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ELECTRONIC TICKETING — CURRENT LEGAL ISSUES

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I. INTRODUCTION

ELECTRONIC TICKETING (“e-ticketing”) is arguably the most critical commercial tool aimed at cutting rising costs in the airline industry. The International Air Transport Association (“IATA”) has announced that its vision is to accomplish 100 percent implementation of e-ticketing worldwide by 2007.¹ At present, IATA processes 300 million paper tickets a year, each of which costs U.S. \$10 to process.² An e-ticket will only cost U.S. \$1 to process, saving the industry approximately U.S. \$3 billion annually.³ In addition to the significant savings that the e-ticket offers, it will also ensure easier handling of itinerary changes and last minute travel decisions, obviate the danger and inconvenience associated with lost tickets, and expedite the use of internet facilities. The e-ticket will bring aviation commerce to the final frontier of the communication revolution by eliminating cumbersome processes and reducing costs related to postage, shipping, storage, and accounting. Using e-tickets will eliminate costs relating to producing envelopes and ticket jack-

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¹ Press Release, International Air Transport Association, IATA Takes Giant Steps Forward to Simplify the Business (May 30, 2005), *available at* <http://www.iata.org/pressroom/pr/2005-05-30-04.htm> (last visited Aug. 29, 2005).

² Speech by Giovanni Bisignani, President, International Air Transport Association (Nov. 16, 2001).

³ *Id.*

ets. Above all, the use of e-tickets will allow airlines to replace airport counter staff and space with self-service check-ins.

The airline industry has already taken initial measures toward reaching the overall goal of issuing 100% of airline tickets electronically. Global Distribution Systems ("GDS"), major airlines, and other vendors have already implemented a resilient and durable e-ticket technology.⁴

The ultimate aim of an e-ticket-based airline industry is to get rid of the existing cumbersome processes through bilateral arrangements, which cost annually anywhere between U.S. \$50,000 and U.S. \$150,000 for implementation and administration.⁵ This practice of exchanging e-tickets with all commercial partners, however, is far too expensive for the 420 carriers operating air services globally. As a solution, both IATA and SITA⁶ have established a "hubbing" system where a designated hub will distribute e-tickets. This approach has not been popular among airlines, some of which prefer to transact business with their clients directly through the internet.

With all its efficiency, the internet is not bereft of problems. The most stultifying of these is the unavailability of internet access in less technologically sophisticated regions such as Africa and remote parts of Asia. Additionally, intra-regional or domestic passengers may not be able to purchase tickets through the internet from small airlines unless internet cafes can accept cash from customers and settle with airlines through credit card transactions. A practical approach to overcoming the internet's lack of global reach is for airlines to enter into suitable code-sharing systems where, for a small fee, one airline could issue electronic tickets on behalf of another.

The exponential increase of online sales of consumer goods serves as a good reason for airlines to follow the e-route. Statistics indicate that online sales are too prodigious to ignore, representing 2% of all retail sales in 2000 and jumping to 7% in 2004.⁷ Although multi-channel retailers generate 75% of e-com-

⁴ See *E-Ticket Challenges—Interlining and Small Carriers*, AIRLINES INT'L, Oct.-Nov. 2004, at 2.4.

⁵ *Id.*

⁶ Airline Telecommunications and Information Services (SITA).

⁷ Bill Grabarek, *E-Partnerships Essential for Retailers*, DIRECT MKTG. BUS. INTELLIGENCE, Sept. 1, 2004, available at http://www.directmag.com/ar/marketing_epartnerships_essential_retailers (last visited Aug. 28, 2005). Between the first half of 1998 and 1999, IBM's e-commerce revenue rose from \$472 million to \$6 billion. See Feldman, *infra* note 10.

merce transactions, offline retailers also capture a significant slice of the electronic commerce market.⁸ Simple e-commerce websites are available for as little as U.S. \$99. Airlines could also join an existing online store for a rental fee of a few thousand dollars a year or could spend millions of dollars on a sophisticated commercial website.⁹ An e-ticket website requires not only a browsing facility to view different goods, but must also enable the potential buyer to review available products and services and to pay for them online. This may require the use of an online e-commerce hosting service.

The above notwithstanding, the process of selling airline tickets electronically is not as simple as it may seem. To obtain maximum returns from e-ticketing, airlines must decide whether to use standard websites or portals or to become portals themselves.¹⁰ Unfortunately, airlines have reportedly been dragging their feet, not recognizing e-commerce possibilities available to them over major online distributors such as Amazon.com.¹¹ They have been inhibited by their dogmatic reliance on traditional sales agents, their age-old regulatory practices, and their inexplicable reluctance to update computer software. Airlines have refused to transcend the expectation of being sought after by their clients and have not aggressively pursued the market. Encouragingly, carriers such as United Airlines have created e-super stores such as Buy-Travel.com. These stores sell car rentals, cruises, and holiday packages in addition to airline tickets. Smaller airlines such as Easyjet have followed, graduating from telephone sales to e-ticketing on the world wide web.

E-ticketing also brings to bear the business issues and complexities inherent in a paperless transaction. For example, e-commerce fraud, which is on the rise, raises emergent issues of security and privacy, together with the frustrating and often distracting spam and pop-up intervention. The most ominous legal issue which e-commerce portends is the transaction itself, which may have to be judicially interpreted.

⁸ *Id.*

⁹ Cary Griffith, *The E-Commerce Dilemma*, available at <http://www.computeruser.com/articles/2005,5,38,1,0501,01.html> (last visited Aug. 28, 2005).

¹⁰ Joan M. Feldman, *E-Commerce: The Future is Now*, AIR TRANSP. WORLD, Nov. 1999, at 44.

¹¹ *Id.*

II. CURRENT LEGAL PROBLEMS

A. DEFINITIONS

E-commerce in general and e-ticketing in particular are no longer subject to a static set of legal rules driven by judicial precedent. The nature of e-ticketing in air transport¹² is constantly changing, requiring vigilant adaptation by legislators and regulators. The United Nations Commission on International Trade Law ("UNCITRAL"), at its thirty-eighth session in July, 2005 was scheduled, at the time of writing, to discuss a Draft Convention on the Use of Electronic Communications in International Contracts to promote international trade. The Draft Convention regards trade as an important element in promoting friendly relations among states on the basis of equality and mutual benefit. The Draft Convention also evinces the problems created by the uncertain legal value of electronic communications in international contracts as an obstacle to international trade.¹³ The fundamental premise of the Draft Convention is that increased electronic communication improves the efficiency of commercial activities, enhances trade connections, and allows new access to previously remote parties and markets, thereby promoting trade and e-commerce, domestically and internationally.¹⁴ The Convention applies to the use of electronic communications related to the formation or performance of a contract or agreement (implying that they are not the same) between parties whose businesses are not located in the same country.¹⁵ Article 1 implies that the Draft Convention applies to international business between two or more parties conducting business, suggesting that it excludes a contract by a person who purchases an e-ticket for his personal use. The Draft Convention clarifies this in Article 2(1)(a) which states categorically

¹² See Ruwantissa Abeyratne, *E-Commerce and the Airline Passenger*, 66 J. AIR L. & COM. 1345 (2001) (describing the e-ticketing process); Ruwantissa Abeyratne, *The Use of E-Commerce in Carriage by Air, Some Legal Issues*, 6 TOLLEY'S COMM. L. 798 (2001); Ruwantissa Abeyratne, *The E-ticket and Trademark Issues of Computerized Airline Ticketing*, 5 TOLLEY'S COMM. L. 58 (2000).

¹³ *Draft Convention on the Use of Electronic Communications in International Conflicts*, U.N. Commission International On Trade Law, 38th Sess., U.N. Doc. A/CN.9/577 (2004), available at <http://daccessdds.un.org/doc/undoc/gen/v04/592/87/pdf/v0459287.pdf?Open+element> (last visited May 1, 2005).

¹⁴ *Id.* Annex 1, at 3.

¹⁵ *Id.* art 1.

that the instrument excludes contracts concluded for personal, family, or household purposes.¹⁶

The inapplicability of the Draft Convention to personal transactions conducted by a person with an airline based in a foreign country (although the “place of business” in Article 1 may not necessarily apply exclusively to the head office of the airline)¹⁷ does not preclude its relevance to definitions and conditions relating to the purchase of e-tickets. For example, the word “communication” is defined as “any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract.”¹⁸ The same provision defines an “electronic communication” as “any communication that the parties make by means of data messages, which comprise information generated, sent, received or stored by electronic, magnetic, optical or similar means, including but not limited to electronic data interchange (“EDI”), electronic mail telegram, telex or telecopy.”¹⁹ An electronic contract has to be initiated by an “originator,” who is “a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as an intermediary with respect to that electronic communication.”²⁰ The originator has to address his communication to an addressee, the intended direct recipient of the communication, rather than an intermediary of the electronic communication.²¹ The Draft Convention categorically states that a communication or a contact shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication and that, although nothing in the instrument compels a party to use or accept electronic communications, certain inferences may be drawn from a party’s conduct that the party intends to use an electronic medium to transact his business.²²

¹⁶ *Id.* art. 2.

¹⁷ *Id.* art. 4.

¹⁸ *Id.* art. 4(a).

¹⁹ *Id.* art. 4(b).

²⁰ *Id.* art. 20.

²¹ *Id.* art. 4(e).

²² *Id.* art. 8(1).

B. CONCLUSION OF THE CONTRACT

The originator of the e-communication usually clearly indicates the price of the ticket offered²³ and a quotation of a ticket that will be sold would not amount to an offer but a mere invitation for the buyer to make an offer.²⁴ An internet price list of airline tickets may also be construed as an invitation for an offer.²⁵ An airline ticket has the distinctive characteristic of not only specifying the origin and destination of travel along with the price of the fare, but also including contractual terms that the seller has to take reasonable steps to bring to the notice of the buyer, and on which there is an established *cursus curiae* on other modes of transportation.²⁶ In the 1971 case of *Thornton v. Shoelane Parking Ltd.*, the court held that the operators of a parking lot did not take sufficient steps to ensure that contractual terms appearing on the walls of the parking space also appeared on the parking ticket issued to customers.²⁷ An e-ticket would directly draw from the contractual principle, enunciated by the Ontario Court of Appeals in *Craven v. Strand Holidays (Canada) Ltd.*, that a tour operator should take reasonable steps to bring limitation of liability provisions and conditions attached to the tour package he was selling to the attention of the customer.²⁸ The original court had ruled that, since the customer was not aware of the terms of limitation, he was not expected to abide by it. The court of appeals held:

the question should have been followed by another question to establish whether Strand (the tour operator) had taken reasonable measures to draw the limitations and conditions of the Contract to the customer's attention. If they did, the respondents ought to have been familiar with them and could not successfully rely on their unreasonable failure to read them.²⁹

From the perspective of the vendor, the advantage of the e-ticket is the ample opportunity to hyper-link conditions of the

²³ *Storer v. Manchester City Council*, [1974] 1 W.L.R. 1403 (C.A.); *McGrath v. Black* [1909] 43. N.S.R. 554; *Calgary Hardwood & Veneer Ltd. v. Canadian Nat'l Ry.* [1977] 74. D.L.R. (3d) 284.

²⁴ See *Reynen v. British Columbia Lottery Corp.* [1997] 36 B.C.R. (3d) 282.

²⁵ *Granger & Son v. Gough* [1896] A.C. 325.

²⁶ *Parker v. South Eastern Ry. Co.* [1877] 2. C.P. D 416; *Hood v. Anchor Line (Henderson Bros.) Ltd.* [1918] A.C. 837; *Union Steamships Ltd. v. Barnes* [1956] 5 D.L.R. (2d) 536; *Dipaolo Mach. Works Ltd. v. Prestige Equip. Corp.* [1996] 5. C.P.C. (4th) 175 (Ont).

²⁷ *Thornton v. Shoe Lane Parking Ltd.* [1971] 2. W.L.R. 585.

²⁸ *Craven v. Strand Holidays (Can.) Ltd.*, [1982] 140 O.R. (2d) 186.

²⁹ *Id.* at 40-41.

contract on the web and rely on the defense that a claimant would be presumed to read the conditions of contract before making the purchase through the internet. The electronic notice also precludes the often-adduced argument that the conditions are unreasonable and therefore unenforceable when the buyer does not read them. When purchasing an e-ticket, the party buying the ticket is deemed to assent to the terms whatever they may be, although early cases have established that some degree of special care is needed to notify the purchaser of conditions that the court may deem unreasonable. In the 1956 case of *Spurling v. Bradshaw*,³⁰ Lord Denning expressed the view that "some clauses which I have seen need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."³¹

III. THE ELECTRONIC TICKET

A. CYBER CONTRACTS

Cyber contracts, commonly called "click-wrap" agreements, are formed over the internet in their entirety.³² The essence of a "click-wrap" agreement is that when an offeree visits the web site of a person who has advertised his goods for sale at a given price, and agrees to buy those goods and indicates his assent to be bound by the terms of the offeror or person who offers to sell goods on the internet, a contract is concluded.³³ There is no

³⁰ *J. Spurling Ltd. v. Bradshaw* [1956] 1 W.L.R. 461; *Wallis, Son & Wells v. Pratt* [1910] 2 K.B. 937; *Tocher v. Thompson* [1913] 15 D.L.R. 31 (Man. C.A.); *Hong Kong Fir Shipping Co., Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (CA).

³¹ *J. Spurling Ltd.*, 1 W.L.R. at 466; see also *Thornton v. Shoe Lane Parking Ltd.*, [1971] 2 W.L.R. 585; *Kalmer v. Greyhound Lines of Canada* [1979] 30 A.R. 124; *Dixon v. The Queen in Right of British Columbia* 12 B.C.L.R. 110 [1997]; *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] Q.B. 433 (CA).

³² Click-wrap agreements derive their name from shrink-wrap agreements, by which most software is sold today. It is a well-established fact that in common law jurisdictions, click-wrap agreements are enforceable contracts. See *Hotmail Corp. v. Van Money Pie Inc.*, where the United States District Court for the Northern District of California agreed that once an offeror clicks on the button "I agree" denoting that he accepts all conditions of the offeree, a valid and effectual contract is concluded. *Hotmail Corp. v. Van Money Pie Inc.*, No. 1998 WL 388389 (N.D. Cal. 1998).

³³ For more information see Martin H. Samson, *Click-Wrap Agreement Held Enforceable*, 219 N.Y. L.J. 124 (1998).

paper exchange, nor is there the need for the signature of either party to the contract.³⁴

The initial element of contract formation is the intention to contract and to conclude the process on the part of both the offeror and offeree. Courts have insisted that proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer. Thus, the parties' statements in the process of negotiations are of extreme importance in the determination of a concluded contract. The 1840 case of *Hyde v. Wrench* offers the seminal principle that a series of communications from either party may impinge an original offer.³⁵ In the *Hyde* case, the defendant, on June 6, offered to sell an estate to the plaintiff for £1,000.³⁶ On June 8th, in reply, the plaintiff made an offer of £950, which was refused by the defendant on June 27th.³⁷ However, on June 29th, the plaintiff wrote to the defendant that he was now willing to pay £1,000.³⁸

The importance of *Hyde* decision lies in the fact the court held that no contract existed.³⁹ The plaintiff had, by rejecting the offer made on June 6th, precluded himself from reviving the offer later.⁴⁰ In other words, once an offer is rejected by the offeree, he cannot go on the basis that the offer would still stand in its original form. When this principle is applied to an auction where the airline considers public offers over the Internet, any offer made by a member of the public for a seat on a flight cannot be rejected by the airline and later revived.

A counter-offer situation is different, where an airline nominates an alternate sum as acceptable. For example, if A offers over the internet \$100 as a price he would pay for a seat from

³⁴ See, e.g., *Corinthian Pharm. Sys., Inc. v. Lederle Labs.*, 724 F. Supp. 605 (S.D. Ind. 1989) (dealing in medicinal drugs on a wholesale basis ordered a consignment of drugs through a computerized telephone ordering system).

³⁵ *Hyde v. Wrench* (1840) 3 Beav. 334; see *Kinghorne v. The Montreal Tel. Co.*, [1859] 18 V.C.Q.B.R. 60. "We must look, I think, in the case of each communication, at the papers delivered by the party who sent the message, not at the transcript of the message taken through the wire at the other end of the wire, with all the chances of mistakes in apprehending and noting the signals, and in transcribing for delivery." *Id.* at 64.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

Montreal to Toronto, the airline can counter-offer the seat for \$125, thus making itself the offeror. Here, unlike the situation in the *Hyde* case, there is no outright rejection of the offer.

In the instance of an auction carried out over the Internet, the primary issue at stake in the determination of a contract is whether the parties intended to conclude the contract. For instance, if a person offers a certain price to the airline over the Internet and the airline gives him a reference number, the allocation of that number may not indicate acceptance of the offer by the airline. The 1989 case of *Corinthian Pharmaceutical Systems Inc. v. Lederle Laboratories* is a good example.⁴¹ In that case, a person dealing in medicinal drugs on a wholesale basis ordered a consignment of drugs through a computerized telephone ordering system.⁴² The order was strategically placed a day before a price increase was to take effect.⁴³ The wholesaler ordered through the manufacturer's automated telephone order system, and, after he placed the order, he received a computer-generated "tracking number" from the manufacturer's computer system.⁴⁴ There was absolutely no human interaction in the transaction.⁴⁵ Subsequently, when the manufacturer refused to sell the consignment of drugs at the pre-increase price, the court agreed with manufacturer's position that the tracking number was not an acceptance of the offer, but merely an acknowledgment of the receipt of the order.⁴⁶ The court concluded that no contract had been concluded and denied the wholesaler purchase of the goods at the lower price.⁴⁷

The early case of *Henkle v. Pape* brings out another difficulty that might arise from contracts transacted through the internet.⁴⁸ The *Henkle* case, decided in 1870, concerned a transaction carried out through telegraphic messages for the sale of up to fifty rifles.⁴⁹ The offeror sent the offeree a telegraphic message offering to buy three rifles but the message was transcribed to the offeree as "the" instead of "three" rifles.⁵⁰ Accordingly, the offeree held the offeror liable for the purchase of all fifty

⁴¹ 724 F. Supp. 605 (S.D. Ind. 1989).

⁴² *Id.* at 606-08.

⁴³ *Id.* at 607.

⁴⁴ *Id.*

⁴⁵ *Id.* at 606-08.

⁴⁶ *Id.* at 606-11.

⁴⁷ *Id.* at 611.

⁴⁸ *Henkle v. Pape*, [1870] 23 L.T. 419.

⁴⁹ *Id.*

⁵⁰ *Id.*

rifles.⁵¹ The court held that the offeror could not be held liable for the error of the telegraph clerk who had wrongly deciphered the message and, therefore, no contract had been concluded.⁵²

The 1870 principle of the *Henkle* decision still holds water in the instance of a contract transacted through the internet in that the latter instance, like the *Henkle* case, involves a contract negotiated through electronic means. In just an instant, there is always the risk that messages intending to create contractual obligations may not reach their destination, or, perhaps more ominously, are received by the recipient in a form other than the one originally sent. In the seminal Canadian case of *Kinghorne v. Montreal Telegraph Co.*,⁵³ decided in 1859, the court subsumed the reasons behind the determination of an electronic contract which may still apply:

We must look, I think, in the case of each communication, at the papers delivered by the party who sent the message, not at the transcript of the message taken through the wire at the other end of the wire, with all the chances of mistakes in apprehending and noting the signals, and in transcribing for delivery.⁵⁴

Of course, compared to early telegraph systems that caused numerous problems, the modern internet is more reliable, and errors such as those encountered in the *Henkle* and *Kinghorne* cases may not be commonplace. However, there is the possibility of garbled messages flowing through the internet, where courts would have no hesitation in determining the real intent of the parties to conclude a contract as the preliminary issue.

The above concerns are by no means intended to suggest that contracts through the internet are questionable in general terms. In fact, current computer-based technologies are more effective than earlier technologies at assisting parties to unambiguously conclude their agreement. For example, electronic data interchange ("EDI") as a commercial medium has evolved in Canada to the extent that the EDI Council of Canada's Model TPA encourages parties to be extremely precise in identifying particular messages as constituting an order (or offer) by introducing a two-phased process: the first using a functional acknowledgment of the offer (such as the tracking number in the

⁵¹ *Id.*

⁵² See also *Harper v. W. Union Tel. Co.*, 130 S.E. 119 (S.C. 1925); *Postal Tel. Cable Co. v. Schaefer*, 62 S.W. 1119 (Ky. App. 1901).

⁵³ *Kinghorne v. Montreal Tel. Co.* [1859] 18 V.C.Q.B.R. 60.

⁵⁴ *Id.* at 64.

Corinthian case) and the second using a purchase order acknowledgment.

B. TIME AND PLACE OF CONTRACT

There is no doubt as to when and where the contract comes into being when parties sign a contract simultaneously in a face-to-face setting. It is often not a trivial legal task to determine when and where a contract comes into being when either an offer, an acceptance, or both, are transacted by telegraph, telex, fax, EDI, e-mail, the internet, or telephone. The uncertainty began before the advent of the telegraph with the mail delivery system. The general contract law principle is that an offer is not considered accepted until the acceptance of the offer is received by the offeror. In England in the 19th century, judges developed an exception to this rule for offers and acceptances sent by the mail.⁵⁵ The so-called "mailbox rule," or "expedition theory," prescribes that where an offer is sent in the mail and use of mail is reasonable in the circumstances or expressly contemplated by the parties, the contract takes effect immediately when acceptance is posted in the mail (rather than when the offeror receives the acceptance). This rule shifts the uncertainty of delays in communications from the offeree to the offeror.⁵⁶ Shifting this risk to the offeror and giving the concomitant assurance to the offeree was reasonable because of the increased reliability of the Royal Mail in the 1800s, to the point where multiple deliveries a day in larger urban centres were the norm. The expedition theory is a good example of a legal doctrine being firmly grounded in the communication environment and commercial processes of its day.

As the telegraph, telephone, and other new communication technology evolved into widespread use, cases established principles as to when and where contracts were concluded. In *Carow Towing*, an early Canadian case, the court held that a contract entered into by telephone should be treated like a letter and should follow the expedition theory, with acceptance occurring at the place the acceptance is spoken and not where the offeror hears the acceptance.⁵⁷ By contrast, in the *Entores* case, a later

⁵⁵ *Schiller v. Fischer* [1981] 124 D.L.R. (3d) 577, 580.

⁵⁶ The rule was imputed to instances where telegraphic transactions were involved. See *Ee Stevenson Jacques & Co. v. McLean* [1880] 5 Q.B.D. 346; *Carow Towing Co. v. The "Ed McWilliams"* [1919] 46 D.L.R. 506 (Ex. Ct.).

⁵⁷ *Carow Towing Co.*, 46 D.L.R. at 506.

British decision, Lord Denning concluded that, for simultaneous means of communications like the telephone, the place where the contract is concluded is where the offeror hears the acceptance, and thus, if the line goes dead during the telephone conversation, the onus is upon the offeree to call the offeror to ensure the words of acceptance had been communicated to the offeror.⁵⁸ Subsequent cases in Canada have followed the decision in *Entores* rather than the approach in *Carow Towing*,⁵⁹ with the exception of Quebec where, until recently, the preponderance of case law has followed the principle that telephone contracts arise when and where the offeree speaks its acceptance⁶⁰ since the enactment of the current *Civil Code* of Quebec in January 1994, Article 1387 explicitly provides that, with respect to telephone contracts, acceptance occurs when and where the acceptance is received. It is interesting to note that the *Entores* decision was also followed in two fax cases, one in Nova Scotia⁶¹ and one in New Zealand,⁶² where each held that a contract made by fax arises when the offeror receives by fax the acceptance of the offeree.

The court in the *Entores* case also held that telex technology results in instantaneous communication, with the result that acceptance occurs when the message is received by the offeror. This approach was confirmed in a decision by the House of Lords in the *Brinkibon* case.⁶³ In this case, the court held that, although telex communications should be categorized as simultaneous, the specific constituent elements and factors in the communications system concerned need to be carefully considered:

The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately; messages may be sent out

⁵⁸ *Entores, Ltd. v. Miles Far East Corp.*, [1955] 2 All E.R. 493, (C.A.).

⁵⁹ See, e.g., *McDonald & Sons Ltd. v. Export Packers Co. Ltd.* [1979], 95 D.L.R. (3d) 174 (B.C.S.C.). See also *Re Viscount Supply Co. Ltd.* [1963], 40 D.L.R. (2d) 501 (Ont. S.C.); *Nat'l Bank of Canada v. Clifford Chance* [1996], 30 O.R. (3d) 746 (Gen. Div.).

⁶⁰ *Rosenthal & Rosenthal Inc. v. Bonavista Fabrics Ltd.*, [1984] C.A. 52 (Que. C.A.).

⁶¹ *Balcom (Joan) Sales Inc. v. Poirier* [1991], 288 A.P.R. 377, 383 (N.S. Co. Ct.).

⁶² *Gunac Hawkes Bay (1986) Ltd. v. Palmer*, [1991] 3 N.Z.L.R. 297 (H. Ct.).

⁶³ *Brinkibon Ltd. v. Stahag Stahl & Stahlwarenhandelsgesellschaft mbH*, [1982] 1 All E.R. 293 (H.L.).

of office hours, or at night, with the intention, or on the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur. No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.⁶⁴

The recognition of the facts in the *Brinkibon* case raise a number of emerging issues in respect of EDI, e-mail, and internet communication. Certain EDI transmissions, for example, will fall into the simultaneous communications category. Much of EDI is affected not between the trading principals, however, but by use of intermediaries, so-called value-added networks ("VAN") or service providers. An EDI message could likely go through the message sender's VAN, then through the recipient's VAN, and finally to the recipient. Similarly, e-mail messages over the internet may be routed to electronic mailboxes from which the recipient has to download the messages. In such instances, it may be more difficult to conclude that the simultaneous communication rules should apply. Also, it may be difficult to determine when exactly an electronic message arrives at the recipient's location for purposes of being recognized as legally effective. For instance, an early British case held that a letter sent in a sealed envelope is not considered received until it is opened by the addressee personally.⁶⁵ Whether such a rule should apply in the case of e-mail, or whether an e-mail message should be deemed received when it is available to be viewed by the intended recipient, regardless of the time at which the recipient actually reads the message, is a moot point. Another question is when should a telex or fax be deemed to have arrived at a workplace? In one case,⁶⁶ the court concluded that the fax was deemed to arrive when the message was received by the recipient's machine on a Friday, after business hours, rather than the following Monday morning when a person read the telex.

Given these ambiguities, prudent users of electronic commerce should try to avoid having to refer these issues to a judge. Users' EDI Trading Partner Agreement or other similar docu-

⁶⁴ *Id.* at 296.

⁶⁵ *Arrowsmith v. Ingle* [1810], 3 Taunt. 234.

⁶⁶ The "*Pendrecht*" [1980] 2 Lloyd's Rep. 56 (Q.B.).

ment, should set forth precisely what electronic message must be received by which computer (i.e., the sender's or the recipient's VAN) in order for a contract to arise. This would clarify questions as to when and where the electronic contract arose. As to the "where" question, the parties to the TPA would be well advised to select a governing law in advance, and to make sure the VAN agreements contain the same jurisdiction so that there is no question which law would apply if it were ever considered necessary to resort to adjudication. This is particularly true for EDI and internet transactions where each trading partner's VAN, or internet service provider, may be in a jurisdiction different from the customer, and therefore, the laws of four different jurisdictions could apply if the parties remain silent on the governing law question. In such circumstances, as Lord Denning observed in the *Entores* case concerning two parties in different jurisdictions, the problems arise because the laws of the respective jurisdictions are different. Therefore, predicting a court's probable response is difficult, given that the court will invariably try to seek the most just remedy under the circumstances. In some cases, this is truly a difficult task. As an example, the judge in the *Export Packers* case recommended that the various rules developed by the law over the years, such as the simultaneous communication rule in the *Entores* case, should not be applied in a rigid fashion:

When the common law rules relating to offer and acceptance were under development the telephone did not exist. At that time agreements were made by two or more persons getting together and reaching a common understanding. As the postal system came into being elaborate rules were made by the courts covering the mechanics of reaching a bargain by mail. Today a person ordinarily resident in British Columbia may telephone from Japan where he is on a business trip to a person ordinarily resident in Ontario but who is also then visiting Italy. They may agree to the same kind of contract which is the subject-matter of this writ. It does not necessarily follow the place where the contract was made was Japan and that Japanese law governs its interpretation. Alternatively, it would be hard to argue the place where the contract was made was Italy and the law of that country ought to apply to its interpretation.⁶⁷

This dictum clearly confirms the benefit accrued to users of electronic commerce in crafting their own rules for dealing with

⁶⁷ McDonald & Sons Ltd. v. Export Packers Co., [1979], 95 D.L.R. (3d) 174, 178 (B.C.S.C.) at 180.

issues of contract formation. Making commercial relationships more secure and predictable through contract, however, can be a costly and time-consuming exercise. Therefore, this may be an area ripe for law reform. In the United States, the National Conference of Commissioners of Uniform State Law is already working toward establishing new rules under the Uniform Commercial Code. These rules would take the view that because internet communications are instantaneous, a contract comes into existence when the sender of the offer receives an electronic message signifying acceptance. This does not, however, answer the question as to when the acceptance is effective if the offeror was not present before the computer. In other words, does receipt require a human intervention and acknowledgement? In determining the answer to this question, the court should consider the purpose and function of the rule, the possibility of prejudice by a particular holding, the reasonable expectations of the parties, and who could bear the burden for helping to "fix" the system if it needs it.

C. ISSUES OF JURISDICTION

Arguably, one of the key indicators that cyber contracts should be construed as possessing special characteristics in the context of performance is the need to resolve issues of jurisdiction. Given the world-wide-web and its global application, the most compelling question in this regard would pertain to the trans-boundary applicability of an internet contract. If an offer originated from a computer based in the vendor's office in Virginia, or as in the case of an e-ticket sale, an invitation to treat is issued in Virginia and is responded to by the buyer in Paris, the question at issue would be whether the seller "pushed" his message to Paris or whether the buyer "pulled" the message from Virginia. In such an instance, could the vendor claim that it is unjust to apply French law merely because a computer in Paris "pulled" or received his message? In the 1996 case of *United States v. Thomas*,⁶⁸ concerning criminal liability of the defendant for posting pornographic pictures on his computer, the defendant claimed that he had not "pushed" pornographic pictures into Tennessee from his server in Los Angeles, and, therefore, he should not be subjected to Tennessee's laws. The defendant Thomas claimed that it was the other way around – that a com-

⁶⁸ *United States v. Thomas*, 74 F.3d 701, 709 (6th Cir. 1996).

puter in Tennessee “pulled” the pornographic pictures.⁶⁹ The *Thomas* case clearly demonstrated the compelling need for courts to determine whether a buyer or recipient of a message “drags” a message and, therefore, whether the jurisdiction of the recipient is the appropriate place for adjudication.

In determining jurisdiction in an e-commerce case, the most fundamental issue that arises is whether the jurisdiction in which the buyer or seller transacted the business concerned can rule the entire internet. In the case of *Minnesota v. Granite Gate Resorts, Inc.*,⁷⁰ the Court of Appeals of Minnesota ruled that Minnesota law applied to an online gambling business located in Las Vegas and operating through a server in Belize. The *Minnesota* case coincides with some cases, and at the same time, differs from other decisions in various jurisdictions of the United States and Canada (such as those discussed below) that are inclined to follow the approach that a jurisdiction cannot impose its advertising, gambling, and consumer protection laws on the entire internet.

The most convenient example of an e-ticket transaction comes from the two jurisdictions of Canada and the United States. Would an offeror in Canada, who offers \$500 over the internet for a round trip between Toronto and Miami, be able to enforce an auction agreement against a United States airline at its home base in Florida? In a case decided in 1952⁷¹ in Canada, the plaintiff brought a case to the Ontario High Court against an American radio broadcasting station. The station was broadcasting allegedly libellous statements from across the border, but the broadcast could be heard over the air waves in Canada.⁷² The defendant radio station brought a motion of dismissal, alleging that the Ontario Court in Canada had no jurisdiction to hear a case against a party to the action which was an enterprise based in the United States.⁷³ The Court disagreed, and held:

A person may utter all the defamatory words he wishes without incurring any civil liability unless they are heard and understood by a third person. I think it a “startling proposition” to say that one may, while standing south of the border or cruising in an aeroplane south of the border, through the medium of modern

⁶⁹ *Id.*

⁷⁰ *Minn. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997).

⁷¹ *Jenner v. Sun Oil Co.* [1952] 16 C.P.R. 87 (Ont. H.C.J.).

⁷² *Id.*

⁷³ *Id.*

sound amplification, utter defamatory matter which is heard in a Province in Canada north of the border, and not be said to have published a slander in the Province in which it is heard and understood. I cannot see what difference it makes whether the person is made to understand by means of the written word, sound-waves or other-waves in so far as the matter of proof of publication is concerned. The tort consists in making a third person understand actionable defamatory matter.⁷⁴

In the more recent case of *Pindling v. National Broadcasting Corp.*,⁷⁵ with respect to an American television broadcast received in Canada, the Ontario High Court held that the Prime Minister of the Bahamas was entitled to bring the case to Canada instead of the United States. The *Pindling* decision illustrates the principle of "forum shopping" which can be culled from the television context and applied to the analogous situation of a contract transacted over the internet.

The above principle may be derogated only in an instance where the court seized of the case could invoke the principle of "forum non conveniens," which allows the transfer of a suit from an originally filed jurisdiction to some other jurisdiction which is better placed to hear the case concerned. In the 1996 case of *National Bank of Canada v. Clifford Chance*,⁷⁶ the Canadian court charged with hearing a case where a Toronto-based firm had contracted with a law firm in the United Kingdom, transferred the case to the United Kingdom although the contract was concluded in Toronto, on the grounds that the contract concerned a U.K.-based project and the legal advice obtained had been U.K. law given by lawyers in the United Kingdom. Based on the *Clifford Chance* principle, it would not be unusual for a common law court to determine that, in an auction for an airline seat, where the offer emanates from Canada over the internet for a seat out of the United Kingdom on a U.K.-based carrier, the applicable jurisdiction would lie with the courts in the United Kingdom, although the contract may have been concluded in Canada.

There is a dichotomy in the judicial thinking with regard to cases involving contracts concluded over the internet. On the one hand, courts may refuse to bring a person into a jurisdiction purely because he contracted with a business based in that juris-

⁷⁴ *Id.* at 98-99.

⁷⁵ *Findling v. Nat'l Broad. Corp.*, [1984] 49 O.R. (Ed) 58 (H.C.J.).

⁷⁶ *Nat'l Bank of Can. v. Clifford Chance*, [1996] 30 O.R. (3d) 746 (Gen. Div.)

diction. This approach is illustrated by the 1994 U.S. decision in the case of *Pres-Kap, Inc. v. System One, Direct Access Inc.*,⁷⁷ where the court refused to grant jurisdiction to Florida where a resident of New York had used a Florida based online network information service merely to gain access to a database. Similarly, the court in the famous 1997 *SunAmerica* case⁷⁸ refused to find jurisdiction in a trademark case solely on the basis of the defendant's operation of a general access web site:

Plaintiffs ask this Court to hold that any defendant who advertises nationally or on the Internet is subject to its jurisdiction. It cannot plausibly be argued that any defendant who advertises nationally could expect to be hauled into Court in *any* state, for a cause of action that does not relate to the advertisements. Such general advertising is not the type of "purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable."⁷⁹

Similarly, in the 1997 case of *Hearst Corp. v. Goldberger*,⁸⁰ where the defendant operated a passive general access web site, the courts were of the view that to open worldwide jurisdiction merely because the Internet offered worldwide access would be iniquitous:

Where, as here, defendant has not contracted to sell or actually sold any goods or services to New Yorkers, a finding of personal jurisdiction in New York based on an Internet website would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law nor acceptable to the Court as a matter of policy.⁸¹

The *Hearst Corporation* decision seems to have followed the observation of a case⁸² decided one year earlier where the court held:

⁷⁷ *Pres-Kap, Inc. v. Sys. One, Direct Access, Inc.*, 636 So. 2d. 1351, 1352-54 (Fla. App. 1994).

⁷⁸ *IDS Life Ins. Co. v. SunAmerica, Inc.*, 958 F. Supp. 1258 (N.D. III. 1997), *aff'd in part, vacated in part*, No. 1998 WL 51350 (7th Cir. 1998).

⁷⁹ *IDS Life*, 958 F. Supp. at 1268.

⁸⁰ *Hearst Corp. v. Goldberger*, No. 1997 WL 97097 (S.D.N.Y. 1997).

⁸¹ *Id.* at *1; *see also* *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *Blackburn v. Walker Oriental Rug Galleries*, 99 F. Supp. 636 (E.D. Pa. 1998).

⁸² *McDonough v. Fallon McElligott Inc.*, No. 1996 WL 753991 (S.D. Cal. 1996).

Because the Web enables easy worldwide access, allowing computer interaction via the Web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists; the Court is not willing to take this step. Thus, the fact that Fallon has a Web site used by Californians cannot establish jurisdiction by itself.⁸³

The second line of judicial thinking is the converse of the above approach, where courts have imputed to the non-resident defendant the responsibility for complexities brought about by the internet in its universal applicability. Therefore, in *Compusero Inc. v. Patterson*,⁸⁴ the court held a Texas-based computer programmer legally responsible for his Ohio-based computer network online service, and found him to be subject to Ohio law. Although the defendant had never visited Ohio, he was nevertheless found to be subject to Ohio law on the basis that an electronic contract had been concluded in Ohio, the state where the defendant was distributing his product.

The principle of universal application of jurisdiction has been invoked in other instances, where courts have accepted jurisdiction on the basis of sales made to customers through the defendant's web site,⁸⁵ or based on soliciting donations,⁸⁶ or based on subscribers signed up by the defendant for services delivered over the internet,⁸⁷ or for having follow-on contacts, negotiations, and other dealings in addition to, and often as a result of, the initial internet-based communication.⁸⁸ The common

⁸³ *Id.* at *3.

⁸⁴ *Compusero Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

⁸⁵ *Digital Equip. Corp. v. AltaVista Tech, Inc.* 960 F. Supp. 456 (D. Mass. 1997); see also *Cody v. Ward*, 954 F. Supp. 43 (D. Conn. 1997) (finding jurisdiction based on telephone and e-mail communications that consummated a business relationship begun over *Prodigy's* "Money talk" discussion forum for financial matters). In partially justifying this decision, the court noted that the use of fax technology, and even live telephone conferences, can greatly reduce the burden of litigating out-of-state. *Id.*

⁸⁶ *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1 (D.D.C. 1996).

⁸⁷ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

⁸⁸ *Resuscitation Techs. Inc. v. Cont'l Health Care Corp.*, No. 1997 WL 148567 (S.D. Ind. 1997). The Court in this case was not concerned that the defendants had never visited the forum state in person and concluded: "Neither is the matter disposed of by the fact that no defendant ever set foot in Indiana. The 'footfalls' were not physical, they were electronic. They were, nonetheless, footfalls. The level of Internet activity in this case was significant." See also *EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd.*, 947 F. Supp. 413, 420 (D. Ariz. 1996). In this case, the court summed up the essence of many of the Internet jurisdiction cases by stating: "BASIS [the defendant] should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously

thread that runs through the fabric of judicial thinking in this regard is that parties who avail themselves of technology in order to do business in a distant place should not then be able to escape that place's legal jurisdiction. These cases are all-embracing, from breach of contract claims to tort, including trade libel; in several cases, courts have even found jurisdiction in trademark infringement matters merely on the basis of a defendant's general access web site,⁸⁹ or linking to a national ATM network through a telephone line indirectly through an independent data processor in a third state.⁹⁰

An evaluation of the United States civil cases discussed above concludes that while the general trend is for courts to assert jurisdiction over non-residents based on their internet activities, there are still a few situations where some courts may not apply jurisdiction.⁹¹

Although the choice of forum may extend universally, it does not necessarily mean that enforcement from a judgment would automatically follow. In the case of *Bachchan v. India Abroad Publications Inc.*,⁹² the plaintiff, an Indian national who had won the right to have his case heard in the United Kingdom, was unable to enforce judgment in New York. The New York court held that the United Kingdom law applicable to the case did not ac-

escape traditional notions of jurisdiction." See also *Gary Scott Int'l, Inc. v. Baroudi*, 981 F. Supp. 714 (D. Mass. 1997).

⁸⁹ *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996); *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *Inset Sys. Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996). In the latter case, the court observed:

In the present case, Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all States. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut.

Inset Sys., 927 F. Supp. at 165.

⁹⁰ *Plus Sys. Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992).

⁹¹ *Zippo Mfg. Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119, 1122 (W.D. Pa. 1997).

⁹² *Bachchan v. India Abroad Publ'ns Int'l*, 585 N.Y.S.2d. 661 (N.Y. Supp. 1992).

cord with United States law and therefore the decision could not be enforced in the United States.⁹³

IV. CYBER SOCIETY AND CYBER CONTRACTS

The most distinguishing characteristic of the e-ticket is that it is negotiated and transacted in an environment called "cyber society" which is an independent, self-contained, self-ruled and open environment not susceptible to regulation.⁹⁴ Technically, therefore, cyber society is a free society, untrammelled and unconstrained by real space. Cyberspace is free from control of individual governments, particularly those of industrialized nations which can control activities of national and international trade. Cyberspace is seamless and free of any considerations of race, economic power, military strength, or status of birth. The e-contract is egalitarian and freely available to any person online. It is usually difficult to regulate a network of free and equally accessible commerce, unless there is a uniform code of conduct or filtering process that limits transactions based on an identifiable category of vendors and purchasers, particularly by demarcating geographic parameters which mandate the application of certain national laws as appropriate.⁹⁵ The global marketplace introduced by the internet brings to bear the renewed impetus to have legal coordination of principles, not through an omnibus convention but rather through a harmonious balance of generally applicable laws of countries which could be part of an arrangement to common rate their laws on internet contracts.⁹⁶ The first step would be to determine whether cyberspace, in which an e-ticket is generated, is a place susceptible to a particular jurisdiction or whether it is just a means of communication. One commentator favors the view that cyberspace is

⁹³ *Id.* at 665.

⁹⁴ Lawrence Lesig, *THE LAWS OF CYBERSPACE* available at <http://cyber.law.harvard.edu/lessig.html> (last visited May 1, 2005).

⁹⁵ An example is the Rights Protection System (RPS) applicable to the photographic industry which enforces national law on the internet through a national protection system.

⁹⁶ See David Goddard, *Does the Internet Require New Norms?* INT'L LAW FORUM DU DROIT INTERNATIONAL 2: 183, 187 (2000). The author argues against the adoption of an all purpose convention or multilateral treaty for internet contracts on the grounds that various elements of contract, tort and property laws will have to be integrated; an attempt at coordination of particular technologies will bring about distortions between different types of transactions; a whole range of borderline issues will have to be addressed, and the rapid evolution of technology will overtake and make outdated a multilateral treaty in short time. *Id.* at 192.

neither a place nor a state of mind but rather a means of communication, susceptible to being identified as a continuum of technological progress of which the genesis was the discovery of electricity.⁹⁷ The next logical step of reasoning involves the determination of commercial rules for e-ticketing that are practicable and predictable. The element of prediction of the outcome of an e-ticket contract would enable the parties to envision ways of carrying out the contractual process to finality without undue risk of breach of contract, damages and compensation or enforceability. Dispute resolution is another area that should be predetermined on a uniform basis. Any attempt at regularizing or finding a common set of principles should essentially take into account that states' authorities should not arrogate to themselves extra-jurisdictional reach in regulating a cyber contract, and that dispute resolution principles adopted must accord with the seamless nature of cyberspace. An international body, such as a global cyber commission, should be tasked with addressing issues of jurisdiction and dispute resolution, along with adapting the cyber contract consistently and constantly with evolving technology.

The basic premise with regard to e-ticketing and the principles applicable to the transaction is that an e-ticket purchase is a simple contract that comprises any promise or set of promises, made by one party to another, for the breach of which the law provides a remedy. As in any conventional contract, there are exceptional circumstances in which a party to an e-contract may escape its obligation to perform, such as mutual or unilateral mistake with regard to a basic assumption underlying which the contract, misrepresentation of fact by one party inducing the other party to enter into the contract, duress inducing one of the parties to enter into the contract, lack of capacity to contract (such as that of a minor or a person with impaired mental faculties), public policy or illegality, absence of *consensus ad idem* (or meeting of the minds), impossibility or unwillingness regarding performance and frustration of the contract due to changing circumstances which affect the contract's fundamental objective. These principles amply justify the conclusion that a new set of laws and principles of conduct, particularly applicable to cyber contracts, is not necessary since electronic contracting is but a

⁹⁷ Thomas P. Vartanian, *Whose Laws Rule the Internet? A U.S. Perspective on the Law of Jurisdiction in Cyberspace*, INT'L LAW FORUM DU DROIT INTERNATIONAL 2: 196 (2000).

method of entering into a contract. Admittedly, e-contracts bring with them issues of jurisdiction and choice of law which have been addressed earlier on in this article. The bottom line is that the e-contract is not self-defining and, as some commentators argue, the legal community should not expect that the phrase "electronic-contract" will talismanically invoke a separate and special body of rules. Neither one should expect traditional law to remain stagnant despite significant new processes for forming and recording agreements.⁹⁸

Although legal scholars generally discourage a multilateral treaty on e-commerce for the reasons mentioned above, there exists a system of guidelines in the form of the *UNCITRAL Model Law on Electronic Commerce* (the "Model Law")⁹⁹ which provides a sense of direction for States wishing to adopt laws pertaining to e-commerce. The Model Law aims at prescribing rules of conduct regarding the use of information generated, stored or communicated by electronic, optical or analogous means including EDI, electronic mail, telegram, telex or telecopy. Article 6 of the Model Law provides that, where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a data message ratifies that form if the information contained therein is accessible so as to be usable for subsequent reference. 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 message. When 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.¹⁰⁰ Article 17 of the Model Law refers specifically to transport documents and stipulates that, if a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer or use of 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. Furthermore, any com-

⁹⁸ Donnie L. Kidd Jr. & William H. Daughtrey Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 *RUTGERS COMP. & TECH. L.J.* 215, 270 (2000).

⁹⁹ See *Electronic Data Interchange*, 32 *EUROPEAN TRANSPORT L.* 685 (1997) (providing the full text of the *UNCITRAL Model Law on Electronic Commerce*).

¹⁰⁰ *Id.* art. 11.

pulsory rules of law that apply to paper transactions on transport also apply to transport transactions carried out through the exchange of electronic data messages.

V. THE WARSAW-MONTREAL EQUATION

Another contentious issue relating to e-tickets is the question of how to notify a passenger of contractual conditions attached to his carriage by air. The conventional manner of printing conditions of carriage in the inner jacket of the airline passenger ticket and baggage check alerts the passenger to the limitation of liability of the carrier, in accordance with international treaties. These formalities have followed traditional documentation and may not be relevant in a world without paper tickets. A question has been raised as to whether, in the absence of paper, the passenger would be rendered destitute of some evidence of contract—particularly for accounting, immigration, successive carriage, and other purposes.¹⁰¹

Existing law regarding the sale of air transport requires that a passenger ticket and baggage check be delivered to the buyer and that he be apprised of the conditions of carriage. The *Warsaw Convention* of 1929¹⁰² states that, for the transportation of passengers, the carrier must deliver a passenger ticket which shall contain certain details.¹⁰³ The Convention also says that the absence, irregularity or loss of the passenger ticket shall not affect the existence of the validity of the contract of transportation which shall nonetheless be subject to the rules of the Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered, it shall not be entitled to avail itself of those provisions of the Convention that exclude its liability.¹⁰⁴ Article 3 of the Convention provides that the information contained in the ticket delivered to the passenger must contain the place and date of issue, the place of departure and destination, the agreed stopping places, the name and address of the carrier or carriers, and a statement that carriage is subject to the liability provisions of the Convention.

¹⁰¹ Michael Mide, *The Warsaw System of Liability in International Carriage by Air*, 24 ANNALS OF AIR & SPACE L., 155, 159 (1999).

¹⁰² *Convention for the Unification of Certain Rules Relating to International Carriage by Air* Oct. 12, 1929 available at <http://www.jus.uio.no/lm/aircarriage.warsaw.convention.1929/doc.html> (last visited Aug. 28, 2005) [hereinafter the Convention].

¹⁰³ *Id.* art. 3.1.

¹⁰⁴ *Id.* art. 3.2.

The issue of “delivery” of an airline ticket to a person who contracts with an airline for travel has been significant in air law. Two cases, *Lisi v. Alitalia*¹⁰⁵ and *Chan v. Korean Air*,¹⁰⁶ clearly demonstrate the importance of the meaning of “delivery” in relation to the Convention. The important issue is not the “physical” delivery of the document of carriage, but the “purpose” of delivery of the ticket to the passenger. In this sense, both cases contain similar facts, and, in both cases, the respective tickets were “delivered” to the passengers. The issue, however, was whether the ticket served its purpose as envisaged by the courts, vis-à-vis Article 3 of the Convention. A very important point in this connection is that both cases, and indeed the precedent *cur-sus curiae*, were subject to judicial “surgery” in the interpretation of the meaning and purpose of Article 3 of the Convention. A discussion of the two decisions would be meaningless if their history, albeit very briefly, were not outlined.

Miller succinctly sums up the purpose of Article 3 when she says :

Delivery is no longer the physical delivery of the ticket by the carrier. The requirement is qualified in such a way that the delivery must allow the passenger (I) to realise that the carrier’s liability is greatly limited and (II) if he so wishes, to buy additional insurance. In other words, there must be adequate notice of the liability limitations.¹⁰⁷

The judicial arguments in the United States, where both these cases were decided, are based on the fact that courts have imputed to the carrier the breach of the Convention by “non delivery” of the ticket when the ticket is physically delivered but does not give the passenger the opportunity to read its contents, although Article 3(1)(e) expressly provides that “a statement that the carriage is subject to the rules of the Convention must be included in the ticket,” thereby precluding any need for imputation of liability. By bringing the case under “non delivery” under Article 3.2, the courts effectively veer the case into the realm of sanctions, which entails the all important question of unlimited liability of the carrier.¹⁰⁸

¹⁰⁵ *Lisi v. Alitalia*, 370 F.2d 508 (2d Cir. 1966).

¹⁰⁶ *Chan v. Korean Air*, 490 U.S. 122 (1989).

¹⁰⁷ GEORGETTE MILLER, AIR CARRIER’S LIABILITY UNDER THE WARSAW SYSTEM 84 (1980).

¹⁰⁸ *Id.*

The predecessors to the *Lisi* and *Chan* decisions held that failure to give adequate notice of the liability limitation amounting to the absence of delivery of the ticket has been addressed and recognized in instances where either 1) the ticket was not physically delivered at all or 2) where the passenger received his ticket, but did not have the opportunity to read the contents therein and therefore, lacked sufficient time to take necessary action (such as obtaining additional insurance coverage for himself).¹⁰⁹ These cases involved insane circumstances where the passenger ticket was handed over to the passenger at the stairs to the aircraft, just before boarding, and after the passenger had boarded the aircraft, respectively.

Lisi challenged a United States appellate court to address the issue of the ticket being delivered under normal circumstances, but where the passenger was unable to read its contents owing to the very small print used on the ticket. The court, recalling its decision of *Mertens v. Flying Tiger Line, Inc.*¹¹⁰ stated:

We read Article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability . . .¹¹¹ The convention's arbitrary limitations of liability . . . are advantageous to the carrier, but the quid pro quo for this one sided advantage is delivery of the passenger ticket . . . which gives him notice that on the air trip he is about to take, the amount of recovery . . . is limited very substantially.¹¹²

MacMahon, J., criticizing the small print in the ticket, stated that the conditions of carriage were "camouflaged in Lilliputian print in a thicket of conditions of contract"¹¹³ and unequivocally decided that the ticket had not been delivered to the passenger in the context of Article 3 of the Convention. Circuit Justice Moore, dissenting, called the pronouncement by the majority "judicial treaty making" where the judges have attempted to "rewrite" the Convention.¹¹⁴ According to Justice Moore, the language of the treaty was clear and its parameters were clearly stated.¹¹⁵

¹⁰⁹ *Mertens v. Flying Tiger Line, Inc.*, 35 F.R.D. 1996 (S.D.N.Y. 1963); Warren v. *Flying Tiger Line, Inc.*, 234 F. Supp. 223 (S.D. Cal. 1964).

¹¹⁰ *Mertens*, 234 F. Supp. at 223.

¹¹¹ *Lisi*, 370 F.2d at 512.

¹¹² *Id.* at 513.

¹¹³ *Id.* at 514.

¹¹⁴ *Id.* at 515.

¹¹⁵ *Id.*

*Chan v. Korean Air*¹¹⁶ took a diametrically opposed stance by stating that:

All that the second sentence of Article 3(2) requires in order to avoid its sanction is the "delivery" of a passenger ticket. Expanding this to mean . . . a passenger ticket in compliance with the requirements of the Convention is rendered implausible by the first sentence of Article 3(2) which specifies that irregularity . . . shall not affect the validity of the contract.¹¹⁷

The court in this instance followed a previous decision¹¹⁸ and held that there exists a contract even if the ticket is absent or "irregular," and that the contract was still governed by all the provisions of the Convention.¹¹⁹

It must be noted that, while the *Lisi* case dealt with a ticket with a 4-point print, the *Chan* case dealt with an 8-point print, making it imaginable that the majority in the former case would have been influenced by the minuscule print. It is also noteworthy that the 10-point print prescribed for the passenger ticket, which was authoritatively considered by the latter court was set by the Montreal Agreement of 1966, a private agreement between airlines rather than an international treaty. Valerie Kaiser criticises the *Chan* decision on the grounds that the court was inconsistent in terminology¹²⁰ and used an interpretation of the treaty while claiming to strictly follow the provisions of the Convention. While citing a subsequent case,¹²¹ she concludes that courts should not indulge in "judicial treaty or law making" (presumably implying that treaties have to be adhered to *stricto sensu*). It is indeed relevant in this instance to inquire whether the principles of *contra proferentem* have any place in this debate, since, after all, Warsaw considerations are contractual considerations. As for the question of judicial law making, it could well be argued that the role of the judiciary has been rather simplistically relegated to the background.

¹¹⁶ *Chan*, 490 U.S. at 122.

¹¹⁷ *Id.* at 128.

¹¹⁸ *Ludecke v. Canadian Pac. Airlines Ltd.*, 98 D.L.R. 3d. 52 (1979).

¹¹⁹ *Chan*, 490 U.S. at 128.

¹²⁰ Valerie Kaiser, Comment, *Chan v. Korean Airlines*, 15 ANNALS OF AIR & SPACE L. 505, 507 (1990).

¹²¹ *In re Air Crash Disaster Near New Orleans, Louisiana*, on July 9, 1982, 821 F.2d 1147 (5th Cir. 1987).

The main thrust of the Montreal Convention of 1999,¹²² completed in Montreal on May 28, 1999, and aimed at replacing the Warsaw Convention, is the attempt made throughout the treaty to provide for the orderly development of international air transport and its smooth operation.¹²³ With this approach, the Montreal Convention implies a more flexible focus than the Warsaw Convention by accommodating technological advancement in the entirety of the transaction pertaining to carriage by air. Article 3 provides that the travel document must include information related to the places of departure and destination. However, it does not insist on physical delivery of the airline ticket. Instead, the Convention provides that any other means which preserves the information in the ticket may be substituted for the delivery of the document, provided the carrier offers the passenger a written statement of the information so preserved.¹²⁴ This provision has obviously been designed to accommodate electronic ticketing or even document-less carriage (except in the case of checked baggage for which a baggage check or identification tag has to be delivered). Therefore, the provision is relevant to the commercial exigencies pertaining to current marketing practices and the airline product where carriers would offer different services in apprising their customers of information contained in an airline ticket. There is also a provision for a collective passenger ticket to be issued under the Montreal Convention, and requiring that a minimum of information be given to the passenger.¹²⁵ One requirement that remains in the new regime is the need for notification of the carrier's limits of liability and the identification of the weight of goods in the case of an air way bill, which is calculated to ensure that there are means to determine the carrier's maximum liability in the case of a claim.

Should a seller of an e-ticket mislead potential purchasers about the value of goods or services offered, he could be found liable in tort for fraud. Misrepresentation regarding to on-line transactions may encapsulate a broad range of trading activity

¹²² *Convention for the Unification of Certain Rules for International Carriage by Air*, May 28, 1999, S. TREATY DOC. NO. 106-45, available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999doc> (last visited Aug. 28, 2005).

¹²³ *Id.*, Preamble, ¶ 4.

¹²⁴ *Id.* art. 3.2.

¹²⁵ *Id.* arts. 3.1, 4.1.

including the sale or auction of tickets,¹²⁶ although it is unclear whether web sites conducting auctions of goods can be held liable for implied misrepresentation.¹²⁷

VI. CONCLUSION

From the foregoing discussion, it is clear that much of the restrictive and compelling requirements regarding the sale of the airline ticket that existed under the classical Warsaw regime have been obviated both by practice and by the Montreal Convention of 1999. The key area of contention could well be jurisdiction, where the *cursus curiae* has vacillated from applying the buyer's jurisdiction to establishing the principle that a court's jurisdiction should not apply to the internet on a global basis. Be that as it may, the one question which is both critical and which remains unanswered is: when one party sues another with regard to an e-mail transaction, what is the domicile of the seller, or, in other words, where does the seller reside for organizational purposes? The other question at hand is whether states can regulate cyberspace invitations to treat or solicitations to transact, and, if so, what jurisdictional issues are involved. A related question would ask what specific laws can enforce an e-transaction. Also, should the product placed on the public domain be registered, and, if so, in what country or jurisdiction? Another concern that e-commerce could raise is the blurring of distinction between goods and services offered over the internet.

One approach toward the jurisdiction issue would be for courts to purely consider the terms of negotiation and the nature of the transaction, rather than the physical location of the transaction. This would mean that contractual obligations, rights, and liabilities of parties would drive the underlying criteria for determining liability. Another consideration for individual states would be to create laws within their territories requiring entrepreneurs conducting business out of those states to include certain pertinent information when offering products for sale on the internet, such as the country of origin of the message, applicable conditions, or copyright provisions. To ensure that buyers and sellers know what law applies to a particular

¹²⁶ See Ruwantissa Abeyratne, *Airline Ticket Auctions on the Internet*, 2 WORLD COMPETITION 99 (1998).

¹²⁷ Jennifer Couzin, *Suing eBay: Going, Going, Going?*, THE INDUSTRY STANDARD, Nov. 13, 2000, at 1.

e-transaction, states could issue uniform regulations to all sellers who attempt to attract customers to their websites. Courts and legislators should consider these measures to prevent any exercise of extra-territorial jurisdiction by an individual state. Jurisdictional determinations should be linked to a system of jurisdictional determination of sites based on technological and pre-programmed preferences of the user. The location of a server should not necessarily pre-determine jurisdiction, but should be taken into consideration within the overall perspective of the above mentioned criteria. Above all, generally acceptable principles, set and monitored through a public domain supervisory body, should establish seamless principles to guide adjudicatory bodies.