

The Truly Electronic Law Journal

Obiter

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Whilst subscription to this Law Journal is totally free we are hoping to be able to assist law students in the future by developing a charitable trust that would grant scholarships for law degrees, BVC's and LPC's. In order for us to be successful in this venture we need companies to advertise in this publication in future issues. If you would like to find out more about advertising in Obiter then please contact us on 01942 678705 or by e-mail at administrator@lawfile.org.uk

If you would like to contribute articles to Obiter for future publication then we would dearly love to hear from you. Again you should e-mail your articles to administrator@lawfile.org.uk along with a colour photograph of yourself so that we can publish this next to your article.

As you will see from the pages of this issue we have been hard at work to provide you with a quality publication and we only hope to build on this and better ourselves in the future. If you therefore have any comments about this issue then please do not hesitate to contact us at the address at the bottom of the next page.

We sincerely hope that you will enjoy reading this second issue of Obiter and that you find something useful within these pages. If you have any ideas for future development of obiter then again we would very much like to hear from you.

Lawfile

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The Editor

Alan Lowe

Dear Reader,

May I take this opportunity to wish you a Happy New Year. I hope that you have enjoyed a Peaceful and enjoyable Christmas and that you have not managed to put on too much weight with all of the festive eating.

Since we launched Obiter we have had a good number of people contacting us asking us if they can write articles for future issues. We are always more than happy to consider publishing articles by legal professionals and those with an interest in the legal field.

In this issue we again feature a column by Michael Sweig and are more than happy to have him on board as a regular columnist. To join Michael we now have articles by Graham Bassett, a barrister from Australia. Graham hosts a website which covers all aspects of legal proceedings in Australia.

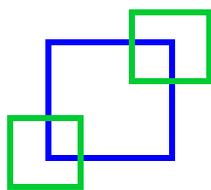
You may recall that in November we featured an article by Gregory Ioannidis. Later this year Gregory will be in charge of the Legal section responsible for drug checks at the Olympic Games and has agreed that he will provide exclusive articles for Obiter from the games. So if you would like to keep up to date with what is happening in sport I would urge you to keep reading Obiter. We would also encourage you to download Obiter from our website and pass it on to your friends and colleagues.

Since we launched Obiter we have seen a marked increase in the number of people reviewing our website and asking for Obiter to be added to the website. As a result of the problems that we encountered with our ISP in December and of these requests we will, in future, be placing all copies of Obiter on the lawfile website.

If you would like to comment on any aspect of Obiter then please e-mail me directly at ajjlow@lawfile.org.uk. It is always a pleasure to hear from our readership.

Happy Reading!

Yours sincerely,
Alan Lowe



The Development of an Adequate Framework for E-Commerce

Judge Ehab Maher Elsonbaty, Judge in South Sinai Court, Egypt,
Visiting Scholar, The Institute for Computer & Communications Law, Centre for
Commercial Law Studies, Queen Mary College, University of London.

Until now the development of the e-commerce had been market driven. Business rapidly moved in to exploit the Internet as soon as it became clear that there were gains to be made from this new medium, not only in the advertising, sale and distribution of goods and services, but in the very methods by which business produced their products, conduct their research and development or gathered payment from the customer. That is why the business wants to lead the regulation of e-commerce by collective actions rather than governmental regulations.

This creates challenge for the regulator, the governments and the international organization – as they try to facilitate and encourage the flow of the e-commerce by different means- will be keen to ensure that the conditions which determine how e-commerce is to develop are consistent with domestic needs in terms of job creation, taxation, capital investment and ultimately an access to a share of the information economy. Meanwhile the business is working in expanding e-commerce to the point that newcomers to the .com arena should adapt to the new environment, if they want to achieve success.

In the next lines the role of international organizations on this topic will be examined.

The role of international organization:

To facilitate the involvement of different entities in developing and developed countries and arrange for an e-commerce friendly environment, international organisations are seeking to assist countries with the creation of suitable legal frameworks as well as support systems.

(<http://www.undp.org/info21/text/e-com/e-9.html>)

In the next lines we will examine the efforts of the international organizations in the field of developing e-commerce and the creation of proper environment for its transactions.

The World Bank:

The World Bank is one of the world's largest sources of development assistance. It is assumed that it focus on helping the poorest people and the poorest countries.

The World Bank is looking to the development of e-commerce in the developing countries as a tool to fight its poverty. It does this through four ways:

First, by policy advisory role relating to e-Commerce, they are providing policy advice in a number of areas such as: increasing access to and efficiency of telecommunication services; establishing the legal and contractual underpinnings of E-commerce transactions, using G2B (Government to Business) transactions as the basis for creating E-commerce; developing the E-Commerce payments and settlement framework. They are working with policy makers and regulatory agencies in a diverse group of countries -- Bangladesh, China, Korea, and Ecuador. Secondly by Financing Role, In the Information Technology Sector, the World Bank uses IBRD and IDA resources to finance complimentary long-term investments in the public sector, for training and for institutional capacity building. They use their guarantees to secure better financing terms and lending volumes from private financiers in specific investment projects.

Thirdly by their Partnership Role, in its partnership role they raise money from a variety of countries and private and public institutions. In Korea they assisted the authorities to prepare a knowledge strategy in partnership with local think tanks, industry associations and OECD. They assisted the Jordanian authorities to assess the national information infrastructure.

Finally, by their Knowledge Brokering Role, by bring local leaders in contact with leaders and champions in other countries. They have established a web-based facility the Global Development Gateway to bring together civil society, development practitioners and Government officials. (<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:43912~piPK:36602,00.html>)

The International Finance Corporation IFC:

The International Finance Corporation (IFC), the private sector arm of the World Bank Group, located in Washington D.C., on June 2, 2003 has closed a US\$3 million round of equity financing in Novica, a leading global e-commerce company that links artisans in developing countries with international markets. The round includes

investments from both new and existing shareholders and marks IFC's first investment in an e-commerce company. (<http://ifcln1.ifc.org/IFCExt/Pressroom/IFCPressRoom.nsf/0/2C4CE8864C50697685256D390078D39D?OpenDocument>)

THE World Trade Organization WTO:

The declaration on global electronic commerce adopted by the Second (Geneva) Ministerial Conference on 20 May 1998 urged the WTO General Council to establish a comprehensive work programme to examine all trade-related issues arising from global electronic commerce. The General Council adopted the plan for this work programme on 25 September 1998, initiating discussions on issues of electronic commerce and trade by the Goods, Services and TRIPS (intellectual property) Councils and the Trade and Development Committee.

In the meantime, WTO members also agreed to continue their current practice of not imposing customs duties on electronic transmissions.

In the Doha WTO Ministerial meeting, it has been declared that it "take note of the work which has been done in the General Council and other relevant bodies since the Ministerial Declaration of 20 May 1998 and agree to continue the Work Programme on Electronic Commerce. The work to date demonstrates that electronic commerce creates new challenges and opportunities for trade for members at all stages of development, and we recognize the importance of creating and maintaining an environment which is favourable to the future development of electronic commerce. We instruct the General Council to consider the most appropriate institutional arrangements for handling the Work Programme, and to report on further progress to the Fifth Session of the Ministerial Conference. We declare that members will maintain their current practice of not imposing customs duties on electronic transmissions until the Fifth Session." (http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief18_e.htm)

It is argued that the WTO is the only organization which can govern and regulate the e-commerce since it is the only one which has "teeth" (meaning that its agreements give it a lot of powers towards its member states). (Susan Schiavetta, *The WTO and legal regulation of E-Commerce*, Yulex 2002, Institut for rettinformatikk, p.47) but this will be taken in greater consideration in a coming article concentrating on the legal side.

The United Nations Conference on Trade and

Development UNCTAD:

Established in 1964, the United Nations Conference on Trade and Development (UNCTAD) aims at the development-friendly integration of developing countries into the world economy.

UNCTAD has launched the Global Trade Point Networks (GTPN), which fosters greater participation in international trade by SMEs. It offers assistance in banking, freight forwarding, customs and insurance. UNCTAD also supports multilateral policy discussions designed to promote international e-commerce and help developing countries to design appropriate policies and frameworks.

It assists developing countries in identifying policies and strategies in order to benefit from e-commerce, thus alleviating the widening of the international digital divide. The E-commerce programme consists in:

- Development and maintenance of information and proposals for an agenda for action to promote electronic commerce, (since 2001 this material is presented in the Annual UNCTAD E-commerce and Development Report);

- Advice to Governments on policy issues relating to e-commerce, including on the establishment of a legal and regulatory framework to ensure security and to protect consumers and intellectual property rights. (<http://www.unctad.org/Templates/Page.asp?intItemID=1983&lang=1>)

Considering the importance of e-commerce in the development, UNCTAD established ECB, which is The Electronic Commerce Branch of UNCTAD. It is responsible for implementing the organization's mandate in this field. The mandate is established by the member States at the ministerial Conference, which is held once every four years, and is implemented by the UNCTAD Trade and Development Board (TDB). The most recent Conference was held in Bangkok, in February 2000. (http://r0.unctad.org/ecommerce/ecommerce_en/about_en.htm).

The UNCTAD E-commerce and Development Report 2003 is in the final phase of preparation and will be launched on 20 November 2003. (http://r0.unctad.org/ecommerce/ecommerce_en/edr03_en.htm)

The United Nation Development Department UNDP:

UNDP has begun pilot projects aimed at the creation of electronic community centres as a platform for access and connectivity in rural areas, initially in Egypt and South Africa. They

shall also serve as centres for capacity building, skills enhancement, training, communications and content development. SMEs are encouraged to utilise these facilities and they will be assisted in the creation of websites, digital web management and the conduct of electronic commerce.

(<http://www.undp.org/>)

United Nations Economic Commission for Europe UNECE:

UNECE was set up in 1947 by ECOSOC. It is one of five regional commissions of the United Nations. Its primary goal is to encourage greater economic cooperation among its member States.

The UN/ECE Team of Specialists on Internet Enterprise Development was established in June 2000 by the Committee for Trade, Industry and Enterprise Development to act as the UN/ECE focal point and forum for discussion and exchange of views on best practices, trends, policies, guidelines and other issues relating to the Internet-based enterprise development in transition economies.

The Team of Specialists explores issues, elaborates, disseminates and implements guidelines related to the Information Society and e-commerce with the following objectives:

- To support the Governments of transition economies in developing best practices for information society initiatives. This includes the elaboration of the relevant policies and regulatory framework designed to accelerate the process.

-to assist in the creation of an enabling environment for e-commerce and Internet-based services development in transition economies.

For this purpose, the Team of Specialists may assist countries in transition in organizing seminars, symposia, workshops and other informal forums on issues related to Information Society development. The Team of Specialists will also assist other international organizations and non-governmental organizations in furthering the objectives of national Internet enterprise development initiatives.

The Organisation for Economic Co-operation and Development OECD:

The OECD groups 30 member countries sharing a commitment to democratic government and the market economy. With active relationships with some 70 other countries, NGOs and civil society, it has a global reach. Best known for its publica-

tions and its statistics, its work covers economic and social issues from macroeconomics, to trade, education, development and science and innovation.

The OECD contributed to the policy analysis and debate on electronic commerce by different methods. Action plans setting out the policy requirements for meeting the rapid development of ICT and electronic commerce, and for reaping and sharing the benefits, have been developed in a co-ordinated work programme involving almost all parts of the Organisation and most of its working committees. Outside the OECD, some of the most visible events have been a series of high-level OECD conferences, most recently, the Emerging Market Economy Forum on Electronic Commerce in Dubai, U.A.E., in January 2001.

The OECD's work programme still, to a great extent, follows the "OECD Action Plan for Electronic Commerce" endorsed by Ministers in Ottawa in 1998, along the following thematic lines:

- Building trust for users and consumers.
- Establishing ground rules for the digital marketplace.
- Enhancing the information infrastructure for electronic commerce.
- Maximising the benefits of electronic commerce.

A significant change in priorities in the OECD's e-commerce work is the move towards outreach to non-Member countries. This has involved greater attention to non-Member countries in all work areas in the Action Plan but important activities have started in the domains of ICT and electronic commerce policies for emerging market and developing economies. This included the Global Forum Exploiting the Digital Opportunities for Poverty Reduction, which was held at the OECD in March 2001. The OECD also contributes to the work of the Digital Opportunity Task Force (Dot. Force) set up in line with the Okinawa Charter on the Global Information Society by the G8 at their summit in July 2000.

The OECD Emerging Market Economy Forum on Electronic Commerce, took place in Dubai, U.A.E. 16-17 January 2001, and was the first of its kind to be held outside the OECD's own membership. It was preceded on 15 January by two parallel events: the Public Voice Conference organised by civil society groups, and a Business-Government Forum, organised by the business community.

At this meeting it was acknowledged that accessing and using information and knowledge are fundamental for the economic growth and social development of the emerging market and developing economies as well as for the OECD Member countries. The matter is now a priority issue at the highest political level.

The OECD has put some answers and guidelines to the most frequent issues in the field of e-commerce such as:

- How to build trust for users and consumers?
- Consumer protection.
- Privacy protection.
- Security and authentication.
- Taxation.
- Trade policy and market access.
- Competition law and policy,
- Electronic finance.
- Access to and use of the information infrastructure.
- The Internet, governance and the Domain Names System.
- How to maximise the benefits of electronic commerce.
- Economic and social impact.
- E-Government.
- Small and medium-sized enterprises (SMEs).
- Education and skills.
- ICT and territorial development.
- Development co-operation.
- Ensuring global participation.

The OECD claims that it will continue to ensure dissemination of its work on electronic commerce outside Member countries in co-ordination with other international organisations such as the World Bank, the World Trade Organization (WTO), UN agencies and regional bodies such as APEC. Follow-up events will take place in the context of the OECD Global Forum on the Knowledge Based Economy and other programmes with non-Member countries.

The headlines put by the OECD are quite important in the legal field and it will be studied in a coming article.

http://www.oecd.org/topic/0,2686,en_2649_37441_1_1_1_1_37441,00.html

The International Chamber of Commerce ICC:

The International Chamber of Commerce (ICC) represents global business. ICC's membership includes companies of all sizes, in all sectors, and is geographically diverse. ICC has national committees, groups and direct members in over 130 countries around the world.

The ICC worked in the development of the e-

commerce in a manner that ensures participation by all countries in the online global economy. Focusing on the following objectives:

1. to promote the development of the infrastructure that is necessary to conduct e-commerce;
2. to promote the development of trade in goods and services via e-commerce; and
3. To prevent the establishment of new barriers to e-commerce during and after the GATS 2000 negotiations.

The ICC explained the reason why the business is concerned about the regulation of the Internet saying that "the Internet continues to be a growing, vibrant and important medium for conducting business. Indeed, the Internet and e-commerce facilitate international trade. Given the benefits of increased trade for society, governments should refrain from imposing unnecessary restrictions on Internet content". So, the ICC has developed a policy statement which aims to provide governments, regulatory authorities and courts with a business perspective regarding the effect of content regulations on the Internet and electronic commerce.

In this concern the ICC put out some guidelines:

1. Allow self-regulation to demonstrate its efficacy --- Filtering, labelling and self-regulation on the Internet should be carefully considered as alternatives to legislation
2. When necessary, regulation should be kept to a minimum and only deal with specific, observed abuses, taking account of existing technologies
3. When necessary, laws and regulations should be clear, precise and narrowly tailored
4. Legislation should not place additional costs and burdens on business
5. Jurisdiction and applicable law mechanisms should not plague business with the risks of unexpectedly being subjected to laws and judgments in other countries
6. Provisions dealing with liability should limit the liability of technical service providers and carefully balance the interests of all stakeholders in

the electronic environment. (http://www.iccwbo.org/home/statements_rules/statements/2001/trade_related_aspects.asp)

The Asian Development Bank ADB:

ADB is a multilateral development finance institution dedicated to reducing poverty in Asia and the Pacific. Established in 1966, we are now owned by **62 members**, mostly from the region.

ADB recognizes that information and communication technology (ICT) is a powerful force in shaping the social and economic development of Asia and Pacific, potentially helping developing countries leapfrogs stages of economic development.

ADB has adopted a strategic approach to assist its developing member countries seize the opportunities created by ICT. This approach will support ICT-related activities in ADB's developing member countries to enhance the impact of ADB's poverty reduction strategy and other development activities.

Its Strategic Thrusts includes:

1-Create an enabling environment by fostering

- the development of innovative sector policies
- the strengthening of public institutions
- the development of ICT facilities, related infrastructure and networks

2-Build human resources to improve knowledge and skills and promote ICT literacy and lifelong learning through e-learning and awareness programs

3-Develop ICT applications and information content for ADB-supported activities, e.g., poverty reduction and good governance.

In addition to this the ADB has concentrated on the policies to develop e-commerce in its developing member state in its Long-Term Strategic Framework (LTSF) provides an agenda for ADB's poverty reduction and growth-financing activities till 2015. (http://www.adb.org/Projects/APEC/Insurance_Regulation/E_Commerce.pdf)

The Bank for International Settlements BIS:

Since 1996, the BIS in cooperation with the

Committee on Payment and Settlement Systems (CPSS) and with the support of the CPSS Secretariat, has been regularly surveying electronic money developments around the globe with the help of central banks worldwide. The surveys were initially conducted twice a year and were confidential, with information being shared only with the participating central banks. However, in view of the widespread public interest in this innovative means of payment the CPSS decided to make the contents of the survey publicly available after obtaining the consent of the participating central banks.

For this year 2001 survey, the number of participating central banks was expanded. In all, 82 countries from around the world responded. The information in the survey relates to late 2000 or early 2001. An Introductory chapter has been included in this year's report which provides the readers with information on the policy stance adopted by the various authorities concerned, including central banks. Electronic money products are defined here as stored value or prepaid products in which a record of the funds or value available to the consumer is stored on a device in the consumer's possession. This definition includes both prepaid cards (sometimes called electronic purses) and prepaid software products that use computer networks such as the internet (sometimes called digital cash). These products differ from so-called access products that allow consumers to use electronic means of communication to access otherwise conventional payment services (for example, use of the internet to make a credit card payment or for general "online banking").

(<http://www.bis.org>)

The International Telecommunication Union ITU:

The International Telecommunication Union ITU is a worldwide organization where 189 Member States and some 570 Sector members representing public and private companies and organizations with an interest in telecommunications co-operate for the development of telecommunications and the harmonisation of national telecommunication policies. It has a central role in the development of the global infrastructure used for electronic commerce, the promotion and co-ordination of programmes to accelerate the transfer of appropriate technologies to developing countries and is active in the development of widely used related standards (e.g., X.509 Digital Certificate).

It has been mentioned that the first Electronic Commerce service developed as a result of the

partnership between the International Telecommunication Union (ITU), the World Trade Centre Geneva and the World Internet Secure Key (WISeKey SA) was launched at the ITU Telecom 99 and Interactive 99 in Geneva.

The service, called the Business Exchange Service (BeX), is to be donated by the partnership to developing countries participating in the ITU's Electronic Commerce for Developing Countries project (EC-DC) to provide them with a low-cost gateway and enable them to leap start into electronic commerce. (http://www.itu.int/newsarchive/press_releases/1999/20.html)

The ITU begun to gain a great attention toward the work on making uniform rules for e-transactions made on the Internet. In a Symposium for the Multilingual Domain Names jointly organized between the WTO and ITU in December 2001, the ITU had recognized the Internet as a global standard for computer network.

Just in this Decmeber the ITU had played a leading role in the conducting of the World Summit on the Information Society. In the draft of this Summit's delceration it was emphasised that "An enabling environment at national and international levels is essential for the Information Society. ICTs should be used as an important tool for good governance....The rule of law, accompanied by a supportive, transparent, pro-competitive, technologically neutral and predictable policy and regulatory framework reflecting national realities, is essential for building a people-centred Information Society. Governments should intervene, as appropriate, to correct market failures, to maintain fair competition, to attract investment, to enhance the development of the ICT infrastructure and applications, to maximize economic and social benefits, and to serve national priorities." http://www.itu.int/wsis/documents/doc_single-en-1161.asp

(<http://www.itu.int>)

The International Organization for Standardization ISO:

The International Organization for Standardization ISO is an international organization for making uniform standards in the field of technology. Answering the rising complaints from consumers concerning e-commerce transaction, the ISO has begun a project to unify the rules for complaints handling. This project aims to establish uniform standard for the proper handling of consumer complaints by the business.

(<http://www.iso.ch/iso/en>)

In the vision of developing standards for e-commerce transactions a Memorandum of Understanding (MoU) on electronic business in support of e-commerce has been signed by the four main organizations which develop international standards in this area: ISO, IEC, ITU, UN/ECE, with full participation from international user groups.

It is claimed that the MoU establishes a coordination mechanism under a unique cooperative model to produce mutually supportive standards required in business transactions (data interchange and interoperability) as well as products design and manufacturing to meet the urgent needs of both the industry and the end-users. Electronic business covers the information definition and exchange requirements within and between enterprises, including customers. Given that it provides the vital framework for e-commerce, it is intended that this MoU will support this rapidly changing and fast growing business sector. The purpose of the MoU is to minimize the risk of divergent and competitive approaches to standardization, avoid duplication of efforts and avoid confusion amongst users.

(<http://www.itu.int/itu-t/e-business/mou/>)

The World Intellectual Property Organization WIPO:

WIPO is an international organization dedicated to promoting the use and protection of intellectual property right. It has conducted a lot of effort in developing the e-commerce, in its connections with the intellectual property rights.

In September 1999, the Director General of the World Intellectual Property Organization, Dr. Kamil Idris, announced the WIPO Digital Agenda at the WIPO International Conference on Electronic Commerce and Intellectual Property. The WIPO Digital Agenda subsequently received approval from WIPO's Member States at their General Assembly in September 1999. This agenda sets out a series of guidelines and goals for WIPO in seeking to develop practical solutions to the challenges raised by the impact of electronic commerce on intellectual property rights. In addition to this WIPO is conducting domain name activities, including the WIPO Internet Domain Names Processes, convened to address certain intellectual property issues arising in the Domain Name System. WIPO also has other activities related to electronic commerce, such as WIPO e-commerce programs and issuing a country code top-level domains (ccTLDs) database as well as a Trademark database. (<http://ecommerce.wipo.int/agenda/index.html>)

WIPO is acting as a manager of an arbitration and settlement systems for disputes on trademarks, creating new treaties on copyright protection for electronic transactions. (<http://ecommerce.wipo.int/>)

In coming article the legal role of the WIPO will be deeply discussed.

The United Nations Commission on International Trade Law UNICTRAL:

The United Nations Commission on International Trade Law (UNCITRAL) is the core legal body within the United Nations system in the field of international trade law. (General Assembly resolution 2205 (XXI)).

There is a specialised Working Group in UNICTRAL in the field of e-commerce. It has started this specialization from 1997. Since then it has contributed to issue the UNICTRAL Model Law on Electronic Commerce with a Guide to Enactment with additional article 5 was adopted in 1998. And the Unictal Model law on Electronic Signatures. Currently it is working on a draft of a convention on electronic contracting. (Toshiyuki Kono and others, *Selected Legal Issues of E-Commerce*, Kluwer Law International, 2002, p.14)

Other working groups In UNICTRAL are touching some important points relating to e-commerce. The International Contract Practices Working Group has developed a Draft Convention on Assignment of Receivable in International Trade. The International Arbitration and Conciliation Working Group have discussed the problem on arbitration agreement in electronic commerce. (www.unictral.org/en-index.htm)

The work done by the UNICTRAL is very important in this research, so in a coming article we will deal with it in a greater depth.

The Hague Conference on Private International Law:

The Hague Conference on Private International Law is an intergovernmental organisation whose objective is the unification of private international law norms (essentially conflict of laws, procedure and judicial co-operation).

In the field of e-commerce it has held, jointly with the University of Geneva (Switzerland), a Round Table discussion on issues of jurisdiction and applicable law arising out of electronic commerce and Internet transactions.

This meeting took place on 2, 3 and 4 Septem-

ber 1999 and was attended by one hundred experts representing the different sectors interested in electronic commerce: industry, operators, consumers, governmental experts and international organisations, both world-wide and regional. Twenty-six countries, as well as fourteen international governmental and non-governmental organisations were represented.

Seven commissions met simultaneously on the following subjects: contracts, torts, choice of court and choice of law clauses, service of process, applicable law to data protection, evidence and legalisation, standards of procedure for on-line dispute resolution.

The recommendations of the Round Table were synthesized as follows:"

1. As far as possible, instead of the creation of new norms for electronic commerce and internet operations, existing principles, rules, and procedures can and should be applied, in particular by way of interpretation, including the use of functional equivalents. This is not only true for the validity of choice of court and choice of law clauses in contracts entirely executed electronically by application of principles laid down by the UNICTRAL Model Law on Electronic commerce, but also, as a general rule, for the Hague Conventions of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.
2. When new norms are needed, they should be technologically neutral.
3. For on-line contracts in general, in the matter of jurisdiction and applicable law, if the performance of the relevant obligation takes place off-line, the existing rules of private international law referring to the place of performance remain relevant. If the performance takes place on-line, the place of performance is not appropriate as a connecting factor. In that case, the relevant connecting factors are the location of each of the parties involved.
4. In business-to-business electronic transactions, party autonomy should be the leading principle, both as regards appli-

cable law and jurisdiction. As regard to jurisdiction, article 4 of the proposed preliminary draft Convention on jurisdiction and judgments was considered fully appropriate to provide operators with a flexible and adapted legal framework to uphold the validity of choice of court clauses.

5. For business-to-consumer transactions, further assessment is required in the light of all the interests involved. Particularly, during the second plenary, Professor Catherine Kessedjian proposed to avoid the traditional dichotomy between the "country of origin" (i.e. that of the seller or provider) and the "country of reception" (i.e. that of the consumer). She proposed to start with a process of site-certification along the lines of the work done within the ICC and other private organisations. This certification process should include minimum substantive rules of protection for the consumer including warranties, and a fair and easy dispute resolution mechanism which could possibly be free of charge to the consumer. When a site has obtained the certification label, it could provide for the application of the law of the country of origin and for the courts of that country for the residual cases which could not be solved by the dispute resolution mechanism part of the certification. If a site has not been certified, then the law and the courts of the consumer's location would be competent.
6. In the interim, before such a certification system is available and fully in place, rules could be developed to allow countries to differ in the protection they afford to consumers residing on their territory. This principle could be enshrined in a provision amending the present drafting of article 7, paragraph 3, of the proposed convention on jurisdiction and judgments and read: "If the agreement (i.e. the choice of court clause) is entered into by a consumer who is habitually resident in a State which has declared that such agreements are enforceable against such consumers".
7. Identification of players over the net is essential to the well functioning of e-commerce. This principle is in line with the draft European directive on electronic commerce, the Best Business Practice principles and the ICC guide-

lines on marketing over the Net.

8. In matters of tort and jurisdiction, it is difficult to depart from one of the two connecting factors: defendant's or victim's habitual residence forum. No definite conclusion could be reached. Some participants would require that the victim's habitual residence forum coincide with at least part of the injury. The preliminary draft Convention on jurisdiction and judgments (article 10) will have to be reviewed in light of the discussions.
9. In the matter of data protection, the Round Table recognised that data collection, personal data included, and processing thereof are inherent to electronic commerce. The dichotomy between systems which do not accept general standards and those which require a rigid a priori framework for the collection and transfer of data should be avoided. Furthermore, it is necessary to carry out a study on the most relevant system of applicable law which would also allow a greater role to self-regulation and model contracts such as those proposed by the ICC and in line with the principles recommended by the Council of Europe.
10. In matters of security of systems (confidentiality, integrity, authentication, non-repudiation and availability), the Round Table came to the conclusion that the need for confidentiality should not be considered as a bar to the use of electronic forms of transmission. Techniques currently do exist to protect confidentiality. It was suggested that States should encourage the use of those techniques.
11. Finally, the Round Table encouraged the development of on-line dispute resolution mechanisms and of standards of procedure relevant for this new method of dispute resolution."

In addition to this The Hague conference is working on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters through different seminars and workshops. (<http://www.hcch.net/e/workprog/e-comm.html>)

The role of this important organization in the development of a legal frame work for e-commerce specially related to the Private International Law will be discussed deeply in a further article.

International Institute for the Unification of

P r i v a t e L a w (UNIDROIT):

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States.

Following the success met by the UNIDROIT Principles of International Commercial Contracts in both contract and arbitration practice since their publication in 1994, the Governing Council of UNIDROIT in 1997 decided to reconvene a working group for the preparation of Part II covering a number of additional topics which had not been dealt with in the first edition.

In a coming article we will have a deep look in the UNIDROIT Principles of International Commercial Contracts and Principles and Rules of Transnational Civil Procedure.

(<http://www.unidroit.org/>)

The American Arbitration Association (AAA):

With the introduction of eCommerce Services, the American Arbitration Association delivers a global resource for the efficient containment and resolution of online disputes. These services give the AAA an advantage in the area of Online Dispute Resolution (ODR) an element in the Alternative Dispute Resolution (ADR)

The AAA argued that it understands that all participants in the electronic marketplace want smoother operations and improved transaction flows. Above all, you need to be sure that transactions will take place safely, securely and with conflict mechanism built in. (<http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload/livesite/focusArea/eCommerce/About%20AAA%20eCS.htm>)

In this concern The AAA has established a B2B Dispute Management Protocol to guide eCommerce dispute resolution. This protocol is a groundbreaking set of forward-thinking principles that guide companies managing disputes in a fair, timely and definitive manner. This Protocol encompasses principles related to Fairness, Continuity of Business, Clear Dispute Management Policies, Range of Resolution Options and Commitment to Technology. Leading Fortune 500 businesses and law firms have endorsed this Protocol to help avoid costly and time-consuming traditional methods of resolving disputes such as litigation. (<http://www.adr.org/>).

In addition to these organizations there are many other organizations interested in developing e-commerce such as:

- International Centre for Settlement of Investment Disputes ICSID which was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention) which came into force on October 14, 1966. <http://www.worldbank.org/icsid/about/about.htm>
- the International Maritime Organization IMO, <http://www.imo.org/index.htm>
- The African Development Bank ADB, (www.adb.org)
- The Organization of American States (OAS), (<http://www.oas.org/>)
- The United Nations Industrial Development Organization UNIDO, (<http://www.unido.org/>)
- The American Bar Association ABA, (<http://www.abanet.org/about/home.html>)
- The American Society of International Law, ASIL (<http://www.asil.org/org.htm>.)
- Centro di Arbitraje y Mediacion Paraguay, (<http://www.camparaguay.com/index.asp/>)
- The Comité Maritime International, CMI, (<http://www.comitemaritime.org/histo/his.html>)
- The European Lawyers Union ELU, (<http://www.uae.lu/en/10.html>)
- The Factor Chain International, FCI, (<http://www.factors-chain.com/b2/b2.html>)
- the International Association of Ports and Harbours, (IAPH), (<http://www.iaphworldports.org/about/main-today.htm>)

- The International Bar Association, IBA, (<http://www.ibanet.org/>)
- International Federation of Freight Forwarders Associations, FIATA (<http://www.fiata.com>)
- The International Law Institute, ILI, (<http://www.ili.org>)
- The International Council for Commercial Arbitration ICCA, (http://www.arbitration-icca.org/about_icca.htm)
- Permanent Court of Arbitration (PCA), (<http://www.pca-cpa.org/ENGLISH/GI/#History>)
- The Institute for Transnational Arbitration (ITA), (<http://www.cailaw.org/ita/>)
- The Kluwer Arbitration.com, (<http://www.kluwerarbitration.com/arbitration/arb/default.asp>)
- The Transnational Law Database (TLDB), (<http://www.tldb.de/>)
- Eye on International Business Law, (<http://www.laweye.de/>)
- Center for Transnational Law (CENTRAL), University of Cologne, Germany. (<http://www.transnational-law.de/>)
- Pace University School of Law, Institute of International Commercial Law, Middle East Centre for International Commercial Law, (<http://www.law.pace.edu/aboutpace/index.html>)
- International Monetary Fund, IMF, (<http://www.imf.org/external/about.htm>)
- Internet Law and Policy Forum ILPE, (<http://www.ilpf.org/>)
- Global Business Dialogue on Electronic Commerce (GBDe), (<http://gbde.org/>)
- Global Information Infrastructure Commission (GIIC), (<http://giic.org/>)

After this study of the efforts made by the international organizations working in the development of e-commerce environment. It is clear that the nature of e-commerce has urged all these organizations (either governmental or non governmental) to deal with it in a different approaches and processes. We can notice that apparently most of these organizations are applying a fast policy in their project to face the day to day development of the Internet.

It is always important that in this era, all the interested actors must try to organize their efforts in order to achieve the targeted results, avoiding any kind of overlapping between them.

It has also argued that the private organizations must be welcomed to play the role they are looking to do, but their aims should be controlled, in order to assure the neutrality of their efforts. Specially that most of them are connected and sponsored by the business. (Toshiyuki Kono and others, Selected Legal Issues of E-Commerce, Kluwer Law International, 2002, p.21)

Conduct of Employment Agencies Regulations

By Daniel Barnett - Barrister-at-Law (UK)

The DTI has, today, issued guidance on how the long-awaited *Conduct of Employment Agencies and Employment Businesses Regulations 2003* Regulations will work.

They are due to come into force on 6th April 2004. The main implication for employment lawyers is the way in which it requires employment agencies / business to specify the employment

status of any individual who obtains work through the agency / business (i.e. self-employed, employed). It also requires the agency / business to give written notice as to the terms and condition on which the individual is employed or engaged.

LINKS:

The Regulations - <http://www.legislation.hmso.gov.uk/si/si2003/20033319.htm>

The DTI Guidance - <http://www.dti.gov.uk/er/agency/conduct.pdf>



IN JUDGMENT: Comments on Law & Culture

"There but for the Grace of God go us All"

By Michael Sweig, J.D., President of Sweig Family Venture, LLC, and Adjunct Professor of Legal Studies, Roosevelt University, Chicago, (US)

When life is rough it can be hard to see the good that happens to us, and even more difficult to see the good in ourselves. Seven years ago when the bottom fell out of my life and my law practice, I made a phone call that began an education for me that I will always feel compelled to pass on to others.

I was sitting in my cousin's silk stocking law office. He was first and foremost a friend and role model to me. He had just hung up the telephone with my law partner, who had threatened to summon the authorities if I or my family did not hand over about half a million dollars that my partner had invested in our failed law firm. He was rightfully steamed at me for my trust account defalcations.

My cousin looked at me and said "You need a white collar criminal defence guy, and that's not me. You know that, right?" Of course, right. My cousin had already helped me enormously in sorting out many of the partnership issues we faced as we looked down the road of dissolution. I knew who to call: Mike, a former opponent of mine who when he describes his law practice says, "I only do trouble."

I had built enough good will and rapport with Mike and his staff so that when I called him and his assistant answered the phone, she not only took me quite seriously when I told her I was in trouble, but she insisted I wait by the phone while she contacted Mike. Within five minutes Mike called me. He had excused himself from a meeting with clients far more important than I was, certainly.

"Michael, what's wrong?," he asked with an avuncular tone that could calm any storm. "Trust account issues, Mike. And it's all going to come out," I said, on the verge of tears. I was so ashamed and embarrassed that I had to call someone I admired so much personally and professionally, and who I knew admired me.

"Michael, go home and wait for me. I'll be there as soon as I can; in a few hours. Tell me your address."

I was stunned. This man owed me nothing. I was speechless. But, as I would do repeatedly and often over the next five years or so, I did what he told me to do.

In the early evening, Mike showed up at my home. He sat me down at my dining room table and listened long and hard. When I was through, he reached across the table and took my hand. "You're not going to jail. I won't let that happen." "Mike, you know you can't insure that. How can you say that?" I was relieved that he ventured that far but concerned that he was unduly optimistic. We were talking about a five hundred thousand dollar trust account issue.

"Michael, no one I know professionally would believe that I could possibly advise you to do what I am about to suggest. But I know it will keep you out of jail. I could be wrong, but I doubt it. I've never advised any client to do this, but I am going to do it now. Ready?"

How could I not be ready? "Okay....?" My heart pounded with self-hatred for my vulnerability.

"Waive the attorney-client privilege and the Fifth Amendment."

"What? You're serious?"

"Totally. That's what Al Secord did in Watergate and he avoided prison. How much more accountable could you be than that? Think about it. It's the fastest way to get this behind you and your family. No matter what happens, you can always hold your head up and know you did the right thing. And most importantly, you can always hold yourself up as an example in the future when your kids make mistakes and you need to teach them accountability. Plus, you'll give me the most ammunition I could possibly have with the authorities; I'll always be able to say that you did the right thing, and in mitigation when it comes to sentencing, I think that's what will get you probation and not jail."

Despite the fear and bad judgment that had made clear thinking so difficult for so long at that point in my life, something allowed me to hear Mike. I knew he was right.

"I'll do it."

"Don't you want to think about it? What I am suggesting is a huge step. Like I said, no one I know professionally will ever believe that I advised you to do this."

"Let's do it."

Within a day or two I had voluntarily offered to turn in my law license and had offered the State's Attorney a one count plea. It took a while to work out the details, but from that moment on I moved forward with a new clarity about my life that I now believe I could never have gained without Mike's help. And I avoided prison.

Before Mike left that night, I asked him: "Mike, why are you helping me. You know that by the time we get this cleaned up I'll owe you so much money it will take years for me to pay you."

Mike's answer has become a major force and guiding light in my life.

"First of all, we lawyers ought all operate on the

there-but-for-the-grace-of-God-go-I theory. You watch, of all the people you will encounter from now on who know what you did and what happened, or what will happen to you, the least judgmental of them will be us lawyers. And don't forget, for the most part, the people who will handle and decide your matter and fate over this will be lawyers. I have faith in lawyers. That's part of why I don't think you'll go to jail. Secondly, I am helping you because a not so long time ago when I needed help in my own life, someone who owed me nothing reached out and helped me in a way that mattered, and that became a turning point in my life. I asked him why he was helping me when he owed me nothing. He told me that because at a crucial time in his life someone had reached out and helped him, and that when he had asked why this man was helping him when he owed him nothing, he answered that someone who owed him nothing had reached out and helped him when he needed help badly.

"So, Michael, that's just the way it goes. The way to pay me is this: from now on in your life there will be people who unexpectedly show up on your doorstep and will need help. And you'll be in a position to help them. So, help them. That's how you're going to pay me back."

I had tears running down my face. I still do when I think of this story, and when I consider its implications.

Mike changed my life with that story and with his help. You don't have to be a lawyer to help when help calls. Just do it, because there but for the grace of God go us all.



Cyberwig.com: Case Citations and Summaries

Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd 2003 U.S. Dist. LEXIS 800

By Graham Bassett BA, Dip Ed, MInfoTech, LLB (Hons) - Barrister-at-Law

ourt/Judges US District Court for the Central District of California, Stephen Wilson

Legally Relevant Facts Co-defendants Grokster, Streamcast and Kazaa distributed software that enabled users to exchange digital media by a peer-to-peer network. Sharman Networks is a company principally doing business in Sydney, Australia but organised under the laws of Vanuatu. Sharman bought the assets of the Kazaa group.

Sharman Networks used the FastTrack software for facilitating file exchange. In return Sharman received advertising revenue from third parties. The Kazaa Media Desktop (KMD) software was bundled with third-party advertising software.

Procedural History The plaintiffs sought to exercise personal jurisdiction over Sharman under California's long-arm jurisdictional statute.

Basis of Claim/Grounds for Appeal The Plaintiffs brought suit against Grokster and Kazaa for copyright infringements of their intellectual property. This hearing is a motion to dismiss the defendant Sharman Networks for lack of personal jurisdiction, lack of subject matter jurisdiction, improper venue and forum non-conveniens.

Summary Analysis Sharman lacked a traditional basis for the plaintiffs to assert jurisdiction based on domicile, consent or physical presence. It was not registered or licensed to do business in California and had no substantial presence by way of offices or employees. The lack of such indicia of corporate presence meant general jurisdiction could not be established even though it had a "continuing stream of commercial contact" with the forum state including provision of software, licensing agreements and a web site for downloads.

Jurisdiction had to be considered under due process provisions which are based on notions of air play and substantial justice. The court found that the contracts for advertising were entered into by the third parties aligned with Sharman and thus targeting of persons in the forum step was done by them and not Sharman. Sharman argued its activities were passive in nature and it did not know the identity of people

downloading its software nor where they reside. Any distribution contacts with California were initiated by residents of that state.

The court disagreed and argued that Sharman "purposefully availed itself of the privilege of doing business in California". The court said it was estimated Sharman had two million users and it would be "mere cavil" to deny they had significant contact in California.

Furthermore, the court held that Sharman was aware the entertainment industry was based in California and the alleged copyright infringements would be borne by them. "Sharman is well aware that California is the heart of the entertainment industry, and that the brunt of the injuries described in these cases is likely to be felt here. It is hard to imagine on these bases alone that Sharman would not reasonably anticipate being haled into court in California."

The court said it was aware of the burdens placed on a defendant who must litigate in a foreign country. However, modern advances in technology have reduced that burden. This burden however was outweighed by the fact Sharman had significant contact with the forum state. The court argued that even if significant contacts with a particular state could not be maintained, it was enough that in copyright claims injury to any US residents is sufficient.

Decision Sharman Networks motion to dismiss the complaint for want of jurisdiction was denied.

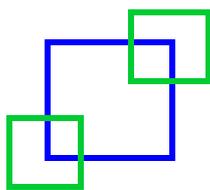
Court Order Similar Case Comments *Airways Corporation of NZ Ltd & Anor v Pricewaterhouse Coopers Legal & Anor* [\[2002\] NSWSC 138](#)

Kabushiki Kaisha Sony Computer Entertainment v Stevens [\[2001\] FCA 1379](#)

Kabushiki Kaisha Sony Computer Entertainment v Stevens [\[2002\] FCA 906](#)

Kabushiki Kaisha Sony Computer Entertainment v Stevens [\[2003\] FCAFC 157](#)

Universal Music & Ors v Hendy Petroleum & Ors [\[2003\] FMCA 373](#)



Daniel Barnett: Employment Law Summaries

Data Protection: Curtailment of Right to Demand Information

By Daniel Barnett - Barrister-at-Law (UK)

The Court of Appeal has decided an important case on the scope of the **Data Protection Act 1998** and, in so doing, provides guidance on the extent to which employers are obliged to provide copies of employees' personnel files, Emails etc.. In short, it drastically curtails the right of employees to demand information by means of a data protection request.

The case, **Durant v Financial Services Authority**, provides as follows:

1. in order for data, whether held on computer or a manual file, to be 'personal data' (thus giving rise to a disclosure obligation), it must name or directly refer to an individual. But that it not enough: mere mention of a subject's name in a document does not make the information in that document 'personal data'. For the disclosure obligation to arise, the information must be biographical in a significant extent, and should have the data subject as its focus. Thus information stored by the FSA concerning a complaint by Mr Durant about Barclays Bank was not personal data which the FSA was obliged to disclose to Mr Durant (paras 26-28).

2. a 'relevant filing system', for a manual (rather than computer) system, is one where the information is structured by reference to that individual. Thus the FSA's file marked 'Mr Durant', which contained a large number of documents relating to his claim in date order, was *not* a relevant filing system because it was struc-

ured by reference to date, not to the individual (para. 35 and 48). The purpose of the Act is to protect the privacy of personal data, not documents. If the documents are not structured by reference to that data, the disclosure provisions of the Act are not triggered. Any manual filing system which requires an individual to "leaf through" multiple documents to find the personal data contained therein falls outside the scope of the Act. The fact a folder is labelled with an individual's name is not, without more, enough to bring it within the Act.

The Court of Appeal also considered the difficulties arising when personal data, which would otherwise be disclosable, identifies other people.

The Court concluded with criticisms of individuals who seek to use the Act as a method of obtaining information generally which refers to them by name, rather than information relating only to personal data. Mummery LJ described Mr Durant's application and appeal as "*misconceived*", which will not bode well for Applicants who put Respondents to cost in tribunal claims dealing with a (now) unwarranted Data Protection disclosure application.

LINK: <http://www.courtservice.gov.uk/judgmentsfiles/j2136/durant-v-fsa.htm>

Daniel Barnett

10th December 2003



Information Privacy: Are We Really Concerned (2) ?

By Saravanan Muthaiyah & Hurriyah El-Islamy,
Multimedia University, Malaysia

Abstract

Online security and privacy has been a major issue of debate in the recent years. Electronic cash payment systems are becoming more important than ever to facilitate online transactions and thus replacing traditional payment methods such as checks. The prime objective of this paper is to determine the legal status quo and deficiencies of the law in view of consumer protection. As Bill Gates once said "The best product in the world is useless if nobody wants to use it". This paper also examines the perception and awareness of security from the consumers' standpoint especially in recent e-business processes that facilitate transfer of payment via electronic systems such as e-wallet, credit card and e-cash. Finally an examination of the measures that can be taken so that the mindset of users can be changed to suite this new on-line culture.

Study Objectives and Research Questions

Security issues emerge as the utmost concern in the mind of consumer. Besides that, there are many threats in e-commerce, for example intellectual property threats, client threats, communication channel threats, and server threats. Security plays a very important role in overcoming these threats. Failure of overcoming these threats will cause a negative impact not only to the e-commerce businessman but the consumers as well. Security will become an obstacle to the development of e-commerce when people take it lightly. Some of the research problems regarding this issue have been identified as below.

Business and retail transactions move into a new era leveraging on the electronic platform, namely the Internet. Many traditional businesses are considering Electronic Commerce as a lucrative alternative mode for exchange of transactions. Though E-Commerce is widely spoken and also predicted as the new way of business transactions, it however, had failed to attract significant number of customers. Many consumers due to security issues claimed that they simply do not prefer purchasing products and services via the Internet. Therefore this study is to find out what laws are in place to protect the consumer in view of privacy and Internet

security which in turn affects the E-commerce transactions.

Survey of Literature

Anthony D Miyazaki and Ana Fernandez (2001) stated that information privacy and security would be the major obstacles in the development of consumer-related e-commerce. They described that risk perceptions regarding Internet privacy and security have been identified as issues for the consumers. They explained that the early research suggested that the risk perception wouldn't affect much the e-commerce. However the recent studies revealed that consumer risk perceptions would be the main obstacle to the growth of e-commerce. They explained that the higher Internet experience would reduce the risk perception of the e-commerce included system security, retailer fraud and privacy. They suggested further research is needed to find out how risk perceptions influence e-commerce, how should retailers manage it and what is the management of risk perceptions may impact consumer welfare. This can be considered as the limitation of this article.

Hudgins-Bonafield Christy (1998) stated that the rapid growth of e-commerce has attracted a lot of commerce service provider (CSP) company to be set up worldwide. However, the little knowledge and primitive ideas about what constitutes good security has caused concern to people. For example, some CSPs transmit credit-card information without any form of encryption, some only use a single firewall while some never use at all but only rely to the filtering of their routers. This may cause some risk to the company as well. He explained that e-commerce merchants need to ensure that encryption occurs in their credit-card transactions with the consumer, as well as in any back-end transactions that credit-card information or directly to the merchant. He described that it is ideal to have physical security and logical security together. This article is only described on the implementation of security in e-commerce. Beside that, what is the impact of the poor security control to the e-commerce and the consumers also has not been described. The absence of

the law to protect consumers may be a disaster as consumers don't have any protection from the systems implementers or the law i.e. the Data Protection Act.

Scott A Chadwick (2001) stated that creating trust is one of the processes in building a relationship with a consumer. He mentioned that research showed that trust could develop over time (Walther and Burgoon, 1992) or swiftly (Jarvenpaa and Leidne, 1998). He explained that there are differences between e-commerce interactions and face-to-face interactions in the process of building relationship with a consumer. He stated that trust must exist for a successful transaction. He described that trust does affect how consumer can behave in an e-commerce transaction. When the price differences are small, consumers are preferred to buy from an online company they trust. He also explained that trust problem is appeared both in e-businesses and consumers.

He described that two factors that can help e-companies to gain trust in their consumers are Web design and trust-building behavior. He stated that Kim and Moon (1998) found that the design of Web could manipulate the perceptions of trustworthy especially in the use of graphics and color. He explained that most analysis limited to the issue of privacy, risk security, and reliability regarding trust-building behaviors. He suggested that structuring a more personal relationship within the e-commerce interaction might allow knowledge-based trust or even identification-based trust to develop. He concluded that the analysis of trust in e-commerce may start with technical, but it must include, and likely end with the communicative. The limitation of the article is the explanation is only focused on the trust issue in e-commerce. There is no explanation about what are the factors that will affect the consumer's trust in e-commerce.

Adele et al (2001) stated that the rapid growing of e-commerce has a significant impact on the computer market and people's working style. They mentioned that according to the Ramsey and eMarketer it has been estimated that the worldwide e-commerce market reached up to \$42 billion consumer transactions in the year 2000 and is expected to grow further in the future. However, whether e-commerce is growing to its full potential or not somehow also depends on the consumers' perception of e-commerce especially in the security issues and the risks involved. Their study in South Africa revealed that over 50 % of the respondents are not willing to give their credit card information in a secure transaction on the Internet while purchasing

products and services.

The most common reason is because they concerned about the safety of their credit card information when conducting online business. Another reason they provided is they concerned that a hacker could intercept their credit card number. Besides that, their study also indicated that consumer with information technology (IT) knowledge are more willing to buy products or services over the Internet and have better knowledge and awareness of information security knowledge. They concluded that the problem of trust and consumers' perceptions of safety measures should be addressed to convince them to use e-commerce. Once again literature supports the enormous growth of online transactions and it is evident that consumer protection in the form of laws are highly desired at this point.

Introduction

The information revolution has provided part of the world's population with a de facto information superhighway that we know as the Internet. Use of these networks for on-line purchases and some transactions forms just part of the growth in global electronic commerce (e-commerce), which is actually a broader use of information technologies by businesses and the government. Its revenues are projected to reach US \$152 billion this year in Europe, and the global revenue from e-commerce in Europe, US and Japan achieved a total of US\$657 billion in 1997. In 2002, the global figure for e-commerce projected was to reach US\$1,500 billion. The potential growth for e-commerce in Malaysia still remains huge. From a modest RM12.5 million in on line sales achieved in 1997, Malaysia was projected to achieve over RM647 million in online sales in 2002 (Larson, 1998).

However, the users remain extremely concerned about the level of privacy and security of this technology that's sweeping the world like a storm. Rapid growth generally brings about several concerns. One survey conducted showed that only one third of all local Internet users have made online purchases in 2001. A recent survey result also indicated that 70% of corporate purchasing decision-makers indicated that security concerns hindered them from buying over the Internet. (Larson, 1998). Another general survey among individuals of general public, to determine peoples attitude towards security showed that, 58% who had not yet purchased online cited insecure communications (51%), potential untrustworthiness of the vendors (43%) and no need to buy online (46%) as their con-

cerns towards e-commerce (S.M Furnell and T. Karweni, 1999).

One aspect of information privacy which is usually overlooked is the situation where the personal data have been personally submitted to others, under the impression or assurance that this other will not disclose the data in any way, is disclosed without the consent of the data subject. There are several articles that examine personal data protection in Malaysia. However, these studies analysed the proposed Personal Data Protection Bill, which has not even been tabled in the Malaysian Parliament. There is no reference made to the existing law, neither any examination made to see if any relevant legal protection may be afforded to personal data. This paper analyses the deficiencies of the legal Status Quo of existing legal protection in Malaysia with a comparison to UK and laws in the US.

Definition

Data & Information

In the subject of information systems, data would mean raw facts and information would be data that has been transformed into something meaningful. The Interpretation Acts 1948 and 1967 of Malaysia do not define the terms information and data. In the Draft Legislation on Personal Data Protection year 1998, the term 'personal data' has been defined as any information recorded in a document in which it can practically be processed wholly or partly by any automatic means or otherwise which relates directly or indirectly to a living individual who is identified or identifiable from that information or from that and other information in the possession of the data user.

However, since this definition is meant to be used in relation to the provisions in the draft legislation and until today this draft has yet to be tabled to the Malaysian Parliament, this definition will be of no assistance until such legislation is passed by the legislature. In the absence of any contrary definition and for the purpose of this paper, both terms, information and data, shall be understood according to its literal interpretation given above.

Malaysian Law

The law in Malaysia can be found in both written and unwritten sources. The written sources of law include the Federal Constitution, Legislation, and Subsidiary Legislation – commonly known as Regulations. As for the unwritten sources of law, Malaysian law is very much influenced by the English common law principles and rules of

equity.

Data Protection Act in Malaysia

The Malaysian Parliament has yet to enact legislation that protects the individual's right to privacy - not in its general scope, nor for certain aspect of privacy. The word privacy, however, has been used in several statutes including: Births and Deaths Registration Act 1957 (Revised 1983); Child Act 2001; Law Reform (Marriage & Divorce) Act 1976; Penal Code (Revised 1997); Private Healthcare Facilities & Services Act 1998; and in two regulations namely Communication and Multimedia (Licensing) Regulations 1999 and Private Hospitals Regulations 1973.

The word 'privacy' has been used in the context of right to data protection. This can be found in sections 4 of the Births and Deaths Registration Act 1957; s. 9 of the Communication and Multimedia (Licensing) Regulations 1999; s. 46A of the Law Reform (Marriage and Divorce) Act 1976 and s. 107 of the Private Healthcare Facilities and Services Act 1998. In each of these provisions, the word 'privacy' has been used in connection with confidentiality and security of individuals' information.

The provisions require that the person maintaining the data has to ensure that the data he keeps are well protected and safe. However, the scope of protection is limited to those types of data that are submitted in pursuance to the provision of the respective legislation/regulation. Consequently no legal protection is offered for personal data submitted in any way, other than those ways as required in legislation/regulations. Likewise, there is no statutory protection that protects individuals against the disclosure of individuals' personal data without such individuals consent, especially since the 'supposed' Data Protection Act 1998 has yet to be tabled in the Malaysian Parliament.

Draft Legislation on Personal Data Protection

In year 1998, the Ministry of Energy, Communications and Multimedia prepared the draft on Personal Data Protection Legislation – supposed to be known as Personal Data Protection Act 1998. Section 2 defines data subject as an individual who is the subject of a personal data. It also defines data user as a person who either alone or jointly with other persons, controls the collection, holding, processing or use of personal data but does not include any person who collects, holds, processes or uses data solely on behalf of another. Hence, it can be said that in the given scenario I would be identified as data

subject and the contest organizers are the data user.

Part IV of the Draft provides for the rights of data subjects. Among the rights given include the rights for non-disclosure of personal data (s. 42). Section 42(1) states that, “no data user shall use or disclose any personal data of a data subject for purposes other than the purpose in connection with which the personal data is collected, held or processed.”

Exception for such disclosure given in subsection 3 to section 42 of the Draft legislation that allows such use or disclosure if ... (a) the data subject or relevant person has given his consent to the use or disclosure. In addition to the above, a data subject would be entitled to compensation. Section 88(1) allows an individual who suffers any damage or distress by reason of a contravention of a requirement under the legislation to get compensation from the data user for such damage or distress. It is interesting to note that the term ‘damage’ in this section includes injury to feelings (s. 90(3)). Unfortunately, this draft has yet to be tabled in Parliament and thus, will be of no assistance up to date.

Data Protection Act in UK

In 1984 the Data Protection Act was enacted. In 1995 Data Protection Directive (95/46/EC) was adopted. The Directive requires that the national law of Member States must be in conformity with it. Hence the 1998 UK Data Protection Act. Section 1(1) of the 1998 Act defines personal data as data which relate to a living individual who can be identified from those data; or from those data and other information which is in the possession of the data controller.

Data controller is defined as a person who either alone or jointly or in common with other persons determines the purposes for which and the manner in which any personal data are (or are to) be processed. By virtue of this definition, those sites gathering individuals’ personal data are likely to be considered as data controllers and individuals who are the subject of personal data. Finally the 1998 Act allows the data subject - who suffers damage for any contravention of the requirements of the Act by the data controller (s. 13(1)) or who suffers distress for contravention relates to the processing of personal data for special purpose (s. 13(2)(b)) – to get compensation from such data controller. Thus, it can be said that the availability of the personal data protection legislation in the UK provides sufficient safeguard to most aspects of information privacy

and this let the individuals feel assured that there is legal remedy available in cases where there is any abuse or misuse of one’s personal data.

Data Protection Act in USA

In the USA, the legislature’s concern about privacy goes back to 1980 (the Privacy Protection Act 1980). However, instead of providing one general statute that provides for general protection of personal data, the USA government prefers to take a sector-based approach. To mention a few, the Health Insurance Portability and Accountability Act (HIPAA) has been enacted to deal with protection of health information; the Gramm-Leach Biley Act (GLB) governs financial privacy provisions; the Children’s Online Privacy Protection Act (COPPA) is meant to regulate the privacy of children under the age of 13 and the Electronic Communications Privacy Act (ECPA) limits the circumstances under which federal and state government may access the contents of transactional data in both real time communications and stored communications.

In reality, however, in the absence of general protection for personal data, in some circumstances the position in the USA will be more or less similar with the current position in Malaysia. In situation where any businesses, in disregard of their self-adopted privacy policy, have infringed one’s right to information privacy, the data subject may be left without remedy against such disclosure. In the USA to initiate an action for infringement of online information privacy, one has to base the claim on the existing law. However, the position in the USA is better than that in Malaysia because there are many existing privacy legislation that provides protection for certain types of information.

Main Security Threats

❖ Online Credit Card Fraud

One major cause of consumer dilemma is the usage of credit card over the Internet. Credit card to a certain extent portrays the following threats.

- When an Internet vendor detects fraudulent credit card information, the credit card cannot be confiscated and the fraudster and credit card are free to try alternative sites.
- Fraud perpetrators are also free to use stolen card numbers or even attempt to manufacture numbers for use as purchase over the net does not need the actual cards and

signature.

- The remoteness of the buyer and seller make it extremely difficult to apprehend the fraud perpetrator. In fact, remoteness is among the factors that attract individuals to electronic commerce fraud.

❖ Privacy

Hackers breaching sophisticated systems have become more and more common these days. It is performed by means of identifying passwords, breaching firewalls, and with other hacking tools. Besides, they don't need sophisticated understanding of the computers and Internet to crack a company's computer. ID numbers, passwords, credit card numbers and fraud instruction guides are available in Internet chat rooms. Consultants with Advanced Software

Applications Corp claims that many electronic commerce sites do not adequately protect consumers databases and are vulnerable to hackers seeking customer information (Morgan, 1999). However, there are other sources of threats from potential intruders like competitors, trading partners, employees, or customers. Richard Powers of the Computer Security Institute single out competitors as the single greatest threat in computer crime (Young, 1996). Competitors are a real hazard to companies engaging in electronic commerce as they try to steal valuable customer information.

Besides, many webserver host computers run other servers besides the webserver. One such example is the FTP server. This server sends and receives message in clear text. Yet, many organizations are using this method for transferring sensitive data or information between host computers and remote computers over the Internet. Thus, key passwords for sensitive directories are likely to be broadcast semi publicly over the Internet, where anyone with a little luck and packet sniffer can discover them.

❖ Authentication

Domain Name System (DNS) spoofing is also possible with improperly set permissions. In DNS spoofing, hackers with write access changes the translation file rerouting web surfers to hacker.com. If the two webpages look identical, even prudent customers can be easily defrauded and the company's reputation damaged.

❖ Vulnerabilities in General Security Procedures

Security breaches takes place too often when security measures are by passed. Carelessness like giving out passwords over the phone, or throwing security manuals without shredding can create problems if it falls in the wrong hand.

One important way to control the system security is by having a tight access control. That is by giving the users access only sufficient for their job functions and not more than that. Besides there should always be check and balance for the accesses granted. For instance, a data entry clerk should not be given access to delete the data, and there should be an independent checker to ensure comprehensives and completeness of the data.

Poor usage of passwords is another reason security breaches. Users or staff in organizations may not use strong passwords because it is not easy to remember. Four character passwords are too easy to guess. Six to eight character passwords is more difficult to crack. Examples of strong passwords are "dog%sky" , "24tohh4s21". There are many passwords guessing programs publicly available with built in dictionaries containing hundreds and thousands of words.

❖ Security System Design

Company's that don't adhere to good security designs are exposing themselves and the consumers data to fraud. Good security design, include good general control, proper segregation of duties, clearly delineated lines of authority, internal audit, good documentation, proper authorization, internal audit, good documentation, proper authorization and approval for both transaction and program changes. Also with all these in place, careful attention must be given to the prevention, detection and correction of security breaches.

Conclusion

However the law has to protect the consumer and be fair to service providers. Since the laws in Malaysia and other parts of the world are quite vague the only way out of the problem for now is self-regulation. This indeed is required to increase the confidence among consumers about their perception on Internet security is-

sues. The following are some of the recommendations of this paper so as to improve the current situation.

- Consumers must educate themselves to protect their confidential information and Consumer Rights.
- It is believed that in the absence of legislation on personal data protection, self-regulation is the best solution that may provide similar protection. In this paper it is shown that the so-called self-regulated rules are unlikely to be enforceable in the court of law, at least not in Malaysia.
- Consumer should be more proactive to know the sites they are visiting and be more conscious in giving personal or financial information and also take the effort to know the credibility of the organization they are dealing with.
- Internet Security and Consumer Rights to be made available in secondary education system. Citizens are taught during their young age.
- IT and Internet Security Roadshows and Exhibitions to be extended to rural areas to educate the rural folks.
- PC Ownership campaign to be extended to have more citizens to access the Internet and learn about E-Commerce and Internet Security.

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EDITORIAL APOLOGY

I confess that being a sole editor of a publication such as Obiter as well as a full time and other part time occupations is not easy.

Last month I printed an apology to Ms. Hurriyah El-Islamy and attempted to rectify the problem that had arisen in the November issue of Obiter. Unfortunately I made an error and published the November article again, giving the principal credit to the co-author Mr. Saravanan Muthaiyah. This should not have happened and the principal author of the article was in deed Ms. Hurriyah El-Islamy.

The article that appears on pages 19-24 of this issue of Obiter is the work, again, of both parties but the principal author on this occasion is Mr. Saravanan Muthaiyah.

An article which Mr. Saravanan Muthaiyah has submitted for this issue of Obiter, entitled "Online Security: User Perception, Legal Status Quo & Protection Measures" will now be published in the February 2004 issue of Obiter.

In order to prevent such errors occurring in future we will be introducing a certification system whereby authors will be required to supply their details and details of the article(s) which they are submitting for publication. Watch this space.



Obiter: Comment and Future Plans for the Publication

By Alan Lowe, JP, Editor of Obiter & Proprietor of Lawfile

In the first issue of Obiter I invited the readership to comment on any aspect of the publication, be they good, bad or indifferent.

Whilst I have received many complimentary remarks and comments about this publication I received one very interesting e-mail which I have discussed with our regular columnist, Michael Sweig. The e-mail concerned the possibility of Obiter becoming a Peer Review Journal thus giving us the ability to have all articles reviewed by a peer group prior to their publication. I have to say that I have given this matter some considerable thought and have decided that at some point in the future we will aim to have all of our articles Peer Reviewed. By doing this I would hope that this would give Obiter more credibility in the legal arena throughout the world.

Whilst this is a plan for the future of Obiter I would like to introduce a new concept to Obiter in the next couple of months, and that is an Editorial Panel to assist with both the sourcing of articles and the publication of Obiter.

To this end I would like to ask for nominations, either from yourself or from others, for the positions of Editor. I would ideally like Editors from around the world who would be able to speak for their respective country.

If you would like to nominate yourself or someone else as an Editor of Obiter then please e-

mail me at ajjlow@lawfile.org.uk attaching the following to the e-mail;

1. A current and comprehensive Curriculum Vitae of yourself.
2. A self photograph (Portrait Style)
3. A short statement of not more than 300 words as to why you would like to be an Editor of Obiter.
4. Names and addresses of two academic referees—who can attest to your ability to deal with complex legal issues and act in a diplomatic and Editorial manner.
5. A comprehensive list of any articles or papers which you may have had published in journals or periodicals.

I appreciate that not all of the above may apply to those of you wishing to be considered for a position as an Editor but would still like to ask you, whatever your experience, of applying for one of these positions.

I envisage that we will have well in excess of 10 Editors to comprise the Editorial Board and will introduce you to such a board in the very near future.

Unfortunately as Obiter is a free publication the positions of Editor will be without remuneration and will only carry the honour and credit of being able to claim the title of Editor of Obiter.

I look forward to receiving your nominations!