude specifically certain types of situations, depending in particular on the purpose of the formal requirement in question. One such type of situation may be the case of writing requirements intended to provide notice or warning of specific factual or legal risks, for example, requirements for warnings to be placed on certain types of products.[51]

[48] See Paragraph 47, Guide to the UNCITRAL Model Law on Electronic Commerce (1996).
[49] See Paragraph 50, Guide to the UNCITRAL Model Law on Electronic Commerce (1996).
[50] See Paragraph 50, Guide to the UNCITRAL Model Law on Electronic Commerce (1996).
[51] See Paragraph 51, Guide to the UNCITRAL Model Law on Electronic Commerce (1996).

Paragraph (3) of Article 6 can therefore be utilized to exclude certain classes of contract from the general application of Article 6. For example, if the Parliament of Malaysia deems it necessary that a contract for the assignment of copyright is excluded from the application of Article 6, such exemption can be provided for through this paragraph. In Singapore, Section 4(1) of the Electronic Transactions Act 1998 that is modeled closely after the UNCITRAL Model Law for example excludes from its application certain classes of documents and contracts such as contracts for sale and conveyance of immovable property.[52]

For the reasons hereinabove stated, it is highly recommended that a statutory provision in the form of Article 6 of the UNCITRAL Model Law is introduced into the law of Malaysia, possibly into the Contracts Act, or more preferably, into a separate statute altogether as is the case in a number of other countries like Singapore,[53] the United States,[54] Hong Kong[55] and Australia.[56] This initiative shall provide the certainty that is required for the growth of electronic commerce in this country. A provision that is modeled after Article 6 shall be helpful for the legal community and the general public to comprehend the elements that shall constitute a contract in writing when the contract is made electronically. Such a provision shall also emphasize to

[52] Admittedly, the Singapore Electronic Transactions Act 1998 does not follow the structure of Article 6 of the Model Law completely. Whilst the words of Article 6(1) of the Model Law are largely utilized in Section 7 of this Act, the principle behind Article 6(3) is embodied in Section 4(1) instead. This statute will be discussed in greater detail in Chapter 7 of this Thesis below.
[53] Electronic Transactions Act 1998, Singapore.
[54] Uniform Electronic Transactions Act 1999, United States
[55] Electronic Transactions Ordinance 2000, Hong Kong

the legal community and the public in general of certain contracts that must continue to be made in the traditional paper-ink medium despite the immense convenience of the electronic media.

REQUIREMENT OF SIGNATURE

(1) Contracts that Must be Signed

Traditionally, a signature is a ceremonial method for a person to show that he is awake to the gravity of his action and that he is acting voluntarily as he finalizes an important document like a contract.[57] Under English common law, a signature carries with it far reaching consequences, noting the well-known cautionary words of Scrutton LJ in *L'Estrange v. F. Graucob Limited*:[58]

> When a document containing contractual terms is signed, then in the absence of fraud or I will add misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not.

Everyone is undoubtedly familiar with signatures made in ink on paper. How does the concept of signature co-exist with a contract that is made over the electronic media like the Internet? The requirement of signature in electronic contract formation is one of the most overlooked subject matter, but one that is capable of causing immense difficulty as some contracts must be signed in order to be valid and enforceable.[59]

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[56] Electronic Transactions Act 1999, Commonwealth of Australia
[57] Wright, Benjamin, *Electronic Signatures – Making Electronic Signatures a Reality*, Computer Law & Security Report Vol. 15 no. 6 of 1999, at pg. 401.
[58] [1934] 2 KB 394

Not unlike the requirement of contract in writing, the common law generally does not require a contract to be signed by the parties to the contract in order for it to be valid and enforceable.[60] This general rule is again modified by a number of statutory provisions resulting in that certain contracts must be signed by either or all the contracting parties in order to be valid. These contracts are logically also statutorily required to be made or evidenced in writing, in order to be able to contain the signatures. Likewise, a contract must be made or evidenced in writing as a condition precedent to enforceability often also means the said contract must be signed by the parties concerned. Hence, it can be said that the concept of a contract made in writing, and the concept of a contract having to be signed often go hand in hand.

The requirement of signature exists in numerous Malaysian statutory provisions. For instance, Section 16(1) of the Moneylenders Act 1951 (Act 400) as amended by the Moneylenders (Amendment) Act 2003 requires a money-lending agreement to be signed by all parties among others for the same to be enforceable.[61] Like the requirement of writing, the requirement of signature also exists in the Malaysian Hire Purchase Act 1967 (Act 212).

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[59] Edwards, Lilian & Waelde Charlotte, *Law and the Internet – Regulating Cyberspace*, (Hart Publishing 1997), at pg.118.

[60] Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract* (1st Singapore and Malaysian Student's Edition), (Butterworths Publication), at pg. 270.

[61] This section reads "*No moneylending agreement shall be enforceable unless the agreement has been signed by all the parties concerned and a copy of the agreement duly stamped is delivered to the borrower by the moneylender before the money is lent*". Note that the Moneylenders (Amendment) Act 2003 [Act A1193] wasfirst read in the Parliament on 27 March 2003, and received Royal Assent on 12 May 2003. As of the date of the writing of this Thesis, this Amending Act is still not in force.

Section 4B of this Act provides that every hire-purchase agreement shall be signed by or on behalf of all parties to the agreement,[62] failing which, such an agreement shall be void.[63] The requirement of signature also exists in the Bill of Exchange Act 1949 (Act No. 204). Section 3(1) of this Act provides that in order to qualify as a bill of exchange, the said bill must be in writing, addressed by one person to another and signed by the person giving it. The well known Statute of Fraud 1677 of England also refers to the requirement of signature. Section 4 of this statute, which has no application in Malaysia, reads as follows:

> Noe action shall be brought whereby to charge the Defendant upon any speciall promise to answere for the debt, default or miscarriages of another person unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized.[64]

With the proliferation in the use of the computer and the Internet (in particular) as a medium through which commercial contracts are made, it is necessary to determine whether and how the statutory requirement of signature is satisfied when the contract is made through the electronic media like the Internet, EDI or exchange of electronic mail messages. In this connection, one is faced with two inter-related questions that this Thesis will attempt to answer hereunder, namely:

(1) Does the law of Malaysia dogmatically require all signatures to be executed by ink on paper? If such is the requirement, all contracts

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Note that the previous section 16(1) of the Moneylenders Act also requires a moneylending agreement to be made in writing in order for the same to be enforceable.

[62] Hire Purchase Act 1967, Section 4B(1).

[63] Hire Purchase Act 1967, Section 4B(2).

[64] The present author has included the underline as emphasis.

made through the Internet or electronic mails that can never carry any signatures in ink, shall be unenforceable. Or does the law allow alternative methods of signatures, so that acceptable alternative forms of signature can be utilized in respect of Internet or electronic mail contracts?; and

(2) If the law of Malaysia allows other forms of signature to be used, what is the minimal standard that these alternative forms of signature must satisfy?

At this juncture, it may be useful to briefly consider the functions of signatures. Although normally associated with identifying the maker of a document, signatures perform a large variety of functions. In preparing the UNCITRAL Model Law on Electronic Commerce 1996, the drafters of the same considered the traditional functions of signatures generally and came up with a comprehensive list. According to the drafters of the UNCITRAL Model Law, signatures are normally utilized; (1) to identify a person; (2) to provide certainty as to the personal involvement of that person in the act of signing; (3) to associate that person with the content of a document; (4) to attest to the intent of a party to be bound by the content of a signed contract; (5) to attest to the intent of a person to endorse authorship of a text; (6) to attest to the intent of a person to associate itself with the content of a

document written by someone else; and (7) to attest to the fact that, and the time when, a person had been at a given place.[65]

From the foregoing lengthy list, it may be summarized that the primary functions of signature in the real physical world are threefold, namely, (1) to provide evidence on the identity of the signatory; (2) to provide evidence that the signatory intended the signature to be his / her signature; and (3) to provide evidence that the signatory approves of and adopts the contents of the documents that bear his / her signature.[66]

(2) Digital Signatures and Electronic Signatures

A traditional signature made by ink or some other forms of physical impression is naturally not possible when the parties conclude the contract through the Internet or other electronic media.[67] Technological advancements in the recent years have introduced into every day use numerous new tools that are used as substitutes for traditional handwritten signatures. Among these new tools, the most commonly discussed about is the digital signature, the basic concept of which is discussed in Chapter 1 of this Thesis.[68]

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[65] See Paragraph 53, Guide to the UNCITRAL Model Law on Electronic Commerce (1996). It must be highlighted that the UNCITRAL Model Law was concerned with signature generally and not signatures in contracts.
[66] Reed, Chris, *Internet Law – Text & Materials*, (Butterworths Publication, 2000), at pg. 156.
[67] Reed, Chris, *Internet Law – Text & Materials*, (Butterworths Publication, 2000), at pg. 154.
[68] See pages 30-32 of this Thesis in Chapter 1 above

To recapitulate, digital signature is actually a form of encryption that utilizes a pair or private and public keys. Being a form of encryption that affects the whole document, it may be argued that a digital signature should not be equated in all instances with a conventional handwritten signature.[69] Digital signatures are created and verified by cryptography, that is a branch of applied mathematics that concerns itself with transforming messages into seemingly unintelligible forms and back again.

Digital signatures normally use what is known as "public key cryptography" that employs an algorithm using two different but mathematically related keys. One private key is used by the sender to create a digital signature or transforming a document into a seemingly unintelligible form. Another key is used by the receiver to verify a digital signature or returning the document received from the sender to its original form. Hence, the use of the digital signature requires two processes, one performed by the sender who sends the encrypted document, and the other by the receiver of the digital signature to return the encrypted document to its original form.

Because digital signature is a form of encryption, it is able to authenticate the identity of the sender as well as the message that is sent.[70] Its ability to authenticate the identity of the sender contributes greatly to the reason a

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[69] Wright, Benjamin, *Electronic Signatures – Making Electronic Signatures a Reality*, Computer Law & Security Report Vol. 15 no.6 of 1999, at pg. 401.

[70] A good description of how digital signatures work is found in the American Bar Association's *Digital Signatures Guidelines*, an excerpt of which is reproduced in Reed, Chris, *Internet Law –Text & Materials*, (Butterworths Publication, 2000), at pp. 162-164.

digital signature is often referred to as a signature, although in reality it bears no close resemblance to a handwritten signature.

Apart from digital signature, there are other forms of electronic signatures that do not use public key cryptography. One digital innovation that deserves some attention is the pen-computer that captures actual handwritten signatures in an electronic form.[71] This technology is frequently found in supermarket cashiers that accept electronic payments. A closely related innovation dispenses with the pen altogether in which the salient features of the handwritten signature are recorded in the memory of a computer and can be "pasted" onto a document by the click of the mouse[72] or pressing the "Control" and "V" buttons on the keyboard simultaneously. In this Thesis, these latter form of signatures will be simply referred to as "*electronic signatures*" to differentiate them from a "*digital signature*" which is largely a form of encryption.[73]

The above are surely not the only available alternatives to the traditional handwritten signature. With the continual advancements of electronic

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[71] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999) at pp.202-203. See also Paras.33 - 44 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures 2001, which draws a distinction between electronic signatures relying on techniques other than public key cryptography and electronic signatures that do, namely, digital signatures. The UNCITRAL Model Law on Electronic Signatures 2001 however treats both forms of signatures equally as regards their effects in law.

[72] The software that enables this form of electronic signature can be downloaded from the Internet. See www.onsign.com for example. There is also the possibility of the signature taking the form of a scanned image of a signature into a word processing file, followed by the sending of that document as an electronic mail attachment; see Reed, Chris, *Internet Law – Text & Materials*, (Butterworths Publication, 2000), at pg. 154.

[73] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999) at pg.203.

technology, it shall be of no surprise if other forms of signatures in the electronic form are developed. The question that now confronts us is whether digital signatures and electronic signatures are both recognized as "*signatures*" under the law of Malaysia for the purpose of contract formation.

(3) Whether Digital and Electronic Signatures are Signatures in Law

In order to answer the above question, reference shall first be made to the Interpretation Acts 1948 & 1967 (Act 388). Section 3 of this Act provides that the word "*sign*" includes the making of a mark or the affixing of a thumb-print. This definition is evidently wide and liberal. Although there are no decisions of the Courts in Malaysia that directly ruled on this definition, it is arguable, that from a literal reading of this definition, there is no need for a person to actually write his or her name in order for the same to qualify as signature. Any mark made by this person shall fall within the ambit of this definition. Moreover, this definition does not stipulate the medium on which and by which the signature must be executed. Hence, one may forcefully argue that there is no prohibition against signatures not made on paper and signatures not made by ink or pencil.

Turning to the common law for guidance, it should be noted that the courts have generally given the word "*signature*" a wide interpretation and it seems that what is required is simply some indication on the written document to show that the signor adopts the written document. Under common law, the

signor need not write his / her name. In *Morton v. Copeland*,[74] the Court in England observed that signing did not necessarily mean writing a person's Christian and surname, but any mark that identified it as the act of the party concerned.[75] In *Durrell v. Evans,*[76] which is a decision that concerns the Statute of Fraud 1677, the Court in England (per Blackburn J) was of the opinion that:

> If the name of the party to be charged is printed or written on a document intended to be a memorandum of the contract, either by himself or by his authorized agent, it is his signature whether it is at the beginning or middle or foot of the document.[77]

It was also decided by the Court in England in *Hill v. Hill*[78] that an initial in a rent book was sufficient to constitute a signature. In stretching the definition of "*signature*", it was also suggested by the Court in *Clipper Maritime Ltd v. Shirlstar Container Transport Ltd (The "Anemone")*[79] that where a message was sent by telex, the answerback of the sender of the telex might suffice as a signature.

The use of electronic signature often raises some degree of concern, particularly because the electronic media is often viewed as being impermanent and is open to alternation and fraud. However, the foregoing concern did not seem to trouble the English Court in *Re a Debtor (No. 2021 of 1995)*[80] which stated *obiter dicta* that:

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[74] *Morton v. Copeland* (1855) 16 CB 517
[75] *Morton v. Copeland* (1855) 16 CB 517 at 535.
[76] (1862) H&C 174
[77] (1862) H&C 174 at 191
[78] [1947] 1 All ER 54 at pg. 59.
[79] [1987] 1 Lloyd's Law Report 546 at pg. 556.
[80] *Re a Debtor (No. 2021 of 1995)* [1996] 2 All ER 345

> For example, it is possible to instruct a printing machine to print a signature by electronic signal sent over a network or via a modem. Similarly, it is now possible with standard personal computer equipment and readily available popular word processing software to compose, say, a letter on a computer screen, incorporate within it the author's signature which has been scanned into the computer and is stored in electronic form, and to send the whole document including the signature by fax modem to a remote fax. The fax received at the remote station may well be the only hard copy of the document. It seems to me that such a document has been signed by the author.[81]

From the foregoing discussion, this Thesis concludes that any symbol or mark made electronically would satisfy the requirement of signature in law despite the impermanence of the electronic media and susceptibility of the same to fraud and unauthorized alteration. That is, any symbol or mark made electronically and, which the maker intends to serve as a signature, and which forms part of the electronic contract, [82] is sufficient to satisfy the requirement of signature for the purpose of contract formation. The impermanence of the electronic media and the susceptibility of the same to unauthorized alteration and fraud are no barriers to recognizing an electronic signature as being signature sanctioned by law.

As regards digital signatures, the Parliament of Malaysia was quick to expressly provide that digital signatures shall qualify as signatures in law. In this relation, Section 62(2) of the Digital Signature Act 1997 states:

> Section 62(2)
> Notwithstanding any written law to the contrary-
> (a) a document signed with digital signature in accordance with this Act shall be as legally binding as a document signed with a handwritten signature, an affixed thumb print or any other mark;

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[81] *Re a Debtor (No. 2021 of 1995)* [1996] 2 All ER 345 at pg. 351. The present author has included the underline as emphasis.

[82] This conclusion of course is subject to the law having accepted a contract made electronically as a written contract, in view of the close association between writing and signature. See discussion on writing and the electronic media in the preceding section above in this same Chapter.

(b) a digital signature created in accordance with this Act shall be deemed to be a legally binding signature;
(c) Nothing in this Act shall preclude any symbol from being valid as a signature under any other applicable law.

The above provision erases all doubt that digital signatures are recognized as signatures in law, and that they are in fact as valid as a traditional handwritten signature.[83] Concerning the formation of contract, this provision makes it possible for a contract (that must be signed in order to be enforceable) to be signed using a digital signature.

Although the above provision paves the way for digital signatures to be utilized as an alternative to traditional ink signatures, it must be highlighted that the scope of Section 62(2)(a) of the Digital Signatures Act is limited. That is, this provision is only applicable in respect of digital signatures issued in accordance with the Digital Signatures Act 1997. It has no application whatsoever in respect of electronic signatures or other symbols or marks made electronically but which do not qualify as digital signatures under the Digital Signatures Act 1997.[84]

Moreover, on a literal reading of Section 62(2)(a), the same does not even recognize digital signatures made pursuant to other foreign digital signature statutes. Consequently, the validity of these other forms of electronic signatures remains dependent on the definition as provided under the

[83] Ding, Julian, *E-Commerce: Law & Practice*, (Sweet & Maxwell Asia Publication, 1999) at pg. 236

Interpretation Acts 1948 & 1967 and the common law.[85] This is arguably a serious obstacle to the growth of electronic commerce that must be quickly resolved by the Parliament of Malaysia, although admittedly, the problem is not as serious as the ambiguity in the definition of "*writing*" as discussed in the previous section.

(4) UNCITRAL Model Law on Electronic Commerce 1996 & UNCITRAL Model Law on Electronic Signatures 2001

From the foregoing discussion in the above sub-sections, it can be concluded that the law in Malaysia, as it presently stands, does not dogmatically require signatures to be made in the traditional ink and paper medium. Both the statute law of Malaysia and common law decisions that are binding or highly persuasive in Malaysia allow the use of electronic signatures and digital signatures for the purpose of contract formation. The existing concept of "*signature*" under both the statute law of Malaysia and the common law is not obstructive to the use of both electronic signatures and digital signatures for the purpose of contract formation. Hence, this Thesis does not recommend that the law in this area being expanded or varied.

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[84] Note in particular the words "in accordance with this Act" as used in Section 62(2)(a) and Section 62(2)(b) which effectively exclude the applicability of Section 62 to digital signatures not issued under this specific Act.

[85] Reference must also be made to Section 62(3) of the Digital Signature Act, which provides that nothing in the Act shall preclude any symbol from being valid as a signature under any other applicable law. Arguably, pursuant to this provision, a digital signature issued by a foreign

Nevertheless, much can still be achieved by consolidating the law, for the purpose of promoting clarity and certainty. To promote the use of electronic signatures / digital signatures by the business community, Parliament should enact the necessary provisions to consolidate the existing position under the Interpretation Acts, the Digital Signature Act and the common law. This new provision shall clearly sanction the use of electronic signatures or digital signatures for the purpose of contract formation. This new consolidating provision could be included into the present Contracts Act or, more preferably, into a separate statute altogether that deals with electronic commerce. The consolidation shall also include valuable guidance from the underlying principles of the UNCITRAL Model Law on Electronic Signatures 2001 that gives equal recognition to all signature technologies, regardless of whether the signature is based on public-key cryptography or otherwise.[86]

This new consolidating provision could replicate the form of Section 62(2)(a) of the Digital Signature Act 1997 and Article 7 of the UNCITRAL Model Law on Electronic Commerce 1996. Articles 7(1) and Article 7(3) of the UNCITRAL Model Law on Electronic Commerce 1996 reads as follows:

> Article 7
> (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if: (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

Certification Authority can be used to sign a contract, but the user will have to rely on the Interpretation Acts and common law to argue his case that the contract has been signed.

[86] See Article 3 of the UNCITRAL Model Law on Electronic Signatures 2001.

(3) The provisions of this article do not apply to the following: [...].[87]

Like Paragraph (3) of Article 6 of the UNCITRAL Model Law on Electronic Commerce 1996, Paragraph (3) of Article 7 of the UNCITRAL Model Law on Electronic Commerce allows the legislature to exclude the application of Article 7 to certain classes of contracts. Hence, where for example, Parliament is of the view that a contract of hire-purchase must continue to be signed in the traditional ink and paper medium, this can be provided for under Article 7(3).

Both Section 62(2)(a) of the Digital Signature Act and Article 7 of the UNCITRAL Model Law on Electronic Commerce 1996 do not exclusively deal with the subject of contract formation. For this reason, Parliament would have to modify the wordings of both Section 62(2) and Article 7 appropriately to enable this new provision to exclusively deal with the subject of signature in the process of contract formation. The new consolidating provision would probably read as follows:

Suggested New Provision

(1) Where the law requires a signature of a person for the purpose of contract formation, that requirement is met even if that contract signed with an electronic signature and the contract shall be as valid and enforceable as a contract signed with a handwritten signature, an affixed thumb print or any other mark

(2) An electronic signature may be used for contract formation if it comprises a method and this method: (a) is used to identify that person and to indicate that person's approval of the terms contained in the contract; and (b) is reasonably reliable for the purpose of contract formation.

(3) The expression "*electronic signature*" used herein includes a "*digital signature*" that uses public key cryptography technology. The expression

[87] It must be highlighted that Article 7 (and the UNCITRAL Model Law in general) applies not just to the requirement of signature for the purpose of contract formation but the requirement of signature in data messages generally.

"*digital signature*" as used in this section refers to a digital signature issued pursuant to the Digital Signature Act 1997 or any other statute in force in Malaysia or elsewhere at the time the contract is formed.

(4) This provision does not apply to contracts formed under the requirements of the following statutes:

The above suggested consolidating provision will lay to rest all doubts that electronic signatures and digital signatures can be used for the purpose of satisfying the requirement of signature for the purpose of contract formation. Since the existing law in Malaysia as regards the use of electronic and digital signature is already sufficiently complete for the purpose of contract formation, this Thesis does not recommend the creation of a lengthy legislation that specifically deals with electronic signatures, as is envisaged under the regime of the UNCITRAL Model Law on Electronic Signatures 2001.

Hence, although this Thesis commends the efforts of the UNCITRAL in putting together the UNCITRAL Model Law on Electronic Signatures 2001, and that the principles found therein are sound, this Thesis takes the position that the UNCITRAL Model Law on Electronic Signatures 2001 should not be wholly replicated into the statute laws of Malaysia. The present writer believes that the creation of a lengthy statute dealing with electronic signature (which expression includes a digital signature) will only make the existing Digital Signatures Act 1997 superfluous, hence confusing the public. This Thesis argues the more appropriate strategy will be to promote the use of the existing Digital Signatures Act whilst consolidating the existing legal principles dealing with signatures for the purpose of

contract formation and the electronic media in one short provision to enforce the idea that contracts can be legally made with the use of electronic and digital signatures.

SUMMARY AND ANALYSIS OF THIS CHAPTER

By extending the definition of "*writing*" under the Interpretation Acts 1948 & 1967 to include electronic storage and transmission, the Parliament of Malaysia indicated that it was prepared to recognize a contract made through the Internet or exchange of electronic messages as a contract made or evidenced in writing. Nonetheless, this new definition is inadequate in many respects and the Parliament of Malaysia seemed to have underestimated the complexity of the electronic media. The concept of writing promulgated under Section 64 of the Digital Signature Act is also very limited in its scope to have any far-reaching consequences on the subject. This Thesis recommends that the Parliament of Malaysia enact a general provision in the form of Article 6 of the UNCITRAL Model Law on Electronic Commerce to clearly establish the parameters that must be satisfied in order to qualify as writing for the purpose of contract formation.

As regards the requirement of signature in electronic contract formation, the present definition of "*sign*" under the Interpretation Acts 1948 & 1967 as well as common law decisions all indirectly allow the use of electronic and digital signatures for the purpose of contract formation. Much credit must be given to the Parliament of Malaysia in the recognition it gave to digital signature

under Section 62(2) of the Digital Signature Act 1997. Nonetheless, the Parliament of Malaysia must enact unequivocal provisions to consolidate the existing laws to recognize the use of electronic and digital signatures for the exclusive purpose of contract formation. In this connection, the Parliament of Malaysia could make reference to Section 62(2) of the Digital Signatures Act and Article 7 of the UNCITRAL Model Law on Electronic Commerce 1996 for guidance. Such a consolidating provision shall be beneficial for the promotion of electronic commerce generally in Malaysia. Although Parliament can also seek valuable guidance from the UNCITRAL Model Law on Electronic Signatures 2001, this Thesis argues against replicating this new Model Law to avoid any confusion.

CHAPTER SIX

CONFLICT OF LAWS & CONTRACTS CONCLUDED USING INTERNET AND ELECTRONIC MAILS

INTRODUCTION

In the previous chapters, this Thesis examines the various issues associated with the formation and validity of contracts concluded through the use of the Internet, Electronic Data Interchange (EDI) and the electronic mail where the law governing the contract and the formation thereof is the law of Malaysia. Since the Internet and electronic mail have a global reach, the use of these media to conclude contracts inevitably gives rise to issues concerning the application of foreign law and private international law.[1] Nonetheless, it must be remembered that private international law is itself not the same body of principles in all countries and there is no one uniform system that can claim universal recognition.[2] In this connection, the conflict of law principles referred to in this Chapter are the principles found under the laws of Malaysia.

The conflict of laws principles applicable in Malaysia in turn are almost identical to the principles applicable under English law, save where the principles under English law are derived from international conventions to

[1] In this chapter, the writer shall use the expressions private international law (which is the expression generally used by English lawyers) and conflict of laws (which is the expression generally used by American lawyers) interchangeably and the reader is advised to treat both expressions as synonymous.

[2] North, PM & Fawcett, JJ, *Cheshire & North's Private International Law*, (Butterworths Publication, 1992) (12th Edition), at pg. 9.

which Malaysia is not a party.[3] In respect of conflict of laws principles in connection to the law of contract, the Courts in Malaysia have therefore largely applied the theories and doctrines that have been applied and developed by the English Courts.[4] In the circumstances, this Chapter shall often refer to persuasive decisions emanating from the English Courts as well as influential English legal literature on the subject.

The issue that concerns this Chapter is; what is the law that governs the issues concerning the formation and validity of a contract when the contract in question:

(a) is made through the use of the Internet and electronic mails between two or more parties and where each or more than one of whom are located in different jurisdictions, or where the parties are located within the same jurisdiction but the contract shall be performed in another jurisdiction; and

(b) does not expressly contain a choice of law clause; that is, if the contract is in writing, the text of the contract itself is silent as to the governing law.

It is critical that clear guidelines are available to establish the law that governs the formation and validity of a contract where the parties have failed

[3] One clear example is the Rome Convention that was ratified by the United Kingdom in April 1991. The purpose of this convention is to establish uniform choice of law rules for contractual obligations throughout the European Community. See North, PM & Fawcett, JJ, *Cheshire & North's Private International Law*, (Butterworths Publication, 1992) (12th Edition), at pg. 460.

[4] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999), at pg. 66. See also Hickling, RH & Wu, MA, *Conflict of Laws in Malaysia*, (Butterworths Asia Publication,

or neglected to nominate one expressly. This is so as a contract may be validly formed under the law of a particular state but not properly concluded under the law of another state. In view of the global reach of the Internet and electronic mails, the need for such clear guidelines becomes critical. As this Thesis has discussed in the previous Chapters, the use of the Internet and electronic mails to conclude contracts and to perform the same pose immense challenges to the well-established principles concerning the formation and validity of contracts. It is therefore the purpose of this Chapter to examine if the traditional principles of conflict of laws are still valid as regards contracts made through the use of the Internet and exchange of electronic mails.

CHALLENGES INTRODUCED BY THE ELECTRONIC MEDIA

Many academics have argued that traditional notions of jurisdiction are outdated vis-à-vis the Internet as the same is a world divided not into nations, states and provinces but networks, domains and hosts.[5] The irrelevance of geographic presence in the Internet has been extensively written upon, and the general opinion of these writers is that the Internet cannot be properly regulated by traditional conflict of laws principles.[6] The

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1995) at pp.162-177 that largely adopted the conflict of laws principles under English law when considering the choice of law principles in cases concerning the law of contract.

[5] Burnstein, MR, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 Vanderbilt Journal of Transnational Law 75 at pg. 81.

[6] See for example, Cronin, Michael & Jew, Bernadette, *Government in Cyberspace – What Jurisdiction?*, (1997) available at www.rmmb.co.nz/papers/cybergov.html and Burk, Dan, *Jurisdictions in a World Without Borders*, (Spring 1997) available at http://vjolt.student.virginia.edu and Johnson, David & Post, David, *Law & Borders – The Rise of Law in Cyberspace*, 48 Stanford Law Review (1995 – 1996) pg. 1367.

Internet is said to be so "insensitive to geographical location" that it is impossible to determine the physical location of a resource or user and that all Internet addresses are eminently portable because they are not physical addresses in real space, but are simply logical addresses on the Internet network.[7] For example, it has been highlighted that the Internet web-site www.nz.com was established by a New Zealander living in Boston, United States and that it was maintained from the United States with much of its contents being prepared in New Zealand and then loaded on the server in the United States.[8] Hence, although the Internet web-site address may contain the suffix "*.nz*" that points to New Zealand, the same is not conclusive that the server and / or the owner are likewise located in New Zealand.

To further illustrate, when a buyer who is resident in Malaysia purchases from a seller through the latter's Internet web-site having the address, say, seller@openmarket.uk, he cannot conclude unequivocally that the seller is located in the United Kingdom although the address contains the suffix "*.uk*". In fact the seller could be located anywhere, whether in one jurisdiction or has his business performed in multiple jurisdictions (like the www.nz.com example above) other than the United Kingdom. Similarly, where the contract is made by the exchange of electronic mails from two parties, it cannot be unequivocally concluded that the respective parties are located at

[7] Burk, Dan, *Jurisdictions in a World Without Borders*, (Spring 1997) available at http://vjolt.student.virginia.edu at paragraphs 14 – 16.

the country where their electronic mail domains specify. Using the above example again, it is not certain that a buyer having the "*.my*" suffix at the end of his electronic mail address is actually located in Malaysia, and that a seller having the suffix "*.uk*" is not necessarily located in the United Kingdom at the time when the contract is concluded.

From the above discussion, it can be concluded that the issue at hand is really whether the existing private international law principles that are based on geographical and national boundaries would still be applicable in respect of the Internet in which geographical and national boundaries have no real significance. If traditional conflict of law principles are not effective anymore in the borderless Internet, what alternative principles can the legal community resort to? Or has the complexity of the Internet been exaggerated?

TEST TO FIND THE GOVERNING LAW OF CONTRACT FORMATION

(1) Law Governing Formation and Validity of Contract

The law governing the formation of a contract is that law which would be the proper law of the contract if the contract is validly concluded (that is, the putative proper law of the contract).[9] In the case *Re Bonacina*[10] the Court of Appeal of England had to decide whether a contract to pay that had been

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[8] Cronin, Michael & Jew, Bernadette, *Government in Cyberspace – What Jurisdiction?*, (1997) available at www.rmmb.co.nz/papers/cybergov.html at paragraph 4.4.

[9] *Dicey & Morris on Conflict of Laws*, (Butterworths Publication) (11th Edition, 1987), Volume 2 pg. 1197.

[10] [1912] 2 Ch. 394

concluded in Italy by one Italian national to another constituted a debt provable in an English bankruptcy action despite the same not being supported by consideration, which was not a requirement under Italian contract law relating to formation of contracts. Having concluded that the proper law was the law of Italy, the Court in this case held that the contract was provable in the said bankruptcy proceeding (despite the absence of consideration required by English law) because the contract to pay was validly formed under the law of Italy.

Subsequently, in *Albeko Schuhmaschinen v. Kamborian Shoe Machine Company Ltd*[11] the defendant in England wrote a letter to the plaintiff in Switzerland in which the defendant offered to appoint the plaintiff as its agent in Switzerland. The plaintiff claimed that it accepted the offer and had posted the letter of acceptance in Switzerland but the same was lost in the post. Pursuant to the Postal Rule under English contract law, a contract is concluded when the same is posted even if the letter is lost in post. However, by Swiss law, a contract was only concluded when the letter of acceptance was received by the offeror. The Court, *obiter dicta,* expressed the view that if it could be proved that the letter of acceptance had been posted, there would be still no contract because *if a contract had been concluded*, Swiss law would have been its proper law. This case is a clear

[11] (1961) 111 LJ 519. See also the English Court of Appeal decision in *The Parouth* [1982] 2 Lloyd's Report 98 at pg. 100.

authority for the principle that the law governing the formation of a contract is the putative proper law of the contract.

As regards the issue of governing law and contractual capacity, the learned authors of *Dicey & Morris* was of the opinion that a person's capacity to contract can be looked at as an emanation of his status and therefore as governed by the *lex domicilii*, alternatively, as a factor determining the validity of the contract and hence governed by the proper law of the contract itself. [12] If a person has capacity either by the proper law of the contract *or* by the law of his domicile and the residence, then the contract is valid, so far as contractual capacity is concerned.[13] Hence, in determining what law would govern the capacity to contract, it is inevitable that we shall refer *inter alia* to the proper law of the contract itself.

Case law authorities also point to the proper law as being the law that governs both the formal validity and material validity of a contract. "Formal validity" refers to, for example, the requirement that a contract must be made in writing, or that a contract must be made under deed or sealed. On the other hand, "essential validity" or "material validity" refers to the nature of the contract itself, that is, whether the contract is valid and not for example, a contract for restraint of trade, marriage, wager or restraint of legal

[12] *Dicey & Morris on Conflict of Laws*, (Butterworths Publication) (11th Edition, 1987), Volume 2 pg. 1202. See also Morris, JHC, *The Conflict of Laws*, (Stevens & Sons Publication) (3rd Ed. 1984) at pg. 285.
[13] Morris, JHC, *The Conflict of Laws*, (Stevens & Sons Publication) (3rd Ed. 1984) at pg. 288.

proceedings, all of which are void under Sections 28, 27, 31 and 29 of the Contracts Act 1950 respectively.[14]

The learned authors of *Dicey & Morris* was of the opinion that the formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*) or by the proper law of the contract.[15] Although the use of the *lex loci contractus* can be justified on the grounds that parties must be able to rely on local legal advice when making their contract, now it is generally accepted among English writers that it is sufficient to comply with formalities prescribed by the proper law.[16] The argument for referring to the proper law as the governing law is evidently compelling. To illustrate, let us assume a situation whereby a Malaysian vendor and a Malaysian purchaser of a land located in Malaysia are entering into a sale and purchase agreement for the same whilst they are in Singapore. All factors in respect to the transaction point towards Malaysia. It will be illogical to compel the parties to abide by the provisions of the Statute of Fraud[17] in Singapore as the *lex loci contractus*, just because they are making the contract while they are both in Singapore. The more logical choice would be referring to the law of Malaysia as the proper law of the contract.

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[14] Hickling, RH & Wu, MA, *Conflict of Laws in Malaysia*, (Butterworths Asia Publication, 1995) at pg. 174.
[15] *Dicey & Morris on Conflict of Laws*, (Butterworths Publication) (11th Edition, 1987), Volume 2 pg. 1207.
[16] Morris, JHC, *The Conflict of Laws*, (Stevens & Sons Publication) (3rd Ed. 1984) at pp. 284-285.
[17] The Statute of Fraud has no application in Malaysia, though the same is applicable in Singapore.

In respect of the essential validity of a contract, the same is governed by its proper law. In fact, it has been said that in matters of essential validity, the proper law is omnipotent.[18] Hence all issues pertaining to the validity of a contract of restraint of trade, restraint of marriage, wager or restraint of legal proceedings shall be governed by the proper law of the contract. Where the proper law is the law of Malaysia, a contract of restraint of trade will be void under Section 28 of the Contracts Act although the same contract could be valid under the *lex domicilii*, the *lex loci contractus* or the *lex loci solutionis* if these are not the also the law of Malaysia.

(2) How is the Proper Law of a Contract Ascertained?

The above discussion shows the predominance of the proper law doctrine to establish the law governing the formation and validity of contracts. The courts in Malaysia have largely adopted the same test as the English courts to ascertain the proper law of a contract. In the Malaysian High Court decision *James Capel (Far East) Ltd v. YK Fung Securities Sdn Bhd (Tan Koon Swan, Third Party),*[19] Peh Swee Chin FCJ, following the Privy Council decision of *Bonython v. Commonwealth of Australia*[20] took the view that the proper law of a contract was to be ascertained through the following steps[21]:

(a) If the parties to the contract had stipulated for a governing law of the contract or words giving the same effect, then they had made an express choice of it and the court will give effect to the said

[18] Morris, JHC, *The Conflict of Laws*, (Stevens & Sons Publication) (3rd Ed. 1984) at pg. 291.
[19] [1996] 2 MLJ 97. See also *Hang Lung Bank v. Datuk Tan Kim Chua* [1988] 2 MLJ 367.

express choice.[22] In this case, the expressed governing law is the proper law of the contract;

(b) In the absence of an express choice, the court would have to find next if there was an implied choice which was a system of law by reference to which the contract was made, and such implied choice was to be inferred from the terms or form of contract or surrounding circumstances, for example, the presence of choice of forum clause, the use of terminology or concept peculiar to a particular system of law, the fact that one party to the contract was a government or the fact that both parties to the contract carried on business of live in the same country;[23]

(c) If an implied choice is not so found, then the court adopts the system of law with which the transaction has the closest and most real connection. Examples of these would be (1) the place of performance of the contract, (2) the place where the contract was made, (3) the links of the parties of the contract to any particular countries, (4) the site of the immovable property if such property is involved and (5) the currency in which money under the contract is expressed. In implementing this approach of the closest and most

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[20] [1951] AC 201

[21] [1996] 2 MLJ 97 at pp. 109 - 110

[22] Cases in which the courts applied this first stage of the test include *Greer v. Poole* (1880) 5 QBD 272; *Vita Food Products v. Unus Shipping* [1939] AC 277; *Re Herbert Wagg & Co. Ltd.* [1956] Ch. 323; and *Whitworth Street Estates Ltd. v. James Miller & Partners Ltd.* [1970] AC 583.

[23] Cases in which the courts applied the second stage of the test includes *Compagnie Tunisienne de Navigation SA v. Compagnie d'Armement Maritime SA* [1971] AC 572; *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co.* [1984] AC 50; and *Sayers v. International Drilling Co.* [1971] 1 WLR 1176.

real connection, the best test was the "localization" or "center of gravity" approach in which the law having the closest and most real connection is the law of the country in which factors similar to those mentioned above were most densely grouped, in other words, it was the law of the country where there was a clear preponderance of such factors.[24] The third stage is largely a balancing act to find what would be the proper law.

The first stage of the test arises from the "party autonomy" principle in that parties are free to choose the law governing their contract and that if the choice of law is expressly stated and the intention expressed by the parties therewith is *bona fide,* not contrary to public policy and legal, the courts will give effect to it.[25] On this subject, the Privy Council (per Lord Wright) in *Vita Food Products Inc. v. Unus Shipping Company Ltd*[26] expressed the view that:

> ...where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no avoiding the choice on the ground of public policy.[27]

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[24] Cases in which the courts applied the third stage of the test includes *The Hoogly Mills Co. Ltd. v. Seltron Pte. Ltd* [1995] 1 Singapore Law Report 773; *The Assunzione* [1954] P.150; *Bonython v. Commonwealth of Australia* [1951] AC 201; and *Mount Albert Borough Council v. Australasian etc. Assurance Society Ltd.* [1938] AC 224.

[25] This principle was recently applied by the Malaysian High Court in *Dato' Ho Seng Chuan v. Rabobank Asia Limited* [2002] 4 CLJ 475 at pp. 483-484. It must however be highlighted that this case was more concerned with choice of jurisdiction issue rather than choice of law issue, but the judge, in giving effect to the parties' express choice of law clause, was prepared to rule that the Plaintiff was estopped from invoking the jurisdiction of the Malaysian Courts as the parties had agreed to subscribe to the usage of Singapore laws.

[26] [1939] AC 277

[27] [1939] AC 277 at pg. 290

A more unequivocal statement supporting the principle that parties are entitled to select the governing law of the contract is found in *Whitworth Street Estates Ltd v. James Miller and Partners Ltd*[28] in which the House of Lords (per Lord Reid) observed *obiter dicta* that:

> Parties are entitled to agree what is to be the proper law of their contract..... There has been from time to time suggestions that parties ought not to be so entitled, but in my view there is no doubt that they are entitled to make an agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled.[29]

The second stage of the test is a subjective test of the intention of the parties, although this was not clearly stated in *James Capel (Far East) Ltd v. YK Fung Securities Sdn Bhd (Tan Koon Swan, Third Party).*[30] The subjective quality of the second stage of the test is supported by the decision of the English Court in *Jacobs v. Credit Lyonnais*[31] in which Bowen LJ expressed the view that:-

> ...the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties.[32]

The learned authors of *Dicey & Morris* also support the view that the second stage of the test is a subjective one, in view of Sub-Rule 2 of Rule 180 found in this oft-cited publication that reads:

> When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.[33]

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[28] [1970] AC 583
[29] [1970] AC 583 at pg. 603.
[30] [1996] 2 MLJ 97 at pg. 110
[31] (1884) 12 QBD 589
[32] (1884) 12 QBD 589 at pg. 601. The present writer has included the underlines for emphasis.
[33] *Dicey & Morris on Conflict of Laws*, (Butterworths Publication) (11th Edition, 1987), Volume 2 at pg. 1182. The present writer has included the underlines for emphasis.

In contrast to the second stage of the test, the third stage of the test, which concerns the finding of a system of law having the closest and most real connection to the transaction, is an objective test. Again, although not clearly stated in *James Capel (Far East) Ltd v. YK Fung Securities Sdn Bhd (Tan Koon Swan, Third Party)*[34] the objective quality of this stage of the test is supported by a train of persuasive Commonwealth authorities. In *Mount Albert Borough Council v. Australasian etc. Assurance Society Ltd*[35] it was stated that in the absence of an express or implied selection of the proper law:

> The court has to impute an intention or to determine for the parties what is the proper law, which as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract.[36]

The objective quality of the third stage of the test is also supported by the speech of the Court of Appeal of England (per Willmer J) in *The Assunzione*[37] in which it was stated that the task of the court was to ascertain what intention:-

> ...ordinary, reasonable and sensible businessmen would have been likely to have had if their minds had been directed to the question .[38]

One inherent advantage of the above three tests is that they collectively allow the court to look at the whole factual matrix of the case to ascertain the proper law of a contract. The court can look at all aspects that may have a

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[34] [1996] 2 MLJ 97 at pg. 110
[35] [1938] AC 224
[36] [1938] AC 224 at pg. 240. The present writer has included the underlines for emphasis.
[37] [1953] 1 WLR 929
[38] [1953] 1 WLR 929 at pg. 939. The present writer has included the underlines for emphasis.

bearing on what the proper law would be; from the express intention of the parties, then to both the objective and intention of the parties concerned. The court's discretion is not restricted in any manner whatsoever. In particular, the court's consideration is not limited to any geographic or national boundaries.

It is noteworthy that English judges have consistently declined to tie themselves down by any narrow rule for determining the proper law of a contract, and they have always considered a wide variety of circumstances, such as the nature of the contract, the customs of business, the place where the contract is made or is to be performed, and the like.[39] In short, the above three-stage test is a versatile test that allows the courts immense flexibility to examine all relevant indications in the quest to determine what the governing law of a contract is. This flexibility and broad range of the proper law doctrine makes it the ideal tool for determining the governing law of a contract made through the Internet or exchange of electronic mails.

(3) Advantages of Using the Proper Law Test and the Internet

The English doctrine of the proper law (or the putative proper law) is perhaps one of the most important contributions made by English lawyers to the general science of the conflict of laws.[40] The use of the putative proper law

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[39] *Dicey & Morris on Conflict of Laws*, (Butterworths Publication) (11th Edition, 1987), Volume 2 pp. 1164 – 1165

[40] Morris, JHC, *The Conflict of Laws*, (Stevens & Sons Publication) (3rd Ed. 1984) at pg. 281.

or the proper law doctrine to ascertain the law governing the formation and validity of a contract has a number of distinct advantages.

First and most importantly, the fact that the law that governs the formation or validity of a contract can be the putative proper law or the proper law of the contract means that the courts' discretions are not restricted to just having to determine where the contract was made or where it was performed as would be the case if the governing law is the *lex loci contractus* and the *lex loci solutionis* respectively. Under the proper law doctrine, the place where the contract was made and the place where it was performed are only some of the factors that the court would have to take into account. Their significance is hence largely diluted by the need to consider the weight of other factors. The inability to determine or determine accurately the place where the contract was performed or was made is consequently not fatal in ascertaining the governing law.

Second, the proper law doctrine provides an all-embracing formula into which all types of contracts can be fitted.[41] The proper law doctrine is independent of the type of contracts that are being considered. Case law authorities have shown that this doctrine has been applied to determine the governing law in respect of charter parties and contract of carriage,[42]

[41] Morris, JHC, *The Conflict of Laws*, (Stevens & Sons Publication) (3rd Ed. 1984) at pg. 281.
[42] See for example, *The Industrie* [1894] P.58 and *Chartered Mercantile Bank of India v. Netherlands Company* (1883) 10 QBD 521.

contract of insurance,[43] contract of employment[44] and a contract of monetary loan.[45]

On the basis of the foregoing, this Thesis concludes that the proper law doctrine can be successfully utilized to ascertain the governing law of contracts made through the use of the Internet or electronic mails and the law governing the formation of which. The irrelevance or absence of geographic presence in the Internet does not preclude the use of the proper law doctrine. In fact, the insensitivity of the Internet to geographic boundaries makes the proper law doctrine the most ideal private international law doctrine to determine the governing law of a contract made through this medium, especially if the parties have failed or neglected to choose one expressly. As the proper law doctrine can be applied to all types of contracts, it is also well suited to contracts made through the use of the Internet, in view of the large variety of contracts that are being made through this medium.

Despite these overwhelming advantages of the proper law doctrine in respect of contracts made through the Internet, it is noteworthy that there remains wide support for departing from traditional conflict of laws principles when it comes to the Internet. These supporters, both local and abroad, have seemingly ignored the advantages of the proper law doctrine and have

[43] See for example, *Amin Rasheed Shipping Corporation v. Kuwait Insurance Company* [1984] AC 50 and *Greer v. Poole* (1880) 5 QBD 272.

relied on the insensitivity of the Internet to geographical location as the basis to argue that alternative methods be adopted to resolve any choice of law issue that may arise through the use of the Internet. This Chapter shall discuss the merits (if any) of their arguments in the section hereunder.

ARGUMENTS FOR CHANGE

(1) Basis for the Arguments

Although Mr. Julian Ding in a recent local publication is of the opinion that we would see no change in the method of determining the proper law of a contract even when the contract is made electronically, he is nonetheless of the view that rules for determining the choice of law through the use of the implied or inferred choices may be inappropriate in view of the virtual presence in multiple countries which an Internet trading has by reason of being on the Internet.[46] Writing on the law of Malaysia, he went on to argue very extensively as follows:[47]

> In examining and analyzing this question, reference is made to the following examples:
> Illustration A
> If a supplier and the developer of software which are located in the United States and in Australia respectively create a web site and house the site in a server located in Germany. Customer A, a Malaysian company, accesses the web site and decides to order the software, which is done by the following procedures set out in the web-site. Payment of the price in US Dollars, and is done by way of a Malaysian credit card. Assuming there is no agreement which customer A accepts, what would be the proper law of the transaction?
> Illustration B
> Suppose then that customer A, a Malaysian company, requested the same supplier to perform certain customization of the software for a particular purpose, and the customization took place in the state of Washington, US and in England by two teams

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[44] See for example, *Sayers v. International Drilling Company* [1971] 1 WLR 1176.
[45] *Re Herbert Wagg & Co. Ltd* [1956] Ch. 323.
[46] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999), at pg. 72.
[47] Though lengthy, this Thesis has decided to quote the passage in full as this Thesis finds it is essential to deal with Mr. Julian Ding's learned arguments in full.

of different employees of the supplier. Payment is in US Dollars and Pound Sterling to these two separate development houses. However, customer A has a greater interaction in this case, whereby he contacts both development sites in England and the US and provides further details of his requirement. Again, there is no formal contract signed. In such a case, what would be the proper law of the contract?

In both scenarios, since there is no formal agreement, there is therefore no express choice of law clause which the court may utilize to determining the parties' rights and liabilities. As pointed out earlier, even in E-Commerce, an express choice of law clause would be applicable and would govern the parties' agreement, subject, however, to the limiting factors that the selection must be bona fide and for a legal purpose.

If there is no agreement as to the applicable law, or there is no express selection by the parties of the proper law, would the court be able to determine what the implied choice of the parties is? In illustration A, the relevant circumstances would be: the contracting parties are nationals of the United States and Malaysia respectively; the currency for payment is US Dollars, but the point of access was in Germany since the contract was made arguably in Germany. Which country's system of laws would govern? In all likelihood, a case may be made out for three possible countries' systems od law, namely, that of the state of Washington, United States on the basis that that state is where the contract will be performed; that of Germany on the basis that that is where the server was located and probably where the contract was made; or that of Malaysia on the basis of it being the lex fori. However, to argue that the laws of the state of Washington would be applicable would not be without merit as it appears from the illustration that it is possible that the state of Washington may point to what the parties intended. Equally convincing would be the argument that the location of the server is where the proper law should be, ie the law of Germany, since the point of access and interaction, was all done in Germany or at least between Germany and Malaysia. The position is made even more difficult in illustration B, since not only is there the same issues as in illustration A, but there is greater interactivity between customer A and the development areas which would create even greater difficulties. All these tend to show that there may be no dominant countries' system of law where the factors point to.

What is patently obvious is that the implied choice formula would not produce a result and this means that the court will seek to determine the parties' inferred choice. The inferred choice enables the court to act objectively to determine the system of law of the country which is in the opinion of the court, has the closest and most real connection to the transaction.

Referring to illustration A, the country which has the closest and most real connection to the transaction would arguably be the state of Washington, US since it is that country where the supplier resides. It is from that state that the product is sent, albeit electronically, via the server housed in Germany. However, if the case law as developed by the US courts are referred to, it is probable that where a commercial arrangement is concluded, the governing law of the contract could be the law of Malaysia since it may be considered that the supplier by having a virtual presence would be deemed to be carrying on a business in Malaysia.

The situation for illustration B is not quite the same. Where is the country which has the closest and most real connection to the transaction? Is it the state of Washington, England, Germany or Malaysia? The difficulty is compounded by the fact that the available choice is not just between 2 jurisdictions but between 4 jurisdictions. The applicable principles appear to break down and it becomes difficult to ascertain which country's law is the proper law pf the contract. It is also equally possible that a court may decide that no particular country's law is the proper law in illustration B. What these two illustrations clearly demonstrate is that if no express selection of the proper law is made, then the other existing rules for ascertaining the proper law of a contract

> may not be sufficient to produce a result, since these rules may not provide the court with the ability to ascertain the proper law of the contract.[48]

The thrust of the Mr. Julian Ding's argument is that a contract made through the use of the Internet simply contains too many points of contacts, and that if there is no express selection of the proper law, the existing rules of finding the implied choice and the inferred choice would not be sufficient to produce a result. Mr. Julian Ding's opinion is that the existing conflict of laws rules would break down, as the choice would be from more than two jurisdictions. The accuracy of this last opinion is however doubtful. As this Thesis will argue in the section hereunder, the existing proper law doctrine had been used in a situation in which the choice is from more than two jurisdictions.

Mr. Ding is not alone in expressing the view that traditional conflict of law principles for the determining of the proper law of a contract are inadequate in respect of a contract made through the Internet with contact points in multiple jurisdictions. Writing on the law of the United States, an author noted that:

> Thus, if the dispute arises over the formation of contract, presumably the law of the nation in which the contract was made would apply. Likewise, if the dispute is performance related, the applicable law is that where performance was to occur. The obvious fallacy with Section 188 [of the Second Restatement]'s method for choosing law for contractual disputes is in its continual reference to the "place" and "location" of certain events. This Note demonstrates that cyberspace confounds notions of space and locations. Relying on the place of contracting, the place of performance, and similar factors leads to the inevitable conclusions that place or location mean little or nothing when it comes to cyberspace contracts.[49]

[48] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999), at pp. 73-74. The present writer has included the underlines for emphasis.

Earlier, the same author had expressed the view that:-

> Like any human endeavor, the Internet presents seemingly endless legal issues. The law has not yet met this technology with a coherent doctrine that takes into account the transnational dimensions of global computer networks. Traditional notions of jurisdiction are outdated in a world divided not into nations, states, and provinces but networks, domains, and hosts. Cyberspace confounds the conventional law of territorial jurisdiction and national borders. In cyberspace, it does not matter at all whether a site lies in one country or another because the networked world is not organized in such a fashion. Remote log on, telnet, gopher, and the World Wide Web all render political borders obsolete, to some extent.[50]

The above reservation about the ability of traditional conflict of laws principles to determine the governing law in respect of issues arising from the use of the Internet generally is repeated by another author, also writing on the law of United States:

> The traditional models of choice of law doctrine are all tied to land, to place, to some geographical location. In Cyberspace one can send a message to any physical location in any physical jurisdiction without any distance-based degradation or delay. Traveling or "surfing" the Internet, a user does not get cues that they have crossed a national border, or some other geographical line on the map. The Internet "enables simultaneous transactions between large numbers of people who do not know, and in many cases cannot know, the physical location of another party." In Cyberspace, one is nowhere and everywhere all at the same time. Because of these characteristics the traditional choice of law doctrines fall short of answering the question of what law to apply. Existing Doctrines fall short because they are all tied to land and geographical locations while Cyberspace is not tied to a geographical location.[51]

The arguments of these American authors are again centered upon the premise that since the Internet is not structured according to traditional geographical boundaries any attempt to use the traditional choice of law principles that are developed along the notion of geographical boundaries to

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[49] Burnstein, Matthew, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, Vol 29 Vanderbilt Journal of Transnational Law (1996) 75 at pg. 95. The present writer has included the underlines for emphasis.

[50] Burnstein, Matthew, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, Vol 29 Vanderbilt Journal of Transnational Law (1996) 75 at pp. 81-82. The present writer has included the underlines for emphasis.

determine the governing law of a contract made through the Internet would be unsatisfactory. To circumvent the apparent unsatisfactory formulae of the existing conflict of laws doctrine, these authors have proposed a number of alternative approaches. These alternative approaches are discussed hereunder.

SUGGESTED ALTERNATIVE APPROACHES

(1) Resorting to *Lex Mercatoria*

The legal issues arising from the use of the Internet have inspired many authors to refer to the medieval *Lex Mercatoria* - the Law Merchant - as a conceptual framework for a new body of cyber-law. [52] The *Lex Mercatoria,* as a separate and distinct body of trade law, is an attractive alternative as it precludes the need to enquire into the choice of law, and the attendant balancing and weighing of interests.[53] Under this alternative approach, all legal issues arising from the Cyberspace shall be resolved according to the new Cyberspace *Lex Mercatoria*, regardless where the issues might have emanated from, and the number of potential jurisdictions that are involved. The attractiveness of resorting to the *Lex Mercatoria* cannot be easily

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[51] Hicks, Bill, *Choice of Law Issues in Cyberspace*, available in www.law.ttu.edu/cyberspc/jour13.htm#N_36. The present writer has included the underlines for emphasis.

[52] Burnstein, Matthew, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, Vol 29 Vanderbilt Journal of Transnational Law (1996) 75 at pg. 108. See also de Zylva & Harrison, *International Commercial Arbitration – Developing Rules for the New Millennium* (Jordans Publication, 2000) at pg.155 in which the authors argued for a market based solution to the conflict of laws problems in the Internet based on the principles of *Lex Mercatoria*. .

[53] Burnstein, Matthew, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, Vol 29 Vanderbilt Journal of Transnational Law (1996) 75 at pg. 109.

ignored and it is by far the most frequent alternative approach advocated by legal academics.

The *Lex Mercatoria* has been loosely described as a collection of customary trade practices among traveling merchants in Medieval Europe and Asia that was enforceable in all commercial countries of the then civilized world; it was an international body of trade law that was founded on the shared legal understandings of an international community composed principally of commercial, shipping, insurance and banking enterprises of all countries.[54] *Lex Mercatoria* was envisaged as a system of law that did not rest exclusively on the institutions and local customs of any particular country but consisted of certain common principles of equity and usages of trade which general convenience and a common sense of justice had established to regulate the dealings of merchants and mariners in all commercial countries of the civilized world.[55] Drawing inspiration from the *Lex Mercatoria* of the Middle Ages, an article published in 1998 in the United States argued that:

> During the middle ages, itinerant merchants traveling across Europe to trade fairs, markets, and sea-ports needed common ground rules to create trust and confidence for robust international trade. The differences among local, feudal, royal and ecclesiastical law provided a significant degree of uncertainty and difficulty for merchants. Custom and practices evolved into a distinct body of law known as the "Lex Mercatoria" which was independent of local sovereign rules and assured commercial participants of basic fairness in their relationships.
> In the era of networks and communications technologies, participants traveling on information infrastructures confront an unstable and uncertain environment of multiple governing laws, changing national rules and conflicting regulations. For the information infrastructure, default ground rules are just as essential for participants

[54] Burnstein, Matthew, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, Vol 29 Vanderbilt Journal of Transnational Law (1996) 75 at pp. 108-109.
[55] Trakman, Leon, *The Law Merchant: The Evolution of Commercial Law*, (Fred B. Rothman & Co. Publications, 1983) at pp. 11-12.

in the Information Society as Lex Mercatoria was to merchants hundreds of years ago.[56]

In an earlier publication in 1996, also from the United States, it was forcefully argued that:-

> Perhaps the most apt analogy to the rise of a separate law of Cyberspace is the origin of the Law Merchant – a distinct set of rules that developed with the new, rapid boundary crossing trade of the Middle Ages. Merchants could not resolve their disputes by taking them to the local noble, whose established feudal law mainly concerns land claims. Nor could the local lords easily establish meaningful rules for a sphere of activity that he barely understood and that was executed in locations beyond his control. The result of this jurisdictional confusion was the development of a new legal system – *Lex Mercatoria*. The people who cared most about and best understood their new creation formed and championed this new law, which did not destroy or replace existing law regarding more territorially based transactions (eg transferring land ownership). Arguably, exactly the same type of phenomenon is developing in Cyberspace right now.[57]

Having concluded that electronic commerce resulted in the dramatic reduction of time and space that could quickly bring so many different people and jurisdictions together in legal interaction, the learned authors of a recent publication commenting principally on the law of Canada proposed a return to the use of the *Lex Mercatoria*.[58] They argued:-

> The Law Merchant didn't spring from a statute or a nation's rule; it existed apart from the law of the city hosting a trade fair. Its "courts" were composed of merchants themselves. Since time is money, it promised speedy resolution of disputes. Because its rules emerged from trade custom its judgments were practical and flexible. While its courts eventually disappeared, the Law Merchant, in reverse osmosis, gradually became part of English common law.
> Today speed, frequently changing commercial parties, and interaction over vast distances crossing national boundaries and time zones are characteristics of commerce in cyberspace. Speedy, predictable, inexpensive, fair, and enforceable resolution of disputes is increasingly needed. Do online discussion groups and their "netiquette" provide the basics for "a cyber small claims court"?[59]

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[56] Reidenberg, Joel, *Lex Informatica: The Formulation of Policy Rules Through Technology*, Volume 76 Texas Law Review (1998) 553 at pp. 553 – 554. The present writer has included the underlines as emphasis.

[57] Johnson, David & Post, David, *Law and Borders – The Rise of Law in Cyberspace*, Volume 48, Stanford Law Review (1995-1996) 1367 at pp. 1389 – 1390. The present writer has included the underlines as emphasis.

[58] Johnston, D., Handa, S., Morgan, C., *Cyber Law*, (Pelanduk Publications, 1998), at pg. 235

[59] Johnston, D., Handa, S., Morgan, C., *Cyber Law*, (Pelanduk Publications, 1998), at pp. 237-238. The present writer has included the underlines as emphasis.

The present writer will summarize the forceful arguments of the above authors as follows:

(a) The Internet gives rise to the dramatic reduction of time and space and could quickly bring so many different people and jurisdictions together in legal interaction. This complicates the traditional conflict of laws principles which according to the majority of the above authors, are unsuitably developed to be applied to the Internet;

(b) Like the present users of the Internet, the merchants of Europe in the Middle Ages also traveled trough many jurisdictions;

(c) The custom and practices of these merchants evolved into a body of law known as the "*Lex Mercatoria*" that was distinct and separate from the law of the states in which they traded;

(d) The *Lex Mercatoria* provided a common framework for these merchants from many countries, and provided a speedy and practical dispute resolution mechanism for these merchants; and

(e) To circumvent the alleged unsuitability of the traditional conflict of laws doctrines in the Internet, these authors argued that a new body of law, like the old *Lex Mercatoria,* is being developed or ought to be developed to regulate the conduct of parties utilizing the Internet as a medium for commercial activities. Various authors have attributed different names to

this new body of law; for example, *Lex Networkia,*[60] and *Lex Informatica.*[61]

Unfortunately, the *Lex Mercatoria* is not without its weaknesses. Despite the immense appeal of resorting to a Cyberspace *Lex Mercatoria*, none of the authors who advocated the same have sufficiently explained the exact scope of this new Cyberspace *Lex Mercatoria*. For example, none of the advocates of this approach have adequately explained critical issues such as, (i) when the Cyberspace *Lex Mercatoria* shall come into play, (ii) whether it applies to third parties who are remotely connected to the Cyberspace transaction, (iii) how will the Cyberspace *Lex Mercatoria* co-exist and interact with traditional national laws and (iv) most importantly, what exactly are the principles of this Cyberspace *Lex Mercatoria*? Without a precise description of the ambit of the Cyberspace *Lex Mercatoria*, and how and when it shall be applied, it is hereby submitted that any application of the same will lead to more confusion, disputes and uncertainty. For these reasons, this Thesis concludes that the Cyberspace *Lex Mercatoria* is simply a radical alternative approach that unfortunately seems to have attracted relatively large support from academics.

Moreover, the *Lex Mercatoria* of the Middle Ages from which the proponents of Cyberspace *Lex Mercatoria* draw so much inspiration was far from being a

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[60] This is the expression adopted by Edward J. Valauskas in his article *Lex Networkia: Understanding the Internet Community,* available at www.firstmonday.dk/issues/issues4/valauskas.

satisfactory body of law. First and foremost, it was doubtful if the medieval *Lex Mercatoria* could stand on its own without any resort to local laws. It was observed that:

> However, there was still a definite need for law. The diversity of international commerce diminished the self-regulating capacity of a merchant regime. Merchants were not a homogeneous group. They emanated from different localities, spoke different languages and were motivated by different cultures. European traders would not invariably understand one another. Nor was there an automatic inference of trust *inter se*. Geographic distances inhibited direct communication channels. Medieval merchants found it necessary to transact through third part agents - carriers and selling and buying agents. As a result, the plurality of local customs introduced confusion into transactions; they gave rise to hostility towards foreign customs and they ultimately led to mercantile confrontation.[62]

The inability of the *Lex Mercatoria* to stand on its own without any reference to local laws, immediately give rise to the question: which local law shall be applicable? To date, none of the advocates of the Cyberspace *Lex Mercatoria* have been able to provide any convincing answer for this question. The reality is that, the advocates of the new Cyberspace *Lex Mercatoria* are not likely to be able to satisfy the legal community and the public that the Cyberspace *Lex Mercatoria* (unlike the medieval *Lex Mercatoria*) is a complete body of law that can stand on its own without the need to refer to local laws.

Second, the medieval *Lex Mercatoria* is an imprecise body of law and its status as a set of legal rules or principles has been seriously doubted. The

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[61] This is the expression used by Joel Reidenberg in his article, *Lex Informatica: The Formulation of Policy Rules Through Technology*, Volume 76 Texas Law Review (1998) 553.

[62] Trakman, Leon, *The Law Merchant: The Evolution of Commercial Law*, (Fred B. Rothman & Co. Publications, 1983) at pp. 10-11. The present writer has included the underlines as emphasis.

exact scope and contents of the medieval *Lex Mercatoria* are subjects of debate and a learned author has noted the following:-

> What does the lex mercatoria offer that the application of common sense rules does not offer? Is common sense a rule of law just because it should be employed in determining legal disputes? Is reason such a rule for just the same reason? I would assert that the exercise suffers from the fallacy of artificial precision.
> The lex mercatoria is not at all a precise body of law or principles, with clearly definable limits and parameters. It is impossible to conceive of a draftsman inserting a reference to lex mercatoria in an agreement with any sense of confidence that the reference will cover anything more than the very essential rules of reason. Those rules would have been covered even without the reference to lex mercatoria. How can parties not deal in good faith? How can any party to an arbitration plead incapacity to enter into an agreement into which it has entered? How can any party come in with unclean hands? How can any party who is in default claim non-performance by the other? These are not rules and they are hardly even principles. They are fundamental precepts of common sense that would seem to be implied as part of the psychological and juridical attitude and status of any arbitrator, judge or magistrate. To endow them with a precision beyond their competence or scope is to suggest that they form or comprise a separate legal system that is in the process of growing and to which reference may be made.
> In conclusion, when looked at from the viewpoint of drafting or contract formation, the lex mercatoria is only *principia mercatoria* at best. These principia are not even available to the parties in a functional sense, in a way that, for example, certain rules of law can serve as guides to conduct in the course of performance of a contract....I would suggest they are a quasi-legal recognition of rules of common sense, equity, and reasonableness that would probably have been suggested, and used, even in the absence of any reference of thought of a lex mercatoria.[63]

In summary, the advocates of the new Cyberspace *Lex Mercatoria* shall have to satisfy the legal community and the general public that the same is a precise body of legal principles that is void of any ambiguity as to its contents. Again, hitherto, none of the advocates of the new Cyberspace *Lex Mercatoria* have been forthcoming with supporting argument in this respect.

Third, the medieval *Lex Mercatoria* was an unsatisfactory body of principles and this is evident from the discontinuance of its use. The proponents of the Cyberspace *Lex Mercatoria* have failed to highlight that the *Lex Mercatoria*

of the Middle Ages faced immense challenge arising from the diversity of international trade, leading to its diminishing importance and demise at the end of the Middle Ages period in Europe. It has been written that:

> Despite the apparent strengths of the Law Merchant, its unbroken continuity span as a universal institution for the regulation of trade was challenged at times. The aspirations underlying the Law Merchant – its striving towards uniformity of law – could not always be attained. Exceptions, distinctions and qualifications were inevitable. Uniformity of law, a realistic ideal for the development of a single merchant regime, was not always capable of growing into a reality in the world environment. Diversity in merchant practice – differences in trade and adjudicative values- were all inevitable by-products of the growing complexity of trade across ever widening regional boundaries..... Merchants with indigenous backgrounds did not always adopt the same trade practices as foreign merchants, owing to variations in their ethnic, linguistic and cultural dispositions. .....
> Consequently, even at the height of the Law Merchant era, variations appeared in procedures, in rules and in attitudes among merchant courts. Inconsistent customs among merchants themselves – and their conflicting values – led to the fragmentation of legal rules and attitudes among the merchant courts....
> The most fundamental concepts of the Law Merchant were therefore not always applied with consistency within different merchant courts. The universality of the Law Merchant succumbed to principles of law peculiar to domestic courts and legal systems...
> The consequence of these variations in the Law Merchant was a growing mistrust of the Law Merchant itself. For both merchant customs and merchant laws were now subject to adjudicative scrutiny and to juridical variation....
> In post medieval times, the Law Merchant was not ideally equipped to avoid the socio-economic threats to its foundation as a dynamic legal system. The increased complexity associated with trans-regional trade caused an increased proliferation of the laws regulating merchants. Cultural diversities grew more prevalent in the post-medieval era as societies evolved into nation states, thereby undermining the uniformity of the Law Merchant even further.....As a result the uniformity, the consistency and unimpeded continuity of the Law Merchant as a single system of law came into some question in post-medieval Europe[64].

In summary, the *Lex Mercatoria* of Middle Ages Europe diminished in importance in view of the growing complexity of inter-regional trade and the immense cultural diversity of the merchants themselves. As the use of the Internet spans the globe and the users of the same come from diverse linguistic, cultural and legal environments, this Thesis argues that the

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[63] Highet, Keith, *The Enigma of the Lex Mercatoria*, Volume 63 Tulane Law Review (1989), 613 at pp. 627 – 628. The present writer has included the underlines for emphasis.
[64] Trakman, Leon, *The Law Merchant: The Evolution of Commercial Law*, (Fred B. Rothman & Co. Publications, 1983) at pp. 18 – 21. The present writer has included the underlines for emphasis.

proposed Cyberspace *Lex Mercatoria* will not fare any better than the *Lex Mercatoria* of Middle Ages Europe. Compounded by the fact that the *Lex Mercatoria* is an imprecise body of trade principles with dubious capacity to exist on its own, it is unlikely that the Cyberspace *Lex Mercatoria* will be a good substitute or alternative for traditional conflict of laws doctrines. Unless the proponents of the new Cyberspace *Lex Mercatoria* are able to counter the three weaknesses discussed above, the new Cyberspace *Lex Mercatoria* shall continue to be viewed as a radical solution detached from the reality of Internet based commerce.[65]

(2) Reference to the UNIDROIT Principles of International Commercial Contracts.

The second alternative approach suggested is remotely related to the above approach of referring to a Cyberspace *Lex Mercatoria*. It has been argued by a local author of a recent publication on electronic commerce that:

> If the third test for determining the proper law of a contract, namely what is the inferred choice of law of the parties determined with reference to the country whose system of law has the closest and most real connection with the transaction, does not provide the result as to the selection of a system of law or in fact no one system of law can be held to have the closest and most real connection with the transaction, then the parties must be presumed to have intended that their agreement is to be binding on them, and that the parties intend that general principles of law would govern the transaction.

[65] This Thesis of course does not suggest that the *Lex Mercatoria* of Medieval Europe was absolutely irrelevant even in the old days. It has been noted that many of the principles found under English common law originated from the medieval *Lex Mercatoria*; see Tudsbery FCT, *Law Merchant and the Common Law*, Volume 34 (1918) Law Quarterly Review 392. This Thesis however takes the position that the existing proper law doctrine is flexible enough to deal with an Internet based choice of law problem, and that the proper law doctrine is more definitive as compared to the *Lex Mercatoria*.

> These general principles of law which are to govern the transaction, would in my opinion be the legal rules as set out in the UNIDROIT Principles on the basis that these Principles are recognized as *lex mercatoria*.[66]

The rationale of the above author's argument is that if the three stage test to ascertain the proper law of the contract fails to produce a definite result, the parties would be presumed to have intended to be bound by the general principles of contract law set forth in the UNIDROIT Principles of International Commercial Contracts ("the UNIDROIT Principles" hereinafter). What the author proposes is not an abrogation of the traditional proper law doctrine in respect of contracts made through the Internet or other electronic media. Instead, the author proposes that the three stage test of finding the proper law is extended to include a fourth stage where the parties will be presumed to have agreed to have their contract governed by the UNIDROIT Principles.

The UNIDROIT Principles, published in 1994, is a body of contract principles that are intended to enunciate contractual rules that are common to most of the existing legal systems, and which are best adapted to the special requirements of international trade.[67] The UNIDROIT Principles are a re-statement of the law of international commercial contracts in

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[66] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999), at pg. 77. The present writer has included the underlines for emphasis.

[67] Bonell, Michael, *The UNIDROIT Principles of International Commercial Contracts – Nature, Purposes and First Experiences in Practice*, available at www.unidroit.org/english/principles/pr-exper.htm at section II(2).

general.[68]Admittedly, referring to the UNIDROIT Principles is more concrete as compared to referring to the new Cyberspace *Lex Mercatoria* above. Firstly, the UNIDROIT Principles were prepared under the auspices of the UNIDROIT with special attention to the unique requirements of international trade,[69] in particular with regards to problems arising from conflict of laws.[70]Secondly, unlike the *Lex Mercatoria*, the scope and contents of the UNIDROIT Principles are clear and have been expressed in writing.

The UNIDROIT Principles are divided into seven chapters. Chapter 1 deals with "General Provisions"; Chapter 2 deals with issues concerning the formation of contracts; Chapter 3 deals with validity of contracts; Chapter 4 deals with interpretation of terms; Chapter 5 deals with the content; Chapter 6 with the performance of the contracts and Chapter 7 with the non-performance of contracts. The UNIDROIT Principles are not confined to contracts made in any particular form or medium, so there is no restriction that these principles could not be applied to a contract made through the use of the Internet or exchange of electronic mails.

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[68] Bonell, Michael, *The UNIDROIT Principles of International Commercial Contracts – Nature, Purposes and First Experiences in Practice*, available at www.unidroit.org/english/principles/pr-exper.htm at section II(1).
[69] Bonell, Michael, *The UNIDROIT Principles of International Commercial Contracts – Nature, Purposes and First Experiences in Practice*, available at www.unidroit.org/english/principles/pr-exper.htm at section II(2).
[70] Bonell, Michael, *The UNIDROIT Principles of International Commercial Contracts – Nature, Purposes and First Experiences in Practice*, available at www.unidroit.org/english/principles/pr-exper.htm at section I.

Despite the above stated appeals and advantages of the UNIDROIT Principles, the successful application of the UNIDROIT Principles as an alternative to traditional conflict of laws principles can be challenged on two grounds. First, the UNIDROIT Principles, being specific restatement of the law of contract for international trade, will only act as the "governing law" of any contract if the parties to the same have so agreed to the application of these principles. This is reflected in the preamble (second paragraph) of the UNIDROIT Principles which states:-

> They (the UNIDROIT Principles) shall be applied when the parties have agreed that their contract be governed by them.

Further, from the preambles of the UNIDROIT Principles, the agreement to have the contract governed by these principles must be stated expressly.[71] The present writer submits that in the absence of any express incorporation of the UNIDROIT Principles into the contract in question, it is highly unlikely that any court of law or arbitration panel will refer to these principles. Moreover, in the event the UNIDROIT Principles are expressly incorporated into or referred to in the contract, there will not have been any conflict of laws issues. Hence, any suggestion that the UNIDROIT Principles can function as the fourth stage test to determine the proper law of a contract is misguided as this suggestion is contrary to the fundamental principle on the applicability of the UNIDROIT Principles.

[71] Paragraph 4(a), Preamble to the UNIDROIT Principles of International Commercial Contracts.

Admittedly, the preamble (third paragraph) of the UNIDROIT Principles also states that these principles may be applied when the parties have agreed that their contract be governed by "general principles of law", the *Lex Mercatoria* or the like. As we are concerned about a situation whereby the parties to the contract have failed or neglected to state the governing law *altogether*, the usefulness of this preamble to qualify the UNIDROIT Principles as the fourth stage test to ascertain the proper law is severely limited.

Secondly, the UNIDROIT Principles, as admitted by the Chairman of the Working Group for the preparation of the UNIDROIT Principles, do not represent a complete body of contract law and is not a fully developed and self-sufficient legal system.[72] In fact it is recommended that parties who wish to choose the UNIDROIT Principles as the *lex contractus* should also indicate a domestic law applicable to questions not covered by the Principles.[73] The incompleteness of the UNIDROIT Principles gives rise to two inter-related difficulties:

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[72] Note the observations made in the arbitral decision of the ICC International Court of Arbitration, Lugano (Case No. 9419, dated Sept. 1998) that: the UNIDROIT Principles could certainly be used for reference by the parties involved for the voluntary regulation of their contractual relationship, in addition to helping the arbitrator confirming the existence of a particular trade usages, but they cannot constitute a normative body in themselves that can be considered as an applicable supranational law to replace a national law. Extract available from web-site www.unilex.info.

[73] Bonell, Michael, *The UNIDROIT Principles of International Commercial Contracts – Nature, Purposes and First Experiences in Practice*, available at www.unidroit.org/english/principles/pr-exper.htm at section V(3). Note the decision of the Arbitration Institute of the Stockholm Chamber of Commerce (Case No. 117/1999, Year 2001) which dealt with a case where the parties had deliberately refrained from agreeing on the applicable laws to the agreement. The Arbitral panel found that the appropriate rules of law in dispute are those contained in the UNIDROIT Principles, as supplemented by Swedish law if and to the extent the UNIDROIT Principles do not give any guidance on a particular issue. The Arbitral panel chose Swedish law as the "supplementing law" on

(a) In view of its inherent inadequacy, the courts or arbitration panels concerned may be unwilling to refer to this body of principles as the governing law instead of resorting to traditional conflict of law principles.

(b) The need to refer to national law to supplement the incompleteness of the UNIDROIT Principles creates a circuitous argument. In order to determine which national law is to supplement the UNIDROIT Principles, the courts or arbitration panels will still have to resort to traditional conflict of laws principles.

In view of the above stated shortcomings, this Thesis concludes that the UNIDROIT Principles like the new Cyberspace *Lex Mercatoria,* do not represent a good substitute to traditional conflict of laws principles in respect of a contract made through the use of the Internet or the exchange of electronic mails. For the reasons stated hereinabove, this Thesis concludes that it is unlikely that a court of law or an arbitration tribunal would abandon the traditional conflict of laws principles in favor of applying the UNIDROIT Principles.

SUMMARY & ANALYSIS OF THIS CHAPTER

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the basis that the arbitration in questioned was governed by the Swedish Act on Arbitration which came into force on April 1, 1999. Extract available from web-site www.unilex.info. It is clear from this arbitral decision that the UNIDROIT Principels cannot be considered as a complete body of law, and reference must be made to a national law to supplement the UNIDROIT Principles.

It is firmly established by case law authorities and writings of eminent jurists that the law governing the formation and validity of a contract is primarily the proper law or the putative proper law of the contract. Case law authorities also established that the proper law of a contract is to be determined by a three-stage test that involves *inter alia* the determination of both the subjective and objective intentions of the contracting parties.

In the above sections of this Chapter, the Thesis has highlighted the arguments of a local author that a contract made through the use of the Internet contain too may points of contacts and that if there is no express selection of the governing law, the existing rules of finding the implied choice and the inferred choice may not be sufficient to produce a reliable result.[74] It has also been argued that all Internet addresses are eminently portable because they are not physical addresses in real space, but are rather logical addresses on the Internet network[75]; in other words, an Internet address with the suffix "*.my*" may not necessarily reside within the jurisdiction of Malaysia. This Thesis has also highlighted the arguments of a number of American authors who argued that since the Internet was not structured according to traditional geographical boundaries, any attempt to use the traditional choice of law principles (that were developed along the notion of geographical

[74] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999), at pp. 73-74

[75] Burk, Dan, *Jurisdictions in a World Without Borders*, (Spring 1997) available at http://vjolt.student.virginia.edu at paragraphs 14 – 16.

boundaries) to determine the governing law of a contract made through the Internet would be unsatisfactory.[76]

Despite the forceful arguments of the above authors on the inadequacy of traditional conflict of laws doctrines, this Thesis argues that the traditional conflict of law doctrine of proper law of the contract remains a good doctrine to help determine the governing law of an Internet based contract, and the formation and validity thereof where one is not expressly stated by the parties. As the test to ascertain the governing law of a contract and the formation and validity thereof is largely to look for the proper law (or the putative proper law) of the same using the three-stage test stated above, the insensitivity of the Internet to geographical and national boundaries will not defeat the ascertaining of the governing law of a contract made through the Internet. This is so as the proper law of a contract is not the law of any specific location, for example, the *lex loci solutionis* or *lex locus contractus*. It is just the law having the closest connection to the transaction, having regards to the whole factual matrix of the transaction. Admittedly, if the governing law is to be the *lex loci solutionis* or the *lex loci contractus* instead of the proper law, the argument of the above authors would carry more weight, as it would then be difficult, if not simply impossible, to determine where the contract was concluded or where the contract was performed.

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[76] Burnstein, Matthew, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, Vol 29 Vanderbilt Journal of Transnational Law (1996) 75 at pg. 95; and Hicks, Bill, *Choice of Law Issues*

Moreover, using the proper law doctrine, the potentially numerous contact points inherent in a contract made through the Internet are reduced to factors to be considered by the court in determining the governing law of the contract. The proper law doctrine allows the court to look at all surrounding factors, without being tied to any specific jurisdiction, geographical or national boundaries. Speaking on the advantage of the proper law doctrine over the criteria based on the *lex loci contractus* or the *lex loci solutionis*, the Court in *Mount Albert Borough Council v. Australasian etc Assurance Society Ltd* (per Lord Wright) said:-

> English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary criteria such as *lex loci contractus* or *lex loci solutionis*, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all surrounding facts. It may be that the parties have in terms in their agreement expressed what law they intend to govern, and in that case prima facie their intention will be effectuated by the court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract.

Hence, although the Internet has potentially numerous contact points and is insensitive to any geographical location, the focus of the court is equally free to travel across many jurisdictions and geographic boundaries to determine the system of law by reference to which the contract was made or that which the transaction had its closest and most real connection.[77] It is hereby submitted that for a case where the contract is made through the Internet or through the exchange of electronic mails, the court would look to for

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in Cyberspace, available at the address www.law.ttu.edu/cyberspc/jour13.htm#N_36.

[77] The phrase inn italic is extracted from the judgment of *Bonython v. Commonwealth of Australia* [1951] AC 201 at 219 (per Lord Simonds)

example, the Internet address of the parties concerned, the location of the servers, the place where the digital signature certification authorities are based in addition to the usual considerations like the nationalities of the parties concerned, provision for arbitration or litigation in a particular country and whether the contract was prepared in any form peculiar to the law of any country.

It is evident from the speech of Lord Wright above that the finding of the proper law of the contract is also a determination of the intention of the parties to the contract as to what law shall govern their contract. In this connection, although it has been forcefully argued by many authors that an Internet address of a party with the suffix for example, "*.my*" would not mean that the party is located in Malaysia and could be anywhere, this Thesis argues the fact that a party chooses to have the suffix "*.my*" or "*.nz*" in his Internet address is an indication that he intends to be governed by the law of Malaysia or New Zealand respectively. This consideration would of course have to be weighed and balanced against the whole factual matrix of the case.

In terms of contact points with number of different jurisdictions, a contract made through the use of the Internet or exchange of electronic mail is no more complicated than some conventional transactions made through the

use of other non-electronic media.[78] In other words, although the problems arising from multiple contact points in relation to the use of the Internet are real, they are simply not unique to the realm of the Internet. The fear that the proper law doctrine may not be able to provide a reliable result where the facts are nicely balanced among a number of jurisdictions is also present in respect of a contract made through conventional non-electronic means.[79] Hence, this concern does not support the arguments of the advocates of the Cyberspace *Lex Mercatoria*.

Further, the fear that the traditional proper law doctrine would break down if the choice is derived from more than two jurisdictions (as frequently occurs in respect of a contract made through the Internet)[80] is simply unfounded to say the least. There are numerous case law authorities in which the proper law doctrine was applied to ascertain the governing law of contracts where the choice of law involves more than two jurisdictions. One of the best examples is the case of *The Njegos*[81] where the governing law of the bill of lading could have been French law (as the charterer was French), Yugoslav law (as the nationality of the ship was Yugoslavian), Argentine law (as the

[78] Goldsmith, Jack, *Against Cyberanarchy*, Volume 65 University of Chicago Law Review (1998) 1199 at pp. 1234 – 1235.
[79] Morris, JHC, *The Conflict of Laws*, (Stevens & Sons Publication) (3rd Ed. 1984) at pg. 281.
[80] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999), at pp. 73-74.
[81] [1936] P. 90

cargo was shipped from Argentina), Swedish law (as the cargo was to be shipped to Sweden), and English law (law governing the charterparty).[82]

As comparison to the two illustrations used by the local author cited above[83] in terms of factual complexity, consider the following two illustrations in respect of contracts that are not made through the use of the Internet:

> Illustration X
> A company of French shipowners agree in France to carry oil for a Tunisian company from one Tunisian port to another. The contract is made on an English printed form but the freight is payable in French francs in Paris. French law prevails in Tunisia and no question arises as between French and Tunisian law but a clause in the contract provides for settlement of dispute by arbitration in England. There was no express choice of law clause.
>
> Illustration Y
> A resident of England is employed by a Dutch company to work on an oil rig in Nigerian territorial waters. The contract which is in the English language is negotiated and signed in England. The contract contains a clause that says that the English employee accepts that the United Kingdom industrial accident insurance law will not apply as the employer is a Dutch corporation and his employment will be wholly out of the United Kingdom. The contract says that the English employee would accept the benefits of the Dutch company's compensation program instead. The English employee is injured by the negligence of the Dutch company's other employees. The English employee argues that the clause excluding the United Kingdom industrial accident insurance law is void by virtue of English law. The Dutch company pleads that they are protected by Dutch law that allows the clause excluding the United Kingdom industrial accident insurance law to stand.

The facts of the above illustrations all involve more than two jurisdictions. Illustration X above in fact is a reproduction of the facts of the well known case *Compagnie Tunisienne de Navigation SA v. Compagnie d'Armement Maritime SA*[84] in which the Court, applying the proper law doctrine, held that the governing law of the contract was French law. Illustration Y above is a

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[82] In this case, the Court held that the bill of ladings were governed by English law due to the close legal and commercial connection between the bill of lading and the charterparty. See also *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1984] AC 50, where the governing law could have been Kuwaiti law, English law, law of Dubai or Liberian law.

reproduction of the facts of the case *Sayers v. International Drilling Company*[85] in which the Court, applying the proper law doctrine, held that the governing law was Dutch law and that the English employee's case should be dismissed.

Although the force of the impact of the Internet is real, its impact has often been often exaggerated.[86] This Thesis submits that the authors arguing against the application of traditional choice of law principles to contracts made through the Internet have exaggerated the complexity of Internet based transactions. This Thesis firmly argues that choice of law issues arising from Internet based contracts, including questions pertaining to the law governing the formation and validity of contracts, can be satisfactorily resolved by conventional proper law doctrine. This Thesis further submits that conventional transactions in non-electronic media are potentially as complex as Internet based transactions. Since the choice of law issues in the former are being resolved by the well established traditional choice of law rules, there is no reason why choice of law issues arising out of Internet based transactions could not be similarly resolved by the application of these rules. In respect of the example of *Lex Mercatoria* and the UNIDROIT Principles brought forth by certain academics, this Thesis submits that it is highly unlikely that the Courts in Malaysia would apply them instead of the

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[83] Ding, Julian, *E-Commerce Law & Practice*, (Sweet & Maxwell Asia Publication, 1999), at pp. 73-74.
[84] [1971] AC 572
[85] [1971] 1 WLR 1176

proper law doctrine in view of the shortcomings highlighted in the section above.

[86] Low, Kelvin & Loi, Kelry, *Links, Frames and Meta-tags: More Challenges for the Wild Wild Web*, Singapore Academy of Law Journal Vol 12 (March 2000) 51 at pg.51.

CHAPTER SEVEN

COMPARATIVE STUDY OF FOREIGN STATUTES ON ELECTRONIC COMMERCE

FOREIGN STATUTORY DEVELOPMENTS

The prevalent use of the Internet and other electronic media for commercial purposes has lead a number of countries around the world to enact fresh legislation to regulate electronic commerce. The works of international organizations like the United Nations Commission on International Trade Law (UNCITRAL), the Organization for economic Cooperation and Development (OECD) and the International Chamber of Commerce (ICC) have all contributed significantly to the development and influenced the wordings and structure of these foreign statutes.[1] In the United States, Singapore, Australia, Hong Kong and the European Union for example, the legislative making organs of these countries have enacted comprehensive statutes to regulate the conduct of electronic commerce. This Chapter shall deal with the statute of each of these countries in the section hereunder.

SINGAPORE - ELECTRONIC TRANSACTIONS ACT 1998

(1) History and Objectives of the Act

The Electronic Transactions Act 1998 of Singapore (hereinafter referred to as "SETA 1998") was enacted by the Parliament of Singapore on 29th June 1998 and received presidential assent on 3rd July 1998. This Act was closely

[1] Endeshaw, Assafa, *Internet & Electronic Commerce*, (Prentice Hall Publications, 2001), at pp. 462 – 469.

modeled after the UNCITRAL Model Law on Electronic Commerce as well as the electronic transaction statutes of the states of Illinois, Florida and Utah in the United States as well as that of Germany.[2] The SETA 1998 was enacted primarily in response to Singapore's push to create an attractive and favorable environment to become a hub for information technology. This Act was designed to create a predictable legal environment for electronic commerce and to clearly define the rights and obligations of the transacting parties.[3] To date, this Act remains the primary legislation governing electronic commerce under the law of Singapore.[4]

The preamble of the SETA 1998 reads that it is an Act to make provisions for *inter alia* the security and use of electronic transactions and for matters connected to the same. The generality of the foregoing statement is supplemented by Section 3 of the Act that indirectly provides a more elaborate list of the purposes of this Act.[5] For example, Section 3(b) clearly indicates that one of the objectives of the Act is to facilitate electronic commerce, eliminate barriers to electronic commerce resulting from uncertainties over writing and signature requirements, and to promote the development of the legal and business infrastructure necessary to implement secure electronic commerce. Section 3(d) states that the Act is to

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[2] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 268.
[3] See the government of Singapore's web-site www.ec.gov.sg/policy.html.
[4] Lim, Wee Teck, *Electronic Commerce Law – Singapore*, Asia Business Law Review (No.29, July 2000) at pg. 37.
[5] Section 3 is basically a section dealing with the construction of this statute. It states that the Act shall be construed with what is commercially reasonable to give effect to a list of six objectives, that range from electronic commerce, use of electronic records, integrity of electronic records and electronic filing of documents.

minimize the incidence of forged electronic records, intentional and unintentional alteration of records and fraud in electronic commerce and other electronic transactions. It is evident that the drafters of the SETA 1998 intended the same to play a broad role in promoting confidence in the use of electronic commerce in Singapore.

(2) Formation of Electronic Contracts under the Act

The SETA 1998 is divided into twelve parts and Part IV of which focuses on the subject of electronic contracting. Part IV of this Act is in turn divided into five separate sections in the following order:

Section 11: Formation and validity

Section 12: Effectiveness between parties

Section 13: Attribution

Section 14: Acknowledgment of receipt

Section 15: Time and place of dispatch and receipt

The primary test of establishing the presence of *consensus ad idem* between the contracting parties is the offer and acceptance test, and in this connection, Sections 11 of the SETA 1998 makes it crystal clear that the test of offer and acceptance shall continue to apply even where the contract is made through the electronic media. This sections reads as follows:

Section 11(1)

> For the avoidance of doubt, it is declared that in the context of the formation of contracts, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of electronic records.[6]
> Section 11(2)
> Where an electronic record is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that an electronic record was used for that purpose.

Section 11(1) of the Act is clearly an adaptation of the first limb of Article 11(1) of the UNCITRAL Model Law on Electronic Commerce. Pursuant to this section, it is unequivocal that the mechanics of offer and acceptance leading to the formation of a contract can be made electronically. Hence, an offer and the acceptance of the same that are sent through the Internet or exchange of electronic mails are as valid as those expressed through non-electronic media. Moreover, as the writer has discussed in Chapter 2 of this Thesis, Article 11 of the UNCITRAL Model Law puts to rest any uncertainty whether contracts can be validly concluded without any immediate human intervention.[7] Hence, although not expressly clear from the wordings of Section 11(1), this section provides the basis for the legal recognition of agreements made by computers autonomously.

Section 11(2) of the Act is adapted from the second limb of Article 11(1) of the UNCITRAL Model Law that states that where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability solely on the ground that a data message was used for that

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[6] "*Electronic record*" means a record generated, communicated, received or stored by electronic, magnetic, optical or other means in an information system or for transmission from one information system to another. Refer to Section 2 of the SETA 1998. An electronic transmission sent through the Internet or electronic mail would hence qualify as electronic record.
[7] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paragraph 76.

purpose. As Section 11(1) of the SETA 1998 already deals with the mechanics of offer and acceptance, arguably Section 11(2) is intended to deal with the other requirements of contract formation that may be affected by the use of the electronic media; for example, the requirement of writing and signature. Hence, where the contract is concluded by writing or signature in the electronic form, it may be argued that pursuant to Section 11(2), the same shall not be invalidated or rendered unenforceable because the writing or signature are in the form of electronic records.[8] The real breadth of Section 11(2) shall only be known after the same is considered by the courts in Singapore.

As for Section 12 of the Act, it must be observed that this section is particularly useful for the purpose of contract formation, and it in fact significantly complements Section 11 above. Section 12 reads as follows:

> Section 12
> As between the originator and the addressee of an electronic record, a declaration of intent or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record.

Section 12 hence provides the requisite recognition for pre-contractual statements and representations that the parties make during the course of negotiation by way of the electronic media. That is, even though these statements are made in the electronic format, they shall have the same

[8] The definitions of "*record*" and "*electronic record*" under Section 2 of the SETA 1998 are wide enough to cover writing made in the electronic format as well as signature in the electronic format.

effect in law as they would have if made non-electronically.[9] The present writer expects this provision to be heavily relied upon in respects of a contract that is concluded after lengthy negotiations and exchange of representations that are not easily reduced to the mechanics of offer and acceptance.

Section 13 of the Act is a lengthy provision that focuses on the circumstances under which the recipient of an electronic record is entitled to regard the same as originating from the originator of the electronic record. This section establishes two formulae for the purpose of resolving the above issue. Under Section 13(3)(a), the recipient has to prove the existence of a prior agreement between him and the originator and he adhered to the procedures specified in the said agreement. Under Section 13(3)(b), the recipient has to prove that the purported originator of the electronic record enabled a third party to access the method used to identify the electronic records as that of the originator.

The importance of Section 13 cannot be underestimated as the identity of the sender of an electronic record is often not easily established, unlike a non-electronic transaction done by way of paper and ink and the risk of potential mistake or fraud is high. This section establishes the presumption that an electronic record is that of the originator if it is sent by the originator

[9] Lim, Wee Teck, *Electronic Commerce Law – Singapore*, Asia Business Law Review (No.29, July 2000) at pg. 37

himself,[10] and goes on to qualify that presumption in case the addressee knew or ought to have known that the data message was not that of the originator.[11] Section 13 is an adaptation of Article 13 of the UNCITRAL Model Law, hence, the relevant paragraphs under the Guide to the UCITRAL Model Law[12] provides excellent explanatory notes to the interpretation of Section 13.

The subject of acknowledgment of receipt is dealt with under Section 14 of the Act. This section is again a replication of the UNCITRAL Model Law, namely, Article 14. This section is enacted in view of the frequent use of acknowledgment of receipt in the context of electronic commerce.[13] This section *inter alia* sets the principles governing circumstances in which receipt of acknowledgment is made a conditional precedent in the electronic transmission and in circumstances when it is not.[14]

Section 15 of the SETA 1998 provides the principles for determining the time and place of dispatch of electronic messages. This provision is evidently a replication of Article 15 of the UNCITRAL Model Law that focuses on the same subject matter, hence, the Guide to the UNCITRAL Model Law is

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[10] Section 13(1) SETA 1998
[11] Section 13(4) SETA 1998
[12] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paragraphs 83 – 92.
[13] See Paragraph 93 Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce.
[14] Sections 14(3), 14(4) SETA 1998

useful for the purpose of interpreting this section.[15] It is important to observe that the application of Sections 15(1), 15(2) and 15(4) is subject to the modification of the parties concerned. Hence, the originator and addressee of an electronic message can mutually agree to deviate from the formula that Section 15 sets forth to suit their convenience.

To fully comprehend the scope of Section 15, it is necessary to first understand the concept of an electronic record "*entering an information system*", which concept is used to determine the time of receipt and dispatch of the electronic message in Sections 15(1) and 15(2). The expression "*entering an information system*" is not clearly defined in the SETA 1998, but the Guide to the UNCITRAL Model Law proves to be more helpful. Under the Guide, an electronic message is said to have entered an information system at the time when it becomes available for processing within that information system.[16]

It is also evident from the UNCITRAL Model Law that an electronic message is not considered to have been dispatched if it merely reached the information system of the addressee but failed to enter it. For example, where the information system of the addressee does not function at all or functions improperly or, while functioning properly, cannot be entered into by the data message (e.g., in the case of a tele-copier that is constantly

[15] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paragraphs 100 –107.
[16] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paragraph 103.

occupied), dispatch under the UNCITRAL Model Law (and hence Section 15 of the Act) does not occur.[17] Similarly, dispatch would not have occurred where an electronic mail message cannot enter the information system of the addressee in cases where the exchange server is busy or is not working properly or at all.

As regards determining the place of transmission and of receipt, Section 15(4) of the Act provides that an electronic message is deemed to have been dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. By fixing the location(s) of receipt and transmission at the respective place(s) of business of the originator and the addressee, Section 15(4) resolves the problem of an information system being sited at a jurisdiction different from that of the originator or addressee normally resides. Hence, the electronic messages sent and receipt by a vendor who communicates with his customer from his usual place of business in Singapore are deemed to have been sent and received in Singapore, although the server that he uses could reside in the United States or elsewhere outside Singapore.

Although Part IV of the SETA 1998 is said to deal with electronic contracts, we are nonetheless required to refer to other Parts found in the Act to get a complete picture of its effects upon the subject of contract formation. For

[17] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paragraph 104.

example, the requirement of having a contract made in writing, and the use of electronic signatures are also dealt with under Sections 7 and 8 respectively that are found in Part II of the SETA 1998, which sections read as follows:

> Section 7
> Where a rule of law requires information[18] to be written, in writing, to be presented in writing or provides for certain consequences if it is not, an electronic record satisfies that rule of law if the information contained therein is accessible so as to be usable for subsequent reference.
>
> Section 8
> (1) Where a rule of law requires a signature, or provides for certain consequences if a document is not signed, an electronic signature[19] satisfies that rule of law.
> (2) An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a party, in order to proceed further with a transaction, to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of such party.

The above 2 provisions are clearly modeled upon Articles 6 and 7 of the UNCITRAL Model Law that deal with the same subject matters. Pursuant to Section 7 of the SETA 1998, where the law requires a contract to be made in writing in order to be enforceable, this requirement is satisfied by writing in the form of an electronic record so long as the contract is accessible so as to be useable for subsequent reference. Likewise, pursuant to Section 8 of the Act, an electronic contract may be signed by the use of an electronic signature. It should be noted that the SETA 1998 refers to the use of the more generic electronic signature, and not the more technology specific

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[18] The expression "*information*" is defined under Section 2 of the Act to include data, text, images, sound, codes, computer programs, software and databases. This definition is wide enough to encompass a contract.

[19] The expression "*electronic signature*" is defined under Section 2 to mean any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted with the intention of authenticating or approving the electronic record. Under the SETA 1998, an electronic signature is a generic term that includes digital signature. This is obvious from the definition of "*digital signature*" under Section 2 of the same.

digital signature. Hence, this Act allows the public the flexibility to use whichever form of electronic signature that is deemed suitable and does not compel the use of a digital signature as is the case in Hong Kong.[20]

It is essential to note that the provisions found under Part II and Part IV of the Act are not applicable to certain classes of contracts in respect of the requirement of writing or signatures.[21] These contracts would include contracts that are negotiable instruments, contracts of sale of immovable properties, contracts of conveyance of immovable properties and contracts that are also documents of titles. Evidently, these contracts must continue to be made and signed in the traditional paper and ink medium in order to preserve their enforceability under the relevant statute law.

(3) Strengths and Weaknesses of the Act

It is evident that the SETA 1998 is largely modeled upon the UNCITRAL Model Law. On the subject of electronic contract and the formation thereof, the Act strives to equate the issues of electronic contract formation to that of conventional non-electronic contracts, thereby giving legal recognition to these electronic contracts by treating them as identical.[22] The advantage of this approach is that the legal and commercial community would be able to

[20] Refer to section below in this chapter that deals with the Hong Kong Electronic Transactions Ordinance 2000.
[21] Electronic Transactions Act 1998, Section 4
[22] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pp. 269 - 270.

relate to and apply these provisions in the SETA 1998 without having to re-learn any new legal principles.

The strength of the SETA 1998 also lies in its scope, which is very encompassing. That is, this Act covers all major issues concerning electronic commerce, including the liability of network providers, electronic contracts, electronic security, digital signatures and duties of certification authorities. Hence, the Act functions as a one-stop reference point for the law governing electronic commerce applicable in Singapore. Further, as the SETA 1998 is modeled after the UNCITRAL Model Law, this statute is of international standard and the provisions of the same will not be alien to the international commercial community and foreign legal practitioners alike who are familiar with electronic commerce conducted on a global basis.

Unfortunately, the breadth of this Act proves to be its shortcoming also. This Act essentially suffers from the same shortcomings as the UNCITRAL Model Law in that it attempts to deal with too many subject matters within a handful of sections. As a result of which, the SETA 1998 does not deal with a number of critical issues with sufficient depth. The law of contract applicable in Singapore is largely founded upon the English common law and equity, supplemented by local statute laws.[23] Admittedly, it will be impossible to reduce all the principles of contract law applicable to the electronic media

[23] Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract* (1st Singapore and Malaysian Student's Edition), (Butterworths Publication, 1998), at pp.4-5.

into a single statute like the SETA 1998. Nonetheless, the Parliament of Singapore should have dealt with some of the more fundamental principles that are critical for the foundation of a contract in greater detail.

For instance, in respect of contract formation, it must be observed that Section 15 of the SETA 1998 only deals with the time and place of dispatch and receipt of the electronic records. It still leaves unsettled the question of at what stage of the exchange of electronic transmission a contract is legally formed.[24] That is, the Act still does not resolve critical issues such as whether acceptance is complete when the same is received by the offeror, or if acceptance takes place when the message is sent by the offeree, as in the case of the Postal Rule.[25]

The drafters of the UNCITRAL Model Law did not include a provision dealing with the time and place of contract formation into the same so as not to interfere with national laws applicable to contract formation[26] that might differ from one country to another. However, as the Parliament of Singapore had only to deal with the law of Singapore pertaining to contract formation, the omission was inexcusable. It is therefore regretted that the Act does not pay enough attention to the fact that the time and place of the making of an offer

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[24] Lim, Wee Teck, *Electronic Commerce Law – Singapore*, Asia Business Law Review (No.29, July 2000) at pg. 40. See also, Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 270.

[25] Note that the Postal Rule is applicable under the law of Singapore. See Phang, Andrew, *Cheshire, Fifoot and Furmston's Law of Contract* (1st Singapore and Malaysian Student's Edition), (Butterworths Publication, 1998), at pg.99.

[26] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paragraph 78.

and the acceptance of which does not necessarily coincide with the time and place of dispatch and receipt of an electronic message.[27] The Parliament of Singapore in fact made it clear that the Act was not intended to deal with this subject. On this, Section 14(7) of the Act reads:

> Except in so far as it relates to the sending or receipt of the electronic record, this Part is not intended to deal with the legal consequences that may flow either from that electronic record or from the acknowledgment of its receipt.

The SETA 1998 is also absolutely silent on the issue of capacity to contract, and does not contain any provision to alleviate the risks associated with contracts made by minors and persons suffering from unsoundness of mind over the Internet. This Act is also silent on how to deal with electronic contracts that are fraught with conflict of law issues.

When the SETA 1998 was enacted in July 1998, the Parliament of Singapore would already have sufficient time to evaluate the strengths and weaknesses of the UNCITRAL Model Law that was promulgated in 1996 when the use of the Internet was relatively still not as prevalent. The present writer therefore submits that the Parliament of Singapore should have taken a bolder step to depart from the generality and non-committal position adopted by the UNCITRAL Model Law, and composed a statute that would focus more comprehensively on the fundamental subject of contract

[27] An offer is complete when it comes to the knowledge of the person to whom it is sent. This will point to the time of receipt. But under common law of contract that is applicable in Singapore, acceptance is complete at the time of posting (time of dispatch) if the postal rule is applicable, but at the time of receipt for instantaneous communication under the authority of *Brinkibon v. Stahag Stahl und Stahlwarenhandelsgesellschaft mbH*. The SETA 1998 seems to have altogether avoided the question whether the transmission of an electronic record is instantaneous or otherwise.

formation. Such a step would provide more certainty for the benefit of the commercial community and the growth of electronic commerce as a whole in Singapore and elsewhere in the Asia-Pacific region.

THE UNITED STATES – UNIFORM ELECTRONIC TRANSACTIONS ACT 1999

(1) History and Objectives of the Act

The US Uniform Electronic Transactions Act 1999 (hereinafter referred to as "the UETA 1999") was prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL)[28] upon the pattern of the UNCITRAL Model Law on Electronic Commerce, and as of December 4 2002, forty-one states in the US have enacted the same in their state legislation.[29] Although the UETA 1999 is modeled after the UNCITRAL Model Law, it contains significant constructive deviation from the latter by including governmental transactions, electronic promissory notes and provisions concerning the role of notaries on the Internet.[30]

[28] One of the purposes of the NCCUSL is to determine what areas of private state law in the United States might benefit from uniformity among the states, to prepare statutes or uniform Acts, to carry the object forward, and then to have those statutes enacted in each state in the US. See end-note (1) of the article by Gabriel, Henry, *The US Uniform Transactions Act: Substantive Provisions, Drafting History & Comparison to the UNCITRAL Model Law on Electronic Commerce*, available at www.unidroit.org.

[29] Gabriel, Henry, *The US Uniform Transactions Act: Substantive Provisions, Drafting History & Comparison to the UNCITRAL Model Law on Electronic Commerce*, available at www.unidroit.org. The 9 states that have not enacted the UETA into their state legislation, as of December 4, 2002, are Alaska, Georgia, Illinois, Massachusetts, Missouri, New York, South Carolina, Washington and Wisconsin. See state-by-state comparison table available at www.bmck.com.

[30] Endeshaw, Assafa, *Internet & Electronic Commerce*, (Prentice Hall Publications, 2001), at pg. 450.

From the draft of the UETA 1999 that was presented for approval in 1999, the purposes and policies of this Act are stated to be as follows[31]:

(a) to facilitate and promote commerce and governmental transactions by validating and authorizing the use of electronic records and electronic signatures;

(b) to eliminate barriers to electronic commerce and governmental transactions resulting from uncertainties relating to writing and signature requirements;

(c) to simplify, clarify and modernize the law governing commerce and governmental transactions through the use of electronic means;

(d) to permit the continued expansion of commercial and governmental electronic practices through custom, usage and agreement of the parties;

(e) to promote uniformity of the law among the States (and worldwide) relating to the use of electronic and similar technological means of effecting and performing commercial and governmental transactions;

(f) to promote public confidence in the validity, integrity and reliability of electronic commerce and governmental transactions; and

(g) to promote the development of the legal and business infrastructure necessary to implement electronic commerce and governmental transactions.

[31] See explanatory notes to the draft of the UETA 1999, available at www.namic.org, that was visited by the writer on 28th Sept 1999.

The UETA 1999 was therefore enacted for the benefit of the government of the United States, the general public and the commercial community in dealing with electronic commerce. This statute contains provisions dealing with a wide range of subjects including contract formation (including contracts made by computers autonomously), use and retention of electronic record, electronic signatures and use and retention of electronic records by governmental agencies. This Thesis shall concentrate on the subject of contract formation under this Act.

(2) Contract Formation under the Act

The UETA 1999 is a relatively comprehensive statute that comprises twenty-one sections, and the general objectives of the statute is well summarized under Section 7 of the same, that is, to give legal recognition to electronic records, electronic signatures and electronic contracts. Section 7 also contains the spirit of this Act on the subject of contract formation. This section reads as follows:

Section 7

(a) A record[32] or signature[33] may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record[34] was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature[35] satisfies the law.

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[32] "*Record*" is defined under Section 2 of the Act as information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

[33] "*Signature*" is regrettably not defined.

[34] "*Electronic record*" is defined under Section 2 of the Act as record created, generated, sent, communicated, received or stored by electronic means.

[35] "*Electronic signature*" is defined under Section 2 of the Act as an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

Pursuant to Section 7 of the UETA 1999 and the definitions accorded to the various words found therein, the Act gives recognition to a contract that is made entirely in the electronic format. In this connection, the Act also makes it unequivocal that if a contract is required to be made in writing, this requirement may be satisfied even if the writing is stored entirely by electronic means. In respect of contracts that must be signed, this requirement is also met if an electronic symbol, sound or process is adopted by the signer, provided (which is clear from the definition of "*electronic signature*" under Section 2) that the signer must have the requisite intention to sign the contract.[36] In all, Section 7 read together with Section 2 of UETA 1999 provides a concise one-stop provision that deals with the major issues concerning contract formation in the electronic media like the Internet.

One of the most profound features of the UETA 1999 lies in its unequivocal recognition of agreements made by computers independently of direct human intervention as being enforceable at law.[37] Instead of blindly adopting the wordings and structure of Article 11 of the UNCITRAL Model Law, Section 14 of the UETA 1999 provides without any ambiguity that:

> Section 14
> In an automated transaction,[38] the following rules apply:

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[36] See Section 2(8) of UETA 1999.

[37] Please refer to Chapter 2 of this Thesis for further discussion on this subject.

[38] "*Automated transaction*" is defined under Section 2(2) as a transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract or fulfilling an obligation required by the transaction.

(1) A contract may be formed by the interaction of electronic agents[39] of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements;
(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance;
(3) The terms of the contract are determined by the substantive law applicable to it.

From the above provisions, agreements made wholly or partially by computers are enforceable at law, thereby resolving the problem created by the requirement that there must be meeting of the minds between the contracting parties at the time an agreement is made. The drafters of the UETA 1999 is also careful to exclude the application of this Act from certain transactions listed under Section 3 of the same. For example, Section 3(b) of the Act states that it does not apply to transactions involving the creation of trust, wills, codicils and certain provisions found under the US Uniform Commercial Codes (UCC). From the text of Section 3 of the UETA 1999, it is arguable that the drafters of this document had carefully considered the impact of the electronic media, the extent to which records in the electronic format should be recognized and what transactions must remain in the traditional paper and ink medium.

(3) Strengths and Weaknesses of the Act

[39] An "*electronic agent*" is basically a computer that is capable of emulating human actions for the purpose of contract formation. Section 2(6) of the UETA 1999 defines this expression as a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual.

The law of contract in the United States is largely the common law, embodied in court decisions, supplemented by statutes like the Uniform Commercial Code.[40] Although it is wholly unrealistic to expect this enormous body of law to be reduced into a single statute to deal with electronic contracts, the UETA 1999 generally proves to be an instructive document. Although the UETA 1999 neither attempts to nor succeeds in setting out all the rules that are necessary to effectuate electronic commerce, but it does provide a sound legislative platform for the development of electronic commerce.[41] Reading the provisions of the Act gives a strong impression that the drafters of the same had carefully considered the effects of the electronic media on contract formation. The provisions found under the UETA 1999, especially those dealing with automated transactions and the requirement of writing and signature are genuinely illuminating and would serve as useful precedents for the drafting of comprehensive legislative provisions on the subject of contract formation.

The drafters of the UETA 1999 generally had made a comprehensive list of definitions under Section 2 of the same. The definition of "*record*" however requires further elaboration. The importance of properly defining this word cannot be underestimated, as it forms the foundation of Section 7 of this Act. "*Record*" is defined under Section 2 of the Act as information that is inscribed on a tangible medium or that is stored in an electronic or other

[40] Perillo, Joseph, *Corbin on Contracts*, (West Publishing Co., 1993) at pg. 75.
[41] Gabriel, Henry, *The US Uniform Transactions Act: Substantive Provisions, Drafting History & Comparison to the UNCITRAL Model Law on Electronic Commerce*, available at www.unidroit.org

medium and is retrievable in perceivable form. As it is foreseeable that both hardware and software will evolve over a period of time, thus making information stored in a computer to be inaccessible for future use and reference, the definition of this expression should be "*information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form for subsequent use and reference*". The words added reinforce the notion that to qualify as "*record*" under the Act, the information must be stored in a format that is retrievable both in the present and in the foreseeable future.

One other weakness of this Act is found under Section 14 of the same. As this Thesis argues in Chapter 2 of this Thesis above, Section 14 of the Act does not make it expressly clear whether, for the purpose of contract formation, the electronic agent can have the more sophisticated capability to negotiate the terms of the contract independently, or whether Section 14 only allows the enforceability of agreements made by computers that are rigidly acting on pre-programmed instructions and standing orders of their owners, like in the case of *Thornton v. Shoe Lane Parking Limited*.[42] The explanatory notes to the UETA 1999 on Section 14 merely states that it is intended:

> To assure that contracts can be formed by machines. The concern raised relates to the perceived lack of human intent at the time of contract formation. When machines are involved, the requisite intention flows from the programming and use of the machine.[43]

[42] [1971] 2 QB 163.

[43] See Paragraph 2 of the explanatory notes to Section 113 of the draft of the UETA 1999, available at www.namic.org, that was visited by the writer on 28th Sept 1999.

The above is an area that will surely attract substantial deliberation both by the American Courts as well as academics in view of the continuous increase in computer intelligence.

On the subject of offer and acceptance made through the use of the electronic media like the Internet, the UETA 1999 is also unfortunately silent and is not too instructive. Although Section 15 of the UETA 1999 provides a formula to ascertain the time and place of dispatch and receipt of an electronic record, the same is silent on when and where an offer and the acceptance of the offer is effectively made and consequently, the time and the place the electronic contract is properly concluded. Hence, the UETA 1999 suffers the same shortcoming as that of the SETA 1998 discussed above.[44] It would seem that the drafters of the UETA 1999 intended these issues concerning when the making of an offer and the acceptance of the same are complete, should be resolved by the substantive law dealing with the formation of contract generally.[45] It is regretted that the drafters of the UETA 1999 did not probe further into the issue of offer and acceptance and time of contract conclusion on the electronic media, unlike what was done by the drafters of the European Union Directive on Electronic Commerce 1998.[46]

[44] See pages 261 – 262 in this Chapter above.
[45] See for example Section 15(g) which states that if a person is aware that an electronic record purportedly sent or received was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law.
[46] See section below on legislative developments in the European Union.

Further, it must be noted that, like the SETA 1998, the UETA 1999 contains no provisions dealing with the subject of capacity to contract when the contract is made through the Internet. The law in the United States is generally that a contract entered into by an infant is voidable.[47] Surprisingly, the drafters of the UETA 1999 did not seem concern about the risks that are associated with contracts made by minors or persons of unsound mind through the Internet and other electronic media.

HONG KONG – ELECTRONIC TRANSACTIONS ORDINANCE 2000

(1) History and Objectives of the Ordinance

The Electronic Transactions Ordinance 2000[48] of Hong Kong (hereinafter referred to as "the HKETO 2000") came into force in January 2000. The preamble of the Ordinance states that this is an ordinance to facilitate the use of electronic transactions for commercial and other purposes, to provide for matters arising from and related to such use, to enable the Postmaster General to provide the services of a certification authority and to provide for purposes connected thereto.

The HKETO 2000 represents a step by the government of Hong Kong to ensure that Hong Kong remains a leading economic player in Asia by promoting the use of information technology and encouraging the

[47] Perillo, Joseph, *Corbin on Contracts*, (West Publishing Co., 1993) at pp.19 - 20
[48] Hong Kong Ordinance No. 1 of 2000. A soft copy of this Ordinance is available in the Internet at www.info.gov.hk

development of electronic commerce.[49] The bill leading to this Act was first introduced to the Hong Kong legislature on 14th July 1999, that is, merely 6 months prior to its enactment, hence underlining the determination of the Hong Kong government to speedily establish a legal regime to deal with electronic commerce.[50] Like the SETA 1998 and the UETA 1999 discussed above, the HKETO 2000 is largely a replication of the UNCITRAL Model Law; the principles found in this statute draw a parity between electronic and real space transactions.[51] Hence, the Guide to the UNCITRAL Model Law on Electronic Commerce is a good source of explanatory material for the purpose of interpreting the provisions found under the HKETO 2000.

(2) Formation of Contract under the Ordinance

The HKETO 2000 is divided into twelve Parts and comprises fifty-one distinct sections. The subject of contract formation is generally dealt with under Section 17 of the Ordinance that reads as follows:

> Section 17
> (1) For the avoidance of doubt, it is declared that in the context of the formation of contract, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be in whole or in part expressed by means of electronic records.[52]
> (2) Where an electronic record is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that an electronic record was used for that purpose.

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[49] Young, Dean, *Electronic Commerce Law – Hong Kong*, Asia Business Law Review Volume No.28 (April 2000) at pg.39

[50] Wu, Richard, *Electronic Transactions Ordinance – Building a Legal framework for E-commerce in Hong Kong*, 2000(1) The Journal of Information, Law & Technology (JILT) available at http://elj.warwick.ac.uk/jilt/00-1/wu.html.

[51] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 307

[52] "*Record*" is defined under Section 2(1) of the HKETO 2000 as information that is inscribed on, stored in or otherwise fixed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form. "*Electronic record*" means a record generated in digital form by an information system, which can be (a) transformed within an information system or from one information system to another, and (b) stored in an information system or other medium

(3) For the avoidance of doubt, it is stated that this section does not affect any rule of common law to the effect that the offeror may prescribe the method of communicating acceptance.

Section 17(1) and Section 17(2) of the HKETO 2000 are closely modeled after Sections 11(1) and 11(2) of the SETA 1998. The source of Section 17(1) and Section 17(2) of the HKETO 2000 is hence Article 11(1) of the UNCITRAL Model Law. Pursuant to Section 17(1), it is unequivocal that the mechanics of offer and acceptance leading to the formation of a contract can be made electronically. Hence, an offer and the acceptance of the same that are sent through the Internet or exchange of electronic mails are as valid as those expressed through non-electronic media. Further, as this Thesis has discussed in Chapter 2 above, Article 11(1) of the UNCITRAL Model Law puts to rest any uncertainty that contracts can be validly concluded without any immediate human intervention.[53] Hence, although not expressly clear from the wordings of Section 17(1), this section provides the basis for the legal recognition of agreements made by computers autonomously.

Like Section 11(2) of the SETA 1998, Section 17(2) of the HKETO 2000 is clearly adapted from the second limb of Article 11(1) that states that where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability solely on the ground that a data message was used for that purpose. As Section 17(1) of the HKETO 2000 already deals with the mechanics of offer and acceptance, Section 17(2) is therefore

[53] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paragraph 76.

clearly included to deal with other requirements of contract formation that may be affected by the use of the electronic media; for example, the requirement of writing and signature. Hence, where the contract is concluded by writing or signature in the electronic form, it may be argued that pursuant to Section 17(2), the same shall not be invalidated or rendered unenforceable solely on the grounds the writing or signature are in electronic form.[54]

Sections 18 and 19 of the HKETO 2000 deal with the issues of attribution of sending and receiving electronic records respectively. The wordings of these sections are closely similar to the wordings of Sections 13 and 15 of the SETA 1998 respectively. Nonetheless, there is one apparent difference. Whilst Sections 13 and 15 of the SETA 1998 are grouped under Part IV of the Act that deals with electronic contracts, Sections 18 and 19 of the HKETO 2000 are grouped into a Part on its own.[55] This arrangement under the HKETO 2000 is definitely more correct as compared to the one seen under the SETA 1998, since the issue of attribution and sending and receipt of electronic records are definitely not confined to the subject of contract formation but to electronic communications generally.

[54] The definitions of "*record*" and "*electronic record*" under Section 2(1) of the HKETO 2000 are wide enough to include writing made in the electronic format as well as signature in the electronic format.

[55] These 2 sections are grouped under Part VI that carries the title "*Attribution of Sending and Receiving Electronic Records*".

The HKETO 2000 however has one unfortunate similarity with the SETA 1998, as well as with the UETA 1999 discussed above. The HKETO 2000 fell short of expectation by neglecting to stipulate in detail the mechanics of offer and acceptance in the electronic media. Hence, it remains ambiguous as to when and where an offer and the acceptance of which are complete and the contract is finally concluded. Nonetheless, it must be observed that the HKETO 2000 makes it explicitly clear that Section 17 does not affect the common law position that the offeror may stipulate the method of communicating acceptance.[56]

As regards the requirement of writing and signature, it is also necessary to refer to Sections 5 and 6 of the HKETO 2000 that read as follows:

Section 5

(1) If a rule of law requires information[57] to be or given in writing or provides for certain consequences if it is not, an electronic record satisfies the requirement if the information contained in the electronic record is accessible so as to be usable for subsequent reference.

(2) If a rule of law permits information to be or given in writing, an electronic record satisfies that rule of law if the information contained in the electronic record is accessible so as to be usable for subsequent reference.

Section 6

(1) If a rule of law requires the signature of a person or provides for certain consequences if a document is not signed by a person, a digital signature of the person satisfies the requirement but only if the digital signature is supported by a recognized certificate and is generated within the validity of that certificate.

(2) In subsection (1), "within the validity of that certificate" means that at the time the digital signature is generated-

a. The recognition of the recognized certificate is not revoked or suspended;

b. If the Director has specified a period of validity for the recognition of the recognized certificate, the certificate is within that period, and

c. If the recognized certification authority has specified a period of validity for the recognized certificate, the certificate is within that period.

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[56] See Section 17(3) of the HKETO 2000.

[57] The word "*information*" is defined under Section 2 of the HKETO 2000 to include data, text, images, sound, codes, computer programs, software and databases. This definition is wide enough to include a contract.

These sections are clearly modeled after Articles 6 and 7 of the UNCITRAL Model Law that deal with the same subject matters. From the above Section 5, it is clear that where the law requires a contract to be in writing or evidenced by writing, this requirement is satisfied by writing made in the electronic format, like in the case of a contract made over the Internet or exchange of electronic mails. This is of course subject to the requirement that the writing that formed the electronic contract is accessible so as to be usable for subsequent reference. It must be noted that certain contracts are excluded from the application of Section 5, and must therefore continue to be made in the traditional paper-ink medium, among them, contracts dealing with land and employment.[58]

In addition to the following, pursuant to Section 6 of the HKETO 2000, a digital signature that is supported by a recognized and valid certificate is as good as traditional signature made by ink. Hence, where a contract needs to be signed in order to preserve its enforceability, the requirement is satisfied by the use of such a digital signature. Again, the Hong Kong legislature had taken the precaution to exclude certain documents from the application of this Section6, hence it would not be sufficient to just use digital signatures for these documents.[59]

[58] See Schedule 1 to the Hong Kong Electronics Transactions (Exclusion) Order
[59] See Schedule 2 to the Hong Kong Electronics Transactions (Exclusion) Order

It must be observed that the HKETO 2000 only provides for the use of the digital signature and does not give recognition to electronic signatures generally. Hence, and unlike the SETA 1998, a contract signed by the use of an electronic signature that does not qualify as a digital signature under the HKETO 2000 is not sufficient. The primary reason why Hong Kong only gives legal recognition to digital signature, but not to other kinds of electronic signatures is that digital signature is currently the only technically matured technology that provides adequate security features for user protection.[60]

(3) Strengths and Weaknesses of the Ordinance

The contract law applicable in Hong Kong was dominated for the past 150 years by the English common law. The common law shall continue to have application in Hong Kong after 1997.[61] The English common law of contract is an immense body of law, and it is of course unrealistic to expect that all these principles could be codified under the HKETO 2000 with respect to electronic contracts. The HKETO 2000 on a whole is a concise statute, like the SETA 1998 and the UETA 1999. As it is modeled after the UNCITRAL Model Law, the provisions found under this Act are not alien to lawyers and judges familiar with the UNCITRAL regime. For the same reason, the HKETO 2000 is also definitely a statute that is of international standard.

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[60] Wu, Richard, *Electronic Transactions Ordinance – Building a Legal framework for E-commerce in Hong Kong*, 2000(1) The Journal of Information, Law & Technology (JILT) available at http://elj.warwick.ac.uk/jilt/00-1/wu.html

[61] Fisher, Michael, *Contract Law in Hong Kong*, (Sweet & Maxwell Publication, 1996) at pg.1

However, it is regretted that the legislative body of Hong Kong did not go one step further by stating when an offer and the acceptance of an offer for an electronic contract are complete under the HKETO 2000. Like the SETA 1998 and the UETA 1999, the HKETO 2000 has failed to depart from the ambiguous position adopted by the UNCITRAL Model Law. Hence, it remains uncertain whether an acceptance is complete when the same is sent (as in the Postal Rule), or when the same is received by the offeror. The time and place of the making of the contract are therefore shrouded in much uncertainty.

Moreover, as the HKETO 2000 only recognizes the use of the digital signature as opposed to electronic signature generally, the general public may be precluded from using other forms of signatures that may be equally or more useful than a digital signature for the signing of electronic contracts.[62] The recognition of only the digital signature also unnecessarily restricts the scope of this Act. It is also regretted that nothing is mentioned in the HKETO 2000 on the issue of capacity to contract, although this is recognized by commentators in Hong Kong as and remains a universal problem especially for vendors in an Internet based contract.[63]

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[62] Wu, Richard, *Electronic Transactions Ordinance – Building a Legal framework for E-commerce in Hong Kong*, 2000(1) The Journal of Information, Law & Technology (JILT) available at http://elj.warwick.ac.uk/jilt/00-1/wu.html

[63] Young, Dean, *Electronic Commerce Law – Hong Kong*, Asia Business Law Review Volume No.28 (April 2000) at pp.39 – 40. In Hong Kong the age of contractual capacity is 18

THE EUROPEAN UNION – DIRECTIVE ON ELECTRONIC COMMERCE 1998

(1) Background Information

The European Union (EU) is a political and economic bloc that comprises 15 western and central European nations.[64] With the exception of England, Ireland and Wales of the United Kingdom, all the member states of the EU are from the civil law traditions. The mechanics of the EU law making process and the ratification of EU law into national legislation are indeed complicated subjects for lawyers not trained in the process concerned. On the subject of electronic commerce, the law making organ of the EU has shown much innovation, although by all accounts, the EU still trails behind the United States in both the volume of electronic commerce and devising regulatory framework.[65]

In the European Parliament and Council Directive on Certain Aspects of Electronic Commerce in the Internal Market of 18th November 1998 ("the EU Directive 1998" hereinafter), we find a document that is said to surpass any efforts done elsewhere in the world.[66] The EU Directive 1998 aims to provide uniform rules for electronic commerce within the European Union by addressing four main issues, namely; (1) establish a common conflict of laws rule; (2) regulation of commercial communication; (3) liability of Internet

[64] The member states are Belgium, Denmark, Germany, Greece, Spain, France, Republic of Ireland, Italy, Luxembourg, Netherlands, Austria, Portugal, Finland, Sweden and the United Kingdom.
[65] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 452
[66] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 454

service providers for illegal materials; and (4) electronic contracts.[67] For the purpose of this Thesis, we shall concentrate on items (1) and (4).

Article 1 of the Directive provides that it seeks to ensure the proper functioning of the internal market, particularly the free movement of Information Society services[68] between the Member States. It must be observed that the EU Directive 1998 is not a really set of statute in the form with which we are familiar. It is in fact a set of instructions to the legislatures of the EU Member States, on how the national electronic commerce law of each Member State should be like.[69] This is achieved by providing the minimal requirements that these national statutes shall adopt.

(2) Formation of Electronic Contracts

Section 3 of the EU Directive 1998 comprises three Articles (Articles 9, 10 and 11) and deals with electronic contracts. On the subject of formation of electronic contracts, Articles 9(1) and 9(2) of the EU Directive 1998 provides that:

> Article 9
> 1. Member States shall ensure that their legislation allows contracts to be concluded electronically. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither prevent the effective use of electronic contracts nor result in such contracts being deprived of legal effect and validity on account of their having been made electronically.
> 2. Member States may lay down that paragraph 1 shall not apply to the following contracts:

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[67] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 454

[68] "*Information Society services*" is defined as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

[69] This is obvious from the wordings of the Directive itself. Every article is directed as an instruction to the Member State (presumably the legislative body) and not to individual citizens or residence of each Member State.

a. Contracts requiring the involvement of a notary;
b. Contracts which, in order to be valid, are required to be registered with a public authority;
c. Contracts governed by family law;
d. Contracts governed by the law of succession.

It is clear from Article 9(1) above, that the EU Directive 1998 requires the legislature of each Member State to treat a contract made electronically as the equal of a conventional contract made in non-electronic media. Further, it precludes the legislature of each Member State to enact legislations that will deter, limit or prevent the legal effect and validity or use of electronic contracts. Article 9(1) is sufficiently wide to include all issues concerning contract formation, namely, offer and acceptance, intention to create legal relation and the formalities of writing and signature.

Giving Article 9 above the widest possible interpretation, it may be forcibly argued that the drafters of the EU Directive 1998 have the intention to also give legal recognition to contracts concluded by computers autonomously, like Articles 5 and 11 of the UNCITRAL Model Law on Electronic. Pursuant to Article 9, Member States are therefore precluded from enacting national laws that shall prevent, limit or deter the possibility of contracts being concluded by computers autonomously. It is unfortunate that the EU Directive 1998 fails to stipulate in explicit language if the expression "*...contracts to be concluded electronically...*" and "*...electronic contracts...*" includes contracts that are made without any immediate human involvement as in the use of EDI.

Whilst the UNCITRAL Model Law and the various national statues that replicate the same (like the SETA 1998, the HKETO 2000 and the UETA 1999 discussed above) all fail to expressly provide for the exact moment when a contract is concluded, the EU Directive 1998 is relatively clear about this issue. On this subject, Article 11 of the same states:

> Article 11
> (1) The Member States shall lay down in their legislation that, save where otherwise agreed by professional persons, in cases where a recipient[70], in accepting a service provider's [71]offer, is required to give his consent through technological means, such as clicking on an icon, the following principles shall apply:
> (a) the contract is concluded when the recipient of the service has received from the service provider, electronically, an acknowledgment of receipt of the recipient's acceptance, and has confirmed receipt of the acknowledgment of receipt;
> (b) acknowledgment of receipt is deemed to be received and confirmation is deemed to have been given when the parties to whom they are addressed are able to access them;
> (c) acknowledgment of receipt by the service provider and confirmation of the service recipient shall be sent as quickly as possible.
>
> (2) Member States shall lay down in their legislation that, save where otherwise agreed by professional persons, the service provider shall make available to the recipient of the service appropriate means allowing him to identify and correct handling errors.

The above provision provides a relatively easy to adopt formula to ascertain the time at which a contract is said to have been concluded by requiring each contracting party to give acknowledgment of receipts of acceptance and confirmation of the same. The above provision is also fair to both the service provider (the Internet vendor) as well as the recipient of the service (the purchaser) as it lays down a system involving acknowledgment of receipts and measures for the latter to make corrections on errors. Article 11

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[70] Article 2 of the EU Directive 1998 defines "*recipient of the service*" as any natural or legal person who for professional ends or otherwise uses an Information Society service, in particular for the purposes of seeking information, or making it accessible. This definition covers all persons that make purchases of goods or services over the Internet.

[71] Article 2 of the EU Directive 1998 defines "*service provider*" as any natural or legal person providing an Information Society service.

is clearly superior to the provisions found in the UNCITRAL Model Law[72] and the statues that replicate the same that provided for the time of dispatch and receipt of electronic transmissions but failed to go far enough to tie the same to the issues of offer and acceptance and the formation of contracts.[73]

To date, Article 11 of the EU Directive 1998 remains the best available precedent of a provision that deals with the mechanics of offer and acceptance and that stipulates a definite time for the conclusion of the electronic contract. Of course, there are still opportunities for improvement. It must be observed that the above mechanics of electronic contract formation only deals with the formation of a very simple contract, without complicated offer and acceptance scenarios, and prolonged negotiations. Often, the process that leads to the formation of a contract is not easily analyzed according to the principles of offer and acceptance,[74] and often, the formation of contracts cannot be analyzed in accordance with the rules of offer and acceptance.[75] It is therefore uncertain how Article 11(1)(a) will be utilized in respect of such a complicated transaction that involves prolonged negotiations, or where the contract involves more than two parties.

(3) Dealing with Conflict of Laws

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[72] See Articles 14 and 15 of the UNCITRAL Model Law on Electronic Commerce.
[73] See pages 261-262 above on the discussion on this issue as regards the SETA 1998 for example
[74] For example, where the contract is made after a long process of negotiation, or where more than 2 parties are involved.
[75] This has been discussed in detail in Chapter 3 of this Thesis above. As for case law authorities, see generally, *New Zealand Shipping Co. Ltd v. AM Satterthwaite & Co. Ltd* [1975] AC 154 and *Gibson v. Manchester City Council* [1978] 2 All ER 583.

As the EU comprises fifteen Member States, conflict of laws is definitely in the minds of the drafters of the EU Directive 1998. The enormity of the problem is self-evident, as each Member State not only would possibly have different set of substantive law dealing with electronic commerce, but would possibly also have different conflict of laws principles also. In attempting to lay down a common conflict of laws rule for the member states, Article 3of the EU Directive 1998 states that:

> Article 3
> (1) Each Member State shall ensure that the Information Society services provided by a service provider established on it territory comply with the national provisions applicable in the Member State in question which fall within this Directive's coordinated field.[76]
> (2) Member States may not, for reasons falling within this Directive's coordinated field, restrict the freedom to provide Information Society services from another Member State.
> (3) Paragraph 1 shall cover provisions set out in Articles 9, 10 and 11 only in so far as the law of the Member States applies by virtue of its rules of international private law.

The above Article 3(1) seems to establish the principle that the law governing any electronic transaction shall be the law of the state in which the service provider is established.[77] Hence, a contract that is entered into by an Internet seller, being the service provider, who is established within the jurisdiction of Germany and a buyer (being the recipient of the service) located in France, shall be governed by German law. This is the conclusive position, regardless where the purchaser is situated at the time the purchase is made, and regardless what the conflict of laws principles of Germany or France are. The advantage of this rule is clear, as it obviates the laborious task of having to examine the conflict of laws principles and to be concerned

[76] The present writer has inserted the underlines as emphasis.
[77] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 454

by any instance of *renvoi* that may surface. Hence, although it has been commented that Article 3(1) fails to take into account the borderless nature of the Cyberspace,[78] the writer is of the view that the provision provides a simple formula to determine the governing law of a contract when one has not been explicitly provided by the parties in the contract.

Did the drafters of the EU Directive 1998 intend Article 3(1) to override the express choice of law of the contracting parties. That is, does Article 3(1) apply where the service provider and the recipient of the service both had mutually agreed to a governing law? It is regretted that the EU Directive 1998 does not explicitly state whether parties are allowed to choose the governing law of their choice. To give effect to the principle of party autonomy, it is hereby submitted that Article 3(1) should only come into operation when no governing law has been explicitly stated and not when the contracting parties have explicitly chosen a governing law.

Further, from the words used in Article 3(1), it seems that the rule found therein only applies to determine the governing law concerning the performance of the contract. It is not absolutely clear if it is the intention of the drafters that the law of the state where the service provider is established shall also be the governing law in respect of ancillary issues concerning the contract, for example, the law governing the formation and

[78] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 455

interpretation of the resulting contract. The EU Directive 1998 should have gone further to address these issues.

(4) What Can be Learnt from the EU Directive 1998

As stated above, the EU Directive 1998 is merely a set of instructions to the legislatures of the Member States, on how the national electronic commerce law of each Member State should be prepared. Hence, the provisions found therein are all worded as instructions to the legislature of the Member States. The Articles found therein are not crafted in the form of sections in a statute. Hence, these Articles should not be blindly replicated as precedents dealing with electronic commerce. Nonetheless, it must be observed that Article 9 of the EU Directive 1998 provides the best model presently available to deal with the subject of offer and acceptance and the time at which an electronic contract is concluded.

It is however regretted that the EU Directive 1998 is generally inexplicit in dealing with the issue of capacity to contract and the ability of a contracting party to provide full and informed consent. Article 10(2) of the Directive merely expresses a requirement that member states shall provide in their legislation that the different steps to be followed for concluding a contract electronically shall be set out in such a way as to ensure that parties can give their full and informed consent. In view of the real risk posed by contracts made by minors and persons of unsound mind, the EU Directive 1998 should have made clearer provisions in respect of the same. Further,

as the subjects of electronic writing and electronic signature are so closely linked to the making of electronic contracts, it is surprising that the EU Directive 1998 does not make any direct mention of these subjects.

AUSTRALIA – ELECTRONIC TRANSACTIONS ACT 1999

(1) History and Objectives of the Act

In July 1997, the Attorney General of Australia appointed an Electronic Expert Group on Electronic Commerce to look into the appropriate legal response to electronic commerce.[79] The final result was the Electronic Transactions Act 1999[80] of the Commonwealth of Australia (hereinafter referred to as "the AETA 1999"). The AETA 1999 had two stages of implementation. Before 1st July 2001, the Act only applied to laws of the Commonwealth of Australia specified in the Electronic Transactions Regulations 2000; since 1st July 2001, the Act has been made applicable to all laws of the Commonwealth unless specifically exempted.[81]

The Act provides a legal framework to support and encourage business and consumer confidence in the use of electronic commerce, as well as to allow the people in Australia to use the Internet to transmit electronic documents

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[79] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 301

[80] Act No. 162 of 1999

[81] See Government of Australia news release available at the internet web site located at www.law.gov.au/publications/ecommerce. This site was visited by the writer on 13th November 2001.

to government offices and agencies.[82] Section 3 of the AETA 1999 provides the objectives of the same in the following words:

> Section 3
>
> The object of this Act is to provide a regulatory framework that:
> (a) recognizes the importance of the information economy to the future economic and social prosperity of Australia;
> (b) facilitates the use of electronic transactions;
> (c) promotes business and community confidence in the use of electronic transactions; and
> (d) enables business and the community to use electronic communications in their dealings with the government.

Like the SETA 1998, the HKETO 2000 and the UETA 1999, the AETA 1999 is modeled upon the UNCITRAL Model Law of Electronic Commerce.[83] Hence, the Guide to the UNCITRAL Model Law provides an excellent reference material for the purpose of the interpretation of this Act.

(2) Contract Formation under the Act

The AETA 1999 does not have a separate part that deals with the formation of electronic contract, unlike the SETA 1998 and the HKETO 2000. The AETA 1999 does not even go to the extent of stating that an offer an acceptance of an offer may be expressed electronically, as stated under Article 11 of the UNCITRAL Model Law and Section 11 of the SETA 1998. The closest the AETA 1999 comes to recognizing an offer and acceptance made electronically appears in Section 8 of the Act. Section 8(1) of the AETA 1999 merely states a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications. This

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[82] See Attorney General's News Release dated 14th March 2000, *Australia at the Forefront of the Information Economy*, available at www.law.gov.au, visited by the writer on 13th December 2000.
[83] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 301

section is evidently modeled after Article 5 of the UNCITRAL Model Law that states that information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message. Pursuant to this Section, electronic messages or communication should not be discriminated against and should be accorded a status that is equal to that of a paper document.[84] It is wholly unclear if this Section also reflects the intention of the Australian Parliament to recognize offer and acceptance made electronically, and indeed, the enforceability of agreements made by computers autonomously.

On the subject of the requirement of writing, Section 9(1)(a) of the AETA 1999 provides that:

> Section 9(1)
> If under the law of the Commonwealth, a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication, where:
> (a) in all cases – at the time the information was given, it was reasonable to expect that the information would be readily accessible as to be useable for subsequent reference.

Section 9(1)(a) is evidently a replication of Article 6(1) of the UNCITRAL Model Law that provides that where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference. The word "*information*" as used in Section 9 and throughout the AETA 1999 is defined under Section 5 of the Act to mean "*information in the form of data, text, images or speech*". Although this definition is narrower than the

[84] See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paragraph 46

definition of the same word under the SETA 1998 (note the use of the word "*includes*" in the latter), it should still be wide enough to include a contract. Hence, if a contract needs to be made in writing in order to be valid, that requirement is apparently satisfied if the contract is made in an electronic form, provided that at the time the contract was made, it was reasonable to expect that the form in which the electronic contract has been stored, is readily accessible so as to be useable for subsequent reference.

On the subject of the requirement of signature, Sections 10(1)(a) and 10(1)(b) of the AETA 1999 provide that:

> Section 10(1)
> If under a law of the Commonwealth, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if:
> (a) in all cases – a method is used to identify the person and to indicate the person's approval of the information communicated; and
> (b) in all cases – having regard to all relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

Section 10(1)(a) and Section 10(1)(b) of the AETA 1999 are evidently adapted from Article 7 of the UNCITRAL Model Law. Although not as explicit as Section 7(d) of the UETA 1999 or Section 8(1) of the SETA 1998, it would appear from the above provision that where the law requires a contract to be signed, that requirement is satisfied by the use of a signature in the electronic form.

(3) Strengths and Weaknesses of the Act

The drafters of the AETA 1999 have arguably adopted an overly minimalist approach when preparing the said Act, and on the subject of contract formation, there is unfortunately a large lacunae in the Act that will require future attention from the Parliament of Australia.[85] The Act in fact makes no real contribution to the subject of contract formation on the electronic media, and there is really not much to learn from the same.

Unlike the UETA 1999 of the United States, the AETA 1999 does not unequivocally provide that computers can conclude contracts without any direct and immediate human intervention. In fact, it is not even provided under the AETA 1999 if offer and the acceptance of an offer can be made electronically, hence this subject is shrouded in some degree of uncertainty. All that the AETA 1999 has is Section 8, which is a replication of Article 5 of the UNCITRAL Model Law with minimal modification. It is regretted that the Parliament of Australia did not also import Article 11 of the UNCITRAL Model Law into the AETA 1999. Without an equivalent of Article 11 in the Act, the AETA 1999 is a relatively incomplete document and has little to offer in respect of electronic contract formation. As the AETA 1999 does not deal with the issue of offer and acceptance clearly and adequately, it flows that this Act also leaves unsettled the question of at what stage of the exchange of electronic transmission a contract is legally formed. On this subject, Section 14 of the Act merely deals with the time and place of dispatch and

[85] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 304

receipt of electronic communications, but fails to further explain when and where is the offer and the acceptance of the same completed.

It is may also be deduced from the text of the Act that the drafters of the same could have done a better job in respect of the definitions of the various words used under the Act. The definition of "*information*" as appeared in the AETA 1999 is potentially circuitous, and as mentioned above, is definitely narrower in its scope as compared to the definition of the same word under the SETA 1998. Hence, the operation and scope of Section 9 of this Act (that deals with electronic writing) are left shrouded in uncertainty. In addition to the foregoing, Section 10(1) of the Act makes no direct reference to the use of electronic signature, and when the word "*electronic signature*" appears in Section 10(2) of the Act, its significance is uncertain as the word is not even defined under the Act.

It must also be highlighted that the Act is conspicuously silent on the subject of capacity to contract in respect of electronic contracts made at a distance. The law governing incapacity to contract under the law of Australia is essentially the common law of England as modified by local statutes of each state in Australia dealing with the subject, and the age of majority is 21 in all states.[86] The risk of contracts made by minors and persons suffering from

[86] See Starke JG, Seddon NC & Ellinghaus, MP, *Cheshire & Fifoot's Law of Contract*, (6th Australian Edition), (Butterworths Publication, 1992) at pp.545 – 578.

insanity to electronic commerce is real, and this is definitely a subject that the Parliament of Australia should further explore in the future.

The law of contract in Australia is largely founded upon the English common law and equity, as modified by local statutes.[87] Although it is unrealistic to expect the Parliament of Australia to reduce all the principles of contract law as applicable to electronic commerce to a single statute, it is hereby submitted that the drafters of the AETA 1999 could do more to improve both the text and the clarity of this statute. In addition to the shortcomings noted above, the Act is fraught with qualifications and limitations with considerable allocation of power to the various states of the Commonwealth of Australia to fill the lacunae found in the Act.[88] A disproportionately large portion of the AETA 1999 is also attributed to communication with governmental entities. In general, lawyers, judges and legal scholars will find the AETA 1999 to be disappointingly skeletal and leaves more answered questions than before.

SUMMARY AND ANALYSIS OF THIS CHAPTER

When the Parliament of Malaysia enacted the Digital Signature Act 1997 (Act 562), the Computer Crimes Act 1997 (Act 563), the Telemedicine Act 1997 (Act 564) in 1997, Malaysia was arguably placed at the forefront of information technology law. At that time in 1997, with the exception of Germany, Malaysia was the only country that had enacted national

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[87] Carter, JW & Harland, DJ, *Contract Law in Australia* (3rd Edition), (Butterworths Publication, 1996) at pp. 15-18.
[88] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001), at pg. 303

legislation to deal with digital signatures, and Malaysia was the sole nation to have law dealing with telemedicine.[89] This leading position has since been eroded, if not surpassed by many other nations, even within the Asia Pacific region, as more and more nations start to introduce comprehensive legislation to specifically deal with the electronic media and the use thereof.[90]

The erosion of Malaysia's lead in the area of information technology law is not exactly a cause to bemoan. The fact that so many other nations have now enacted legislation to regulate electronic commerce and electronic contracts gives Malaysia an excellent opportunity to choose from the best of these foreign provisions for the purpose of updating our existing electronic commerce law. Moreover, the legislative development outside Malaysia since 1997 means that Parliament is now able to refer to statutes enacted in the advanced economies (like the UETA 1999 of the United States and the EU Directive 1998 of Europe) as well as to statutes enacted in jurisdictions that Malaysia has a long historical relationship on judicial matters (like the SETA 1998 of Singapore, the AETA 1999 of Australia and to a smaller degree, the HKETO 2000 of Hong Kong).

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[89] Computer Law & Security Report Vol. 13 No.6 (1997) at pg. 480

[90] Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001) at pp.297 - 337. Although there is a heavy emphasis on the development in Singapore, this publication also provides a comprehensive development of E-commerce legislation in the Asia Pacific region (includes Australia, China, the Philippines, Malaysia, Singapore, Hong Kong, Taiwan, Korea, Japan, New Zealand and Thailand).

On the subject of contract formation, it is also apparent that the SETA 1998, the UETA 1999, the AETA 1999 and the HKETO 2000 have all replicated to varying degree the scheme and concept found under the UNCITRAL Model Law. Although it is wholly unrealistic to expect the provisions of these foreign statutes to successfully regulate all aspects of electronic commerce and electronic contracting, these foreign statutes provide a much welcome starting point from which comprehensive provisions dealing with electronic commerce generally and formation of contract specifically could be enacted. Foreign statutes like the SETA 1998 and the UETA 1999 show how the UNCITRAL Model Law, which is actually no more than a guide, can be translated into a statute dealing with electronic commerce.

Although it can be observed from the above discussion that the SETA 1998, the UETA 1999, the EU Directive 1998, the HKETO 2000 and the AETA 1999 all differ from one another as regards the scope of application, structure and quality of drafting, it is obvious that all of them seek to deal with issues affecting electronic commerce broadly. That is, these foreign statutes deal with electronic commerce (online security, digital signatures, electronic contracts etc) all in one single document. This approach is unlike the position in Malaysia where for example, the subject of contract formation is still largely governed by the antiquated Contracts Act, the subject of digital signature under the Digital Signature Act, electronic evidence under the Evidence Act and Interpretation Acts etc. This Thesis argues that it is advantageous to consolidate all the critical laws and principles that affect the

conduct of electronic commerce and electronic contracting under one statute, as it promotes clarity and certainty.

As stated above, the quality of the provisions in each of these foreign statute varies, and the Parliament of Malaysia should exercise much care to ensure that we only adopt the most comprehensive and suitable provisions from these foreign statutes. For example, Section 14 of the UETA 1999 provides an excellent sample for the recognition of contracts made by computers. On the other hand, Article 11 of the EU Directive 1998 provides a good precedent in respect of a provision dealing with the time and place of the conclusion of an electronic contract. The SETA 1998 and the HKETO 2000 are generally comprehensive statutes that would provide fine precedents for the organization of a statute dealing with electronic commerce. In particular, this Thesis would highlight the attention the legislative body of Hong Kong had possibly invested in considering the scope of application of the HKETO 2000, from the details found in the Electronic Transactions (Exclusion) Order that provides a comprehensive list of existing local ordinances and regulations not covered by the provisions of the HKETO 2000.[91]

[91] Schedule 1 of the Electronic Transactions (Exclusion) Order lists a total of 63 ordinances and regulations not covered by Section 5 of the HKETO 2000 that deals with the concept of writing in the electronic media. Contrast this position with the broad and sweeping approach adopted by the Malaysian Parliament in extending the definition of writing found under the Malaysian Interpretation Acts 1948 & 1967. Schedule 2 of the Electronic Transactions (Exclusion) Order also lists a total of 21 ordinances and regulations not covered by Section 6 of the HKETO 2000 that deals with the concept of signature in the electronic media.

Moreover, one lesson that we may learn from the discussions in the preceding sub-sections of this chapter is that although the UNCITRAL Model Law is an excellent reference document on electronic commerce, the model provisions found therein must not be blindly and rigidly adopted. It is hereby submitted that the legislative organ of any country that wishes to adopt the UNCITRAL Model Law must have the courage to deviate, modify or add to the provisions found under the same in order to fully address the issues of contract formation under its national law. For example, the UNCITRAL Model Law is wholly silent on the time and place of contract formation as it does not wish to interfere with national laws dealing with contract formation.[92] In this connection, it is regretted that although the Parliament of Singapore had enacted a well structured SETA 1998, it did not take that one important additional step in addressing the issues concerning the time and place of contract formation.

In this Chapter, this Thesis has shown that the SETA 1998, the UETA 1999, the HKETO 2000, the AETA 1999 and the EU Directive 1998 all do not deal with the issue of capacity to contract, although this is recognized as a serious problem for a contract made through the use of the Internet.[93] It is astounding that such an important issue could have been overlooked or ignored, to the extent of giving the impression that the issue of contractual capacity is no longer a relevant aspect of contract formation in the realm of

[92] See Guide to Enactment of UNCITRAL Model Law on Electronic Commerce (1996) paragraph 78.
[93] See Chapter 4 of this Thesis, dealing with contractual capacity and the Internet.

the Internet. In this connection, this Thesis argues that the Parliament of Malaysia must adopt the recommendations in Chapter 4 of this Thesis to place Malaysia at the forefront of information technology law once again.

Lastly, it must be noted that the UNCITRAL Model Law on Electronic Commerce itself was formulated back in 1996, in the early years of the Internet being used as a medium for the conduct of commercial activities.[94] Unlike the Parliament of Malaysia, the drafters of the Model Law did not have the benefit of knowing the extent to which the Internet would affect the way commercial activities would be conducted, and the section of the public most likely to use the Internet as a medium to conduct commercial activities. Now that the use of the Internet, as well as its pattern of usage and development are known, the present writer predicts that the national legislations enacted henceforth are likely to show more deviations from the UNCITRAL Model Law, as compared to the earlier legislations like the SETA 1998 and UETA 1999.

It was recently announced in the local press that that the Malaysian Parliament would table an "Electronic Transactions Bill" in October 2003.[95] As of the date of completion of this Thesis (June 2003), the exact scope of

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[94] Note the observation made by Murray, Vick & Wortley, *Regulating E-Commerce: Formal Transactions in the Digital Age*, Volume 13 (No.2) (1999) International Review of Law & Computers Technology 127 at pg. 135 that the UNCITRAL basically did an excellent job in preparing the Model Law, but the task they had set out to achieve was an almost impossible one, having to accommodate the needs of both the developed and developing worlds at t a time when the Internet was still at its infancy in 1996.

[95] *Law to Prevent E-Trade Fraud*, The Sun (May 26th, 2003), at pg. 1

this new Bill is still not known, and it is also not known if this new legislation shall be based on the UNCITRAL Model Law, or if the Malaysian Parliament has taken bold initiatives to create a statute that adequately addresses the needs of Malaysia without extensively replicating the words of the UNCITRAL Model Law.

CHAPTER EIGHT

STATUTORY REFORMS FOR MALAYSIA

SUMMARY OF NEW PROVISIONS TO BE ENACTED

From the previous Chapters of this Thesis, we observe that in dealing with electronic commerce, we are not constructing a whole new area of the law. Instead, it simply involves an exercise of updating and filling the lacunae found in the law as it presently stands so that it shall be able to regulate the novelties introduced by electronic commerce. The existing legal framework which has to deal with electronic commerce can be likened to an old house that is still serving its purpose, but on which repairs or renovations to create an annex must being carried out so that it can regulate the novelties introduced by the Internet and EDI.[1] The "repairs and renovations" in question are in the form of new legislative provisions to be enacted, either to modify existing legal principles that are unsuitable for the purpose of electronic commerce, or to consolidate existing legal principles for the purpose of clarity.

As the present writer opined in Chapter 1 of this Thesis, hitherto, the Parliament of Malaysia has largely neglected the subject of electronic contracts and the formation thereof. This neglect has shrouded the subject of contract formation through the use of the Internet and the EDI in considerable uncertainties. As the Internet and the EDI have become

[1] See Bhag Singh, *Skills for Cyber Edge*, The Star, November 21 2000 Issue

indispensable tools for the making and concluding of business transactions, the uncertainties associated with its use in regards to formation of electronic contracts are overwhelmingly unhealthy for the growth of electronic commerce in Malaysia. In Chapters 2 to 5 of this Thesis, this Thesis has consequently made a number of recommendations that the Parliament of Malaysia must undertake to fill these lacunae in the law.

In Chapter 2, this Thesis argues that the existing provisions of the Contracts Act do not recognize the enforceability of a contract that is made without any immediate human involvement and with the computer assuming the active role[2] in its formation. In the same Chapter, this Thesis argues that Parliament must enact fresh legislative provisions to recognize the enforceability of agreements made by intelligent computers acting autonomously. Towards achieving this objective, this Thesis recommends that the Parliament of Malaysia refer to the UNCITRAL Model Law on Electronic Commerce and the Uniform Electronic Transactions Act 1999 of the United States for guidance.

In Chapter 3 of this Thesis, the present writer argues that the Internet severely aggravates the difficulty of distinguishing an offer from invitation to treat. As a solution, this Thesis recommends that all ambiguities in this respect must be construed against the seller who sells his products or

[2] Refer to definition of "*active role*" at page 48 of this Thesis above.

services through the use of the Internet, and that Parliament must forthwith enact fresh statutory provisions for this purpose. On the subject of determining the time an acceptance is complete when the same is sent using the electronic media, this Thesis argues that Section 4(2)(a) of the Contracts Act can be successfully utilized to determine the same when read with Article 15(1) of the UNCITRAL Model Law. In this connection, this Thesis recommends that Parliament enact an equivalent of Article 15 of the UNCITRAL Model Law to complement Section 4(2)(a) of the Contracts Act. Alternatively, the Parliament could adopt the approach found under Article 11 of the EU Directive 1998.

Chapter 4 of this Thesis deals with the fundamental issue of capacity to contract. This Chapter argues *inter alia,* that the existing provisions under the Contracts Act unfairly favor a minor and a person of unsound mind. This Thesis argues that this imbalance is not conducive for the future growth of Internet based commerce and a better compromise must be established. This new compromise must take into account the fact that a minor or person of unsound mind must not be allowed to take advantage of his incapacity in law to cause hardship to a vendor who sells entirely through the Internet. In this relation, this Thesis recommends that Parliament should forthwith enact fresh statutory provisions to:

(1) reduce the age of minority in respect of Internet based commerce;

(2) impose upon the minor an obligation to inform the Internet seller of his minority;

(3) shift the burden of proving the supply of necessaries under Section 69 of the Contracts Act to the minor;

(4) require the person alleging that the contract was unenforceable because of his unsoundness of mind to prove that the other party was aware of his unsoundness of mind at the time of the making of the contract before finding the contract as void; and

(5) require the person alleging that the contract was unenforceable because of his unsoundness of mind to prove that the articles supplied are not necessaries under Section 69 of the Contracts Act.

Chapter 5 of the Thesis focuses on the statutory requirement of writing and signature for contracts made through the Internet and electronic mails. In this Chapter, this Thesis argues that the definitions of "*writing*" under both the Interpretation Acts 1948 & 1967 and the Digital Signature Act 1997 are fundamentally inadequate. Moreover, the concept of writing under Section 64 of the Digital Signature Act 1997 is narrow and has no wide application. This Thesis speculates that Parliament had underestimated the complexity of the electronic media when it enacted these provisions in 1997. To resolve these problems, this Thesis recommends that Parliament enact a general provision in the form of Article 6 of the UNCITRAL Model Law on Electronic Commerce to establish unequivocally the parameters that must be satisfied in order to qualify as writing for the purpose of contract formation.

On the requirement of signature, this Thesis argues in Chapter 5 that the existing definition of "*sign*" under the Interpretation Acts 1948 & 1967 is sufficiently wide to cover the use of electronic and digital signatures for the purpose of contract formation. Common law decisions on the requirement of signature are also liberal and do not pose any obstacle to the use of electronic and digital signatures for contract formation. However, as the existing laws dealing with the requirement of signature are found in diverse sources, this Thesis recommends that Parliament enact clear statutory provisions to consolidate the existing laws to recognize the use of electronic and digital signatures for the purpose of contract formation. Towards achieving this goal, Parliament could refer to Section 62(2) of the Digital Signatures Act and Article 7 of the UNCITRAL Model Law as precedent.

Although the existing body of law in Malaysia dealing with electronic contracts in particular requires considerable updating, Parliament must observe great care so as not to exaggerate the complexity of the Internet. Both academics and lawyers often (consciously or unconsciously) exaggerate the uniqueness and complexity of the Internet, and one area that has received tremendous attention from these parties concerns the issue of conflict of laws in relation to transactions made through the Internet.

As regards this issue, Chapter 6 of this Thesis argues that choice of law issues arising from Internet based contracts, including questions pertaining to the law governing the formation and validity of contracts, can be

satisfactorily resolved by conventional proper law doctrine. This Chapter argues that conventional transactions in non-electronic media are potentially just as complex as Internet based transactions. Since choice of law issues in the former are being resolved by the well established traditional choice of law doctrines, there is no reason why choice of law issues arising out of Internet based transactions could not be similarly resolved by the application of these rules.

Chapter 7 of this Thesis reviews the statutes dealing with electronic commerce that have been enacted by the parliaments / law making organs of Singapore, the United States, the European Union, Hong Kong and Australia. One important lesson that we may learn from a review of these foreign statutes is that although the UNCITRAL Model Law is an excellent reference document on electronic commerce, the model provisions found therein must not be blindly and rigidly adopted by our Parliament. For example, the UNCITRAL Model Law is wholly silent on the time and place of contract formation as it does not wish to interfere with national laws dealing with contract formation.

Likewise, the UNCITRAL Model Law does not directly and explicitly deal with the subject of capacity to contract. The Parliament of Malaysia must have the creativity and courage to modify or add to the provisions found under the Model Law to make these provisions more specific in order to address the issues of contract formation under the law of Malaysia. It shall be a serious

mistake to simply replicate the provisions found under the UNCITRAL Model Law, or to import the provisions found in the foreign statutes that adopt the UNCITRAL Model Law without considering the specific intricacies of the legal position in Malaysia.

NEW LEGISLATION, CASE LAW OR SELF-REGULATION?

In the preceding Chapters, this Thesis largely argues that the issues relating to contract formation over the Internet and other electronic media must be regulated through the active intervention of the Parliament of Malaysia. Pursuant to this argument, the present uncertainties in the law concerning the formation of electronic contracts can be adequately and satisfactorily resolved through the formulation of new coherent statutes by Parliament that address and resolve these uncertainties and lacunae in the law. The basis of this argument is that the proactive participation of Parliament has the following two distinct advantages; namely, (1) the resulting principles are transparent to all concerned; and (2) the resulting principles have the force of law. These two advantages ensure that the provisions enacted to resolve the present lacunae in the law dealing with electronic commerce are consistently applied by all parties that are involved in the formation of electronic contracts.

At this juncture, it is also evident that it is unwise and ineffective to depend solely on the development of case law authorities when dealing with a fast evolving area like the Internet. The development of case law authorities is

often unbearably slow and will do little to promote commercial certainty in the regulation of a rapidly changing technology like the Internet.[3] The fact that Parliament decided to enact such wide-ranging legislations in 1997 to deal with electronic commerce bears testimony to the impossibility of dealing with electronic commerce through judge made decisions.

As an alternative to active legislative intervention, it has been argued that the Internet could be satisfactorily governed by self-regulation.[4] Self-regulation basically entails that the Internet users themselves would set the rules governing its use. For example, Internet users would set the rules that all of them would collectively adhere to in respect of contracts made over the Internet. The Internet users would establish the rules to determine the time and place of the making of contracts, rules regarding the capacity to contract and the requirement of contracts made in writing. The users themselves could even establish the necessary private forum for their disputes to be adjudicated upon expeditiously and according to the rules governing the users. Advocates of self-regulation would argue that the same would constitute the best form of regulation as Internet users are driven by self-interest to ensure that the Internet is well regulated. Advocates of self-

[3] See Endeshaw, Assafa, *Internet and E-Commerce Law*, (Prentice Hall Publication, 2001) at pp 250-251.

[4] See for example, Valauskas, Edward, *Lex Networkia: Understanding the Internet Community*, available at www.firstmonday.dk/issues/issue4/valauskas. This site was visited on 10th September 1999. See also Johnson, David & Post, David, *Law and Borders – The Rise of Law in Cyberspace*, Vol. 48 Stanford law Review 1367 at pp 1388-1389.

regulation would also argue that the Internet must be regulated by rules that they themselves make, as they know the Internet the best.[5]

Despite the appeal of self-regulation, this mode of regulation has at least one serious weakness. This weakness stems from the basic question: Which party shall take control of the process of self-regulation on the Internet? As the Internet has an enormous number of users, even within Malaysia, and a large majority of whom have no affiliation to any organization or regulatory body, any attempt to regulate commercial transactions that are made through this medium will be slow and / or haphazard. This weakness is greatly extrapolated once we take into account the fact that Internet based commerce is often conducted between parties who are resident or domiciled in different jurisdictions with dissimilar legal traditions and commercial practice. Further, the success of self-regulation depends heavily on the users being able to educate each other of the rules and to compel adherence to these rules at all times. If an individual refuses or decides not to adhere to the rules, there is really nothing the other users can do to compel him to comply.

In short, self-regulation is not conducive for the growth of electronic commerce. The best approach to regulating electronic commerce remains by way of mandatory statutory provisions. As mandatory statutory provisions

[5] Valauskas, Edward, *Lex Networkia: Understanding the Internet Community*, available at www.firstmonday.dk/issues/issue4/valauskas.

have the force of law, the same would have to be complied with by all parties concerned, once the same is enacted by Parliament. Statutory provisions also provides a uniform platform for all parties to follow, that is, it is not haphazard as is the case with self-regulation. The active intervention of the legislature is therefore unavoidable, although the call for self-regulation could be equally appealing. In fact, such intervention is justified and is much required, as the author of an influential news magazine opined:

> The sheer pervasiveness of the Internet makes it impossible for even the best intentioned of regulators to keep out. Such issues as privacy, consumer protection, intellectual property rights, contracts and taxation cannot be left entirely to self-regulation if e-commerce is to flourish. And, as the judge's ruling in favor of a break-up of Microsoft has just confirmed, anti-trust action may be even more important online than off. The real question, alas, is not whether to regulate the Internet, but how.[6]

Whilst advocating the need for legislative intervention, this Thesis would like to caution against over-regulation, which would likewise be counter-productive for the growth of electronic commerce. Although the lack of regulation breeds uncertainty and chaos, over-regulation stifles flexibility that is critical for the growth of commerce. Admittedly, finding the right balance is not unlike Ulysses having to navigate cautiously between the rocks of Scylla and the whirlpool Charybdis. This Thesis would in particular caution against enacting legislation that requires the application of one specific class of technology, thereby excluding the application of other cheaper and more practical form of technology. In this connection, it can be argued that the Digital Signature Act 1997 is too restrictive by failing to deal with other forms of electronic signatures not using public-cryptography technology. On the

other hand, the drafters of the UNCITRAL Model Law should be applauded for creating a document that is virtually technology free, thereby not affected by the fast advancements of digital technology. As always, Parliament has to address the practicality of any new legislative provisions with care as once they are enacted, the consequences may be irreparable without significant costs.

FINAL WORDS ON CONCLUSION

This Thesis has shown that serious lacunae exist within the law of Malaysia dealing with electronic contracts and the formation thereof. Even the fundamental issue relating to enforceability of contracts made by computers autonomously is shrouded with uncertainty under the present law of Malaysia, although the EDI and the Internet have both been used in this manner for some periods of time.

In a press interview conducted in early year 2001, the Energy, Communications and Multimedia Minister of Malaysia, Datuk Amar Leo Moggie, said that the "cyberlaws" that had been passed a few years before were already outdated and no longer relevant and that new law would be enacted to replace the existing ones. From the published news report, the Minister was evidently referring to the issues of cyber privacy and use of information.[7] Hitherto, the Ministry has not provided any obvious indication on amendments affecting the subject of electronic contracts under the law of

[6] See *The Economist*, June 10th 2000 issue, at pg.16
[7] *Moggie: New Cyber laws to Replace Outdated Ones*, The Star (April 18th 2001), at pg. 1.

Malaysia. After a period of prolonged silence on this new legislation, the local press recently reported that the Malaysian Parliament would table an "Electronic Transactions Bill" in October 2003.[8] As of the date of completion of this Thesis, the exact scope of this new Bill is still not known, and it is also not known if this new legislation shall be a replication of the UNCITRAL Model Law on Electronic Commerce 1996, as is the case with legislations enacted in Singapore, Australia, Hong Kong and (to a lesser extent) the United States.[9]

There is obviously no quick cure to fill the lacunae in the law, but it is obvious that the Government of Malaysia would have to deal with the issue at two inter-related levels. At the primary level, Parliament must be quick to introduce new domestic legislation to modify the principles found in the Contracts Act (especially) in order to bring more certainty to the subject of contract formation. Alternatively, Parliament could introduce a new statute that deals with the subject of electronic contracts specifically. As precedent, the Parliament could refer to the UNCITRAL Model Law and the many statutes of other countries that replicate the same. The EU Directive 1998 will also prove to be a useful point of reference. However, as the present writer previously argued, in referring to the above-mentioned precedents, Parliament must be mindful of the shortcomings of the same.[10]

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[8] *Law to Prevent E-Trade Fraud*, The Sun (May 26th, 2003), at pg. 1

[9] See Chapter 7 of this Thesis for discussions on these foreign legislations dealing with electronic commerce.

[10] Note the observation made by Murray, Vick & Wortley, *Regulating E-Commerce: Formal Transactions in the Digital Age*, Volume 13 (No.2) (1999) International Review of Law &

At a secondary and higher level, the Government of Malaysia must actively participate in regional and global efforts to promote and standardize the law concerning electronic commerce. A good starting point will be to promote some form of standardization within the framework of the Asia Pacific Economic Cooperation (APEC) Electronic Commerce Task Force that was formed at the Senior Officials meeting held in Pulau Pinang, Malaysia in February 1998.[11] The APEC is presently looking into five groups of electronic commerce projects, namely, (1) trials of new technology and standards, (2) promoting awareness, training and use, (3) building consumer confidence and security in electronic commerce, (4) legal and regulatory issues, and (5) studies of usage.[12]

In addition to the foregoing efforts of the APEC, the ASEAN Economic Ministers had also mandated the undertaking of a study on the evolution of electronic commerce and how ASEAN could take advantage of the benefits of electronic commerce by establishing a Coordinating Committee on Electronic Commerce (CCEC). To date the CCEC has drawn up a work program on electronic commerce with the objectives to (1) create the policy

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Computers Technology 127 at pg. 135 that the UNCITRAL basically did an excellent job in preparing the Model Law, but the task they had set out to achieve was an almost impossible one, having to accommodate the needs of both the developed and developing worlds at t a time when the Internet was still at its infancy in 1996.

[11] See *Electronic Commerce – Discussion Paper by Australia*, available at www.dfat.gov.au/apec/ecom/apec_ecom_diss160298.html. The present writer visited this site on 22nd November 2000.

[12] See Supriya Singh, *Electronic Commerce in the APEC Region*, available at www.dfat.gov.au/apec/ecom/CIRCITI.html. The present writer visited this site on 22nd November 2000

and legislative environment to facilitate cross-border electronic commerce, (2) ensure the coordination and adoption of a framework and standards for cross-border electronic commerce that is in line with international standards, and (3) encourage technical cooperation between member states of ASEAN in the field of electronic commerce.[13] In parallel to the foregoing, ASEAN also established the "e-ASEAN Task Force" as far back as 1999 to focus on boosting electronic commerce in the region, by *inter alia* calling for member nations to pass digital signature laws.[14]

Of course, there are definitely major challenges in the development of a coherent international approach to electronic commerce. Even within the APEC region, such an effort is hampered by the fact that many aspects of electronic commerce are still in their infancy, hence need to mature before concrete policies could be established. Moreover, the uneven use of the electronic media among member nations leads to high variance in policy development.[15] However, it is undeniable that it is only through the participation of many nations in such regional forum that Malaysia could ensure that our electronic commerce laws are of international standards and promotes commercial certainty within the framework of international business and trade.

---------- *End of Thesis* ----------

[13] See www.asean.or.id/ec/ov_ec.html. The present writer visited this site on 24th November 2000
[14] Enos, Lori, *Asia Seeks E-Commerce Parity*, E-Commerce Times, November 27, 2000
[15] See *Electronic Commerce – Discussion Paper by Australia*, available at www.dfat.gov.au/apec/ecom/apec_ecom_diss160298.html. The present writer visited this site on 22nd November 2000

APPENDIX

UNCITRAL MODEL LAW
ON
ELECTRONIC COMMERCE

UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE

WITH

GUIDE TO ENACTMENT

1996

with additional article 5 *bis* as adopted in 1998

UNITED NATIONS

CONTENTS

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RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Sixth Committee (A/51/628)]

51/162 Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on International Trade Law, with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Noting that an increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information,

Recalling the recommendation on the legal value of computer records adopted by the Commission at its eighteenth session, in 1985,[1] and paragraph 5(b) of General Assembly resolution 40/71 of 11 December 1985, in which the Assembly called upon Governments and international organizations to take action, where appropriate, in conformity with the recommendation of the Commission,[1] so as to ensure legal security in the context of the widest possible use of automated data processing in international trade,

Convinced that the establishment of a model law facilitating the use of electronic commerce that is acceptable to States with different legal, social and economic systems, could contribute significantly to the development of harmonious international economic relations,

Noting that the Model Law on Electronic Commerce was adopted by the Commission at its twenty-ninth session after consideration of the observations of Governments and interested organizations,

Believing that the adoption of the Model Law on Electronic Commerce by the Commission will assist all States significantly in enhancing their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists,

1. *Expresses* its appreciation to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Electronic Commerce contained in the annex to the present resolution and for preparing the Guide to Enactment of the Model Law;

2. *Recommends* that all States give favourable consideration to the Model Law when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based methods of communication and storage of information;

3. *Recommends* also that all efforts be made to ensure that the Model Law, together with the Guide, become generally known and available.

85th plenary meeting

16 December 1996

UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE

[Original: Arabic, Chinese, English, French, Russian, Spanish]

Part one. Electronic commerce in general

Chapter I. General provisions

Article 1. Sphere of application*

This Law** applies to any kind of information in the form of a data message used in the context*** of commercial**** activities.

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* The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages:

"This Law applies to a data message as defined in paragraph (1) of article 2 where the data message relates to international commerce."

** This Law does not override any rule of law intended for the protection of consumers.

*** The Commission suggests the following text for States that might wish to extend the applicability of this Law: "This Law applies to any kind of information in the form of a data message, except in the following situations: [...]."

**** The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road

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Article 2. Definitions

For the purposes of this Law:

(a) "Data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) "Originator" of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

(d) "Addressee" of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) "Intermediary", with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message;

(f) "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages.

Article 3. Interpretation

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 4. Variation by agreement

(1) As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of chapter III may be varied by agreement.

(2) Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.

Chapter II. Application of legal requirements to data messages

Article 5. Legal recognition of data messages

Information shall not be denied legal effect, validity or enforce- ability solely on the grounds that it is in the form of a data message.

Article 5 bis. Incorporation by reference

(as adopted by the Commission at its thirty-first session, in June 1998)

Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.

Article 6. Writing

(1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.

(3) The provisions of this article do not apply to the following: [...].

Article 7. Signature

(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) The provisions of this article do not apply to the following: [...].

Article 8. Original

(1) Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:

(a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

(b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.

(3) For the purposes of subparagraph (a) of paragraph (1):

(a) 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 display; and

(b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

(4) The provisions of this article do not apply to the following: [...].

Article 9. Admissibility and evidential weight of data messages

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:

(a) on the sole ground that it is a data message; or,

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

Article 10. Retention of data messages

(1) Where the law requires that certain documents, records or information be retained, that requirement is met by retaining data messages, provided that the following conditions are satisfied:

(a) the information contained therein is accessible so as to be usable for subsequent reference; and

(b) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

(c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

(2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be sent or received.

(3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided that the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

Chapter III. Communication of data messages

Article 11. Formation and validity of contracts

(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

(2) The provisions of this article do not apply to the following: [...].

Article 12. Recognition by parties of data messages

(1) As between the originator and the addressee of a data message, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.

(2) The provisions of this article do not apply to the following: [...].

Article 13. Attribution of data messages

(1) A data message is that of the originator if it was sent by the originator itself.

(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:

(a) by a person who had the authority to act on behalf of the originator in respect of that data message; or

(b) by an information system programmed by, or on behalf of, the originator to operate automatically.

(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

(a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or

(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

(4) Paragraph (3) does not apply:

(a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or

(b) in a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

(5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.

(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.

Article 14. Acknowledgement of receipt

(1) Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.
(2) Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement may be given by
(a) any communication by the addressee, automated or otherwise, or
(b) any conduct of the addressee,
sufficient to indicate to the originator that the data message has been received.
(3) Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.
(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time, the originator:
(a) may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and
(b) if the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.
(5) Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. That presumption does not imply that the data message corresponds to the message received.
(6) Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.
(7) Except in so far as it relates to the sending or receipt of the data message, this article is not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt.

Article 15. Time and place of dispatch and receipt of data messages
(1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.
(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
(i) at the time when the data message enters the designated information system; or
(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.
(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).
(4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is

deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.

(5) The provisions of this article do not apply to the following: [...].

Part two. Electronic commerce in specific areas

Chapter I. Carriage of goods

Article 16. Actions related to contracts of carriage of goods

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:

(a) (i) furnishing the marks, number, quantity or weight of goods;
(ii) stating or declaring the nature or value of goods;
(iii) issuing a receipt for goods;
(iv) confirming that goods have been loaded;
(b) (i) notifying a person of terms and conditions of the contract;
(ii) giving instructions to a carrier;
(c) (i) claiming delivery of goods;
(ii) authorizing release of goods;
(iii) giving notice of loss of, or damage to, goods;
(d) giving any other notice or statement in connection with the performance of the contract;
(e) undertaking to deliver goods to a named person or a person authorized to claim delivery;
(f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;
(g) acquiring or transferring rights and obligations under the contract.

Article 17. Transport documents

(1) Subject to paragraph (3), 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 messages.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for failing either to carry out the action in writing or to use a paper document.

(3) 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 one or more data messages, provided that a reliable method is used to render such data message or messages unique.

(4) For the purposes of paragraph (3), the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.

(5) Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper

document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.

(6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.

(7) The provisions of this article do not apply to the following: [...].

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GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE (1996)

Purpose of this guide

1. In preparing and adopting the UNCITRAL Model Law on Electronic Commerce (hereinafter referred to as "the Model Law"), the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information would be provided to executive branches of Governments and legislators to assist them in using the Model Law. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of communication techniques considered in the Model Law. This Guide, much of which is drawn from the *travaux préparatoires* of the Model Law, is also intended to be helpful to users of electronic means of communication as well as to scholars in that area. In the preparation of the Model Law, it was assumed that the draft Model Law would be accompanied by such a guide. For example, it was decided in respect of a number of issues not to settle them in the draft Model Law but to address them in the Guide so as to provide guidance to States enacting the draft Model Law. The information presented in this Guide is intended to explain why the provisions in the Model Law have been included as essential basic features of a statutory device designed to achieve the objectives of the Model Law. Such information might assist States also in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances.

I. INTRODUCTION TO THE MODEL LAW

A. Objectives

2. The use of modern means of communication such as electronic mail and electronic data interchange (EDI) for the conduct of international trade transactions has been increasing rapidly and is expected to develop further as technical supports such as information highways and the INTERNET become more widely accessible. However, the communication of legally significant information in the form of paperless messages may be hindered by legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity. The purpose of the Model Law is to offer national legislators a set of internationally acceptable rules as to how a number of such legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as "electronic commerce". The principles expressed in the Model Law are also intended to be of use to individual users of electronic commerce in the drafting of some of the contractual solutions that might be needed to overcome the legal obstacles to the increased use of electronic commerce.

3. The decision by UNCITRAL to formulate model legislation on electronic commerce was taken in response to the fact that in a number of countries the existing legislation governing communication and storage of information is inadequate or outdated because it does not contemplate the use of electronic commerce. In certain cases, existing legislation imposes or implies restrictions on the use of modern means of communication, for example by prescribing the use of "written", "signed" or "original" documents. While a few countries have adopted specific provisions to deal with certain aspects of electronic commerce, there exists no legislation dealing with electronic commerce as a whole. This may result in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper document. Moreover, while sound laws and practices are necessary in all countries where the use of EDI and electronic mail is becoming widespread, this need is also felt in many countries with respect to such communication techniques as telecopy and telex.

4. The Model Law may also help to remedy disadvantages that stem from the fact that inadequate legislation at the national level creates obstacles to international trade, a significant

amount of which is linked to the use of modern communication techniques. Disparities among, and uncertainty about, national legal regimes governing the use of such communication techniques may contribute to limiting the extent to which businesses may access international markets.

5. Furthermore, at an international level, the Model Law may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce, for example by prescribing that certain documents or contractual clauses be made in written form. As between those States parties to such international instruments, the adoption of the Model Law as a rule of interpretation might provide the means to recognize the use of electronic commerce and obviate the need to negotiate a protocol to the international instrument involved.

6. The objectives of the Model Law, which include enabling or facilitating the use of electronic commerce and providing equal treatment to users of paper-based documentation and to users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would create a media-neutral environment.

B. Scope

7. The title of the Model Law refers to "electronic commerce". While a definition of "electronic data interchange (EDI)" is provided in article 2, the Model Law does not specify the meaning of "electronic commerce". In preparing the Model Law, the Commission decided that, in addressing the subject matter before it, it would have in mind a broad notion of EDI, covering a variety of trade-related uses of EDI that might be referred to broadly under the rubric of "electronic commerce" (see A/CN.9/360, paras. 28-29), although other descriptive terms could also be used. Among the means of communication encompassed in the notion of "electronic commerce" are the following modes of transmission based on the use of electronic techniques: communication by means of EDI defined narrowly as the computer-to-computer transmission of data in a standardized format; transmission of electronic messages involving the use of either publicly available standards or proprietary standards; transmission of free-formatted text by electronic means, for example through the INTERNET. It was also noted that, in certain circumstances, the notion of "electronic commerce" might cover the use of techniques such as telex and telecopy.

8. It should be noted that, while the Model Law was drafted with constant reference to the more modern communication techniques, e.g., EDI and electronic mail, the principles on which the Model Law is based, as well as its provisions, are intended to apply also in the context of less advanced communication techniques, such as telecopy. There may exist situations where digitalized information initially dispatched in the form of a standardized EDI message might, at some point in the communication chain between the sender and the recipient, be forwarded in the form of a computer-generated telex or in the form of a telecopy of a computer print-out. A data message may be initiated as an oral communication and end up in the form of a telecopy, or it may start as a telecopy and end up as an EDI message. A characteristic of electronic commerce is that it covers programmable messages, the computer programming of which is the essential difference between such messages and traditional paper-based documents. Such situations are intended to be covered by the Model Law, based on a consideration of the users' need for a consistent set of rules to govern a variety of communication techniques that might be used interchangeably. More generally, it may be noted that, as a matter of principle, no communication technique is excluded from the scope of the Model Law since future technical developments need to be accommodated.

9. The objectives of the Model Law are best served by the widest possible application of the Model Law. Thus, although there is provision made in the Model Law for exclusion of certain

situations from the scope of articles 6, 7, 8, 11, 12, 15 and 17, an enacting State may well decide not to enact in its legislation substantial restrictions on the scope of application of the Model Law.

10. The Model Law should be regarded as a balanced and discrete set of rules, which are recommended to be enacted as a single statute. Depending on the situation in each enacting State, however, the Model Law could be implemented in various ways, either as a single statute or in several pieces of legislation (see below, para. 143).

C. Structure

11. The Model Law is divided into two parts, one dealing with electronic commerce in general and the other one dealing with electronic commerce in specific areas. It should be noted that part two of the Model Law, which deals with electronic commerce in specific areas, is composed of a chapter I only, dealing with electronic commerce as it applies to the carriage of goods. Other aspects of electronic commerce might need to be dealt with in the future, and the Model Law can be regarded as an open-ended instrument, to be complemented by future work.

12. UNCITRAL intends to continue monitoring the technical, legal and commercial developments that underline the Model Law. It might, should it regard it advisable, decide to add new model provisions to the Model Law or modify the existing ones.

D. A "framework" law to be supplemented by technical regulations

13. The Model Law is intended to provide essential procedures and principles for facilitating the use of modern techniques for recording and communicating information in various types of circumstances. However, it is a "framework" law that does not itself set forth all the rules and regulations that may be necessary to implement those techniques in an enacting State. Moreover, the Model Law is not intended to cover every aspect of the use of electronic commerce. Accordingly, an enacting State may wish to issue regulations to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing, circumstances at play in the enacting State, without compromising the objectives of the Model Law. It is recommended that, should it decide to issue such regulation, an enacting State should give particular attention to the need to maintain the beneficial flexibility of the provisions in the Model Law.

14. It should be noted that the techniques for recording and communicating information considered in the Model Law, beyond raising matters of procedure that may need to be addressed in the implementing technical regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law, which the Model Law is not intended to deal with.

E. The "functional-equivalent" approach

15. The Model Law is based on the recognition that legal requirements prescribing the use of traditional paper-based documentation constitute the main obstacle to the development of modern means of communication. In the preparation of the Model Law, consideration was given to the possibility of dealing with impediments to the use of electronic commerce posed by such requirements in national laws by way of an extension of the scope of such notions as "writing", "signature" and "original", with a view to encompassing computer-based techniques. Such an approach is used in a number of existing legal instruments, e.g., article 7 of the UNCITRAL Model Law on International Commercial Arbitration and article 13 of the United Nations Convention on Contracts for the International Sale of Goods. It was observed that the Model Law should permit States to adapt their domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying

those requirements. At the same time, it was said that the electronic fulfilment of writing requirements might in some cases necessitate the development of new rules. This was due to one of many distinctions between EDI messages and paper-based documents, namely, that the latter were readable by the human eye, while the former were not so readable unless reduced to paper or displayed on a screen.

16. The Model Law thus relies on a new approach, sometimes referred to as the "functional equivalent approach", which is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques. For example, among the functions served by a paper document are the following: to provide that a document would be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts. It should be noted that in respect of all of the above-mentioned functions of paper,.electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met. However, the adoption of the functional-equivalent approach should not result in imposing on users of electronic commerce more stringent standards of security (and the related costs) than in a paper-based environment.

17. A data message, in and of itself, cannot be regarded as an equivalent of a paper document in that it is of a different nature and does not necessarily perform all conceivable functions of a paper document. That is why the Model Law adopted a flexible standard, taking into account the various layers of existing requirements in a paper-based environment: when adopting the "functional-equivalent" approach, attention was given to the existing hierarchy of form requirements, which provides distinct levels of reliability, traceability and unalterability with respect to paper-based documents. For example, the requirement that data be presented in written form (which constitutes a "threshold requirement") is not to be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act".

18. The Model Law does not attempt to define a computer-based equivalent to any kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function. It should be noted that the functional-equivalent approach has been taken in articles 6 to 8 of the Model Law with respect to the concepts of "writing", "signature" and "original" but not with respect to other legal concepts dealt with in the Model Law. For example, article 10 does not attempt to create a functional equivalent of existing storage requirements.

F. Default rules and mandatory law

19. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to most of the legal difficulties raised by the use of modern means of communication are sought within contracts. The Model Law embodies the principle of party autonomy in article 4 with respect to the provisions contained in chapter III of part one. Chapter III of part one contains a set of rules of the kind that would typically be found in agreements between parties, e.g., interchange agreements or "system rules". It should be noted that the notion of "system rules" might cover two different categories of rules, namely, general terms provided by communication networks and specific rules that might be included in those general terms to deal with bilateral relationships between originators and addressees of data messages. Article 4 (and the notion of "agreement" therein) is intended to encompass both categories of "system rules".

20. The rules contained in chapter III of part one may be used by parties as a basis for concluding such agreements. They may also be used to supplement the terms of agreements in cases of gaps or omissions in contractual stipulations. In addition, they may be regarded as setting a basic standard for situations where data messages are exchanged without a previous agreement being entered into by the communicating parties, e.g., in the context of open-networks communications.

21. The provisions contained in chapter II of part one are of a different nature. One of the main purposes of the Model Law is to facilitate the use of modern communication techniques and to provide certainty with the use of such techniques where obstacles or uncertainty resulting from statutory provisions could not be avoided by contractual stipulations. The provisions contained in chapter II may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. Such well-established rules are normally of a mandatory nature since they generally reflect decisions of public policy. The provisions contained in chapter II should be regarded as stating the minimum acceptable form requirement and are, for that reason, of a mandatory nature, unless expressly stated otherwise in those provisions. The indication that such form requirements are to be regarded as the "minimum acceptable" should not, however, be construed as inviting States to establish requirements stricter than those contained in the Model Law.

G. Assistance from UNCITRAL secretariat

22. In line with its training and assistance activities, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation based on the UNCITRAL Model Law on Electronic Commerce, as it may for Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

23. Further information concerning the Model Law as well as the Guide and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

International Trade Law Branch
Office of Legal Affairs
United Nations Vienna International Centre
P.O. Box 500
A-1400, Vienna, Austria
Telephone: (43-1) 26060-4060 or 4061
Telefax: (43-1) 26060-5813 or (43-1) 2692669
Telex: 135612 uno a
E-mail: uncitral@unov.un.or.at
Internet Home Page: http://www.un.or.at/uncitral

II. ARTICLE-BY-ARTICLE REMARKS

Part one. Electronic commerce in general

Chapter I. General provisions

Article 1. Sphere of application

24. The purpose of article 1, which is to be read in conjunction with the definition of "data message" in article 2(a), is to delineate the scope of application of the Model Law. The approach used in the Model Law is to provide in principle for the coverage of all factual situations where information is generated, stored or communicated, irrespective of the medium on which such information may be affixed. It was felt during the preparation of the Model Law that exclusion of any form or medium by way of a limitation in the scope of the Model Law might result in practical difficulties and would run counter to the purpose of providing truly "media-neutral" rules. However, the focus of the Model Law is on "paperless" means of communication and, except to the extent expressly provided by the Model Law, the Model Law is not intended to alter traditional rules on paper-based communications.

25. Moreover, it was felt that the Model Law should contain an indication that its focus was on the types of situations encountered in the commercial area and that it had been prepared against the background of trade relationships. For that reason, article 1 refers to "commercial activities" and provides, in footnote ****, indications as to what is meant thereby. Such indications, which may be particularly useful for those countries where there does not exist a discrete body of commercial law, are modelled, for reasons of consistency, on the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration. In certain countries, the use of footnotes in a statutory text would not be regarded as acceptable legislative practice. National authorities enacting the Model Law might thus consider the possible inclusion of the text of footnotes in the body of the Law itself.

26. The Model Law applies to all kinds of data messages that might be generated, stored or communicated, and nothing in the Model Law should prevent an enacting State from extending the scope of the Model Law to cover uses of electronic commerce outside the commercial sphere. For example, while the focus of the Model Law is not on the relationships between users of electronic commerce and public authorities, the Model Law is not intended to be inapplicable to such relationships. Footnote *** provides for alternative wordings, for possible use by enacting States that would consider it appropriate to extend the scope of the Model Law beyond the commercial sphere.

27. Some countries have special consumer protection laws that may govern certain aspects of the use of information systems. With respect to such consumer legislation, as was the case with previous UNCITRAL instruments (e.g., the UNCITRAL Model Law on International Credit Transfers), it was felt that an indication should be given that the Model Law had been drafted without special attention being given to issues that might arise in the context of consumer protection. At the same time, it was felt that there was no reason why situations involving consumers should be excluded from the scope of the Model Law by way of a general provision, particularly since the provisions of the Model Law might be found appropriate for consumer protection, depending on legislation in each enacting State. Footnote ** thus recognizes that any such consumer protection law may take precedence over the provisions in the Model Law. Legislators may wish to consider whether the piece of legislation enacting the Model Law should apply to consumers. The question of which individuals or corporate bodies would be regarded as "consumers" is left to applicable law outside the Model Law.

28. Another possible limitation of the scope of the Model Law is contained in the first footnote. In principle, the Model Law applies to both international and domestic uses of data messages. Footnote * is intended for use by enacting States that might wish to limit the applicability of the

Model Law to international cases. It indicates a possible test of internationality for use by those States as a possible criterion for distinguishing international cases from domestic ones. It should be noted, however, that in some jurisdictions, particularly in federal States, considerable difficulties might arise in distinguishing international trade from domestic trade. The Model Law should not be interpreted as encouraging enacting States to limit its applicability to international cases.

29. It is recommended that application of the Model Law be made as wide as possible. Particular caution should be used in excluding the application of the Model Law by way of a limitation of its scope to international uses of data messages, since such a limitation may be seen as not fully achieving the objectives of the Model Law. Furthermore, the variety of procedures available under the Model Law (particularly articles 6 to 8) to limit the use of data messages if necessary (e.g., for purposes of public policy) may make it less necessary to limit the scope of the Model Law. As the Model Law contains a number of articles (articles 6, 7, 8, 11, 12 , 15 and 17) that allow a degree of flexibility to enacting States to limit the scope of application of specific aspects of the Model Law, a narrowing of the scope of application of the text to international trade should not be necessary. Moreover, dividing communications in international trade into purely domestic and international parts might be difficult in practice. The legal certainty to be provided by the Model Law is necessary for both domestic and international trade, and a duality of regimes governing the use of electronic means of recording and communication of data might create a serious obstacle to the use of such means.

References[2]

A/50/17, paras. 213-219;
A/CN.9/407, paras. 37-40;
A/CN.9/406, paras. 80-85; A/CN.9/WG.IV/WP.62, article 1;
A/CN.9/390, paras. 21-43; A/CN.9/WG.IV/WP.60, article 1;
A/CN.9/387, paras. 15-28; A/CN.9/WG.IV/WP.57, article 1;
A/CN.9/373, paras. 21-25 and 29-33; A/CN.9/WG.IV/WP.55, paras. 15-20.

Article 2. Definitions

"Data message"

30. The notion of "data message" is not limited to communication but is also intended to encompass computer-generated records that are not intended for communication. Thus, the notion of "message" includes the notion of "record". However, a definition of "record" in line with the characteristic elements of "writing" in article 6 may be added in jurisdictions where that would appear to be necessary.

31. The reference to "similar means" is intended to reflect the fact that the Model Law was not intended only for application in the context of existing communication techniques but also to accommodate foreseeable technical developments. The aim of the definition of "data message" is to encompass all types of messages that are generated, stored, or communicated in essentially paperless form. For that purpose, all means of communication and storage of information that might be used to perform functions parallel to the functions performed by the means listed in the definition are intended to be covered by the reference to "similar means", although, for example, "electronic" and "optical" means of communication might not be, strictly speaking, similar. For the purposes of the Model Law, the word "similar" connotes "functionally equivalent".

32. The definition of "data message" is also intended to cover the case of revocation or amendment. A data message is presumed to have a fixed information content but it may be revoked or amended by another data message.

"Electronic Data Interchange (EDI)"

33. The definition of EDI is drawn from the definition adopted by the Working Party on Facilitation of International Trade Procedures (WP.4) of the Economic Commission for Europe,

which is the United Nations body responsible for the development of UN/EDIFACT technical standards.

34. The Model Law does not settle the question whether the definition of EDI necessarily implies that EDI messages are communicated electronically from computer to computer, or whether that definition, while primarily covering situations where data messages are communicated through a telecommunications system, would also cover exceptional or incidental types of situation where data structured in the form of an EDI message would be communicated by means that do not involve telecommunications systems, for example, the case where magnetic disks containing EDI messages would be delivered to the addressee by courier. However, irrespective of whether digital data transferred manually is covered by the definition of "EDI", it should be regarded as covered by the definition of "data message" under the Model Law.

"Originator" and "Addressee"

35. In most legal systems, the notion of "person" is used to designate the subjects of rights and obligations and should be interpreted as covering both natural persons and corporate bodies or other legal entities. Data messages that are generated automatically by computers without direct human intervention are intended to be covered by subparagraph *(c)*. However, the Model Law should not be misinterpreted as allowing for a computer to be made the subject of rights and obligations. Data messages that are generated automatically by computers without direct human intervention should be regarded as "originating" from the legal entity on behalf of which the computer is operated. Questions relevant to agency that might arise in that context are to be settled under rules outside the Model Law.

36. The "addressee" under the Model Law is the person with whom the originator intends to communicate by transmitting the data message, as opposed to any person who might receive, forward or copy the data message in the course of transmission. The "originator" is the person who generated the data message even if that message was transmitted by another person. The definition of "addressee" contrasts with the definition of "originator", which is not focused on intent. It should be noted that, under the definitions of "originator" and "addressee" in the Model Law, the originator and the addressee of a given data message could be the same person, for example in the case where the data message was intended for storage by its author. However, the addressee who stores a message transmitted by an originator is not itself intended to be covered by the definition of "originator".

37. The definition of "originator" should cover not only the situation where information is generated and communicated, but also the situation where such information is generated and stored without being communicated. However, the definition of "originator" is intended to eliminate the possibility that a recipient who merely stores a data message might be regarded as an originator.

"Intermediary"

38. The focus of the Model Law is on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary. However, the Model Law does not ignore the paramount importance of intermediaries in the field of electronic communications. In addition, the notion of "intermediary" is needed in the Model Law to establish the necessary distinction between originators or addressees and third parties.

39. The definition of "intermediary" is intended to cover both professional and non-professional intermediaries, i.e., any person (other than the originator and the addressee) who performs any of the functions of an intermediary. The main functions of an intermediary are listed in subparagraph *(e)*, namely receiving, transmitting or storing data messages on behalf of another person. Additional "value-added services" may be performed by network operators and other intermediaries, such as formatting, translating, recording, authenticating, certifying and preserving data messages and providing security services for electronic transactions. "Intermediary" under the Model Law is defined not as a generic category but with respect to

each data message, thus recognizing that the same person could be the originator or addressee of one data message and an intermediary with respect to another data message. The Model Law, which is focused on the relationships between originators and addressees, does not, in general, deal with the rights and obligations of intermediaries.

"Information system"

40. The definition of "information system" is intended to cover the entire range of technical means used for transmitting, receiving and storing information. For example, depending on the factual situation, the notion of "information system" could be indicating a communications network, and in other instances could include an electronic mailbox or even a telecopier. The Model Law does not address the question of whether the information system is located on the premises of the addressee or on other premises, since location of information systems is not an operative criterion under the Model Law.

References

A/51/17, paras. 116-138;
A/CN.9/407, paras. 41-52;
A/CN.9/406, paras. 132-156; A/CN.9/WG.IV/WP.62, article 2;
A/CN.9/390, paras. 44-65; A/CN.9/WG.IV/WP.60, article 2;
A/CN.9/387, paras. 29-52; A/CN.9/WG.IV/WP.57, article 2;
A/CN.9/373, paras. 11-20, 26-28 and 35-36; A/CN.9/WG.IV/WP.55, paras. 23-26;
A/CN.9/360, paras. 29-31; A/CN.9/WG.IV/WP.53, paras. 25-33.

Article 3. Interpretation

41. Article 3 is inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods. It is intended to provide guidance for interpretation of the Model Law by courts and other national or local authorities. The expected effect of article 3 is to limit the extent to which a uniform text, once incorporated in local legislation, would be interpreted only by reference to the concepts of local law.

42. The purpose of paragraph (1) is to draw the attention of courts and other national authorities to the fact that the provisions of the Model Law (or the provisions of the instrument implementing the Model Law), while enacted as part of domestic legislation and therefore domestic in character, should be interpreted with reference to its international origin in order to ensure uniformity in the interpretation of the Model Law in various countries.

43. As to the general principles on which the Model Law is based, the following non-exhaustive list may be considered: (1) to facilitate electronic commerce among and within nations; (2) to validate transactions entered into by means of new information technologies; (3) to promote and encourage the implementation of new information technologies; (4) to promote the uniformity of law; and (5) to support commercial practice. While the general purpose of the Model Law is to facilitate the use of electronic means of communication, it should not be construed in any way as imposing their use.

References

A/50/17, paras. 220-224;
A/CN.9/407, paras. 53-54;
A/CN.9/406, paras. 86-87; A/CN.9/WG.IV/WP.62, article 3;
A/CN.9/390, paras. 66-73; A/CN.9/WG.IV/WP.60, article 3;
A/CN.9/387, paras. 53-58; A/CN.9/WG.IV/WP.57, article 3;
A/CN.9/373, paras. 38-42; A/CN.9/WG.IV/WP.55, paras. 30-31.

Article 4. Variation by agreement

44. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to the legal difficulties raised by the use of modern means of communication are mostly sought within contracts. The Model Law is thus intended to support

the principle of party autonomy. However, that principle is embodied only with respect to the provisions of the Model Law contained in chapter III of part one. The reason for such a limitation is that the provisions contained in chapter II of part one may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. Such well-established rules are normally of a mandatory nature since they generally reflect decisions of public policy. An unqualified statement regarding the freedom of parties to derogate from the Model Law might thus be misinterpreted as allowing parties, through a derogation to the Model Law, to derogate from mandatory rules adopted for reasons of public policy. The provisions contained in chapter II of part one should be regarded as stating the minimum acceptable form requirement and are, for that reason, to be regarded as mandatory, unless expressly stated otherwise. The indication that such form requirements are to be regarded as the "minimum acceptable" should not, however, be construed as inviting States to establish requirements stricter than those contained in the Model Law.

45. Article 4 is intended to apply not only in the context of relationships between originators and addressees of data messages but also in the context of relationships involving intermediaries. Thus, the provisions of chapter III of part one could be varied either by bilateral or multilateral agreements between the parties, or by system rules agreed to by the parties. However, the text expressly limits party autonomy to rights and obligations arising as between parties so as not to suggest any implication as to the rights and obligations of third parties.

References

A/51/17, paras. 68, 90 to 93, 110, 137, 188 and 207 (article 10);
A/50/17, paras. 271-274 (article 10);
A/CN.9/407, para. 85;
A/CN.9/406, paras. 88-89; A/CN.9/WG.IV/WP.62, article 5;
A/CN.9/390, paras. 74-78; A/CN.9/WG.IV/WP.60, article 5;
A/CN.9/387, paras. 62-65; A/CN.9/WG.IV/WP.57, article 5;
A/CN.9/373, para. 37; A/CN.9/WG.IV/WP.55, paras. 27-29.

Chapter II. Application of legal requirements to data messages

Article 5. Legal recognition of data messages

46. Article 5 embodies the fundamental principle that data messages should not be discriminated against, i.e., that there should be no disparity of treatment between data messages and paper documents. It is intended to apply notwithstanding any statutory requirements for a "writing" or an original. That fundamental principle is intended to find general application and its scope should not be limited to evidence or other matters covered in chapter II. It should be noted, however, that such a principle is not intended to override any of the requirements contained in articles 6 to 10. By stating that "information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message", article 5 merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability. However, article 5 should not be misinterpreted as establishing the legal validity of any given data message or of any information contained therein.

References

A/51/17, paras. 92 and 97 (article 4);
A/50/17, paras. 225-227 (article 4);
A/CN.9/407, para. 55;
A/CN.9/406, paras. 91-94; A/CN.9/WG.IV/WP. 62, article 5 *bis;*
A/CN.9/390, paras. 79-87;
A/CN.9/WG.IV/WP. 60, article 5 *bis;*
A/CN.9/387, paras. 93-94.

Article 5 *bis*. Incorporation by reference

46-1. Article 5 *bis* was adopted by the Commission at its thirty-first session, in June 1998. It is intended to provide guidance as to how legislation aimed at facilitating the use of electronic commerce might deal with the situation where certain terms and conditions, although not stated in full but merely referred to in a data message, might need to be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of that data message. 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 protection. 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.

46-2. In an electronic environment, incorporation by reference is often regarded as essential to widespread use of electronic data interchange (EDI), electronic mail, digital certificates and other forms of electronic commerce. For example, electronic communications are typically structured in such a way that large numbers of messages are exchanged, with each message containing brief information, and relying much more frequently than paper documents on reference to information accessible elsewhere. In electronic communications, practitioners should not have imposed upon them an obligation to overload their data messages with quantities of free text when they can take advantage of extrinsic sources of information, such as databases, code lists or glossaries, by making use of abbreviations, codes and other references to such information.

46-3. Standards for incorporating data messages by reference into other data messages may also be essential to the use of public key certificates, because these certificates are generally brief records with rigidly prescribed contents that are finite in size. The trusted third party which issues the certificate, however, is likely to require the inclusion of relevant contractual terms limiting its liability. The scope, purpose and effect of a certificate in commercial practice, therefore, would be ambiguous and uncertain without external terms being incorporated by reference. This is the case especially in the context of international communications involving diverse parties who follow varied trade practices and customs.

46-4. The establishment of standards for incorporating data messages by reference into other data messages is critical to the growth of a computer-based trade infrastructure. Without the legal certainty fostered by such standards, there might be a significant risk that the application of traditional tests for determining the enforceability of terms that seek to be incorporated by reference might be ineffective when applied to corresponding electronic commerce terms because of the differences between traditional and electronic commerce mechanisms.

46-5. While electronic commerce relies heavily on the mechanism of incorporation by reference, the accessibility of the full text of the information being referred to may be considerably improved by the use of electronic communications. For example, a message may have embedded in it uniform resource locators (URLs), which direct the reader to the referenced document. Such URLs can provide "hypertext links" allowing the reader to use a pointing device (such as a mouse) to select a key word associated with a URL. The referenced text would then be displayed. In assessing the accessibility of the referenced text, factors to be considered may include: availability (hours of operation of the repository and ease of access); cost of access; integrity (verification of content, authentication of sender, and mechanism for communication error correction); and the extent to which that term is subject to later amendment (notice of updates; notice of policy of amendment).

46-6. One aim of article 5 *bis* is to facilitate incorporation by reference in an electronic context by removing the uncertainty prevailing in many jurisdictions as to whether the provisions dealing with traditional incorporation by reference are applicable to incorporation by reference in an electronic environment. However, in enacting article 5 *bis*, attention should be given to avoid

introducing more restrictive requirements with respect to incorporation by reference in electronic commerce than might already apply in paper-based trade.

46-7. Another aim of the provision is to recognize that consumer-protection or other national or international law of a mandatory nature (e.g., rules protecting weaker parties in the context of contracts of adhesion) should not be interfered with. That result could also be achieved by validating incorporation by reference in an electronic environment "to the extent permitted by law", or by listing the rules of law that remain unaffected by article 5 *bis*. Article 5 *bis* is not to be interpreted as creating a specific legal regime for incorporation by reference in an electronic environment. Rather, by establishing a principle of non-discrimination, it is to be construed as making the domestic rules applicable to incorporation by reference in a paper-based environment equally applicable to incorporation by reference for the purposes of electronic commerce. For example, in a number of jurisdictions, existing rules of mandatory law only validate incorporation by reference provided that the following three conditions are met: (a) the reference clause should be inserted in the data message; (b) the document being referred to, e.g., general terms and conditions, should actually be known to the party against whom the reference document might be relied upon; and (c) the reference document should be accepted, in addition to being known, by that party.

References

A/53/17, paras. 212-221;
A/CN.9/450;
A/CN.9/446, paras. 14-24;
A/CN.9/WG.IV/WP.74;
A/52/17, paras. 248-250;
A/CN.9/437, paras. 151-155;
A/CN.9/WG.IV/WP. 71, paras 77-93;
A/51/17, paras. 222-223;
A/CN.9/421, paras. 109 and 114;
A/CN.9/WG.IV/WP.69, paras. 30, 53, 59-60 and 91;
A/CN.9/407, paras. 100-105 and 117;
A/CN.9/WG.IV/WP.66;
A/CN.9/WG.IV/WP.65;
A/CN.9/406, paras. 90 and 178-179;
A/CN.9/WG.IV/WP.55, para. 109-113;
A/CN.9/360, paras. 90-95;
A/CN.9/WG.IV/WP.53, paras. 77-78;
A/CN.9/350, paras. 95-96;
A/CN.9/333, paras. 66-68.

Article 6. Writing

47. Article 6 is intended to define the basic standard to be met by a data message in order to be considered as meeting a requirement (which may result from statute, regulation or judge-made law) that information be retained or presented "in writing" (or that the information be contained in a "document" or other paper-based instrument). It may be noted that article 6 is part of a set of three articles (articles 6, 7 and 8), which share the same structure and should be read together.

48. In the preparation of the Model Law, particular attention was paid to the functions traditionally performed by various kinds of "writings" in a paper-based environment. For example, the following non-exhaustive list indicates reasons why national laws require the use of "writings": (1) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (2) to help the parties be aware of the consequences of their entering into a contract; (3) to provide that a document would be legible by all; (4) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (5) to allow for the reproduction of a document so that each party would hold a copy of the same data; (6) to allow for the authentication of data by means of a signature; (7) to provide that a document would be in a form acceptable to public authorities and courts; (8) to finalize the intent of the author of the "writing" and provide a record of that intent; (9) to allow for the easy storage of data in a tangible form; (10) to facilitate control and sub-sequent audit for accounting, tax or regulatory purposes; and (11) to bring legal rights and obligations into existence in those cases where a "writing" was required for validity purposes.

49. However, in the preparation of the Model Law, it was found that it would be inappropriate to adopt an overly comprehensive notion of the functions performed by writing. Existing requirements that data be presented in written form often combine the requirement of a "writing" with concepts distinct from writing, such as signature and original. Thus, when adopting a functional approach, attention should be given to the fact that the requirement of a "writing" should be considered as the lowest layer in a hierarchy of form requirements, which provide distinct levels of reliability, traceability and unalterability with respect to paper documents. The requirement that data be presented in written form (which can be described as a "threshold requirement") should thus not be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act". For example, under certain national laws, a written document that is neither dated nor signed, and the author of which either is not identified in the written document or is identified by a mere letterhead, would be regarded as a "writing" although it might be of little evidential weight in the absence of other evidence (e.g., testimony) regarding the authorship of the document. In addition, the notion of unalterability should not be considered as built into the concept of writing as an absolute requirement since a "writing" in pencil might still be considered a "writing" under certain existing legal definitions. Taking into account the way in which such issues as integrity of the data and protection against fraud are dealt with in a paper-based environment, a fraudulent document would nonetheless be regarded as a "writing". In general, notions such as "evidence" and "intent of the parties to bind themselves" are to be tied to the more general issues of reliability and authentication of the data and should not be included in the definition of a "writing".

50. The purpose of article 6 is not to establish a requirement that, in all instances, data messages should fulfil all conceivable functions of a writing. Rather than focusing upon specific functions of a "writing", for example, its evidentiary function in the context of tax law or its warning function in the context of civil law, article 6 focuses upon the basic notion of the information being reproduced and read. That notion is expressed in article 6 in terms that were found to provide an objective criterion, namely that the information in a data message must be accessible so as to be usable for subsequent reference. The use of the word "accessible" is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. The word "usable" is not intended to cover only human use but also computer processing. As to the notion of "subsequent reference", it was preferred to such notions as "durability" or "non-alterability", which would have established too harsh standards, and to such notions as "readability" or "intelligibility", which might constitute too subjective criteria.

51. The principle embodied in paragraph (3) of articles 6 and 7, and in paragraph (4) of article 8, is that an enacting State may exclude from the application of those articles certain situations to be specified in the legislation enacting the Model Law. An enacting State may wish to exclude specifically certain types of situations, depending in particular on the purpose of the formal requirement in question. One such type of situation may be the case of writing requirements intended to provide notice or warning of specific factual or legal risks, for example, requirements for warnings to be placed on certain types of products. Another specific exclusion might be considered, for example, in the context of formalities required pursuant to international treaty obligations of the enacting State (e.g., the requirement that a cheque be in writing pursuant to the Convention providing a Uniform Law for Cheques, Geneva, 1931) and other kinds of situations and areas of law that are beyond the power of the enacting State to change by means of a statute.

52. Paragraph (3) was included with a view to enhancing the acceptability of the Model Law. It recognizes that the matter of specifying exclusions should be left to enacting States, an approach that would take better account of differences in national circumstances. However, it should be noted that the objectives of the Model Law would not be achieved if paragraph (3)

were used to establish blanket exceptions, and the opportunity provided by paragraph (3) in that respect should be avoided. Numerous exclusions from the scope of articles 6 to 8 would raise needless obstacles to the development of modern communication techniques, since what the Model Law contains are very fundamental principles and approaches that are expected to find general application.

References

A/51/17, paras. 180-181 and 185-187 (article 5);
A/50/17, paras. 228-241 (article 5);
A/CN.9/407, paras. 56-63;
A/CN.9/406, paras. 95-101; A/CN.9/WG.IV/WP.62, article 6;
A/CN.9/390, paras. 88-96; A/CN.9/WG.IV/WP.60, article 6;
A/CN.9/387, paras. 66-80; A/CN.9/WG.IV/WP.57, article 6; A/CN.9/WG.IV/WP.58, annex;
A/CN.9/373, paras. 45-62; A/CN.9/WG.IV/WP.55, paras. 36-49;
A/CN.9/360, paras. 32-43; A/CN.9/WG.IV/WP.53, paras. 37-45;
A/CN.9/350, paras. 68-78;
A/CN.9/333, paras. 20-28;
A/CN.9/265, paras. 59-72.

Article 7. Signature

53. Article 7 is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Model Law, the following functions of a signature were considered: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text; the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.

54. It may be noted that, alongside the traditional handwritten signature, there exist various types of procedures (e.g., stamping, perforation), sometimes also referred to as "signatures", which provide various levels of certainty. For example, in some countries, there exists a general requirement that contracts for the sale of goods above a certain amount should be "signed" in order to be enforceable. However, the concept of a signature adopted in that context is such that a stamp, perforation or even a typewritten signature or a printed letterhead might be regarded as sufficient to fulfil the signature requirement. At the other end of the spectrum, there exist requirements that combine the traditional handwritten signature with additional security procedures such as the confirmation of the signature by witnesses.

55. It might be desirable to develop functional equivalents for the various types and levels of signature requirements in existence. Such an approach would increase the level of certainty as to the degree of legal recognition that could be expected from the use of the various means of authentication used in electronic commerce practice as substitutes for "signatures". However, the notion of signature is intimately linked to the use of paper. Furthermore, any attempt to develop rules on standards and procedures to be used as substitutes for specific instances of "signatures" might create the risk of tying the legal framework provided by the Model Law to a given state of technical development.

56. With a view to ensuring that a message that was required to be authenticated should not be denied legal value for the sole reason that it was not authenticated in a manner peculiar to paper documents, article 7 adopts a comprehensive approach. It establishes the general conditions under which data messages would be regarded as authenticated with sufficient credibility and would be enforceable in the face of signature requirements which currently present barriers to electronic commerce. Article 7 focuses on the two basic functions of a

signature, namely to identify the author of a document and to confirm that the author approved the content of that document. Paragraph (1)*(a)* establishes the principle that, in an electronic environment, the basic legal functions of a signature are performed by way of a method that identifies the originator of a data message and confirms that the originator approved the content of that data message.

57. Paragraph (1)*(b)* establishes a flexible approach to the level of security to be achieved by the method of identification used under paragraph (1)*(a)*. The method used under paragraph (1)*(a)* should be as reliable as is appropriate for the purpose for which the data message is generated or communicated, in the light of all the circumstances, including any agreement between the originator and the addressee of the data message.

58. In determining whether the method used under paragraph (1) is appropriate, legal, technical and commercial factors that may be taken into account include the following: (1) the sophistication of the equipment used by each of the parties; (2) the nature of their trade activity; (3) the frequency at which commercial transactions take place between the parties; (4) the kind and size of the transaction; (5) the function of signature requirements in a given statutory and regulatory environment; (6) the capability of communication systems; (7) compliance with authentication procedures set forth by intermediaries; (8) the range of authentication procedures made available by any intermediary; (9) compliance with trade customs and practice; (10) the existence of insurance coverage mechanisms against unauthorized messages; (11) the importance and the value of the information contained in the data message; (12) the availability of alternative methods of identification and the cost of implementation; (13) the degree of acceptance or non-acceptance of the method of identification in the relevant industry or field both at the time the method was agreed upon and the time when the data message was communicated; and (14) any other relevant factor.

59. Article 7 does not introduce a distinction between the situation in which users of electronic commerce are linked by a communication agreement and the situation in which parties had no prior contractual relationship regarding the use of electronic commerce. Thus, article 7 may be regarded as establishing a basic standard of authentication for data messages that might be exchanged in the absence of a prior contractual relationship and, at the same time, to provide guidance as to what might constitute an appropriate substitute for a signature if the parties used electronic communications in the context of a communication agreement. The Model Law is thus intended to provide useful guidance both in a context where national laws would leave the question of authentication of data messages entirely to the discretion of the parties and in a context where requirements for signature, which were usually set by mandatory provisions of national law, should not be made subject to alteration by agreement of the parties.

60. The notion of an "agreement between the originator and the addressee of a data message" is to be interpreted as covering not only bilateral or multilateral agreements concluded between parties exchanging directly data messages (e.g., "trading partners agreements", "communication agreements" or " interchange agreements") but also agreements involving intermediaries such as networks (e.g., "third-party service agreements"). Agreements concluded between users of electronic commerce and networks may incorporate "system rules", i.e., administrative and technical rules and procedures to be applied when communicating data messages. However, a possible agreement between originators and addressees of data messages as to the use of a method of authentication is not conclusive evidence of whether that method is reliable or not.

61. It should be noted that, under the Model Law, the mere signing of a data message by means of a functional equivalent of a handwritten signature is not intended, in and of itself, to confer legal validity on the data message. Whether a data message that fulfilled the requirement of a signature has legal validity is to be settled under the law applicable outside the Model Law.

References

A/51/17, paras. 180-181 and 185-187 (article 6);

A/50/17, paras. 242-248 (article 6);
A/CN.9/407, paras. 64-70;
A/CN.9/406, paras. 102-105; A/CN.9/WG.IV/WP.62, article 7;
A/CN.9/390, paras. 97-109; A/CN.9/WG.IV/WP.60, article 7;
A/CN.9/387, paras. 81-90; A/CN.9/WG.IV/WP.57, article 7; A/CN.9/WG.IV/WP.58, annex;
A/CN.9/373, paras. 63-76; A/CN.9/WG.IV/WP.55, paras. 50-63;
A/CN.9/360, paras. 71-75; A/CN.9/WG.IV/WP.53, paras. 61-66;
A/CN.9/350, paras. 86-89;
A/CN.9/333, paras. 50-59;
A/CN.9/265, paras. 49-58 and 79-80.

Article 8. Original

62. 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 message would always receive a copy thereof. However, article 8 should be put in a different context. The notion of "original" in article 8 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 the Model Law attempts to remove. Although in some jurisdictions the concepts of "writing", "original" and "signature" may overlap, the Model Law approaches them as three separate and distinct concepts. Article 8 is also useful in clarifying the notions of "writing" and "original", in particular in view of their importance for purposes of evidence.

63. Article 8 is pertinent to documents of title and negotiable instruments, in which the notion of uniqueness of an original is particularly relevant. However, attention is drawn to the fact that the Model Law is not intended only to apply to documents of title and negotiable instruments, or to such areas of law where special requirements exist with respect to registration or notarization of "writings", e.g., family matters or the sale of real estate. Examples of documents that might require an "original" are trade documents such as weight certificates, agricultural certificates, quality or quantity certificates, inspection reports, insurance certificates, etc. While such documents are not negotiable or used to transfer rights or title, it is essential that they be transmitted unchanged, that is in their "original" form, so that other parties in international commerce may have confidence in their contents. In a paper-based environment, these types of document are usually only accepted if they are "original" to lessen the chance that they be altered, which would be difficult to detect in copies. Various technical means are available to certify the contents of a data message to confirm its "originality". 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.

64. Article 8 should be regarded as stating the minimum acceptable form requirement to be met by a data message for it to be regarded as the functional equivalent of an original. The provisions of article 8 should be regarded as mandatory, to the same extent that existing provisions regarding the use of paper-based original documents would be regarded as mandatory. The indication that the form requirements stated in article 8 are to be regarded as the "minimum acceptable" should not, however, be construed as inviting States to establish requirements stricter than those contained in the Model Law.

65. Article 8 emphasizes the importance of the integrity of the information for its originality and sets out criteria to be taken into account when assessing integrity by reference to systematic recording of the information, assurance that the information was recorded without lacunae and protection of the data against alteration. It links the concept of originality to a method of authentication and puts the focus on the method of authentication to be followed in order to

meet the requirement. It is based on the following elements: a simple criterion as to "integrity" of the data; a description of the elements to be taken into account in assessing the integrity; and an element of flexibility, i.e., a reference to circumstances.

66. As regards the words "the time when it was first generated in its final form" in paragraph (1)*(a)*, it should be noted that the provision is intended to encompass the situation where information was first composed as a paper document and subsequently transferred on to a computer. In such a situation, paragraph (1)*(a)* is to be interpreted as requiring assurances that the information has remained complete and unaltered from the time when it was composed as a paper document onwards, and not only as from the time when it was translated into electronic form. However, where several drafts were created and stored before the final message was composed, paragraph (1)*(a)* should not be misinterpreted as requiring assurance as to the integrity of the drafts.

67. Paragraph (3)*(a)* sets forth the criteria for assessing integrity, taking care to except necessary additions to the first (or "original") data message such as endorsements, certifications, notarizations, etc. from other alterations. As long as the contents of a data message remain complete and unaltered, necessary additions to that data message would not affect its "originality". Thus when an electronic certificate is added to the end of an "original" data message to attest to the "originality" of that data message, or when data is automatically added by computer systems at the start and the finish of a data message in order to transmit it, such additions would be considered as if they were a supplemental piece of paper with an "original" piece of paper, or the envelope and stamp used to send that "original" piece of paper.

68. As in other articles of chapter II of part one, the words "the law" in the opening phrase of article 8 are to be understood as encompassing not only statutory or regulatory law but also judicially-created law and other procedural law. In certain common law countries, where the words "the law" would normally be interpreted as referring to common law rules, as opposed to statutory requirements, it should be noted that, in the context of the Model Law, the words "the law" are intended to encompass those various sources of law. However, "the law", as used in the Model Law, is not meant to include areas of law that have not become part of the law of a State and are sometimes, somewhat imprecisely, referred to by expressions such as "lex mercatoria" or "law merchant".

69. Paragraph (4), as was the case with similar provisions in articles 6 and 7, was included with a view to enhancing the acceptability of the Model Law. It recognizes that the matter of specifying exclusions should be left to enacting States, an approach that would take better account of differences in national circumstances. However, it should be noted that the objectives of the Model Law would not be achieved if paragraph (4) were used to establish blanket exceptions. Numerous exclusions from the scope of articles 6 to 8 would raise needless obstacles to the development of modern communication techniques, since what the Model Law contains are very fundamental principles and approaches that are expected to find general application.

References

A/51/17, paras. 180-181 and 185-187 (article 7);
A/50/17, paras. 249-255 (article 7);
A/CN.9/407, paras. 71-79;
A/CN.9/406, paras. 106-110; A/CN.9/WG.IV/WP.62, article 8;
A/CN.9/390, paras. 110-133; A/CN.9/WG.IV/WP.60, article 8;
A/CN.9/387, paras. 91-97; A/CN.9/WG.IV/WP.57, article 8; A/CN.9/WG.IV/WP.58, annex;
A/CN.9/373, paras. 77-96;
A/CN.9/WG.IV/WP.55, paras. 64-70;
A/CN.9/360, paras. 60-70; A/CN.9/WG.IV/WP.53, paras. 56-60;
A/CN.9/350, paras. 84-85;
A/CN.9/265, paras. 43-48.

Article 9. Admissibility and evidential weight of data messages

70. The purpose of article 9 is to establish both the admissibility of data messages as evidence in legal proceedings and their evidential value. With respect to admissibility, paragraph (1), establishing that data messages should not be denied admissibility as evidence in legal proceedings on the sole ground that they are in electronic form, puts emphasis on the general principle stated in article 4 and is needed to make it expressly applicable to admissibility of evidence, an area in which particularly complex issues might arise in certain jurisdictions. The term "best evidence" is a term understood in, and necessary for, certain common law jurisdictions. However, the notion of "best evidence" could raise a great deal of uncertainty in legal systems in which such a rule is unknown. States in which the term would be regarded as meaningless and potentially misleading may wish to enact the Model Law without the reference to the "best evidence" rule contained in paragraph (1).

71. As regards the assessment of the evidential weight of a data message, paragraph (2) provides useful guidance as to how the evidential value of data messages should be assessed (e.g., depending on whether they were generated, stored or communicated in a reliable manner).

References

A/50/17, paras. 256-263 (article 8);
A/CN.9/407, paras. 80-81;
A/CN.9/406, paras. 111-113; A/CN.9/WG.IV/WP.62, article 9;
A/CN.9/390, paras. 139-143; A/CN.9/WG.IV/WP.60, article 9;
A/CN.9/387, paras. 98-109; A/CN.9/WG.IV/WP.57, article 9; A/CN.9/WG.IV/WP.58, annex;
A/CN.9/373, paras. 97-108; A/CN.9/WG.IV/WP.55, paras. 71-81;
A/CN.9/360, paras. 44-59; A/CN.9/WG.IV/WP.53, paras. 46-55;
A/CN.9/350, paras. 79-83 and 90-91;
A/CN.9/333, paras. 29-41;
A/CN.9/265, paras. 27-48.

Article 10. Retention of data messages

72. Article 10 establishes a set of alternative rules for existing requirements regarding the storage of information (e.g., for accounting or tax purposes) that may constitute obstacles to the development of modern trade.

73. Paragraph (1) is intended to set out the conditions under which the obligation to store data messages that might exist under the applicable law would be met. Subparagraph *(a)* reproduces the conditions established under article 6 for a data message to satisfy a rule which prescribes the presentation of a "writing". Subparagraph *(b)* emphasizes that the message does not need to be retained unaltered as long as the information stored accurately reflects the data message as it was sent. It would not be appropriate to require that information should be stored unaltered, since usually messages are decoded, compressed or converted in order to be stored.

74. Subparagraph *(c)* is intended to cover all the information that may need to be stored, which includes, apart from the message itself, certain transmittal information that may be necessary for the identification of the message. Subparagraph *(c)*, by imposing the retention of the transmittal information associated with the data message, is creating a standard that is higher than most standards existing under national laws as to the storage of paper-based communications. However, it should not be understood as imposing an obligation to retain transmittal information additional to the information contained in the data message when it was generated, stored or transmitted, or information contained in a separate data message, such as an acknowledgement of receipt. Moreover, while some transmittal information is important and has to be stored, other transmittal information can be exempted without the integrity of the data message being compromised. That is the reason why subparagraph *(c)* establishes a distinction

between those elements of transmittal information that are important for the identification of the message and the very few elements of transmittal information covered in paragraph (2) (e.g., communication protocols), which are of no value with regard to the data message and which, typically, would automatically be stripped out of an incoming data message by the receiving computer before the data message actually entered the information system of the addressee.

75. In practice, storage of information, and especially storage of transmittal information, may often be carried out by someone other than the originator or the addressee, such as an intermediary. Nevertheless, it is intended that the person obligated to retain certain transmittal information cannot escape meeting that obligation simply because, for example, the communications system operated by that other person does not retain the required information. This is intended to discourage bad practice or wilful misconduct. Paragraph (3) provides that in meeting its obligations under paragraph (1), an addressee or originator may use the services of any third party, not just an intermediary.

References

A/51/17, paras. 185-187 (article 9);
A/50/17, paras. 264-270 (article 9);
A/CN.9/407, paras. 82-84;
A/CN.9/406, paras. 59-72; A/CN.9/WG.IV/WP.60, article 14;
A/CN.9/387, paras. 164-168;
A/CN.9/WG.IV/WP.57, article 14;
A/CN.9/373, paras. 123-125; A/CN.9/WG.IV/WP.55, para. 94.

Chapter III. Communication of data messages

Article 11. Formation and validity of contracts

76. Article 11 is not intended to interfere with the law on formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed. In certain countries, a provision along the lines of paragraph (1) might be regarded as merely stating the obvious, namely that an offer and an acceptance, as any other expression of will, can be communicated by any means, including data messages. However, the provision is needed in view of the remaining uncertainties in a considerable number of countries as to whether contracts can validly be concluded by electronic means. Such uncertainties may stem from the fact that, in certain cases, the data messages expressing offer and acceptance are generated by computers without immediate human intervention, thus raising doubts as to the expression of intent by the parties. Another reason for such uncertainties is inherent in the mode of communication and results from the absence of a paper document.

77. It may also be noted that paragraph (1) reinforces, in the context of contract formation, a principle already embodied in other articles of the Model Law, such as articles 5, 9 and 13, all of which establish the legal effectiveness of data messages. However, paragraph (1) is needed since the fact that electronic messages may have legal value as evidence and produce a number of effects, including those provided in articles 9 and 13, does not necessarily mean that they can be used for the purpose of concluding valid contracts.

78. Paragraph (1) 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. 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. It was felt that such a provision might exceed the aim of the Model Law, which should be limited to providing that electronic communications would achieve the same degree of legal certainty as paper-based communications. The combination of existing

rules on the formation of contracts with the provisions contained in article 15 is designed to dispel uncertainty as to the time and place of formation of contracts in cases where the offer or the acceptance are exchanged electronically.

79. The words "unless otherwise stated by the parties", which merely restate, in the context of contract formation, the recognition of party autonomy expressed in article 4, are intended to make it clear that the purpose of the Model Law is not to impose the use of electronic means of communication on parties who rely on the use of paper-based communication to conclude contracts. Thus, article 11 should not be interpreted as restricting in any way party autonomy with respect to parties not involved in the use of electronic communication.

80. During the preparation of paragraph (1), it was felt that the pro- vision might have the harmful effect of overruling otherwise applicable provisions of national law, which might prescribe specific formalities for the formation of certain contracts. Such forms include notarization and other requirements for "writings", and might respond to considerations of public policy, such as the need to protect certain parties or to warn them against specific risks. For that reason, paragraph (2) provides that an enacting State can exclude the application of paragraph (1) in certain instances to be specified in the legislation enacting the Model Law.

References

A/51/17, paras. 89-94 (article 13);
A/CN.9/407, para. 93;
A/CN.9/406, paras. 34-41; A/CN.9/WG.IV/WP.60, article 12;
A/CN.9/387, paras. 145-151; A/CN.9/WG.IV/WP.57, article 12;
A/CN.9/373, paras. 126-133; A/CN.9/WG.IV/WP.55, paras. 95-102;
A/CN.9/360, paras. 76-86; A/CN.9/WG.IV/WP.53, paras. 67-73;
A/CN.9/350, paras. 93-96;
A/CN.9/333, paras. 60-68.

Article 12. Recognition by parties of data messages

81. Article 12 was added at a late stage in the preparation of the Model Law, in recognition of the fact that article 11 was limited to dealing with data messages that were geared to the conclusion of a contract, but that the draft Model Law did not contain specific provisions on data messages that related not to the conclusion of contracts but to the performance of contractual obligations (e.g., notice of defective goods, an offer to pay, notice of place where a contract would be performed, recognition of debt). Since modern means of communication are used in a context of legal uncertainty, in the absence of specific legislation in most countries, it was felt appropriate for the Model Law not only to establish the general principle that the use of electronic communication should not be discriminated against, as expressed in article 5, but also to include specific illustrations of that principle. Contract formation is but one of the areas where such an illustration is useful and the legal validity of unilateral expressions of will, as well as other notices or statements that may be issued in the form of data messages, also needs to be mentioned.

82. As is the case with article 11, article 12 is not to impose the use of electronic means of communication but to validate such use, subject to contrary agreement by the parties. Thus, article 12 should not be used as a basis to impose on the addressee the legal consequences of a message, if the use of a non-paper-based method for its transmission comes as a surprise to the addressee.

References

A/51/17, paras. 95-99 (new article 13 *bis*).

Article 13. Attribution of data messages

83. Article 13 has its origin in article 5 of the UNCITRAL Model Law on International Credit Transfers, which defines the obligations of the sender of a payment order. Article 13 is intended

to apply where there is a question as to whether a data message was really sent by the person who is indicated as being the originator. In the case of a paper-based communication the problem would arise as the result of an alleged forged signature of the purported originator. In an electronic environment, an unauthorized person may have sent the message but the authentication by code, encryption or the like would be accurate. The purpose of article 13 is not to assign responsibility. It deals rather with attribution of data messages by establishing a presumption that under certain circumstances a data message would be considered as a message of the originator, and goes on to qualify that presumption in case the addressee knew or ought to have known that the data message was not that of the originator.

84. Paragraph (1) recalls the principle that an originator is bound by a data message if it has effectively sent that message. Paragraph (2) refers to the situation where the message was sent by a person other than the originator who had the authority to act on behalf of the originator. Paragraph (2) is not intended to displace the domestic law of agency, and the question as to whether the other person did in fact and in law have the authority to act on behalf of the originator is left to the appropriate legal rules outside the Model Law.

85. Paragraph (3) deals with two kinds of situations, in which the addressee could rely on a data message as being that of the originator: firstly, situations in which the addressee properly applied an authenti- cation procedure previously agreed to by the originator; and secondly, situations in which the data message resulted from the actions of a person who, by virtue of its relationship with the originator, had access to the originator's authentication procedures. By stating that the addressee "is entitled to regard a data as being that of the originator", paragraph (3) read in conjunction with paragraph (4)*(a)* is intended to indicate that the addressee could act on the assumption that the data message is that of the originator up to the point in time it received notice from the originator that the data message was not that of the originator, or up to the point in time when it knew or should have known that the data message was not that of the originator.

86. Under paragraph (3)*(a)*, if the addressee applies any authentication procedures previously agreed to by the originator and such application results in the proper verification of the originator as the source of the message, the message is presumed to be that of the originator. That covers not only the situation where an authentication procedure has been agreed upon by the originator and the addressee but also situations where an originator, unilaterally or as a result of an agreement with an intermediary, identified a procedure and agreed to be bound by a data message that met the requirements corresponding to that procedure. Thus, agreements that became effective not through direct agreement between the originator and the addressee but through the participation of third-party service providers are intended to be covered by paragraph (3)*(a)*. However, it should be noted that paragraph (3)*(a)* applies only when the communication between the originator and the addressee is based on a previous agreement, but that it does not apply in an open environment.

87. The effect of paragraph (3)*(b)*, read in conjunction with paragraph (4)*(b)*, is that the originator or the addressee, as the case may be, is responsible for any unauthorized data message that can be shown to have been sent as a result of negligence of that party.

88. Paragraph (4)*(a)* should not be misinterpreted as relieving the originator from the consequences of sending a data message, with retroactive effect, irrespective of whether the addressee had acted on the assumption that the data message was that of the originator. Paragraph (4) is not intended to provide that receipt of a notice under subparagraph *(a)* would nullify the original message retroactively. Under subparagraph *(a)*, the originator is released from the binding effect of the message after the time notice is received and not before that time. Moreover, paragraph (4) should not be read as allowing the originator to avoid being bound by the data message by sending notice to the addressee under subparagraph *(a)*, in a case where the message had, in fact, been sent by the originator and the addressee properly applied agreed or reasonable authentication procedures. If the addressee can prove that the message

is that of the originator, paragraph (1) would apply and not paragraph (4)*(a)*. As to the meaning of "reasonable time", the notice should be such as to give the addressee sufficient time to react. For example, in the case of just-in-time supply, the addressee should be given time to adjust its production chain.

89. With respect to paragraph (4)*(b)*, it should be noted that the Model Law could lead to the result that the addressee would be entitled to rely on a data message under paragraph (3)*(a)* if it had properly applied the agreed authentication procedures, even if it knew that the data message was not that of the originator. It was generally felt when preparing the Model Law that the risk that such a situation could arise should be accepted, in view of the need for preserving the reliability of agreed authentication procedures.

90. Paragraph (5) is intended to preclude the originator from disavowing the message once it was sent, unless the addressee knew, or should have known, that the data message was not that of the originator. In addition, paragraph (5) is intended to deal with errors in the content of the message arising from errors in transmission.

91. Paragraph (6) deals with the issue of erroneous duplication of data messages, an issue of considerable practical importance. It establishes the standard of care to be applied by the addressee to distinguish an erroneous duplicate of a data message from a separate data message.

92. Early drafts of article 13 contained an additional paragraph, expressing the principle that the attribution of authorship of a data message to the originator should not interfere with the legal consequences of that message, which should be determined by other applicable rules of national law. It was later felt that it was not necessary to express that principle in the Model Law but that it should be mentioned in this Guide.

References

A/51/17, paras. 189-194 (article 11);
A/50/17, paras. 275-303 (article 11);
A/CN.9/407, paras. 86-89;
A/CN.9/406, paras. 114-131; A/CN.9/WG.IV/WP.62, article 10;
A/CN.9/390, paras. 144-153; A/CN.9/WG.IV/WP.60, article 10;
A/CN.9/387, paras. 110-132; A/CN.9/WG.IV/WP.57, article 10;
A/CN.9/373, paras. 109-115; A/CN.9/WG.IV/WP.55, paras. 82-86.

Article 14. Acknowledgement of receipt

93. The use of functional acknowledgements is a business decision to be made by users of electronic commerce; the Model Law does not intend to impose the use of any such procedure. However, taking into account the commercial value of a system of acknowledgement of receipt and the widespread use of such systems in the context of electronic commerce, it was felt that the Model Law should address a number of legal issues arising from the use of acknowledgement procedures. It should be noted that the notion of "acknowledgement" is sometimes used to cover a variety of procedures, ranging from a mere acknowledgement of receipt of an unspecified message to an expression of agreement with the content of a specific data message. In many instances, the procedure of "acknowledgement" would parallel the system known as "return receipt requested" in postal systems. Acknowledgements of receipt may be required in a variety of instruments, e.g., in the data message itself, in bilateral or multilateral communication agreements, or in "system rules". It should be borne in mind that variety among acknowledgement procedures implies variety of the related costs. The provisions of article 14 are based on the assumption that acknowledgement procedures are to be used at the discretion of the originator. Article 14 is not intended to deal with the legal consequences that may flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message. For example, where an originator sends an offer in a data message and requests acknowledgement of receipt, the acknowledgement of receipt simply evidences that

the offer has been received. Whether or not sending that acknowledgement amounted to accepting the offer is not dealt with by the Model Law but by contract law outside the Model Law.

94. The purpose of paragraph (2) is to validate acknowledgement by any communication or conduct of the addressee (e.g., the shipment of the goods as an acknowledgement of receipt of a purchase order) where the originator has not agreed with the addressee that the acknowledgement should be in a particular form. The situation where an acknowledgement has been unilaterally requested by the originator to be given in a specific form is not expressly addressed by article 14, which may entail as a possible consequence that a unilateral requirement by the originator as to the form of acknowledgements would not affect the right of the addressee to acknowledge receipt by any communication or conduct sufficient to indicate to the originator that the message had been received. Such a possible interpretation of paragraph (2) makes it particularly necessary to emphasize in the Model Law the distinction to be drawn between the effects of an acknowledgement of receipt of a data message and any communication in response to the content of that data message, a reason why paragraph (7) is needed.

95. Paragraph (3), which deals with the situation where the origin- ator has stated that the data message is conditional on receipt of an acknowledgement, applies whether or not the originator has specified that the acknowledgement should be received by a certain time.

96. The purpose of paragraph (4) is to deal with the more common situation where an acknowledgement is requested, without any statement being made by the originator that the data message is of no effect until an acknowledgement has been received. Such a provision is needed to establish the point in time when the originator of a data message who has requested an acknowledgement of receipt is relieved from any legal implication of sending that data message if the requested acknowledgement has not been received. An example of a factual situation where a provision along the lines of paragraph (4) would be particularly useful would be that the originator of an offer to contract who has not received the requested acknowledgement from the addressee of the offer may need to know the point in time after which it is free to transfer the offer to another party. It may be noted that the provision does not create any obligation binding on the originator, but merely establishes means by which the originator, if it so wishes, can clarify its status in cases where it has not received the requested acknowledgement. It may also be noted that the provision does not create any obligation binding on the addressee of the data message, who would, in most circumstances, be free to rely or not to rely on any given data message, provided that it would bear the risk of the data message being unreliable for lack of an acknowledgement of receipt. The addressee, however, is protected since the originator who does not receive a requested acknowledgement may not automatically treat the data message as though it had never been transmitted, without giving further notice to the addressee. The procedure described under paragraph (4) is purely at the discretion of the originator. For example, where the originator sent a data message which under the agreement between the parties had to be received by a certain time, and the originator requested an acknowledgement of receipt, the addressee could not deny the legal effectiveness of the message simply by withholding the requested acknowledgement.

97. The rebuttable presumption established in paragraph (5) is needed to create certainty and would be particularly useful in the context of electronic communication between parties that are not linked by a trading-partners agreement. The second sentence of paragraph (5) should be read in conjunction with paragraph (5) of article 13, which establishes the conditions under which, in case of an inconsistency between the text of the data message as sent and the text as received, the text as received prevails.

98. Paragraph (6) corresponds to a certain type of acknowledgement, for example, an EDIFACT message establishing that the data message received is syntactically correct, i.e., that it can be processed by the receiving computer. The reference to technical requirements, which is to be

construed primarily as a reference to "data syntax" in the context of EDI communications, may be less relevant in the context of the use of other means of communication, such as telegram or telex. In addition to mere consistency with the rules of "data syntax", technical requirements set forth in applicable standards may include, for example, the use of procedures verifying the integrity of the contents of data messages.

99. Paragraph (7) is intended to dispel uncertainties that might exist as to the legal effect of an acknowledgement of receipt. For example, paragraph (7) indicates that an acknowledgement of receipt should not be confused with any communication related to the contents of the acknowledged message.

References

A/51/17, paras. 63-88 (article 12);
A/CN.9/407, paras. 90-92;
A/CN.9/406, paras. 15-33; A/CN.9/WG.IV/WP.60, article 11;
A/CN.9/387, paras. 133-144; A/CN.9/WG.IV/WP.57, article 11;
A/CN.9/373, paras. 116-122; A/CN.9/WG.IV/WP.55, paras. 87-93;
A/CN.9/360, para. 125; A/CN.9/WG.IV/WP.53, paras. 80-81;
A/CN.9/350, para. 92;
A/CN.9/333, paras. 48-49.

Article 15. Time and place of dispatch and receipt of data messages

100. Article 15 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 information. The use of electronic communication techniques makes those difficult to ascertain. 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. The Model Law 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 rule.

101. Paragraph (1) defines the time of dispatch of a data message as the time when the data message enters an information system outside the control of the originator, which may be the information system of an intermediary or an information system of the addressee. The concept of "dispatch" refers to the commencement of the electronic transmission of the data message. Where "dispatch" already has an established meaning, article 15 is intended to supplement national rules on dispatch and not to displace them. If dispatch occurs when the data message reaches an information system of the addressee, dispatch under paragraph (1) and receipt under paragraph (2) are simultaneous, except where the data message is sent to an information system of the addressee that is not the information system designated by the addressee under paragraph (2)*(a)*.

102. Paragraph (2), the purpose of which is to define the time of receipt of a data message, addresses the situation where the addressee unilaterally designates a specific information system for the receipt of a message (in which case the designated system may or may not be an information system of the addressee), and the data message reaches an information system of the addressee that is not the designated system. In such a situation, receipt is deemed to occur when the data message is retrieved by the addressee. By "designated information system", the Model Law 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. 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.

103. Attention is drawn to the notion of "entry" into an information system, which is used for both the definition of dispatch and that of receipt of a data message. A data message enters an information system at the time when it becomes available for processing within that information system. Whether a data message which enters an information system is intelligible or usable by the addressee is outside the purview of the Model Law. The Model Law does not intend to overrule provisions of national law under which receipt of a message may occur at the time when the message enters the sphere of the addressee, irrespective of whether the message is intelligible or usable by the addressee. Nor is the Model Law intended to run counter to trade usages, under which certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee. It was felt that the Model Law should not create a more stringent requirement than currently exists in a paper-based environment, where a message can be considered to be received even if it is not intelligible for the addressee or not intended to be intelligible to the addressee (e.g., where encrypted data is transmitted to a depository for the sole purpose of retention in the context of intellectual property rights protection).

104. 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 may be noted that the Model Law does not expressly address the question of possible malfunctioning of information systems as a basis for liability. In particular, where the information system of the addressee does not function at all or functions improperly or, while functioning properly, cannot be entered into by the data message (e.g., in the case of a telecopier that is constantly occupied), dispatch under the Model Law does not occur. It was felt during the preparation of the Model Law that the addressee should not be placed under the burdensome obligation to maintain its information system functioning at all times by way of a general provision.

105. The purpose of paragraph (4) is to deal with the place of receipt of a data message. The principal reason for including a rule on the place of receipt of a data message is to address a circumstance characteristic of electronic commerce that might not be treated adequately under existing law, namely, that very often the information system of the addressee where the data message is received, or from which the data message is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Thus, the rationale behind the provision is to ensure that the location of an information system is not the determinant element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt, and that that place can be readily ascertained by the originator. The Model Law does not contain specific provisions as to how the designation of an information system should be made, or whether a change could be made after such a designation by the addressee.

106. Paragraph (4), which contains a reference to the "underlying transaction", is intended to refer to both actual and contemplated underlying transactions. References to "place of business", "principal place of business" and "place of habitual residence" were adopted to bring the text in line with article 10 of the United Nations Convention on Contracts for the International Sale of Goods.

107. The effect of paragraph (4) is to introduce a distinction between the deemed place of receipt and the place actually reached by a data message at the time of its receipt under paragraph (2). That distinction is not to be interpreted as apportioning risks between the originator and the addressee in case of damage or loss of a data message between the time of its receipt under paragraph (2) and the time when it reached its place of receipt under paragraph (4). Paragraph (4) merely establishes an irrebuttable presumption regarding a legal fact, to be used where another body of law (e.g., on formation of contracts or conflict of laws) require determination of the place of receipt of a data message. However, it was felt during the preparation of the Model Law that introducing a deemed place of receipt, as distinct from the place actually reached by that data message at the time of its receipt, would be inappropriate outside the context of computerized transmissions (e.g., in the context of telegram or telex). The

provision was thus limited in scope to cover only computerized transmissions of data messages. A further limitation is contained in paragraph (5), which reproduces a provision already included in articles 6, 7, 8, 11 and 12 (see above, para. 69).

References

A/51/17, paras. 100-115 (article 14);
A/CN.9/407, paras. 94-99;
A/CN.9/406, paras. 42-58; A/CN.9/WG.IV/WP.60, article 13;
A/CN.9/387, paras. 152-163; A/CN.9/WG.IV/WP.57, article 13;
A/CN.9/373, paras. 134-146; A/CN.9/WG.IV/WP.55, paras. 103-108;
A/CN.9/360, paras. 87-89; A/CN.9/WG.IV/WP.53, paras. 74-76;
A/CN.9/350, paras. 97-100;
A/CN.9/333, paras. 69-75.

Part two. Electronic commerce in specific areas

108. As distinct from the basic rules applicable to electronic commerce in general, which appear as part one of the Model Law, part two contains rules of a more specific nature. In preparing the Model Law, the Commission agreed that such rules dealing with specific uses of electronic commerce should appear in the Model Law in a way that reflected both the specific nature of the provisions and their legal status, which should be the same as that of the general provisions contained in part one of the Model Law. While the Commission, when adopting the Model Law, only considered such specific provisions in the context of transport documents, it was agreed that such provisions should appear as chapter I of part two of the Model Law. It was felt that adopting such an open-ended structure would make it easier to add further specific provisions to the Model Law, as the need might arise, in the form of additional chapters in part two.

109. The adoption of a specific set of rules dealing with specific uses of electronic commerce, such as the use of EDI messages as substitutes for transport documents does not imply that the other provisions of the Model Law are not applicable to such documents. In particular, the provisions of part two, such as articles 16 and 17 concerning transfer of rights in goods, presuppose that the guarantees of reliability and authenticity contained in articles 6 to 8 of the Model Law are also applicable to electronic equivalents to transport documents. Part two of the Model Law does not in any way limit or restrict the field of application of the general provisions of the Model Law.

Chapter I. Carriage of goods

110. 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 needed. Articles 16 and 17 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.

Article 16. Actions related to contracts of carriage of goods

111. Article 16, which establishes the scope of chapter I of part two of the Model Law, is broadly drafted. It would encompass a wide variety of documents used in the context of the carriage of goods, including, for example, charter-parties. In the preparation of the Model Law, the Commission found that, by dealing comprehensively with contracts of carriage of goods, article 16 was consistent with the need to cover all transport documents, whether negotiable or non-negotiable, without excluding any specific document such as charter-parties. It was pointed out that, if an enacting State did not wish chapter I of part two to apply to a particular kind of

document or contract, for example if the inclusion of such documents as charter-parties in the scope of that chapter was regarded as inappropriate under the legislation of an enacting State, that State could make use of the exclusion clause contained in paragraph (7) of article 17.

112. Article 16 is of an illustrative nature and, although the actions mentioned therein are more common in maritime trade, they are not exclusive to such type of trade and could be performed in connection with air transport or multimodal carriage of goods.

References

A/51/17, paras. 139-172 and 198-204 (draft article x);
A/CN.9/421, paras. 53-103; A/CN.9/WG.IV/WP.69, paras. 82-95;
A/50/17, paras. 307-309;
A/CN.9/407, paras. 106-118; A/CN.9/WG.IV/WP.67, annex; A/CN.9/WG.IV/WP.66, annex II;
A/49/17, paras. 198, 199 and 201;
A/CN.9/390, para. 155-158.

Article 17. Transport documents

113. Paragraphs (1) and (2) are derived from article 6. In the context of transport documents, it is necessary to establish not only functional equivalents of written information about the actions referred to in article 16, but also functional equivalents of the performance of such actions through the use of paper documents. Functional equivalents are particularly needed for the transfer of rights and obligations by transfer of written documents. For example, paragraphs (1) and (2) are intended to replace both the requirement for a written contract of carriage and the requirements for endorsement and transfer of possession of a bill of lading. It was felt in the preparation of the Model Law that the focus of the provision on the actions referred to in article 16 should be expressed clearly, particularly in view of the difficulties that might exist, in certain countries, for recognizing the transmission of a data message as functionally equivalent to the physical transfer of goods, or to the transfer of a document of title representing the goods.

114. The reference to "one or more data messages" in paragraphs (1), (3) and (6) is not intended to be interpreted differently from the reference to "a data message" in the other provisions of the Model Law, which should also be understood as covering equally the situation where only one data message is generated and the situation where more than one data message is generated as support of a given piece of information. A more detailed wording was adopted in article 17 merely to reflect the fact that, in the context of transfer of rights through data messages, some of the functions traditionally performed through the single transmission of a paper bill of lading would necessarily imply the transmission of more than one data message and that such a fact, in itself, should entail no negative consequence as to the acceptability of electronic commerce in that area.

115. Paragraph (3), in combination with paragraph (4), is intended to ensure that a right can be conveyed to one person only, and that it would not be possible for more than one person at any point in time to lay claim to it. The effect of the two paragraphs is to introduce a requirement which may be referred to as the "guarantee of singularity". If procedures are made available to enable a right or obligation to be conveyed by electronic methods instead of by using a paper document, it is necessary that the guarantee of singularity be one of the essential features of such procedures. Technical security devices providing such a guarantee of singularity would almost necessarily be built into any communication system offered to the trading communities and would need to demonstrate their reliability. However, there is also a need to overcome requirements of law that the guarantee of singularity be demonstrated, for example in the case where paper documents such as bills of lading are traditionally used. A provision along the lines of paragraph (3) is thus necessary to permit the use of electronic communication instead of paper documents.

116. The words "one person and no other person" should not be interpreted as excluding situations where more than one person might jointly hold title to the goods. For example, the

reference to "one person" is not intended to exclude joint ownership of rights in the goods or other rights embodied in a bill of lading.

117. The notion that a data message should be "unique" may need to be further clarified, since it may lend itself to misinterpretation. On the one hand, all data messages are necessarily unique, even if they duplicate an earlier data message, since each data message is sent at a different time from any earlier data message sent to the same person. If a data message is sent to a different person, it is even more obviously unique, even though it might be transferring the same right or obligation. Yet, all but the first transfer might be fraudulent. On the other hand, if "unique" is interpreted as referring to a data message of a unique kind, or a transfer of a unique kind, then in that sense no data message is unique, and no transfer by means of a data message is unique. Having considered the risk of such misinterpretation, the Commission decided to retain the reference to the concepts of uniqueness of the data message and uniqueness of the transfer for the purposes of article 17, in view of the fact that the notions of "uniqueness" or "singularity" of transport documents were not unknown to practitioners of transport law and users of transport documents. It was decided, however, that this Guide should clarify that the words "a reliable method is used to render such data message or messages unique" should be interpreted as referring to the use of a reliable method to secure that data messages purporting to convey any right or obligation of a person might not be used by, or on behalf of, that person inconsistently with any other data messages by which the right or obligation was conveyed by or on behalf of that person.

118. Paragraph (5) is a necessary complement to the guarantee of singularity contained in paragraph (3). The need for security is an overriding consideration and it is essential to ensure not only that a method is used that gives reasonable assurance that the same data message is not multiplied, but also that no two media can be simultaneously used for the same purpose. Paragraph (5) addresses the fundamental need to avoid the risk of duplicate transport documents. The use of multiple forms of communication for different purposes, e.g., paper-based communications for ancillary messages and electronic communications for bills of lading, does not pose a problem. However, it is essential for the operation of any system relying on electronic equivalents of bills of lading to avoid the possibility that the same rights could at any given time be embodied both in data messages and in a paper document. Paragraph (5) also envisages the situation where a party having initially agreed to engage in electronic communications has to switch to paper communications where it later becomes unable to sustain electronic communications.

119. The reference to "terminating" the use of data messages is open to interpretation. In particular, the Model Law does not provide information as to who would effect the termination. Should an enacting State decide to provide additional information in that respect, it might wish to indicate, for example, that, since electronic commerce is usually based on the agreement of the parties, a decision to "drop down" to paper communications should also be subject to the agreement of all interested parties. Otherwise, the originator would be given the power to choose unilaterally the means of communication. Alternatively, an enacting State might wish to provide that, since paragraph (5) would have to be applied by the bearer of a bill of lading, it should be up to the bearer to decide whether it preferred to exercise its rights on the basis of a paper bill of lading or on the basis of the electronic equivalent of such a document, and to bear the costs for its decision.

120. Paragraph (5), while expressly dealing with the situation where the use of data messages is replaced by the use of a paper document, is not intended to exclude the reverse situation. The switch from data messages to a paper document should not affect any right that might exist to surrender the paper document to the issuer and start again using data messages.

121. The purpose of paragraph (6) is to deal directly with the application of certain laws to contracts for the carriage of goods by sea. For example, under the Hague and Hague-Visby Rules, a contract of carriage means a contract that is covered by a bill of lading. Use of a bill of

lading or similar document of title results in the Hague and Hague-Visby Rules applying compulsorily to a contract of carriage. Those rules would not automatically apply to contracts effected by one or more data message. Thus, a provision such as paragraph (6) is needed to ensure that the application of those rules is not excluded by the mere fact that data messages are used instead of a bill of lading in paper form. While paragraph (1) ensures that data messages are effective means for carrying out any of the actions listed in article 16, that provision does not deal with the substantive rules of law that might apply to a contract contained in, or evidenced by, data messages.

122. As to the meaning of the phrase "that rule shall not be inapplicable" in paragraph (6), a simpler way of expressing the same idea might have been to provide that rules applicable to contracts of carriage evidenced by paper documents should also apply to contracts of carriage evidenced by data messages. However, given the broad scope of application of article 17, which covers not only bills of lading but also a variety of other transport documents, such a simplified provision might have had the undesirable effect of extending the applicability of rules such as the Hamburg Rules and the Hague-Visby Rules to contracts to which such rules were never intended to apply. The Commission felt that the adopted wording was more suited to overcome the obstacle resulting from the fact that the Hague-Visby Rules and other rules compulsorily applicable to bills of lading would not automatically apply to contracts of carriage evidenced by data messages, without inadvertently extending the application of such rules to other types of contracts.

References

A/51/17, paras. 139-172 and 198-204 (draft article x);
A/CN.9/421, paras. 53-103; A/CN.9/WG.IV/WP.69, paras 82-95;
A/50/17, paras. 307-309
A/CN.9/407, paras. 106-118 A/CN.9/WG.IV/WP.67, annex; A/CN.9/WG.IV/WP.66, annex II;
A/49/17, paras. 198, 199 and 201;
A/CN.9/390, para. 155-158.

III. HISTORY AND BACKGROUND OF THE MODEL LAW

123. 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 harmonization 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. Over the past quarter of a century, UNCITRAL, whose membership consists of States from all regions and of all levels of economic development, has implemented its mandate by formulating international conventions (the United Nations Conventions on Contracts for the International Sale of Goods, on the Limitation Period in the International Sale of Goods, on the Carriage of Goods by Sea, 1978 ("Hamburg Rules"), on the Liability of Operators of Transport Terminals in International Trade, on International Bills of Exchange and International Promissory Notes, and on Independent Guarantees and Stand-by Letters of Credit), model laws (the UNCITRAL Model Laws on International Commercial Arbitration, on International Credit Transfers and on Procurement of Goods, Construction and Services), the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules, and legal guides (on construction contracts, countertrade transactions and electronic funds transfers).

124. The Model Law was prepared in response to a major change in the means by which communications are made between parties using computerized or other modern techniques in doing business (sometimes referred to as "trading partners"). The Model Law is intended to serve as a model to countries for the evaluation and modernization of certain aspects of their laws and practices in the field of commercial relationships involving the use of computerized or other modern communication techniques, and for the establishment of relevant legislation where none presently exists. The text of the Model Law, as reproduced above, is set forth in annex I to the report of UNCITRAL on the work of its twenty-ninth session.[3]

125. The Commission, at its seventeenth session (1984), considered a report of the Secretary-General entitled "Legal aspects of automatic data processing" (A/CN.9/254), which identified several legal issues relating to the legal value of computer records, the requirement of a "writing", authentication, general conditions, liability and bills of lading. The Commission took note of a report of the Working Party on Facilitation of International Trade Procedures (WP.4), which is jointly sponsored by the Economic Commission for Europe and the United Nations Conference on Trade and Development, and is responsible for the development of UN/EDIFACT standard messages. That report suggested that, since the legal problems arising in this field were essentially those of international trade law, the Commission as the core legal body in the field of international trade law appeared to be the appropriate central forum to undertake and coordinate the necessary action.[4] The Commission decided to place the subject of the legal implications of automatic data processing to the flow of international trade on its programme of work as a priority item.[5]

126. At its eighteenth session (1985), the Commission had before it a report by the Secretariat entitled "Legal value of computer records" (A/CN.9/265). That report came to the conclusion that, on a global level, there were fewer problems in the use of data stored in computers as evidence in litigation than might have been expected. It noted that a more serious legal obstacle to the use of computers and computer-to-computer telecommunications in international trade arose out of requirements that documents had to be signed or be in paper form. After discussion of the report, the Commission adopted the following recommendation, which expresses some of the principles on which the Model Law is based:

> "The United Nations Commission on International Trade Law,
>
> "*Noting* that the use of automatic data processing (ADP) is about to become firmly established throughout the world in many phases of domestic and international trade as well as in administrative services,

"*Noting* also that legal rules based upon pre-ADP paper-based means of documenting international trade may create an obstacle to such use of ADP in that they lead to legal insecurity or impede the efficient use of ADP where its use is otherwise justified,

"*Noting* further with appreciation the efforts of the Council of Europe, the Customs Co-operation Council and the United Nations Economic Commission for Europe to overcome obstacles to the use of ADP in international trade arising out of these legal rules,

"*Considering* at the same time that there is no need for a unification of the rules of evidence regarding the use of computer records in international trade, in view of the experience showing that substantial differences in the rules of evidence as they apply to the paper-based system of documentation have caused so far no noticeable harm to the development of international trade,

"*Considering* also that the developments in the use of ADP are creating a desirability in a number of legal systems for an adaptation of existing legal rules to these developments, having due regard, however, to the need to encourage the employment of such ADP means that would provide the same or greater reliability as paper-based documentation,

"1. *Recommends* to Governments:

"*(a)* to review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission, to be assured that the rules are consistent with developments in technology, and to provide appropriate means for a court to evaluate the credibility of the data contained in those records;

"*(b)* to review legal requirements that certain trade transactions or trade related documents be in writing, whether the written form is a condition to the enforceability or to the validity of the transaction or document, with a view to permitting, where appropriate, the transaction or document to be recorded and transmitted in computer-readable form;

"*(c)* to review legal requirements of a handwritten signature or other paper-based method of authentication on trade related documents with a view to permitting, where appropriate, the use of electronic means of authentication;

"*(d)* to review legal requirements that documents for submission to governments be in writing and manually signed with a view to permitting, where appropriate, such documents to be submitted in computer-readable form to those administrative services which have acquired the necessary equipment and established the necessary procedures;

"2. *Recommends* to international organizations elaborating legal texts related to trade to take account of the present Recommendation in adopting such texts and, where appropriate, to consider modifying existing legal texts in line with the present Recommendation."[6]

127. That recommendation (hereinafter referred to as the "1985 UNCITRAL Recommendation") was endorsed by the General Assembly in resolution 40/71, paragraph 5*(b)*, of 11 December 1985 as follows:

"The General Assembly,

"... Calls upon Governments and international organizations to take action, where appropriate, in conformity with the Commission's recommendation so as to ensure legal security in the context of the widest possible use of automated data processing in international trade; ...". [7]

128. As was pointed out in several documents and meetings involving the international electronic commerce community, e.g. in meetings of WP. 4, there was a general feeling that, in spite of the efforts made through the 1985 UNCITRAL Recommendation, little progress had been made to achieve the removal of the mandatory requirements in national legislation regarding the use of paper and handwritten signatures. It has been suggested by the Norwegian Committee on Trade Procedures (NORPRO) in a letter to the Secretariat that "one reason for this could be that the 1985 UNCITRAL Recommendation advises on the need for legal update,

but does not give any indication of how it could be done". In this vein, the Commis considered what follow-up action to the 1985 UNCITRAL Recommendation could usefull taken so as to enhance the needed modernization of legislation. The decision by UNCITRA formulate model legislation on legal issues of electronic data interchange and related mean communication may be regarded as a consequence of the process that led to the adoptio the Commission of the 1985 UNCITRAL Recommendation.

129. At its twenty-first session (1988), the Commission considered a proposal to examine need to provide for the legal principles that would apply to the formation of internati commercial contracts by electronic means. It was noted that there existed no refined l structure for the important and rapidly growing field of formation of contracts by electr means and that future work in that area could help to fill a legal vacuum and to red uncertainties and difficulties encountered in practice. The Commission requested the Secreta to prepare a preliminary study on the topic.[8]

130. At its twenty-third session (1990), the Commission had before it a report enti "Preliminary study of legal issues related to the formation of contracts by electronic mea (A/CN.9/333). The report summarized work that had been undertaken in the Europ Communities and in the United States of America on the requirement of a "writing" as wel other issues that had been identified as arising in the formation of contracts by electr means. The efforts to overcome some of those problems by the use of model communica agreements were also discussed.[9]

131. At its twenty-fourth session (1991), the Commission had before it a report enti "Electronic Data Interchange" (A/CN.9/350). The report described the current activities in various organizations involved in the legal issues of electronic data interchange (EDI) analysed the contents of a number of standard interchange agreements already develope then being developed. It pointed out that such documents varied considerably according to various needs of the different categories of users they were intended to serve and that variety of contractual arrangements had sometimes been described as hindering development of a satisfactory legal framework for the business use of electronic commerc suggested that there was a need for a general framework that would identify the issues provide a set of legal principles and basic legal rules governing communication thro electronic commerce. It concluded that such a basic framework could, to a certain extent, created by contractual arrangements between parties to an electronic commerce relation and that the existing contractual frameworks that were proposed to the community of user electronic commerce were often incomplete, mutually incompatible, and inappropriate international use since they relied to a large extent upon the structures of local law.

132. With a view to achieving the harmonization of basic rules for the promotion of electr commerce in international trade, the report suggested that the Commission might wis consider the desirability of preparing a standard communication agreement for use international trade. It pointed out that work by the Commission in this field would be of partic importance since it would involve participation of all legal systems, including those of develo countries that were already or would soon be confronted with the issues of electr commerce.

133. The Commission was agreed that the legal issues of electronic commerce would bec increasingly important as the use of electronic commerce developed and that it sh undertake work in that field. There was wide support for the suggestion that the Commis should undertake the preparation of a set of legal principles and basic legal rules gover communication through electronic commerce.[10] The Commission came to the conclusion th would be premature to engage immediately in the preparation of a standard communica agreement and that it might be preferable to monitor developments in other organizati particularly the Commission of the European Communities and the Economic Commissio Europe. It was pointed out that high-speed electronic commerce required a new examinatic

basic contract issues such as offer and acceptance, and that consideration should be given to legal implications of the role of central data managers in international commercial law.

134. After deliberation, the Commission decided that a session of the Working Group on International Payments would be devoted to identifying the legal issues involved and to considering possible statutory provisions, and that the Working Group would report to the Commission on the desirability and feasibility of undertaking further work such as the preparation of a standard communication agreement.[11]

135. The Working Group on International Payments, at its twenty-fourth session, recommended that the Commission should undertake work towards establishing uniform legal rules on electronic commerce. It was agreed that the goals of such work should be to facilitate the increased use of electronic commerce and to meet the need for statutory provisions to be developed in the field of electronic commerce, particularly with respect to such issues as formation of contracts; risk and liability of commercial partners and third-party service providers involved in electronic commerce relationships; extended definitions of "writing" and "original" to be used in an electronic commerce environment; and issues of negotiability and documents of title (A/CN.9/360).

136. While it was generally felt that it was desirable to seek the high degree of legal certainty and harmonization provided by the detailed provisions of a uniform law, it was also felt that care should be taken to preserve a flexible approach to some issues where legislative action might be premature or inappropriate. As an example of such an issue, it was stated that it might be fruitless to attempt to provide legislative unification of the rules on evidence that may apply to electronic commerce massaging (ibid., para. 130). It was agreed that no decision should be taken at that early stage as to the final form or the final content of the legal rules to be prepared. In line with the flexible approach to be taken, it was noted that situations might arise where the preparation of model contractual clauses would be regarded as an appropriate way of addressing specific issues (ibid., para. 132).

137. The Commission, at its twenty-fifth session (1992), endorsed the recommendation contained in the report of the Working Group (ibid., paras. 129-133) and entrusted the preparation of legal rules on electronic commerce (which was then referred to as "electronic data interchange" or "EDI") to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.[12]

138. The Working Group devoted its twenty-fifth to twenty-eighth sessions to the preparation of legal rules applicable to "electronic data interchange (EDI) and other modern means of communication" (reports of those sessions are found in documents A/CN.9/373, 387, 390 and 406).[13]

139. The Working Group carried out its task on the basis of background working papers prepared by the Secretariat on possible issues to be included in the Model Law. Those background papers included A/CN.9/WG.IV/WP.53 (Possible issues to be included in the programme of future work on the legal aspects of EDI) and A/CN.9/WG.IV/WP.55 (Outline of possible uniform rules on the legal aspects of electronic data interchange). The draft articles of the Model Law were submitted by the Secretariat in documents A/CN.9/WG.IV/WP.57, 60 and 62. The Working Group also had before it a proposal by the United Kingdom of Great Britain and Northern Ireland relating to the possible contents of the draft Model Law (A/CN.9/WG.IV/WP.58).

140. The Working Group noted that, while practical solutions to the legal difficulties raised by the use of electronic commerce were often sought within contracts (A/CN.9/WG.IV/WP.53, paras. 35-36), the contractual approach to electronic commerce was developed not only because of its intrinsic advantages such as its flexibility, but also for lack of specific provisions of statutory or case law. The contractual approach was found to be limited in that it could not overcome any of the legal obstacles to the use of electronic commerce that might result from mandatory provisions of applicable statutory or case law. In that respect, one difficulty inherent

in the use of communication agree- ments resulted from uncertainty as to the weight that would be carried by some contractual stipulations in case of litigation. Another limitation to the contractual approach resulted from the fact that parties to a contract could not effectively regulate the rights and obligations of third parties. At least for those parties not participating in the contractual arrangement, statutory law based on a model law or an international convention seemed to be needed (see A/CN.9/350, para. 107).

141. The Working Group considered preparing uniform rules with the aim of eliminating the legal obstacles to, and uncertainties in, the use of modern communication techniques, where effective removal of such obstacles and uncertainties could only be achieved by statutory provisions. One purpose of the uniform rules was to enable potential electronic commerce users to establish a legally secure electronic commerce relationship by way of a communication agreement within a closed network. The second purpose of the uniform rules was to support the use of electronic commerce outside such a closed network, i.e., in an open environment. However, the aim of the uniform rules was to enable, and not to impose, the use of EDI and related means of communication. Moreover, the aim of the uniform rules was not to deal with electronic commerce relationships from a technical perspective but rather to create a legal environment that would be as secure as possible, so as to facilitate the use of electronic commerce between communicating parties.

142. As to the form of the uniform rules, the Working Group was agreed that it should proceed with its work on the assumption that the uniform rules should be prepared in the form of statutory provisions. While it was agreed that the form of the text should be that of a "model law", it was felt, at first, that, owing to the special nature of the legal text being prepared, a more flexible term than "model law" needed to be found. It was observed that the title should reflect that the text contained a variety of provisions relating to existing rules scattered throughout various parts of the national laws in an enacting State. It was thus a possibility that enacting States would not incorporate the text as a whole and that the provisions of such a "model law" might not appear together in any one particular place in the national law. The text could be described, in the parlance of one legal system, as a "miscellaneous statute amendment act". The Working Group agreed that this special nature of the text would be better reflected by the use of the term "model statutory provisions". The view was also expressed that the nature and purpose of the "model statutory provisions" could be explained in an introduction or guidelines accompanying the text.

143. At its twenty-eighth session, however, the Working Group reviewed its earlier decision to formulate a legal text in the form of "model statutory provisions" (A/CN.9/390, para. 16). It was widely felt that the use of the term "model statutory provisions" might raise uncertainties as to the legal nature of the instrument. While some support was expressed for the retention of the term "model statutory provisions", the widely prevailing view was that the term "model law" should be preferred. It was widely felt that, as a result of the course taken by the Working Group as its work progressed towards the completion of the text, the model statutory provisions could be regarded as a balanced and discrete set of rules, which could also be implemented as a whole in a single instrument (A/CN.9/406, para. 75). Depending on the situation in each enacting State, however, the Model Law could be implemented in various ways, either as a single statute or in various pieces of legislation.

144. The text of the draft Model Law as approved by the Working Group at its twenty-eighth session was sent to all Governments and to interested international organizations for comment. The comments received were reproduced in document A/CN.9/409 and Add.1-4. The text of the draft articles of the Model Law as presented to the Commission by the Working Group was contained in the annex to document A/CN.9/406.

145. At its twenty-eighth session (1995), the Commission adopted the text of articles 1 and 3 to 11 of the draft Model Law and, for lack of sufficient time, did not complete its review of the draft Model Law, which was placed on the agenda of the twenty-ninth session of the Commission.[14]

146. The Commission, at its twenty-eighth session,[15] recalled that, at its twenty-seventh session (1994), general support had been expressed in favour of a recommendation made by the Working Group that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the preparation of the Model Law had been completed.[16] It was noted that, on that basis, a preliminary debate with respect to future work to be undertaken in the field of electronic data interchange had been held in the context of the twenty-ninth session of the Working Group (for the report on that debate, see A/CN.9/407, paras. 106-118). At that session, the Working Group also considered proposals by the International Chamber of Commerce (A/CN.9/WG.IV/WP.65) and the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66) relating to the possible inclusion in the draft Model Law of additional provisions to the effect of ensuring that certain terms and conditions that might be incorporated in a data message by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data message (for the report on the discussion, see A/CN.9/407, paras. 100-105). It was agreed that the issue of incorporation by reference might need to be considered in the context of future work on negotiability and transferability of rights in goods (A/CN.9/407, para. 103). The Commission endorsed the recommendation made by the Working Group that the Secretariat should be entrusted with the preparation of a background study on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents, taking into account the views expressed and the suggestions made at the twenty-ninth session of the Working Group.[17]

147. On the basis of the study prepared by the Secretariat (A/CN.9/WG.IV/WP.69), the Working Group, at its thirtieth session, discussed the issues of transferability of rights in the context of transport documents and approved the text of draft statutory provisions dealing with the specific issues of contracts of carriage of goods involving the use of data messages (for the report on that session, see A/CN.9/421). The text of those draft provisions as presented to the Commission by the Working Group for final review and possible addition as part II of the Model Law was contained in the annex to document A/CN.9/421.

148. In preparing the Model Law, the Working Group noted that it would be useful to provide in a commentary additional information concerning the Model Law. In particular, at the twenty-eighth session of the Working Group, during which the text of the draft Model Law was finalized for submission to the Commission, there was general support for a suggestion that the draft Model Law should be accompanied by a guide to assist States in enacting and applying the draft Model Law. The guide, much of which could be drawn from the *travaux préparatoires* of the draft Model Law, would also be helpful to users of electronic means of communication as well as to scholars in that area. The Working Group noted that, during its deliberations at that session, it had proceeded on the assumption that the draft Model Law would be accompanied by a guide. For example, the Working Group had decided in respect of a number of issues not to settle them in the draft Model Law but to address them in the guide so as to provide guidance to States enacting the draft Model Law. The Secretariat was requested to prepare a draft and submit it to the Working Group for consideration at its twenty-ninth session (A/CN.9/406, para. 177).

149. At its twenty-ninth session, the Working Group discussed the draft Guide to Enactment of the Model Law (hereinafter referred to as "the draft Guide") as set forth in a note prepared by the Secretariat (A/CN.9/WG.IV/WP.64). The Secretariat was requested to prepare a revised version of the draft Guide reflecting the decisions made by the Working Group and taking into account the various views, suggestions and concerns that had been expressed at that session. At its twenty-eighth session, the Commission placed the draft Guide to Enactment of the Model Law on the agenda of its twenty-ninth session.[18]

150. At its twenty-ninth session (1996), the Commission, after consideration of the text of the draft Model Law as revised by the drafting group, adopted the following decision at its 605th meeting, on 12 June 1996:

"The United Nations Commission on International Trade Law,

"*Recalling* its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,

"Noting that an increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication commonly referred to as 'electronic commerce', which involve the use of alternatives to paper-based forms of communication and storage of information,

"*Recalling* the recommendation on the legal value of computer records adopted by the Commission at its eighteenth session, in 1985, and paragraph 5*(b)* of General Assembly resolution 40/71 of 11 December 1985 calling upon Governments and international organizations to take action, where appropriate, in conformity with the recommendation of the Commission[19] so as to ensure legal security in the context of the widest possible use of automated data processing in international trade,

"*Being of the opinion* that the establishment of a model law facilitating the use of electronic commerce, and acceptable to States with different legal, social and economic systems, contributes to the development of harmonious international economic relations,

"*Being convinced* that the UNCITRAL Model Law on Electronic Commerce will significantly assist all States in enhancing their legislation governing the use of alternatives to paper-based forms of communication and storage of information, and in formulating such legislation where none currently exists,

"1. *Adopts* the UNCITRAL Model Law on Electronic Commerce as it appears in annex I to the report on the current session;

"2. *Requests* the Secretary-General to transmit the text of the UNCITRAL Model Law on Electronic Commerce, together with the Guide to Enactment of the Model Law prepared by the Secretariat, to Governments and other interested bodies;

"3. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Electronic Commerce when they enact or revise their laws, in view of the need for uniformity of the law applicable to alternatives to paper-based forms of communication and storage of information."[20]

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1. See *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), chap. VI, sect. B.

2. Reference materials listed by symbols in this Guide belong to the following three categories of documents:

A/50/17 and A/51/17 are the reports of UNCITRAL to the General Assembly on the work of its twenty-eighth and twenty-ninth sessions, held in 1995 and 1996, respectively;

A/CN.9/... documents are reports and notes discussed by UNCITRAL in the context of its annual session, including reports presented by the Working Group to the Commission;

A/CN.9/WG.IV/... documents are working papers considered by the UNCITRAL Working Group on Electronic Commerce (formerly known as the UNCITRAL Working Group on Electronic Data Interchange) in the preparation of the Model Law.

3. Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), Annex I.

4. "Legal aspects of automatic trade data interchange" (TRADE/WP.4/R.185/Rev.1). The report submitted to the Working Party is reproduced in A/CN.9/238, annex.
5. Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17), para. 136.
6. Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), para. 360.
7. Resolution 40/71 was reproduced in United Nations Commission on International Trade Law Yearbook, 1985, vol. XVI, Part One, D. (United Nations publication, Sales No. E.87.V.4).
8. Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), paras. 46 and 47, and ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 289.
9. Ibid., Forty-fifth Session, Supplement No. 17 (A/45/17), paras. 38 to 40.
10. It may be noted that the Model Law is not intended to provide a comprehensive set of rules governing all aspects of electronic commerce. The main purpose of the Model Law is to adapt existing statutory requirements so that they would no longer constitute obstacles to the use of paperless means of communication and storage of information.
11. Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 311 to 317.
12. Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 141 to 148.
13. The notion of "EDI and related means of communication" as used by the Working Group is not to be construed as a reference to narrowly defined EDI under article 2(b) of the Model Law but to a variety of trade-related uses of modern communication techniques that was later referred to broadly under the rubric of "electronic commerce". The Model Law is not intended only for application in the context of existing communication techniques but rather as a set of flexible rules that should accommodate foreseeable technical developments. It should also be emphasized that the purpose of the Model Law is not only to establish rules for the movement of information communicated by means of data messages but equally to deal with the storage of information in data messages that are not intended for communication.
14. Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), para. 306.
15. Ibid., para. 307.
16. Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.
17. Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), para. 309.
18. Ibid., para. 306.
19. Ibid., Fortieth Session, Supplement No. 17 (A/40/17), paras. 354 - 360.
20. Ibid., Fifty-first Session, Supplement No. 17 (A/51/17), para. 209.