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E-COMMERCE AND THE AIRLINE PASSENGER

RUWANTISSA ABEYRATNE*

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I. INTRODUCTION

CYBERSPACE HAS opened virtual product development in the air transport industry, giving commercial air carriers the opportunity to conduct business through the Internet. The Internet explosion, occurring largely in the last three years of the 1990s, was due to three fundamental factors: (1) deregulation of telecommunications; (2) globalization; and (3) the acceptance of an Internet protocol as a *de facto* standard.[1] When the concept of electronic commerce (e-commerce) is applied to the average contract of carriage between the airline and the passenger, what immediately comes to mind are concerns related to the centuries-long practice of the exchange of paper-based documents. Paper-based documents have been the predominant means of recording commercial information pertaining to contracts between parties.

Ironically, the Internet explosion, which resulted in e-commerce, brings to bear a certain "back-to-basics" approach from a legal perspective. For centuries, before a documented form of contract was formally recognized as a valid means of recording a

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* The author is a senior official in the International Civil Aviation Organization. He has written this article in his personal capacity.

[1] *See* Ian Shepphard, *Cyberspace*, AEROSPACE INT'L, May 2000, at 24.

contract, the world frowned upon the somewhat widespread practice of entering into oral contracts, particularly in the case of certain types of agreements. This difficulty was obviated under English law with the enactment of the Statute of Frauds.[2] This legislation established the basic requirement of a contract having to be established in writing, at least in the instance of particular contracts. Although the Statute was repealed in 1954, its principles subsist in some common law jurisdictions. The requirement of a "writing," as envisioned in the Statute of Frauds, was arguably a stipulation for words and figures written in ink on paper (the prevalent means of putting things on paper at the time), and therefore left a perceived lacuna in the law on the issue of telegraphic contracts, which became popular in the mid-19th Century. When faced with the question as to whether a telegraph message containing an offer and another reflecting acceptance would constitute a "writing" as required by statutes, common-law jurisdictions[3] achieved consensus in finding that a telegram constituted a written agreement.

Courts even went to the extent of accepting a telephone message, conveyed by one of the parties to the contract to a phone clerk at the telegraph company, and later transcribed by the clerk into telegraphic form, as satisfying the criterion for a "written" agreement. In the 1918 seminal American case *Selma Savings Bank v. Webster County Bank*,[4] the court, dismissing as unimportant the mechanical means of making and signing the writing as a determinant, followed the principle enunciated in an earlier case which held:

> [W]hen a contract is made by telegraph, which must be in writing by the Statute of Frauds, if the parties authorize their agents either in writing or by parol, to make a proposition on one side and the other party accepts it through the telegraph, that constitutes a contract in writing . . . because each party authorizes his agents; the company or the company's operator, to write for him; and it makes no difference whether that operator writes the offer

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[2] The original Statute of Frauds, passed in 1677 by Charles II, was intended as an act for the prevention of frauds and injuries. *See* Douglas Stollery, *Statute of Frauds*, 14 ALTA. L. REV. 222 (1976).

[3] For Canadian law, see *Kinghorne v. Montreal Tel. Co.*, [1859] 18 U.C.Q.B. 60. For British law, see *McBlain v. Cross*, 25 L.T.R. 804 (C.P. 1871) and *Coupland v. Arrowsmith*, 18 L.T.R. 755 (V.C. 1868). For United States law, see *Howley v. Whipple*, 48 N.H. 487 (1869). For general reading, see S. WALTER JONES, A TREATISE ON THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES (2d ed. 1916).

[4] 206 S.W. 870, 872 (Ky. 1918).

> or acceptance in the presence of his principal and by his express direction.[5]

This approach reflects a strong judicial predilection, even at that early stage, to accommodate new developments in technology. It is encouraging that, with the acknowledgement of the first dynamic of computer law that technological advancement would be purposeless without due recognition of its efficacy, courts have pioneered a sensible approach with predictable ramifications.

The telecopier followed the telegram, and the courts followed the path cleared through the telegraph cases. In a 1988 ruling, a Canadian court ruled:

> [T]he law has endeavoured to take cognizance of, and to be receptive to, technological advances in the means of communication. The conduct of business has for many years been enhanced by technological improvements in communication. Those improvements should not be rejected automatically when attempts are made to apply them to matters involving the law. They should be considered and, unless there are compelling reasons for rejection, they should be encouraged, applied and approved.[6]

A subsequent case, which pertained to a fax transmission, endorsed the previous view, urging encouragement and approval of contracts made through the electronic media.[7] This commonsensical approach may well be extended all the way to instances of computer-to-computer transactions (popularly called electronic data interchange) involving e-commerce conducted through electronic mail (e-mail).

In the case of the carriage of passengers and cargo by air, e-commerce is becoming an increasingly popular medium of transaction. However, air carriage raises esoteric issues of liability brought about by a complex web of legal requirements pertaining to the delivery of the document evidencing the contract of carriage. This article will examine some of those legal issues.

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[5] *Howley*, 48 N.H. at 488.

[6] Beatty v. First Exploration Fund 1987 & Co., [1988] 25 B.C.L.R.2d 377.

[7] Rolling v. Willann Invs. Ltd., [1989] 70 O.R.2d 578, 581.

II. THE CONTRACT OF CARRIAGE BY AIR

A. ENCRYPTION

When a contract of carriage by air is entered into through e-commerce, the most fundamental process of an electronic contract—encryption—has to take place. In this context, an e-commerce contract for carriage by air is not dissimilar to any other e-commerce transaction. Without encryption, e-commerce is not only nearly impossible, but also insecure at best. When one buys something online, such as an airline ticket using a "secure server," his private information will be encrypted before it is sent over the Internet. Similarly, when one conducts Internet banking, the bank concerned uses encryption to make private financial information unreadable to anyone but that bank.

"Encryption" is a set of complex mathematical formulae that permit anyone transmitting electronic information to scramble the message so that only the intended recipient can decode it and thus understand it. Encryption is essential for e-commerce because e-commerce largely takes place over the Internet, which is an open network. As a practical matter, this means that somebody other than the intended recipient of information can intercept it and read it. Encryption protects such information as credit card numbers and all other private information sent through the Internet.

There are several ways to learn whether a browser used for an e-commerce transaction is encrypting information. For example, when one purchases something online using Netscape's browser, if the picture of a lock in the lower left-hand corner is in the locked position with a glow around it, proper encryption is being ensured. One can also look at the Internet address of where his browser is. If, for instance, it starts with "https" instead of just "http," it means that the browser is using a secure server that uses encryption.

The basic concept of how one encrypts information is simple: a computer program uses an encryption algorithm (essentially a mathematical equation), which converts the intended data (confidential files, credit card number, etc.) into an encoded message using a key (think of the "key" as your password for decoding or deciphering the message). The result of the encryption process is that the plain-text message comes out the other end unreadable because it looks like gibberish.

Encryption comes in two basic forms. One uses a single key (or password) and the other uses dual keys. With single-key en-

cryption, the key is used to encode information, which is then sent to the intended recipient. The recipient then uses this same key to decipher the encrypted message. This means that the sender of information has to share the secret key with the recipient. A grave concern with this process is that the sender will need a secure way to share the key. This limits the usefulness of single-key encryption in e-commerce because it is rarely practical to whisper the key into someone's ear when one is conducting business online.

On the other hand, dual-key encryption is the prominent player in e-commerce. This system provides two mathematically related keys to work with. One is called the "public key" and the other is called the "private key." The public key is a key that can and should be announced to the world. The sender can post it on a Web site or put it in a newspaper advertisement. It is a public document and, therefore, not a secret. When someone wishes to send a confidential message that only an intended recipient should read, the sender can encrypt it using this public key. For instance, if a consumer wishes to send a credit card number to Utopiaairlines.com, the browser might encrypt the number using Utopiaairlines.com's public key.

The interesting part of this two-way process is that if a thief intercepts a credit card number over the Internet and tries to decode it using Utopiaairlines.com's public key, it will not work. The advantage of a dual-key system is that the public key is a one-way key. It encrypts information, but it will not decrypt it. That is the reason it is not important for a sender of information to keep the public key a secret. When Utopia Airlines wants to read the consumer's credit card number, Utopiaairlines.com's private key is used to decrypt or decode the information. The private key must remain absolutely secret: it allows someone to read messages intended only for them and encrypted using their public key.

B. Offer and Acceptance

Usually, a contract is concluded when, in response to an offer made by an offeror, the offeree indicates an acceptance to the offeror. In cases of simultaneous communication of the offer and acceptance, made face-to-face by the offeror and offeree, the essentials of a contract are clear. However, when parties are not in close proximity to each other and communicate their dealings over the telecommunications medium, the process may become slightly more complicated, in that it may not always be

clear as to what constitutes an offer or an acceptance. In such instances, it largely becomes a matter of interpretation as to whether both the offeror and the offeree had the intent to conclude the contract.

The element of intent to contract and to conclude the process on the part of both the offeror and offeree is inceptive to the formation of the contract. 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 statements made by the parties in the process of negotiations are of extreme importance in the determination of a concluded contract. The 1840 case of *Hyde v. Wrench*[8] offers the principle that a series of communications from either party may impinge an original offer. In *Hyde,* the defendant, on June 6, offered to sell an estate to the plaintiff for £1,000. On June 8, in reply, the plaintiff made an offer of £950, which was refused by the defendant on June 27. However, on June 29, the plaintiff wrote to the defendant that he was now willing to pay £1,000.

The importance of the *Hyde* decision lies in the fact the court held that no contract existed. The plaintiff, by rejecting the offer made on June 6, had precluded himself from reviving the offer later. In other words, once an offer is rejected, the offeree cannot assume that the offer will still stand in its original form.

In the instance of a sale carried out over the Internet, it is important to note that by placing its seats for sale on the Internet, an airline is placing itself in the same position as a shop owner who displays his goods for sale in his shop with price tags marked on the goods. By doing so, the shop owner is merely making an invitation for an offer. The buyer who walks into the shop and selects an item for purchase is making the offer, which the shop owner is entitled to accept or reject. Similarly, it is the purchaser of the airline ticket over the Internet who makes the offer, making him the offeror and the airline the offeree.

The primary issue at stake in the determination of a contract is whether the parties intended the contract to be concluded. For instance, if a person offers to buy an airline ticket over the Internet and the airline gives that person a reference number, the allocation of that number might not necessarily indicate an acceptance of the offer by the airline. The 1989 United States case of *Corinthian Pharmaceutical Systems, Inc. v. Lederle Laborato-*

[8] 3 Beav. 334 (1840).

ries[9] provides a good analogy. A person dealing in medicinal drugs on a wholesale basis ordered a consignment of drugs through a computerized telephone ordering system. The order was placed strategically a day before a price increase was to take effect. The wholesaler ordered through the manufacturer's automated telephone order system. After the wholesaler placed the order message, he was allocated a "tracking number" by the manufacturer's computer system. There was absolutely no human interaction in the transaction. Subsequently, when the manufacturer refused to sell the consignment of drugs as ordered by the wholesaler at the pre-increase price, the court held with the manufacturer's position that the tracking number issued by the manufacturer's computer was not an acceptance of the offer but merely an acknowledgment of the receipt of the order—or an offer in contractual law terms. The court concluded that no contract had been concluded, and the wholesaler was denied the purchase of the goods at the lower price.

The early case of *Henkel v. Pape*[10] brings out another difficulty that might arise from contracts transacted through the Internet. The *Henkel* case, decided in 1870, concerned a transaction carried out through telegraphic messages for the sale of up to fifty rifles. The offeror sent the offeree a telegraphic message offering to buy three rifles, but the message was transcripted to the offeree as 'the' instead of "three" rifles. Accordingly, the offeree held the offeror liable for the purchase of all fifty rifles. 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.[11]

The principle underlying the *Henkle* decision still holds water where a contract is transacted over the Internet. As in *Henkle*, Internet transactions involve a contract negotiated through electronic means where there is always the risk that messages intending to create contractual obligations may not reach their destination or, perhaps more ominous, messages are received by the recipient in a form other than the one sent by the sender. In the 1859 Canadian case of *Kinghorne v. Montreal Telegraph Co.*,[12] the court articulated the reasons behind the determination of an electronic contract. These reasons still may apply:

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[9] 724 F. Supp. 605 (S.D. Ind. 1989).

[10] 23 L.T.R. 419 (Ex. 1870).

[11] *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. 1901).

[12] [1859] 18 U.C.Q.B. 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.[13]

Of course, compared to early telegraph systems that caused numerous problems, the modern Internet is more reliable, and errors such as those encountered in *Henkle* or *Kinghorne* may not be commonplace. However, there is the possibility of garbled messages flowing through the Internet; courts likely 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 the contract to conclude their agreement unambiguously. 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 *Corinthian* case), and the second using a purchase-order acknowledgment.

C. 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. On the other hand, it is often not a trivial legal task to determine when and where a contract comes into being when either an offer, or an acceptance, or both, are sent by telegraph, telex, fax, EDI, e-mail, over the Internet, or by telephone. The uncertainty began even 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 19th-Century England, an exception to this rule was developed by judges for offers and acceptances sent by the mail. The so-called post-box rule or expedition theory prescribes that where an offer is made in the mail, the contract takes effect immediately at the time the

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[13] *Id.* at 66.

acceptance is posted in the mail (rather than when the acceptance is actually received by the offeror) where use of the mail is reasonable in the circumstances or expressly contemplated by the parties. This rule effectively precludes the need to hold the offeree responsible for delays in communications and places the burden of uncertainty during the waiting period on the offeror. That is, the offeror does not know that it has concluded a binding contract until it receives the offeree's acceptance in the mail, whereas the offeree knew the contract came into existence the moment it posted its reply letter. 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 each 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 communications technology evolved into widespread use, cases established principles as to when and where contracts were concluded. In the early Canadian case of *Carow Towing Co . v. The Ed. McWilliams,*[14] 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. By contrast, in *Entores L.D. v. Miles Far East Corp.,*[15] a later British decision, Lord Denning concluded that for simultaneous 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 back the offeror to ensure the words of acceptance had been communicated to the offeror. Subsequent cases in Canada have followed the decision in *Entores* rather than the approach in *Carow Towing,*[16] with the exception of Quebec where, until recently, the preponderance of case law has followed the principle that telephone contracts arise when and

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[14] [1919] 46 D.L.R. 506 (Ex. Ct.).

[15] [1955] 2 Q.B. 327 (Eng. C.A.).

[16] *See, e.g.,* McDonald & Sons Ltd. v. Exp. Packers Co. [1979], 95 D.L.R. 3d 174 (B.C.); *see also* Re Viscount Supply Co., [1963] 40 D.L.R. 2d 501 (Ont. Sup. Ct. Bankr.); Nat'l Bank of Can. v. Chance, [1996] 30 O.R.3d 746.

where the offeree speaks the acceptance.[17] Since the enactment of the current Civil Code of Quebec in January 1994, Article 1387 explicitly provides that, with 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 Scotia[18] and one in New Zealand,[19] where each held that a contract made by fax arises when the offeror receives by fax the acceptance of the offered.

The *Entores* court also held that telex technology involves instantaneous communications with the result that acceptance occurs when the message is received by the offeror. This approach was confirmed by the House of Lords in the *Brinkibon* case.[20] 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 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 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.[21]

The recognition of the above facts in *Brinkibon* raises a number of emerging issues with respect to EDI, e-mail, and Internet communications. Certain EDI transmissions, for example, will fall into the 'simultaneous communications' category. Much EDI is effected not between the trading principals, however, but by use of intermediaries, so-called value-added networks (VAN)

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

[18] Joan Balcom Sales Inc. v. Poirier, [1991] 28 A.C.W.S. 3d 551 (N.S. Co. Ct.).

[19] *See* Gunac Hawkes Bay (1986) Ltd. v. Palmer [1991] 3 N.Z.L.R. 297.

[20] *See* Brinkibon Ltd. v. Stahag Stahl & Stahlwarenhandels-Gesellschaft M.B.H., [1982] 1 All E.R. 293 (H.L.).

[21] *See id.* at 296.

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 must then download. 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.[22] 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 involves when a telex or fax should be deemed to have arrived at a workplace. In one case, the answer pointed to when the message was received by the recipient's machine (on a Friday after business hours and not three days later on a Monday morning when a person actually reads the telex).[23]

Given these ambiguities, prudent users of electronic commerce should try to avoid having to refer these issues to a judge by providing, in their EDI trading partner agreement (TPA) or other similar document, precisely what electronic message must be received by which computer—such as the recipient's or the recipient's VAN—for a contract to arise, thereby bringing clarity to the questions as to when 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 make sure that the VAN agreements contain the same jurisdiction so that there is no question which law would apply if adjudication were ever considered necessary. This is particularly true for EDI and Internet transactions where each trading party's VAN or Internet service provider may be in a jurisdiction different from the customer, and therefore, the laws of four different jurisdictions possibly may apply if the parties remain silent on the governing law question. In such circumstances, as Lord Denning observed in *Entores*, which concerned two parties in different jurisdictions,

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[22] *See* Arrowsmith v. Ingle, [1810] 128 Eng. Rep. 93.

[23] N.V. Stoomv Maats 'de Maas v. Nippon Yusen Kaisha, [1980] 2 Lloyd's Rep. 56 (Q.B.).

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, but in some cases, this is truly a difficult task. As an example, the court's commentary in *Export Packers,* where the judge 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.[24]

This dictum clearly confirms the benefit accrued to users of electronic commerce in crafting their own rules for dealing with 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 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 taking the view that Internet communications are instantaneous in nature, and, therefore, 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, whether receipt requires human intervention and acknowledgement. In determining this question, the following should be observed: (1) the purpose and function of the rule; (2) who would be prejudiced

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[24] McDonald & Sons Ltd. v. Exp. Packers Co., [1979] 95 D.L.R. 3d 174, 180 (B.C.).

by a particular holding; (3) what are the reasonable expectations of the parties; and (4) on whom is it reasonable to place a burden for helping to "fix'" the system if indeed it needs it.

D. Delivery of the Airline Ticket

The Warsaw Convention of 1929 states that, for the transportation of passengers, the carrier must deliver a passenger ticket containing certain details.[25] 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. Yet, if the carrier accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of the Convention that exclude his liability.[26] 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, agreed stopping places, name and address of the carrier or carriers, and a statement that carriage is subject to the liability provisions of the Convention.

The issue of "delivery" of an airline ticket to a person who contracts with an airline for travel is significant in air law. Two cases, *Lisi v. Alitialia-Linee Aeree Italiane, S.p.A.*[27] and *Chan v. Korean Air Lines Ltd.*,[28] clearly demonstrate that the meaning of "delivery" in relation to the Convention is indeed important. 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, *vís à vís* Article 3 of the Convention. A very important point in this connection is that both cases, and, indeed, the precedent *cursus curiae*, were subject to judicial "surgery" in the interpretation of the meaning and purpose of Article 3 of the Convention and that a discussion of the

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[25] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, art. 3.1, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 (1988) [hereinafter Warsaw Convention].

[26] *Id.* at art. 3.2.

[27] 370 F.2d 508 (2d Cir. 1966).

[28] 490 U.S. 122 (1989).

two decisions would be meaningless if their history were not briefly 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.[29]

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 "nondelivery" of the ticket in the case that 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.[30] 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.[31]

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 the ticket was not physically delivered at all or where the passenger receives his ticket but does not have the opportunity to read its contents such that he has sufficient time to take necessary action (such as obtain additional insurance coverage for himself).[32] These cases involved instances 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.

The *Lisi* case added a new twist to the circumstances by challenging the United States Court of Appeals to address the issue of the ticket being delivered under normal circumstances, but the passenger being precluded from reading its contents, owing

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[29] GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT: THE WARSAW SYSTEM IN MUNICIPAL COURTS 84 (1980).

[30] Warsaw Convention, *supra* note 25, at art. 3(1)(e).

[31] MILLER, *supra* note 29.

[32] *See* Mertens v. Flying Tiger Line, Inc., 35 F.R.D. 196, 197 (S.D.N.Y. 1963); Warren v. Flying Tiger Line, Inc., 234 F. Supp. 223, 229 (S.D. Cal. 1964).

to the very small print used in the ticket. The Court of Appeals, recalling its *Mertens v. Flying Tiger Line, Inc.* decision, 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. . . .
>
> . . . .
>
> . . . The Convention's arbitrary limitations of liability . . . are advantageous to the carrier. But the quid pro quo for this one-sided advantage is delivery to the passenger of a ticket . . . which give[s] him notice that on the air trip he is about to take, the amount of recovery to him . . . is limited very substantially. . . .[33]

Justice MacMahon criticized the ticket's small print stating that the conditions of carriage were "'camouflaged in Lilliputian print in a thicket of "Conditions of Contract" . . .'"[34] and unequivocally decided that the ticket had not been delivered to the passenger in the context of Article 3 of the Convention. In a dissenting opinion, Justice Moore, on the other hand, called the pronouncement by the majority "judicial treaty-making," where the court has attempted to "rewrite" the Convention.[35] According to Justice Moore, the language of the Treaty was clear, and its parameters were clearly stated.

Chan v. Korean Air 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 "deliver[y]" 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 "[t]he irregularity . . . shall not affect the . . . validity of the contract. . .[36]

The court in this instance followed a previous decision[37] and held that a contract exists even if the ticket is absent or "irregular," and the contract was still governed by all the provisions of the Convention.[38]

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[33] Lisi v. Alitalia-Linee Aeree Italiane, S.p.A, 370 F.2d 508, 512–13 (2d Cir. 1966) (quoting Mertens v. Flying Tiger Line, Inc., 341 F.2d 851, 856 (2d Cir. 1965)) (emphasis in original).

[34] *Id.* at 514 (quoting Lisi v. Alitalia-Linee Aeree Italiane, S.p.A., 253 F. Supp. 237, 243 (S.D.N.Y. 1966).

[35] *Id.* at 515 (Moore, J., dissenting).

[36] Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 128 (1989) (quoting Warsaw Convention, *supra* note 25, at art. 3(2)).

[37] Ludecke v. Can. Pac. Airlines Ltd., [1979] 98 D.L.R. 3d. 52 (Can.).

[38] *Chan*, 490 U.S. at 132–133.

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 court in the latter, was set by the Montreal Agreement of 1966—a private agreement between airlines and not an international treaty. Valerie Kaiser criticizes the *Chan* decision on the grounds that the court was inconsistent in terminology[39] and used an interpretation of the treaty while claiming to follow strictly the provisions of the Convention. Citing a subsequent case,[40] 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 is arguable that the role of the judiciary has been rather simplistically relegated to the background.

The new Convention,[41] completed in Montreal on May 28, 1999, aimed at replacing the Warsaw Convention. In Article 3 it provides that the travel document must contain certain information, such as the places of departure and destination. However, it does not insist on physical delivery of the airline ticket. Instead, the new Convention provides that any other means that preserve 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.[42] This provision has obviously been designed to accommodate electronic ticketing. It is therefore relevant to the commercial exigencies pertaining to current marketing practices and the airline product where carriers would offer different services in

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

[40] *In re Air Crash Disaster Near New Orleans, Louisiana, on July 9 1982*, 883 F.2d 17 (5th Cir. 1989) (en banc).

[41] *Convention for the Unification of Certain Rules for International Carriage by Air*, ICAO Doc. 9740 (May 28, 1999), *reprinted in* Multilateral Convention for International Carriage by Air, S. Treaty Doc. No. 106-45, 1999 WL 33292734 (Treaty) (Sept. 6, 2000).

[42] *Id.* at art. 3.2.

apprising their customers of information contained in an airline ticket.

E. Issues of Jurisdiction

Perhaps the single most important issue in "cybercontracts" is jurisdiction. Given the World Wide Web and its global application, the most compelling question in this regard would pertain to the transboundary applicability of an Internet contract. On this question, the most convenient analogy 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 agreement concerning a sale against a United States airline at its home base in Florida? In a Canadian case decided in 1952, the plaintiff brought a case to the Ontario High Court against an American radio broadcasting station that was broadcasting allegedly libellous statements, which could be heard over the air waves in Canada from across the border. The defendant radio station brought up 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.[43] 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 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, soundwaves or ether-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.[44]

In the more recent case of *Pindling v. NBC*,[45] involving an American television broadcast received in Canada, the Ontario High Court held that the Prime Minister of the Bahamas was held entitled to bring the case to Canada instead of the United

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[43] *See* Jenner v. Sun Oil Co., [1952] C.P.R. 87 (Ont. High Ct.).

[44] *Id.* at 98–99.

[45] [1984] O.R.2d 58 (Ont. High Ct. J.).

States. The *Pindling* decision illustrates well 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 one jurisdiction to another that is better placed to hear the case. In the 1996 case of *National Bank of Canada v. Clifford Chance*,[46] involving a Toronto-based firm that had contracted with a law firm in the United Kingdom, the Canadian courts transferred the case to the United Kingdom. The case was transferred on the grounds that the contract concerned a U.K.-based project and the legal advice obtained had been U.K. law given by U.K. lawyers even though the contract was concluded in Toronto. Suppose, for example, that a consumer in Canada makes an offer over the Internet for a seat on a U.K.-based carrier departing from the United Kingdom. Based on the *Clifford Chance* principle, it would not be unusual for a common-law court to determine that the applicable jurisdiction would lie with the courts of the United Kingdom, although the contract itself 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 are refusing to bring a person into a jurisdiction purely because he contracted with a business entity based in that jurisdiction. This approach is illustrated by the 1994 U.S. decision *Pres-Kap, Inc. v. System One, Direct Access Inc.*[47] where the court refused to grant jurisdiction to a New York resident who had used a Florida-based online network information service merely to gain access to a database. Similarly, in the famous 1997 case of *IDS Life Insurance Co. v. SunAmerica, Inc.*[48] the court 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 haled into Court in *any* state, for a cause of action that does not relate to the advertisements. Such

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[46] [1996] O.R.3d 746 (Ont. Ct.).

[47] 636 So. 2d. 1351 (Fla. Dist. Ct. App. 1994).

[48] 958 F. Supp. 1258 (N.D. Ill. 1997), *aff'd in part, vacated in part*, 136 F.3d 537 (7th Cir. 1998).

> general advertising is not the type of 'purposeful activity related to the forum that would make the exercise of jurisdiction fair, just or reasonable.'[49]

In the 1997 case of *Hearst Corp. v. Goldberger*,[50] 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 anomalous:

> 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.[51]

The *Hearst* decision seems to have followed the observation of a case[52] decided one year earlier where the court held:

> Because the Web enables easy world-wide access, allowing computer interaction via the [W]eb 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.[53]

The second line of judicial thinking is the converse to the previous 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 *Compuserve Inc. v. Patterson*,[54] the court held a Texas-based computer programmer legally responsible for his Ohio-based computer network online service and found him to be under Ohio law. Although the defendant had never visited Ohio, he nevertheless, was found to be subject to Ohio law on the basis that an

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[49] *Id.* at 1268 (quoting Rush v. Savchuk, 444 U.S. 320, 329 (1980)) (emphasis original).

[50] No. 96 Civ. 3620 (PKL)(AJP), 1997 WL 97097 (S.D.N.Y. Feb. 26, 1997).

[51] *Id.* at *1. For a similar result, see *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997) and *Blackburn v. Walker Oriental Rug Galleries*, 999 F. Supp. 636 (E.D. Pa. 1998).

[52] McDonough v. Fallon McElligott, Inc., 40 U.S.P.Q.2d (BNA) 1826 (S.D. Cal. 1996).

[53] *Id.* at 1828.

[54] 89 F.3d. 1257, 1268–69 (6th Cir. 1996).

electronic contract had been concluded in Ohio 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,[55] solicitation of donations,[56] subscribers signed-up by the defendant for services delivered over the Internet,[57] or follow-on contacts, negotiations, and other dealings in addition to, and often as a result of, the initial Internet-based communication.[58] The common thread running through the fabric of judicial thinking in this regard is that parties who avail themselves of technology 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[59] or linking to a

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[55] *See* 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), where a court took 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.

[56] *See* Heroes, Inc. v. Heroes Found., 958 F. Supp. 1 (D.D.C. 1996).

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

[58] *See* Resuscitation Techs., Inc. v. Cont'l Health Care Corp., No. IP 96-1457-C-M/S, U.S. Dist. LEXIS 3523 (S.D. Ind. Mar. 24, 1997). The Court in this case was not concerned that the defendants had never visited the forum state in person. "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." *Id.* at *12. *See also* EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996). In *EDIAS*, 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 escape traditional notions of jurisdiction." *Id.* at 420. *See also* Gary Scott Int'l, Inc. v. Baroudi, 981 F. Supp. 714 (D. Mass. 1997).

[59] 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

national automatic teller machine (ATM) network through a telephone line indirectly through an independent data processor in a third state.[60]

An overall evaluation of the U.S. 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.

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.*,[61] the plaintiff, a national of India 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 applicable U.K. law did not accord with U.S. law, and therefore, the decision could not be recognized as enforceable in the United States.

III. CONCLUSION

A distinct advantage of using e-commerce in the sale of airline tickets is the facility afforded to airlines to caution possible clients of the hazards of air travel through the Internet. For instance, when a detailed contract of carriage is posted on the Internet, constituting effective delivery of the contract of carriage in accordance with established law, airlines could, at the same time, bring to the attention of the passenger such hazards of travel as the aerotoxic syndrome—the causing of blood clots in the human body through sustained seating in restricted spaces—and turbulence, by explicitly cautioning travelers of these dangers through their Web sites and through Web sites dedicated to such specific issues. This would not only ensure that adequate notice is given to air travelers of such hazards, but also would effectively preclude possible actions against airlines for nondisclosure of material facts in personal injury cases.

> 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.

Id. at 165.

[60] *See* Plus Sys., Inc. v. New England Network, Inc., 804 F. Supp. 111 (D. Colo. 1992).

[61] 585 N.Y.S.2d. 661 (N.Y. Sup. Ct. 1992).

On the minus side, operators of Web sites have to exercise caution to avoid being hauled into any jurisdiction in the event of adjudication. The airline that sells its seats over the Internet is no exception. The first thing an airline must address with their possible clients over the Internet is the need to establish an explicit agreement prescribing applicable or governing law with regard to the agreement and an agreed jurisdiction in case of dispute. The airlines must also set out, as a condition, the types of persons with whom it will not enter into contract (such as persons whose geographic location may not offer the airline benefit from the contract). The bottom line is that airlines, which advertise their seats for sale on the Internet, should have well thought-out, well-drafted conditions of contract, which the offeror must read carefully and indicate agreement with them, before he makes his offer.