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LAW·COMMISSION  
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*Report 50*

# Electronic Commerce Part One

A guide for the legal  
and business community

*October 1998*  
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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# Summary of contents

	<i>Page</i>
Letter of transmittal	vii
Preface	ix
Acknowledgements	xii
Executive summary	xiii
Summary of questions	xvi
1 Introduction	1
2 Guiding principles	11
3 The law of contract	19
4 The law of torts	51
5 Evidence	72
6 Conflict of laws	89
7 Electronic signatures	108
8 Other issues	120
 APPENDICES	
A UNCITRAL Model Law on Electronic Commerce	139
B Revision of Uniform Commercial Code (extracts)	148
C Law Commission draft Evidence Code (extracts)	153
D Conflict of laws: comparative law	156
Bibliography	175
Index	181

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# Contents

	Para	Page
Letter of transmittal		vii
Preface		ix
Acknowledgements		xii
Executive summary	E1	xiii
Summary of questions	Q1	xvi
1 INTRODUCTION	1	1
<i>Role of the Law Commission</i>	6	4
<i>The international trade project</i>	8	5
<i>Aims</i>	9	7
<i>The Model Law on Electronic Commerce</i>	11	8
<i>Guiding principles</i>	13	9
<i>Summary of this report</i>	15	9
2 GUIDING PRINCIPLES	22	11
The principles	28	13
<i>Principle 1</i>	30	14
<i>Principle 2</i>	34	15
<i>Principle 3</i>	40	17
<i>Principle 4</i>	43	18
3 THE LAW OF CONTRACT	46	19
The nature of a contract	48	20
Fundamental principles	50	21
<i>Intention to create legal relations</i>	55	22
<i>Offer</i>	65	25
<i>Acceptance</i>	68	26
<i>Consideration</i>	75	29
<i>Certainty</i>	78	30
Timing	82	31
<i>Revocation of offer</i>	82	31
<i>Lapse of time</i>	85	32
<i>Withdrawal of acceptance</i>	88	33
<i>Reform initiatives</i>	90	34
Issues of attribution	94	36
Property Law Act issues	100	38
<i>Deeds</i>	100	38
<i>Assignments – Property Law Act 1952 s 130</i>	106	40
The statutory overlay	108	40
<i>Statutory regimes</i>	108	40
<i>The Contracts Enforcement Act 1956</i>	109	41

	<i>The Sale of Goods (United Nations Convention) Act 1994</i>	112	42
	<i>Contracts for international shipment of goods</i>	117	44
	<i>Shipment by sea: sea waybills, bills of lading and the Hague–Visby Rules</i>	118	44
	<i>Contracts for shipment of goods by air</i>	128	47
	<i>Marine Insurance Act 1908</i>	135	49
	Conclusion	137	50
4	THE LAW OF TORTS	138	51
	Trespass to property	147	54
	<i>Interference with goods</i>	149	55
	<i>The nature of the damage</i>	154	56
	Confidential information	158	57
	<i>Unauthorised copying of confidential information</i>	161	58
	<i>Unauthorised interception of communications</i>	165	60
	Negligence	167	62
	<i>Duty of care</i>	168	62
	<i>Standard of care</i>	172	64
	<i>Damage</i>	177	66
	<i>Causation</i>	180	67
	<i>Liability for advice: negligent misstatement</i>	183	68
	Defamation	186	68
	Conclusion	191	70
5	EVIDENCE	193	72
	<i>Objective</i>	201	74
	<i>Purpose of the evidence</i>	208	76
	<i>Discovery</i>	211	77
	<i>Getting the evidence in</i>	226	83
	<i>Authentication</i>	235	85
	<i>Proposed Evidence Code</i>	238	86
	Conclusion	249	88
6	CONFLICT OF LAWS	250	89
	The issues	254	90
	Can the court exercise jurisdiction?	258	92
	<i>Generally</i>	258	92
	<i>“Long-arm” statutes</i>	267	95
	<i>Application to electronic commerce</i>	274	96
	Will the court exercise jurisdiction?	279	98
	<i>The principles</i>	280	99
	Choice of law (or laws)	291	102
	Enforcement of foreign judgments	298	104
	<i>Comparative law: major trading partners</i>	305	106
	Conclusion	308	107

	<i>Para</i>	<i>Page</i>
7	ELECTRONIC SIGNATURES	309 108
	Signatures	312 108
	<i>What is a signature?</i>	316 109
	<i>What is an electronic signature?</i>	321 110
	Digital signatures	322 111
	<i>Digital Signature Act 1995 (Utah)</i>	325 112
	<i>Digital Signature Act 1997 (Federal Republic of Germany)</i>	329 113
	Technological neutrality	333 114
	<i>The Model Law on Electronic Commerce</i>	336 115
	<i>Massachusetts Electronic Records and Signatures Bill 1997</i>	339 116
	<i>California Government Code</i>	342 117
	Conclusion	344 118
8	OTHER ISSUES	346 120
	Confidentiality, privacy, and law enforcement	349 120
	Banking issues	353 121
	<i>Electronic money</i>	354 122
	<i>The legal status of electronic money</i>	361 124
	<i>Paperless documentation</i>	363 125
	Intellectual property	365 126
	<i>Domain names</i>	366 126
	<i>Liability for breaches of copyright</i>	370 128
	<i>Hyperlinks, framing and meta tags</i>	375 130
	<i>Conclusion</i>	381 132
	Securities Law	382 132
	Tax	384 133
	Storage of records	391 135
	Conclusion	396 137
	APPENDICES	
A	UNCITRAL Model Law on Electronic Commerce	139
B	Revision of Uniform Commercial Code (extracts)	148
C	Law Commission draft Evidence Code (extracts)	153
D	Conflict of laws: comparative law	<i>D1</i> 156
	Bibliography	175
	Index	181

1 October 1998

Dear Minister

I am pleased to submit to you Report 50 of the Law Commission, *Electronic Commerce Part One: A guide for the legal and business community*.

Yours sincerely

*The Hon Justice Baragwanath*  
President

*The Right Hon Douglas Graham MP*  
Minister of Justice  
Parliament Buildings  
Wellington





# Preface

**I**N OCTOBER 1997 the Law Commission started a new project on the subject of international trade. New Zealand is reliant on exports for much of its income and its economy is becoming increasingly integrated into a global market for goods and services. Our domestic legal infrastructure must not be an impediment to international trade.

This is the first of four reports which will deal with international trade issues. It addresses, in a preliminary way, the subject of electronic commerce. Our second report will address matters on which submissions have been requested in this report and, in addition, will consider whether further changes are needed to the law to accommodate the needs of those who do business domestically. Our second report will also concentrate on some of the wider issues which have been raised for discussion in this report. Our third report will be more general in its application. It will address international trade issues arising out of other reports and model laws prepared by organs of the United Nations to which New Zealand has not yet subscribed. These matters are referred to in more detail in para 9 of this report. In addition, the Commission is scheduled to complete a discrete report on whether New Zealand should adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency: that report is expected to be released later this year.

This report has been prepared to enable business people and their advisors to consider the impact of electronic commerce. Of necessity we have restricted our discussion of applicable law to the law of New Zealand. Some transactions entered into with entities overseas will be governed by New Zealand law; others will not. In some cases there will be a contest as to which law applies and/or as to the state in which litigation should take place. These issues are dealt with by the rules concerning conflict of laws. Again, however, it is important to recognise that the rules which are applied in New Zealand are those of New Zealand's domestic law and that the laws of other countries may be different. There is also an international dimension. Ultimately, because of its global nature, the internet will need to be regulated through international rather than purely territorial means. This report addresses the type

of matters that will need to be considered in advancing a global strategy to deal with these issues.

Electronic commerce is a generic name for business transactions which are entered into through electronic rather than paper-based means. It is not limited to the commercial use of the internet, although that is an important example of electronic commerce. The growth of electronic commerce holds much potential for New Zealand's economy, but for that potential to be realised it is vital that the legal infrastructure is modern enough to cope with new challenges.

This report has been structured to examine the substance of commercial transactions and risks in an electronic environment, and to analyse the application of existing commercial law in that context. In doing so we have taken an elementary approach, because it is necessary to understand how a transaction operates in law before asking how the outcome will be influenced by any move to an electronic medium. We have adopted principles for reform which place emphasis on the need to clarify existing law rather than introduce specific legislation. This approach recognises the commercial need for a predictable legal environment, regardless of the medium used to conduct trade. But in the longer term, it also recognises that electronic commerce is global in its nature: ultimately, the laws which govern electronic commerce will need to be international rather than domestic in their application. In conjunction with the Ministry of Commerce, and with assistance from the Ministry of Foreign Affairs and Trade, the Commission will continue to monitor developments in international commercial law and practice.

In this report we have raised issues for comment and asked for submissions in a number of areas. Apart from the law of evidence, in which the Commission has a pre-existing reference from the Minister of Justice, we do not make firm recommendations for reform. Any other recommendations will be made in our second report on electronic commerce which will take into account submissions received in response to this report.

We have released this report in the Commission's report series, rather than as a preliminary paper, in recognition of the fact that its analysis is likely to be useful as a guide to practitioners and those engaged in business. We intend that the two parts of the electronic commerce report be used as a lasting reference work.

The Law Commission has been assisted by a number of individuals in preparing this paper, including Elizabeth Longworth, Barrister

and Solicitor of Longworth Associates, Auckland; Christopher Nicoll, Senior Lecturer in Commercial Law, University of Auckland; David Goddard of Chapman Tripp Sheffield Young, Wellington; and Peter Jones, Senior Lecturer in Law, University of Waikato. We gratefully acknowledge their assistance.

The Commissioner in charge of the International Trade Law project is Mr DF Dugdale. Mr Paul Heath QC of Hamilton is a Consultant to the Law Commission on Commercial Law. We also acknowledge the work of Nicholas Russell and Megan Leaf, researchers at the Commission.

Submissions or comments on this paper should be sent to Nicholas Russell, Law Commission, PO Box 2590, DX SP 23534, Wellington by 18 December 1998, or by email to [NRussell@lawcom.govt.nz](mailto:NRussell@lawcom.govt.nz). We prefer submissions to be made by email if possible. Any initial inquiries or comments can also be directed to Nicholas Russell: phone (04) 473 3453 or fax (04) 471 0959. This paper is also available from the Commission's website: [www.lawcom.govt.nz](http://www.lawcom.govt.nz).

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Mark Steel, Ministry of Commerce, Wellington

Dr Dennis Viehland, Senior Lecturer, Information Systems, Massey University, Palmerston North

Michael Wigley, Barrister and Solicitor, Wellington



# Executive summary

E1 **N**EW ZEALAND'S BASIC COMMERCIAL LAW is derived from nineteenth-century English law, both common law and consolidating statutes. Examples are the Sale of Goods Act 1908, Mercantile Law Act 1908, Partnership Act 1908 and (until 1996) Arbitration Act 1908. When this law was made, the only forms of electronically generated communications were the telegraph and the telephone: the Bell Telephone Company itself not being founded until 1877. Thus, the law which New Zealand inherited from England at the turn of the twentieth century was designed to facilitate paper-based transactions. At the eve of the twenty-first century, the question is whether that legal infrastructure is, without reform, sufficient to meet the needs of those who wish to engage in trade through electronic means.

E2 The Law Commission decided late last year to embark upon a project to consider whether existing commercial laws were sufficient to accommodate the needs of those engaged in electronic commerce. This report is the result of our first phase of inquiry. Our second report will make recommendations on the form of any reforms proposed as a result of submissions made to us.

E3 Business benefits to be gained by trading through electronic, rather than paper-based, means include:

- lower information transfer costs;
- lower procurement costs;
- reduced inventory costs;
- product customisation;
- ability to conduct business with distant partners in the same way as with neighbouring partners; and
- increased operational efficiency.

If the law can be reformed to facilitate these benefits then much economic benefit to both traders and the national economy can result.

E4 The structure of this report is somewhat different to reports which have been released in other jurisdictions dealing with electronic commerce issues. The Commission's view is that commercial law reform is aimed at improving business efficiency while, at the same time, retaining safeguards for those who use it. In order to address

the problems that arise in adapting the law to fit the electronic environment, the Commission, at an early stage, identified four guiding principles by which it proposed to conduct its analysis. Those guiding principles are:

- To ensure that business people can choose whether to do business through the use of paper documentation or by electronic means without any avoidable uncertainty arising out of the use of electronic means of communication.
- To ensure that fundamental principles underlying the law of contract and tort remain untouched save to the extent that adaptation is required to meet the needs of electronic commerce.
- To ensure that any laws which are enacted to adapt the law of contract or the law of torts to the use of electronic commerce are expressed in a technologically neutral manner so that changes to the law are not restricted to existing technology and can apply equally to technology yet to be invented.
- To ensure compatibility between principles of domestic and private international law as applied in New Zealand and those applied by our major trading partners.

In relation to the last of these guiding principles we have provided in appendix D of this report a comparative law study on issues of conflict of laws.

- E5 Furthermore, we decided to address, in the first instance, electronic commerce issues in an international context. Having said that, we emphasise that our objectives (necessarily) are limited to reform at a domestic level. Compatibility of approach with that of major trading partners will help to ensure that New Zealand businesses do not face costs or obstacles which render the use of electronic commerce uncompetitive. Our work should also be seen as a contribution to an ever-growing foundation for future harmonisation of international commercial law.
- E6 We have considered the law of contract, the law of torts, the law of evidence and the rules of conflict of laws in the context of the principles which we have stated. On these matters we have provided an analysis (in a more elementary form than is customary in a Law Commission report) of how these areas of law are affected by the electronic environment; we have suggested methods of reform on which we have sought submissions (see generally, questions Q1–Q17 in the summary of questions). We have then looked at particular issues arising out of the use of electronic media: notably, issues concerning electronic signatures, banking, intellectual property, tax and privacy. On all of these latter points

we have raised general questions for consideration which we will address in more detail in a further report to be published by the end of April 1999 (see, more specifically, questions Q18–Q30). On all issues we have compared our approach with the provisions to be found in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce and the Australian (Federal) Electronic Commerce Expert Group's report, *Electronic Commerce: Building the Legal Framework*.

- E7 Appendix A to this report is a copy of the UNCITRAL Model Law on Electronic Commerce. Appendix B is a reproduction of extracts from the draft Uniform Commercial Code of the United States of America which deals with similar issues, but in more detail. A comparison of the two texts shows the difference in approach between legislation designed to provide a framework and legislation designed to deal with matters of detail. One of the issues which must be addressed is the type of legislation required to resolve any problems created by commercial activity through electronic means.
- E8 Appendix C contains extracts from the draft Evidence Code which will be recommended when the Commission publishes its final report on its evidence reference later this year. The relevant provisions, which we believe will meet the needs of those who wish to engage in electronic commerce, are discussed in chapter 5.
- E9 Another fundamental issue is whether New Zealand should follow its own predisposition against legislation for particular industries or circumstances. Given the global nature of the internet, New Zealand might be better advised to follow the approach favoured (if there is unanimity) by our major trading partners. Time will give us more information against which to address that difficult question.
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## Summary of questions

THE FOLLOWING QUESTIONS ARE IDENTIFIED in this paper as being matters on which the Law Commission is particularly interested in receiving comments.

### *The law of contract*

- Q1 Is it necessary for the law to state expressly that parties to an agreement are bound by the acts of an electronic system under their control, and may not deny liability purely on the grounds that the electronic system acted without direct human input? (paras 55–64)
- Q2 Does the requirement that the terms of a contract be sufficiently certain pose any particular problem when contracts are formed electronically? (paras 78–81)
- Q3 Should the law be reformed to allocate risk presumptively for electronic messages which are delayed, or should parties be free to make their own arrangements? (paras 85–87)
- Q4 Should a general statutory provision on timing of electronic messages similar to article 15 of the UNCITRAL Model Law on Electronic Commerce be adopted in New Zealand? (paras 90–93)
- Q5 Should there be special statutory rules which attribute liability for electronic messages? (paras 94–99)
- Q6 Should there be an optional statutory register to facilitate electronic bills of lading? (para 125)
- Q7 Is special legislation necessary to facilitate the use of electronic bills of lading, or is it sufficient to allow for electronic equivalents of “writing” and “signature” and leave other impediments for the market to resolve? (para 127)
- Q8 Is there any justification for continuing the existing requirement that air waybills be printed on paper? (paras 129–134)

### *The law of torts*

- Q9 Are there any policy reasons for limiting the boundaries of tortious liability incurred from the use of electronic communication net-



works, having regard to the problems of defining “neighbourhood” in an electronic environment? (paras 191–192)

### *Evidence*

- Q10 Are there any circumstances in which it would not be appropriate to use a standard statutory definition of “document” which includes documents in electronic form? (paras 215–225)
- Q11 Are there any circumstances in which evidence would be inadmissible only by reason of having been created or stored electronically? (paras 235–237)
- Q12 Do the Commission’s recommendations for reform of the law of evidence meet the needs of electronic commerce? (paras 238–249)

### *Conflict of laws*

- Q13 Should New Zealand adopt presumptive rules as to choice of law and choice of forum, such as those relating to sales contracts provided for by the Vienna Sales Convention? (para 297)

### *Electronic signatures*

- Q14 Should New Zealand adopt a statutory provision similar to article 7 of the UNCITRAL Model Law on Electronic Commerce, which allows electronic signatures to have the same effect as manual signatures? (paras 343–344)
- Q15 Should any such reform, if adopted, also specify acceptable standards for electronic signatures, or should standards of security or reliability be left for the market to develop? (paras 343–344)
- Q16 Does New Zealand need a domestic electronic signature infrastructure? (paras 343–344)
- Q17 Should the state play any role in facilitating the use of electronic signature technology, for example, by assuming responsibility for the implementation of such an infrastructure? (paras 343–344)

### *Other issues*

- Q18 How can the appropriate balance be struck between the legitimate need to protect confidentiality of communications and the equally legitimate need of the community to ensure its laws are properly policed? (para 348–351)
- Q19 Which government agency is best placed to address the need for reform and the nature of any reform? (para 348–351)

- Q20 Is there any need to control the issue or use of “electronic money” in New Zealand (paras 360–361)
- Q21 Should issuers of “electronic money” be required to register as banks under the Reserve Bank of New Zealand Act 1989? (paras 360–361)
- Q22 Is special legislation necessary, for example, to prevent “electronic money” from being used to launder money, or to protect consumers in the event of issuers defaulting? (paras 360–361)
- Q23 Is there any need to be concerned about the international movement of “electronic money”? (paras 360–361)
- Q24 Are there any legal or economic implications arising from allowing “electronic money” issued in one country to be redeemed in another? (paras 360–361)
- Q25 Should banking issues be addressed by the Law Commission or the Reserve Bank of New Zealand? (paras 360–361)
- Q26 Are any further steps, beyond redefining “writing” and “signature” to include electronic equivalents, necessary to facilitate paperless international banking transactions? (paras 362–363)
- Q27 Do the laws which protect intellectual property need to be reformed to cope with new forms of electronic communications and publishing? If so, should the Law Commission or the Ministry of Commerce undertake such work? (paras 364–380)
- Q28 Should the Securities Act 1978 be amended to give the Securities Commission jurisdiction over securities offers made to the New Zealand public from overseas? Should this issue be dealt with by the Law Commission or the Securities Commission? (paras 381–382)
- Q29 Is there a case for special rules for the taxation of electronic transactions? Should such issues be addressed by the Law Commission or the Inland Revenue Department? (paras 383–389)
- Q30 Should New Zealand enact a provision similar to article 10 of the UNCITRAL Model Law on Electronic Commerce, allowing those people or organisations who are required to keep records to do so electronically? (paras 390–394)

## *General questions*

The following questions have been identified during our research into legal issues raised by electronic commerce. They do not address electronic commerce issues as such, but rather represent general legal issues which have been brought into sharp focus by the advent of electronic commerce.

- Q31 Should the doctrine of consideration continue to be an essential element of binding contracts? (paras 75–77)
  - Q32 Should the Land Transfer Act 1952 be amended to allow the register itself and registrable instruments to be in electronic form? (para 111)
  - Q33 Are there any statutes which cannot be reformed to permit electronic transactions merely by redefining “writing” and “signature” to include electronic equivalents? (para 137)
  - Q34 Is a statutory remedy of breach of confidence necessary to impose civil liability for unauthorised copying or interception of confidential information? (paras 158–166)
  - Q35 Should New Zealand adopt the Lugano Convention on conflict of laws and recognition of foreign judgments? (paras 305–307)
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# 1

## Introduction

1 **E**LECTRONIC COMMERCE IS A GENERIC NAME given to business transactions which are entered into through electronic rather than paper-based means. No single definition of the term “electronic commerce” has attained universal approval. For the purposes of this paper, the term “electronic commerce” means the use of electronic communications technology (instead of paper, telephone or face-to-face meetings) for business purposes in the widest sense. Electronic commerce is not limited to the purchase and sale of goods or services on the internet: rather, it extends to cover a number of primary and support activities which include electronic publishing, intra-organisational communications (eg, through intranets), computer-supported meetings and communications with other businesses.<sup>1</sup> In this paper the word “internet” is used as shorthand for interconnected computer networks; it is not intended to denote any particular form of computer network. In the same way that commerce (in the sense of the mix of marketing, management, finance and business law) largely consists of information

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<sup>1</sup> The internet was developed by the United States Defence Department in the early 1970s. It was then known as ARPANET (Advanced Research Projects Agency Network). It was designed to provide communications which would not be disrupted even in the event of a major emergency. Computers were interconnected so that each computer in the network was connected to each other computer. Electronic messages could be sent from A to B directly or via any other computer or computers in the network. If part of the network became unoperational, the message would arrive at its destination regardless via an alternative route. The second feature is that the messages are not sent as a single stream of data. Rather they are divided into discrete “packets” that are sent separately and reassembled by the recipient computer. Each packet may take a different route to the destination in order to avoid congestion. The internet is identical to the ARPANET in its operation with the major difference being that while the ARPANET consisted of approximately 40 computers, there are now literally millions of interconnected computers any of which can communicate freely with the others (Gringras 1997 3). The term “intranet” means an internal network which uses the same technology as the world wide web (see para 4) to show and link documents. It is not necessarily linked to the internet itself, but when it is it can allow in viruses and hackers (see para 148) from outside (Gringras 1997 383).

gathering, processing, and distribution networks, electronic commerce is the use of computers and telecommunication networks to carry out those same functions (Viehland 1997 1; see also Tapsell 1998 63).

- 2 All computer-based data communications are based on the bit: a bit being a binary digit (0 or 1). This has changed the fundamental nature of what is used to deliver information from one person to another. It has been said that:

We live in the age of information in which the fundamental particle is not the atom but the bit. Information may still be delivered in magazines or newspapers (atoms), but the real value is in the contents (bits). We pay for our goods and services with cash (atoms) but the ebb and flow of capital around the world is carried out – to the tune of several trillion dollars a day – in electronic funds transfers (bits). (Negroponte cited in Viehland 10)

As Viehland notes, bits do not follow rules that govern other business resources (10). They are weightless. They are easily and flawlessly reproduced. They exist in an infinite supply. They can be shipped anywhere at nearly the speed of light. The implications of this are that barriers of time and space disappear and information distribution costs shrink significantly. If electronic commerce is to result in true savings to business it must be both sufficiently secure and sufficiently adaptable to meet the needs of businesses which currently trade in the paper-based environment. This entails merchants trading with each other having the ability to carry out other functions (such as documentation for shipping of physical goods by air, sea or road, insuring of risk and completion of financial settlements) through the same electronic system. A fully integrated electronic commerce system will require government regulatory bodies to provide and accept certificates and other “documentation” in electronic form to facilitate trade. There is already a facility to transact business electronically through the New Zealand Customs Service. The Inland Revenue Department is also moving to an electronically-based system. A coherent regime is required to ensure that all of these various aspects of trade can blend together in electronic form to produce a wholesome product.

- 3 Commerce can be carried out at different levels. First, there is the business-to-business level; second, there is the consumer-to-business level. The potential implications for consumers in the increasing use of electronic commerce has already been recognised by the Ministry of Consumer Affairs in a 1997 discussion paper, *Electronic Commerce and the New Zealand Consumer: Issues, and Strategies for the Future*. In the first instance, the Commission

proposes to examine electronic commerce from the perspective of those involved in international trade on a business-to-business basis. This is being done to focus issues of law reform on the potential benefits that can be gained from international trade given that, of course, New Zealand earns its living from export earnings. Electronic commerce issues which affect consumers have already been the subject of the Ministry of Consumer Affairs' discussion paper. The Organisation for Economic Co-operation and Development (OECD) is now addressing the question of law reform to protect the interests of consumers on the internet in its Draft Recommendation concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, due to be concluded in October 1998.

- 4 The ability for businesses and consumers to access trading opportunities through the internet and the world wide web renders it necessary to reconsider the fundamental principles of business law by asking what changes, if any, ought to be made to the law to facilitate trade on an electronic basis.<sup>2</sup>
- 5 Business-to-business commerce over the internet (consisting of parts and supplies ordering, financial services and the like) reached an estimated \$US8 billion in 1997: 10 times the 1996 total. Erwin estimated in a 1997 paper, "Sizing Intercompany Commerce", that business-to-business commerce over the internet will grow to \$US327 billion by the year 2002 (1). While it is not possible to vouchsafe the accuracy of the estimated value of future electronic commerce, it is plain that there are many advantages to business by trading through electronic means rather than through a paper-based regime. The business benefits are summarised by Viehland as being:
  - lower information transfer costs;
  - lower procurement costs;
  - reduced inventory costs;
  - product customisation;

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<sup>2</sup> The technology that makes the internet usable by other than specialists is the world wide web (www). This is a system of linking text, graphics, sound and video on computers spread across the globe. The basic technology of the web was created to assist physicists to keep track of all data generated by their experiments. At the heart of the technology is a programming language, hyper-text mark-up language (HTML), which allows a phrase or graphic in one document to be linked to another document anywhere on the global internet. Websites are being used to provide information about particular companies or their products; other websites are being used to sell goods directly over the internet in a form of electronic mail order (see generally, Gringras 1997 388).

- the ability to conduct business with distant partners in the same way as with neighbouring partners; and
- increasing operational efficiency (14–16).

It has been reported that about 10 percent of major New Zealand organisations expect to spend more than \$500,000 each in setting up electronic commerce systems over the next 2 years.<sup>3</sup>

### *Role of the Law Commission*

- 6 The Law Commission has a respectable pedigree in relation to its support of uniform statutes to facilitate international trade: in particular, reference is made to the reports which preceded the enactment of the Sale of Goods (United Nations Convention) Act 1994 and the Arbitration Act 1996. The proposed work of the Commission on electronic commerce builds on that foundation. In addition, the work done by the Commission in identifying the sources of international law has relevance to the international trade aspects of this inquiry.<sup>4</sup>
- 7 In a paper delivered by Law Commission consultant Paul Heath QC to the Asia Pacific Economic Law Forum in Christchurch in 1997, the Commission identified the approach which it took in deciding whether to embark upon this particular project (published as “A Legal Infrastructure for Electronic Commerce?” (1998) 7 *Canta LR* 11). That approach was neatly summarised by the Common Law Team of the Law Reform Commission of England and Wales in the 1996 consultation paper, *Feasibility Investigation of Joint and Several Liability*. First, the Commission must be satisfied that there is something wrong with the law, in particular that it is unfair or inefficient; second, the Commission must be satisfied that there are acceptable legislative solutions that would remedy any deficiencies (para 1.2). This Commission has approached issues raised by electronic commerce by asking itself those same questions. We are satisfied that the law can be made clearer (and, therefore, more efficient) in its application to electronic commerce.

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<sup>3</sup> *New Zealand InfoTech Weekly*, 2 February 1998, 1, referring to a survey conducted by Price Waterhouse, Chartered Accountants. Of the 105 companies (out of 300 consulted) that responded, four said that more than \$2 million would be spent on setting up an electronic commerce site and two others said that they would expect to spend between \$1 million and \$2 million.

<sup>4</sup> See the Law Commission reports *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance* (NZLC R23 1992); *Arbitration* (NZLC R20 1991); and *A New Zealand Guide to International Law and its Sources* (NZLC R34 1996).



## *The international trade project*

8 This is the first of a series of reports dealing with international trade issues. We summarise below the purpose of each of the reports which we propose to make:

- This report questions whether existing commercial laws are sufficient to accommodate the needs of electronic commerce. The recommendations contained in this report address changes to the law which are required immediately in order to provide sufficient clarity to enable business benefits of the type summarised in para 5 to be achieved. We ask whether the current law meets the need of those engaged in business-to-business commerce through electronic means internationally. While domestic business transactions are not considered discretely in this report, the question whether the law meets the needs of domestic business transactions will, largely (but not completely), be determined by the answer to the question whether the law meets the needs of those doing business internationally. There are two particular points of distinction between international business transactions and domestic business transactions. First, domestic business transactions will almost invariably be governed by New Zealand law; in an international setting the question of what law governs the transaction will be determined either by the parties (by a choice of law clause contained in their contract) or by the courts (applying domestic law principles of conflicts of laws; see chapter 6). Second, under New Zealand domestic law, transactions may be governed by different rules depending upon whether they are conducted domestically or internationally. A practical example of this are the differing presumptive regimes applied to domestic and international sales of goods.<sup>5</sup>
- Our second report will address the questions raised in this report (in light of submissions made to us) and will consider whether changes to the law are needed to accommodate the needs of those doing business domestically.
- Our third report is intended to be more general in its application. We propose to address international trade issues arising out of other reports and Model Laws prepared by organs of the United Nations to which New Zealand has not yet subscribed.

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<sup>5</sup> Compare Sale of Goods Act 1908 which applies to domestic transactions with the Sale of Goods (United Nations Convention) Act 1994 which applies to certain international contracts.

These will include, but not be limited to, consideration of the question whether New Zealand should adopt various conventions on the recognition of foreign judgments.<sup>6</sup> It is at this stage that a wider question can also be addressed. That question can be stated as follows:

Can the developing trend of adoption by countries reliant upon international trade, of uniform statutes recommended by organisations such as UNCITRAL, together with the increasing use of standard form contracts or other international standards, truly be regarded as a modern transnational *lex mercatoria*?

This is an issue which must be addressed because of the global nature of the internet. The law applicable to internet transactions (which itself is likely to build on the Conventions and Model Laws to which we have referred) may well turn on international trade custom rather than national legislation. The Commission proposes to contribute to the development of principles of law which meet the needs of international commerce in the twenty-first century in the same way that the *lex mercatoria* met the requirements of traders living under the Roman Empire.<sup>7</sup>

- Finally, a report will be issued later this year which will consider whether New Zealand should adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency.

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<sup>6</sup> Matters to be discussed in this report will include the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Credit Transfers; United Nations Convention on International Bills of Exchange and International Promissory Notes; and the possible adoption of the Brussels Lugano and San Sebastian Conventions (see also Australian Law Reform Commission, *Legal Risk in International Transactions* (Report 80, 1996) 221ff). Consideration will also be given to the proposed European Convention on Insolvency Proceedings and the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules); in the case of the latter the question will be whether the Hamburg Rules are more suited to electronic commerce than the amended Hague Rules currently enshrined in Schedule 5 of the Maritime Transport Act 1994; see in particular s 209.

<sup>7</sup> Although the notion of a general *lex mercatoria* has been disowned by the common law in recent times the suggestion is not without good authority. In *Luke v Lyde* (1759) 2 Burr 822; 97 ER 614, Lord Mansfield noted, in relation to a maritime case, that it “was desirous to have a case made of it, in order to

## Aims

- 9 The Commission sees its work on electronic commerce and other international trade issues as being no more than an initial study of the general, and difficult, issues that arise. Reference has already been made to the possibility of some form of modern transnational *lex mercatoria* being recognised by individual jurisdictions. Wider issues also arise, such as the need to balance rights of privacy and desires for business confidentiality against the state's interests in law enforcement and national security. It is not difficult to appreciate the complex and troublesome issues that arise in this regard: while private methods of encryption of messages may well be considered desirable by business people (to achieve confidentiality), there is also a legitimate interest for the state to ensure, for example, that illicit trade in arms or child pornography does not take place. These issues are identified in chapter 8 and submissions are sought on how they should be addressed.
- 10 The Commission has endeavoured to develop principles which are first, consistent with those which underlie the UNCITRAL Model Law on Electronic Commerce which was approved by the General Assembly of the United Nations on 16 December 1996, and secondly, consistent with policy statements released in other jurisdictions since that time. The Commission has also had the advantage of considering the 1998 report of the Electronic Commerce Expert Group to the Australian (Federal) Attorney-General, *Electronic Commerce: Building the Legal Framework*, from which we have

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settle the point more deliberately, solemnly and notoriously; as it was of so extensive a nature; and especially as the Maritime Law is not the law of a particular country, but the general law of nations: . . .". Lord Mansfield then referred to a quotation from Cicero, *De Republica* 3.22.33: "nor will it be one law at Rome and a different one at Athens, nor otherwise tomorrow than it is today: but one and the same law will bind all peoples and all ages". As Rt Hon Justice Sir Kenneth Keith observed in his 1997 paper, "The International Law Commission's Work the Shaping of International Law": "[Lord Mansfield] was not agreeing with Cicero that the law was unchanging but he was saying that we must concentrate on the essence of our time and understand present conditions and future needs. The dictates of common sense should be heard in the language of recorded experience" (see also the approach of the Privy Council in *Re Piracy Jure Gentium* [1934] AC 586, 588–589; and Higgins 1994). We also note Lord Mustill's 1988 paper, "The New *Lex Mercatoria*: The First Twenty-Five Years" which puts forward a list of 20 principles as constituting a modern *lex mercatoria* from 25 years of international arbitration (see also Redfern and Hunter 1991 117–121).

derived considerable assistance (available at <http://www.law.gov.au/aghome/advisory/eceg>).<sup>8</sup>

### *The Model Law on Electronic Commerce*

- 11 The UNCITRAL Model Law on Electronic Commerce is divided into two parts: the first deals with electronic commerce generally while the second deals with electronic commerce in specific areas (carriage of goods and transport documentation). In discussing the issues the Model Law's *Guide to Enactment* states:

It was observed that the Model Law should permit States to adapt their domestic legislation to developments in communications technology applicable to trade law without necessitating the wholesale removal of the paper based requirements themselves or disturbing the legal concepts and approaches underlying those requirements. At the same time it was said that the electronic fulfilment of writing requirements might, in some cases, necessitate the development of new rules. This was due to one of the many distinctions between EDI [electronic data interchange] messages and paper based documents, namely, that the latter were readable by the human eye, while the former were not so readable unless reduced to paper or displayed on a screen. (20)

- 12 The UNCITRAL Model Law relies upon the “functional equivalent approach”. This approach is

based on an analysis of the purposes and functions of the traditional paper based requirement with a view to determining how those purposes or functions could be fulfilled through electronic commerce techniques. For example, among the functions served by a paper document are the following: to provide that a document will be legible by all; to provide that a document would remain unaltered over time;

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<sup>8</sup> Policy statements released in other jurisdictions include, for example, *A Framework for Global Electronic Commerce* (policy statement issued by President Clinton and Vice-President Gore by the White House, Washington DC, 1 July 1997); *European Initiative in Electronic Commerce* (a communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 15 April 1997); the American Law Institute and National Conference of Commissioners on Uniform State Laws, *Revision of Uniform Commercial Code: Article 2 – Sales* (draft, November 1997); Uniform Law Conference, Canada, *Consultation Paper on a Proposed Uniform Electronic Evidence Act* (March 1997); Standards Australia, *Strategies for the Implementation of Public Key Authentication Framework (PKAF) in Australia* (1996); *Electronic Commerce: Cutting Cybertape: Building Business* (Corporate Law Economic Reform Program, Commonwealth of Australia, Report 5, 1997); and the report produced for the French Ministrie de l'economie des finances et de l'industrie, *Electronic Commerce: A New Factor for Consumers, Companies, Citizens and Government* (1998).

to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts. . . . However, the adoption of the functional equivalent approach should not result in imposing on users of electronic commerce more stringent standards of security (and the related costs) than in a paper based environment. (*Guide to Enactment* 20–21)

### *Guiding principles*

- 13 We have developed four guiding principles to assist our research into electronic commerce which are set out in full and discussed in chapter 2. These principles have been developed so that submissions can be made on the recommendations of the Commission having regard to the policy which underlies the recommendations.
- 14 We also follow the “functional equivalent approach” promulgated by the Model Law on Electronic Commerce. Accordingly, this report is prepared on the basis of the four guiding principles in conjunction with the functional equivalent approach adopted by UNCITRAL.

### *Summary of this report*

- 15 Commercial law reform is aimed at improving business efficiency while, at the same time, retaining safeguards for those who use it. We believe that fundamental principles of commercial law should, so far as is practicable, be retained when adapting the law to fit the electronic commerce environment.
- 16 In chapter 2 we deal with the guiding principles identified by the Commission and explain the reasoning behind adoption of those principles.
- 17 Chapters 3 and 4 of the paper deal with questions involving the law of contract and tort. We examine in this chapter whether any specific changes to the law are required to enable business to be transacted easily through electronic form.
- 18 Chapter 5 deals with matters relating to evidence. Later this year, the Law Commission will release its final report on its evidence reference. The Commission will make recommendations for the enactment of an Evidence Code which, in its present draft form, will enable evidence stored in an electronic form to be produced readily. We proceed on the basis of the recommendations to be adopted in the Evidence Report. We have set out in appendix C the relevant provisions of the current draft Evidence Code even

though those provisions remain subject to possible refinement before the final report is published.

- 19 Chapter 6 deals with issues of conflict of laws and identifies the conflict of laws issues which need to be taken into account in this context.
- 20 Chapter 7 addresses the issue of electronic signatures and discusses the options available for reform.
- 21 Chapter 8 summarises a variety of other issues which have arisen from our consideration of electronic commerce. Submissions are sought both as to what further work needs to be done and as to which body is most appropriate to carry out that work.



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## 2

# Guiding principles

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**T**O BE SUCCESSFUL, any reform of the law to take account of the needs of electronic commerce must be developed in a principled and systematic way. The needs of the commercial community must be taken into account, especially the need for predictability in commercial law. It is also important to distinguish between problems which require a statutory solution and those which are best left to the market or the common law to solve. In broad terms the Commission agrees with recommendations made by the Australian Electronic Commerce Expert Group in *Electronic Commerce: Building the Legal Framework*. The Expert Group's objectives were summarised as follows:

- remove legal impediments to the implementation of electronic commerce;
- ensure certainty as to the application of the law to electronic commerce and enhance business and consumer trust and confidence;
- minimise costs and litigation;
- be applicable to a wide range of transactions, facilitating both related and unrelated transactions;
- minimise regulatory burdens upon government and business by adopting a minimal approach and ensuring functional equivalents between paper-based and electronic transactions;
- facilitate the cross-border recognition and enforcement of electronic transactions and signatures.<sup>9</sup>

These objectives are broadly the same as those identified in the Law Commission's guiding principles as defined in the paper presented to the the Asia Pacific Economic Law Forum in 1997 (published as "A Legal Infrastructure for Electronic Commerce?" (1998) 7 *Canta LR* 11).

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<sup>9</sup> *Electronic Commerce: Building the Legal Framework* 4. Another objective was to provide a vehicle for the harmonisation of laws governing electronic commerce across Australia: this issue does not arise in a unitary state such as New Zealand.

- 23 The Commission has identified as an objective of this work the need to facilitate business efficiency by ensuring that the law keeps apace with technology rather than reacting to it in an ad hoc fashion. As the *Guide to Enactment* of the UNCITRAL Model Law recognises, it is not a matter of electronic communications replacing paper-based methods of doing business; rather, it is a matter of enabling businesses to choose which of the systems they wish to use (para 15). We observe that a different principle may well apply if electronic systems are given legislative approval in order to replace existing paper-based systems.<sup>10</sup> If an electronic regime is mandated by legislation it can be argued cogently that government should assume a responsibility to ensure that the electronic system is as safe and secure as the paper-based system;<sup>11</sup> or, possibly more precisely, that mechanisms are put in place to ensure that market participants will not be disadvantaged by the removal of the right to trade through paper-based systems. Subject to that one (possible) qualification, the principle of choice remains paramount.
- 24 However, the special characteristics of the internet raise particular problems for those who would regulate its use. The internet is global in its operation and neither it nor its users have any regard for traditional concepts of geographical distance or sovereignty. In other words, the internet has no nationality. There is, for example, no distinction between local and international communication, and the actual geographical location of a website or correspondent may be difficult to determine.
- 25 The practical implications of the global nature of the internet for law reform purposes are, at least to some extent, clear. First and foremost, if there is a need to regulate the use of the internet, it will ultimately require international solutions. Apart from banning access to electronic communications entirely, little can be done at a national level to control the actions of internet users or their access to information, products and services. This has led some commentators to advocate minimal regulation or even no regulat-

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<sup>10</sup> For example, the changes to the method by which shares can be transferred under the upgraded FASTER system (Fully Automated Screen Trading and Electronic Registration): see Securities Transfer Act 1996 s 7.

<sup>11</sup> Submissions of the New Zealand Law Society's Commercial and Business Law Committee to the Securities Commission on proposed changes to the FASTER system, 23 October 1997.



ion at all.<sup>12</sup> Second, it is not clear that, even if regulation is desirable, the formulation of international rules for electronic commerce requires governments to negotiate a formal convention.<sup>13</sup>

- 26 It is preferable that uniform terms, based on custom and usage, be developed. These can be given effect in two ways. First, those terms can be embodied in a contract which governs the relationship between the parties. Alternatively, they can be embodied in a convention signed by various states. If New Zealand adopts such a convention New Zealand law would be presumed to conform with its terms. Such commercial usage could translate into a form of *lex mercatoria*.
- 27 The Law Commission has taken these factors into account in formulating its principles for reform. However, rules and standards for the facilitation of international electronic commerce will be of little use if domestic law acts as a barrier or disincentive to business. We therefore consider that the first phase of the electronic commerce project must be to ensure that New Zealand's domestic law is conducive to international electronic commerce. The work of the Commission in this first phase should provide the ground work for more detailed recommendations in the future. Liaison with other international bodies will assist in achieving compatibility of approach with our major trading partners. But, to get maximum benefit from such liaison, the aim should be to achieve a consensus which can be embodied in a convention which will be adopted as part of the domestic law of each state involved.

## THE PRINCIPLES

- 28 In developing the following guiding principles, the Commission has endeavoured to ensure that its recommendations are, as far as practicable, consistent with the themes which underpin both the UNCITRAL Model Law on Electronic Commerce and the policy

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<sup>12</sup> For example, current United States policy is that the internet should be a tariff free environment for the delivery of goods and services: *A Framework for Global Electronic Commerce* (a policy statement issued by President Clinton and Vice-President Gore by the White House, Washington DC, 1 July 1997); see also the Internet Tax Freedom Bill currently before Congress (available from the Congress library at <http://thomas.loc.gov/home/thomas2.html>).

<sup>13</sup> Goode, in Cranston and Goode (eds) 1993, identifies nine distinct ways of developing commercial law internationally. Of these only four have the force of law. An example of international trading rules which are adopted contractually rather than via legislation is the International Chamber of Commerce's Incoterms, which cover the shipment of goods.

statements issued by other jurisdictions. Those principles, while expressed in different language in different documents, generally reflect similar objectives, for example:

- the need to avoid unnecessary or inefficient regulation;
- the need to provide a basic legal framework to ensure electronic commerce can function in a consistent, efficient and predictable way; and
- the need for such a legal framework to apply internationally, bearing in mind the global nature of the internet and the huge potential of electronic commerce.

29 The four principles which the Commission has identified as guiding principles, are now addressed.

### *Principle 1*

30 The Commission's first guiding principle is:

To ensure that business people can choose whether to do business through the use of paper documentation or by electronic means without any avoidable uncertainty arising out of the use of electronic means of communication.

31 Fundamentally, principle 1 is concerned that the right to choose between electronic and paper media should not to be limited by avoidable uncertainties in the law ("law" in this context means the domestic law of New Zealand including conflict of laws rules). Facilitation of electronic commerce does not warrant (at least at this stage of its development) the wholesale replacement of paper-based methods of doing business. Business people should have the opportunity to choose how they wish to do business. This choice will be influenced by factors such as efficiencies and cost. Sometimes, that choice will involve a blend of both electronic and paper media. However, as technology improves and its cost reduces, the "choice" may become less obvious: it may as a matter of economic survival be necessary to transact business purely through electronic means.

32 Emphasis must also be placed on the stated objective of ensuring that "avoidable uncertainty" does not arise out of the use of electronic means of communication. The word "avoidable" has been deliberately chosen. There is a tendency to seek standards of security from electronic forms of communications which are, in fact, higher than those demanded from paper documentation. Risks are inherent in doing business. There is always a risk that a paper document will be forged or that a facsimile sent to accept an offer will not be received. Thus, the emphasis should be on ensuring

that “*avoidable* uncertainty” is removed while accepting that there will always be some *unavoidable* uncertainties in the business process.

- 33 The cost of resolving disputes in an unpredictable legal environment is also relevant to this principle. Businesses (particularly the small and medium-sized businesses which may benefit the most from electronic commerce)<sup>14</sup> may be dissuaded from using electronic communication because of uncertainties in the law and the likely cost of litigating (in both direct terms and in terms of opportunity costs) if problems arise. Elimination of avoidable uncertainties in this way will help the growth of the electronic medium as a means of doing trade. Avoidable uncertainty will also be eliminated by recommendations made concerning the use that can be made of electronic evidence (see chapter 5).

### *Principle 2*

- 34 The Commission’s second guiding principle is:

To ensure that fundamental principles underlying the law of contract and tort remain untouched save to the extent that adaptation is required to meet the needs of electronic commerce.

- 35 We address in chapters 3 and 4 what we regard as the fundamental principles which underlie the law of contract and of tort. In general terms we intend that the term “fundamental principles” refer to the elements which must be established (as a matter of New Zealand domestic law) to prove the existence of a contract, or that a tort has been committed. For example, to prove that company A and company B have entered into a binding contract it is usually necessary to produce evidence showing that: an offer was made; that offer was accepted; there is valuable consideration; the terms of the contract are certain; and the parties intended to create a binding legal relationship. Similarly, to prove that company B is liable in tort for negligence in its dealings with company C, it is necessary to prove the existence of a duty owed to C, which was breached by B, and which caused loss to C (see Gringras 1997 chapters 2 and 4).
- 36 The law of contract has developed over the centuries to meet the needs of the people whom it serves. Similarly, the law of torts has developed to govern relationships where no contractual obligations

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<sup>14</sup> As to the impact of small and medium-sized businesses on the New Zealand economy, see Cameron, Massey and Tweed “New Zealand Small Businesses – A Review” (1997) Chartered Accountants Journal (October 1997) 4–5.

exist (eg, developments in common law principles which underlie the law of agency). Changes to these laws should not be made without proper justification.

37 There is a third branch to what might, generically, be described as the overall law of civil obligations. These are the obligations owed in equity. Examples of such obligations include the fiduciary obligations owed by one person in a position of trust to another (eg, solicitors to their clients), and obligations of trusteeship owed by trustees to beneficiaries. In some cases these obligations will intrude upon obligations otherwise owed in contract or in tort: for example, the position of an agent and his or her principal where the agent has both contractual and fiduciary obligations. In this report we do not deal with equitable obligations as such: an exception is the issue of misuse of confidential information (see chapter 3). Specific issues are raised by electronic commerce in relation to that particular issue (which has never been clearly defined as falling within either the law of torts or equity), and we therefore deal with it specifically.

38 Many laws will adapt neatly to the electronic environment. The Commission takes the view that existing law can and should be adapted (rather than fundamentally reformed) to recognise two distinct imperatives:

- first, as set out in the first principle, that parties should be free to choose the medium by which they do business; and
- second, that the concepts evolved through the common law to meet the needs of traders should remain with only minimum modifications to ensure that the law does not discriminate against those who choose to trade through electronic means.

The latter is consistent with the “non-discrimination” principle underlying article 5 of the UNCITRAL Model Law (see para 46 of the *Guide to Enactment*).

39 The Commission recognises that businesses require the law to be consistent in its application and predictable in its outcomes in order to make commercial decisions. The best way to deliver such consistency and predictability in the field of electronic commerce is to ensure that the law applies equally to business transactions regardless of the medium by which they are performed. It is therefore inappropriate, at least at the present, to propose an entirely new legal environment specifically for electronic transactions. This approach will also ensure that electronic commerce does not become over-regulated and avoid undermining the potential efficiency of the medium.

### Principle 3

40 The Commission's third guiding principle is:

To ensure that any laws which are enacted to adapt the law of contract or the law of torts to the use of electronic commerce are expressed in a technologically neutral manner so that changes to the law are not restricted to existing technology and can apply equally to technology yet to be invented.

41 Technology has advanced with great speed in recent years. It is likely to continue to do so. Unlike technology, the law tends to develop slowly, usually by reacting to situations only as they arise. It is therefore vital that any reform of the law be drafted so as to take account not only of the technology currently available, but also that which has yet to be developed. This presents a considerable challenge. However, it should be possible to draft law in such a way as to meet technological advances. An attempt has already been made in the UNCITRAL Model Law to draft a provision which will encompass further technological advances:

The approach used in the Model Law is to provide in principle for the coverage of all factual situations where information is generated, stored or communicated, irrespective of the medium on which such information may be affixed. It was felt during the preparation of the Model Law that exclusion of any form or medium by way of a limitation in the scope of the Model Law might result in practical difficulties and would run counter to the purpose of providing truly “media-neutral” rules. However the focus of the Model Law is on “paperless” means of communication and except to the extent expressly provided by the Model Law, the Model law is not intended to alter traditional rules on paper based communications. (*Guide to Enactment* para 24)

The drafting technique adopted in the Model Law was to define the term “data message” in a manner which would capture all forms of electronic communication, present and future.<sup>15</sup>

42 Many current statutes are “media-specific” in that they require (either expressly or by necessary implication) transactions to be

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<sup>15</sup> UNCITRAL Model Law on Electronic Commerce, articles 1 and 2(a), defines “data messages” as “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or teletype”. See appendix A and paras 24–28 on the *Guide to Enactment*. To similar effect see the proposed changes to the Uniform Commercial Code (US) designed to provide technologically neutral definitions for concepts such as “writing” (record) and “signatures” (authenticity); see para 95 and appendix B.

effected by paper documents. We examine some of these at paras 100–111 and 118–137. Ultimately, such obstacles can only be removed by statutory reform.

#### *Principle 4*

43 The Commission's fourth and final guiding principle is:

To ensure compatibility between principles of domestic and private international law as applied in New Zealand and those applied by our major trading partners.

44 New Zealand is a small country and is reliant upon export earnings. We also have no control over the laws that may be enacted by our major trading partners. There is no point whatsoever in New Zealand having (at least in our own minds) the best laws in the world to deal with the issues arising out of electronic commerce unless those laws are as compatible as possible with principles of private international law applied by our major trading partners.<sup>16</sup>

45 In addition, many of our major trading partners have already been involved in commercial law initiatives through the United Nations which may lead to common standards both in terms of technology and in terms of law. An example is the Convention on Contracts for the International Sale of Goods which has been given statutory force in New Zealand through the Sale of Goods (United Nations Convention) Act 1994 (see para 112). The UNCITRAL Model Law on Electronic Commerce and the continuing work of UNCITRAL on electronic signatures (see paras 336–338) is likely to be just as important.

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<sup>16</sup> Major trading partners are Australia, the United States, the European Community, Japan, the People's Republic of China, Republic of Korea (South Korea), Malaysia, Singapore, Chinese Taipei (Taiwan), and Thailand (*New Zealand Official Yearbook 1997* 565 (see also the discussion of conflicts of laws in chapter 6 and the comparative study in appendix D of this report).

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### 3

## The law of contract

As the world of electronic commerce expands there is an increasing demand for clarity in the rules which apply to the participants and their transactions. Uncertainty exists on such matters as whether agreements entered into electronically are enforceable, how the operative terms of on-line contracts will be determined by courts, what rights parties have to on-line information, and what electronic self-help remedies they may exercise. The increased costs of dealing with these new legal uncertainties may offset any reduction in costs achieved through the use of new technologies and, as a result, may slow needlessly the rate at which businesses are willing to implement new technologies.

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Much of the demand for the development of a legal framework has come from those who use electronic commerce and want assurances that electronic transactions will be valid and binding as well as certainty about the rules and remedies that apply to their transactions. . . . While much of the popular press has focused on issues such as privacy and freedom of speech, a number of important issues have been raised regarding the use of new technologies by businesses, and the commercial law framework needed to support business done via the internet. (Boss and Winn, "The Emerging Law of Electronic Commerce", 1469–1471)

46 **T**HE CONTRACT IS THE PRIMARY LEGAL MECHANISM by which businesses interact with each other. While authorities differ in their account of the nature of contracts, as a matter of New Zealand law it is probably adequate to define a contract as an agreement (enforceable by the court) under which each party assumes obligations to the other for valuable consideration.<sup>17</sup>

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<sup>17</sup> For example, the authors of *Chitty on Contract* give two basic definitions of contract: promises which the law will enforce, and agreements which give rise to obligations which the law will enforce (para 1-001). Atiyah, *An Introduction to the Law of Contract*, describes contracts in terms of private legal obligations concerning economic exchange (1–7). For a history of the law of contract, and the development of the doctrine of “consideration” see Holmes, *The Common Law* (1881) 247–288.

47 A contract will be governed either by the law agreed by the parties (expressly or impliedly) or by the law imposed by the court. Sometimes, parties to a contract between entities in different jurisdictions will not apply the law of any particular jurisdiction. An example of this is the use, in the context of a submission to arbitration, of phrases such as “internationally accepted principles of law governing contractual relations”,<sup>18</sup> or “general principles of law recognised by civilised nations”,<sup>19</sup> to denote the law by which a dispute is to be resolved (see generally Redfern and Hunter 1991 117–120). It is also open to parties to agree that different aspects of a contract, such as interpretation or damages, are to be governed by different laws. For the purposes of this chapter, unless the context otherwise requires, we assume that New Zealand law governs the contract in question. Issues of conflict of laws are addressed in chapter 6.

## THE NATURE OF A CONTRACT

48 The law of contract has been developed over centuries through the practices of traders, court decisions, and statutory reform. It tends to reflect the needs and values of the people whom it serves. Further, because the law of contract is relatively settled and predictable, commercial decisions can be made in a legal environment which provides a high degree of certainty. This degree of certainty is essential for businesses committing their resources to transactions: for business to prosper parties must have confidence that the contracts they enter into will be binding. Any attempt to dramatically reform the law reduces this degree of certainty, bringing added (avoidable) risks to business. Instead, *adaptation* of existing law to the electronic environment should preserve the underlying principles on which business is conducted.

49 Methods of proving a contract or debt (eg, proof by oral testimony, writing or mark; or signing, sealing and delivering a particular type of document) developed to meet the needs of a particular era (Holmes, *The Common Law*, 271–274). The advent of electronic

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<sup>18</sup> *Deutsche Schachtbau-und Tiefbohrgesellschaft v Ras Al Khaimah National Oil Co and Shell International Petroleum Co Ltd* [1990] 1 AC 295, 312ff, in which the English Court of Appeal held that an award made under such a clause was enforceable and not contrary to public policy. Although an appeal to the House of Lords was allowed the House did not disturb the Court of Appeal on the public policy point.

<sup>19</sup> See Hafez 1998 s1–s15; the phrase is derived from s 38(1) of the Statute of the International Court of Justice.



media simply adds a modern dimension to this evolution. The challenge is to adapt the law to fit the electronic environment.

## FUNDAMENTAL PRINCIPLES

- 50 To prove that a binding contract has been formed under New Zealand law, the parties must establish the following elements:
- the parties *intended to create legal relations* when they entered into the agreement;
  - one party to the contract made an *offer*;
  - the other party or parties *accepted* that offer;
  - the promises contained in the contract were made for *valuable consideration*; and
  - the terms of the contract must be *certain*.
- 51 The common law does not usually impose limitations as to the mode of communication used to form contracts. Thus, oral contracts are as binding as written contracts at common law. Requirements that specific types of contract be in writing and signed under the hand of a party arise as a result of statutory overlay.<sup>20</sup> While statutory reform has displaced or supplemented the common law in a number of areas (eg, Illegal Contracts Act 1970, Contractual Mistakes Act 1977, Contractual Remedies Act 1979, and Contracts (Privity) Act 1982), the fundamental principles of contract law remain constant.<sup>21</sup>
- 52 The principles applicable to the making of a contract by electronic means should be no different to the principles applicable to contracts formed orally or in writing on paper. Indeed, the decided cases appear to have accepted that proposition as self evident.<sup>22</sup>
- 53 The fact that a contract may be validly formed by electronic means does not, however, constitute the end of any inquiry into the relationship between the law of contract and electronic commerce.

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<sup>20</sup> For example, s 2 of the Contracts Enforcement Act 1956. For a discussion of the historical context from which the Contracts Enforcement Act 1956 grew see *Repeal of the Contracts Enforcement Act 1956* (NZLC PP30 1997).

<sup>21</sup> By the term “fundamental principles” we mean the essential elements of a cause of action in contract under New Zealand domestic law.

<sup>22</sup> For example in *Databank Systems Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC) the Privy Council gave a detailed legal analysis of an Electronic Funds Transfer at Point of Sale (EFTPOS) transaction without querying whether it was possible to form a valid contract by means of electronic communication through an EFTPOS terminal (392). Similarly, in *Corinthian Pharmaceutical Systems Inc v Lederle Laboratories* 724 F Supp 605 (1989) a valid contract was formed electronically by telephoning orders directly into the supplier’s computer (see also Boss and Winn 1997 1469).

Rather, it leads to other questions which are less easily answered. For example:

- At what place and time is the contract formed?
- When can an offer or acceptance be withdrawn?

54 We proceed to discuss the elements required to prove a valid contract under New Zealand law with reference, in particular, to specific issues thrown up by the use of electronic methods of communication.

### *Intention to create legal relations*

55 Agreements may be declared unenforceable on the grounds that the parties did not intend to create legal relations (*Chitty on Contracts* paras 2-105–2-120; *Cheshire and Fifoot's Law of Contract* chapter 5). However, there is a strong presumption that parties to an apparent commercial contract intend to create legal relations: for example, *Edwards v Skyways Ltd* [1964] 1 WLR 349, 355. It is unlikely that a court will hold a commercial agreement between businesses to be unenforceable on such grounds in the absence of special factors (eg, an express statement that an agreement is not binding until put into formal terms).

56 Do parties necessarily intend to create legal relations when the communication relied upon for evidence of that intention is generated automatically by a computer as a result of it being programmed in a particular way? This has been referred to as “programmed intention” (Gringras 1997 29). The computer is programmed to make or accept offers when certain circumstances occur. In our view, if a computer is programmed to make or accept offers in predetermined circumstances then, plainly, an intention to create legal relations exists on the part of the user of the computer.

57 It is necessary to analyse precisely what happens in this way:

- A decision is made by a human being within the entity concerned to program the computer to respond in a particular way.
- A human being (the programmer) then programs the computer to respond in accordance with the earlier decision.
- The computer, when faced with a set of circumstances in which a pre-programmed response is required will respond mechanically in terms of the program.

58 While strictly speaking the intention to create legal relations arises from the decision to program a computer in a particular way (and the subsequent programming in accordance with that direction) it is convenient to regard a pre-programmed computer as a metaphorical “electronic agent” of the person making or accepting an

offer. If that metaphor is drawn it is difficult to conceive of a case in which an offeror or an offeree would not be regarded as having intended to enter into legal relations. This remains the case even if the computer (owing to some malfunction or error in programming which meant that the program did not accurately reflect the human decision it was designed to implement) acted contrary to what the offeror or offeree later says they intended.<sup>23</sup> This is comparable to the contract formed when goods are purchased from a vending machine. If a human being had been the agent in such circumstances that person would be regarded as having ostensible authority to bind his or her principal even though they may have departed from the precise instructions given to them. If, however, the agent was acting in a manner clearly inconsistent with the scope of his or her agency the principal may not be bound.<sup>24</sup>

- 59 Regarding a pre-programmed computer as if it were an “electronic agent” raises an analogy to normal principles of agency law. A decision has been made to respond in a particular way to a particular set of facts. If the computer is pre-programmed inadequately, so that it does not respond in terms of what was intended by the offeror or offeree, then third parties dealing with offeror or offeree should not be prejudiced. If the computer is wrongly programmed, the entity which employed the programmer will, of course, have a right of action against the programmer.
- 60 Another circumstance which may arise is where an offer is sent incorrectly or is corrupted in such a way as to remain apparently correct (eg, by currency symbols being confused). Unless what is written is so obviously wrong that the recipient must be aware of the mistake, the offeror will be bound by the resulting contract. This disregards the offeror’s lack of intention to enter into a contract of that type simply because a reasonable person would interpret the message as demonstrating an intention to create legal

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<sup>23</sup> As early as 1972 a judgment of the 10th Circuit Court of Appeal in the United States held that

[h]olding a company responsible for the actions of its computer does not exhibit a distaste for modern business practices. . . . The fact that [business operations] are carried out by an unimaginative mechanical device can have no effect on the company’s responsibility for . . . errors and oversights. (*State Farm Mutual Auto Insurance Company v Bockhorst* 453 F 2d 533, 536–537 (1972)).

<sup>24</sup> Generally, see Laws NZ, *Contract* para 151 and Laws NZ, *Agency* paras 37–39; see also *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (HC, CA and PC), 272–275, 304 and 305.

relations (Nicoll 1998 48–49; Myburg 1993 327). Unless the parties subject themselves to an underlying protocol requiring messages to be verified it is unlikely that any relief would be granted under the Contractual Mistakes Act 1977 as the mistake in question would be purely unilateral. Myburg argues that s 6(1)(c) of that Act would apply if an offeree failed to use an agreed verification protocol and accepted an erroneously sent offer; the offeree has impliedly assumed the risk of mistakes (1993, 327).

61 The concept of an “electronic agent” has received approval in the United States, where s 2-102(a)(12) of the draft Uniform Commercial Code (UCC) refers to “electronic agents” in the following terms:

“Electronic agent” means a computer program or other automated means used, selected, or programmed by a party to initiate or respond to electronic messages or performances in whole or in part without review by an individual.

62 Under s 2-211(a)(1) of the UCC, an electronic record, message or performance is attributable to a party if it was sent by that party, its agent, or its electronic agent. Until it was technically possible for machines to make or to respond to offers in terms of pre-programmed commands it was unnecessary for the law of agency to deal with the concept of electronic agents. Similarly, but perhaps more accurately, article 13(2) of the UNCITRAL Model Law on Electronic Commerce provides that a data message is attributable to a party if it was sent by an authorised agent of the party, or by an information system programmed by, or on behalf of, that party to operate automatically.

63 These provisions are intended to resolve issues arising from the need to attribute an electronic message to a party for evidential purposes, and to protect those who act in reliance upon such messages.<sup>25</sup> However, in attributing the act of the electronic agent (to adopt the expression of the UCC) to the person who uses that agent or, in attributing the act of an information system programmed by or on behalf of a party (to use the Model Law’s expression), they also serve to prevent any disavowal of intention to create legal relations by that person.

64 The Commission seeks submissions as to whether it is necessary to reform the law specifically to ensure that a business entity be bound by what is done on its behalf by a pre-programmed computer.

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<sup>25</sup> See, for example, article 13(5) of the Model Law and the commentary at para 90 of the *Guide to Enactment*; see also chapter 5 of this report.

We are particularly interested in the situation where a computer is programmed incorrectly; should the business entity still be bound to the contract? At this stage we are of the view that it would be wrong to put third parties at risk in situations where a business could rely on inadequate programming to avoid contractual commitments on the grounds of a lack of intention to create legal relations in that particular form.

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Is it necessary for the law to state expressly that parties to an agreement are bound by the acts of an electronic system under their control, and may not deny liability purely on the grounds that the electronic system acted without direct human input?

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### Offer

- 65 The offer is the first legal step to contract formation. It has been described as an expression of willingness to contract made with the intention that it will become binding on the party making the offer (the offeror) when it is accepted by the person or persons to whom it is made (the offeree or offerees) (see *Chitty on Contracts* para 2-002). The important elements of an offer are that its terms are sufficiently clear to allow a contract to be formed merely by acceptance without further negotiation (although such negotiation may still occur); and that the intention of the offeror to be bound may be inferred from his or her words or conduct.<sup>26</sup> Statements which lack one or both of these elements (for example, a simple statement as to price: *Harvey v Facey* [1893] AC 552) are invitations to treat. An invitation to treat cannot be turned into a binding contract by acceptance of its terms.
- 66 The distinction between offers and invitations to treat is important for businesses which choose to sell or advertise products on the internet. It is well established that displaying goods in a shop constitutes an invitation to treat: that is, something falling short of an offer which, if accepted, will result in a concluded contract:

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<sup>26</sup> In this context, intention has a special meaning: the true intention of the offeror is what a third person would infer from the offeror's words or conduct. The actual or subjective intention of the offeror is irrelevant. While evidence will be admitted as to the surrounding circumstances in which a contract was entered into, evidence of what a person intended to enter into is inadmissible; the court will look at the circumstances to ascertain objectively the bargain struck: for example, *Benjamin Developments Limited v Robt Jones (Pacific) Limited* [1994] 3 NZLR 189 (CA) at 203.

*Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 410. The consequence is that the shopper makes an offer to buy the product; the retailer retains control over the transaction because he or she can choose whether or not to accept the offer and thereby form the contract. However, it is equally well settled that advertising goods for sale can constitute an offer if the advertiser gives sufficient detail and demonstrates an intention to be bound. (The resulting contract is known as a unilateral contract: see *Carlill v Carbolic Smoke Ball Co. Ltd* [1893] 1 QB 256.) In such cases the advertiser may have no control over who accepts the offer, or how many people accept the offer. A website communication could therefore be considered either as an invitation to treat or as an offer, depending on the words used.<sup>27</sup>

- 67 A business offering goods or services for sale over the internet will generally want to retain control over the identity and location of its trading partners, and the quantity of goods or services it sells. It is therefore likely to prefer that its website be considered as an invitation to treat rather than an offer. This may be done by taking basic precautions, such as advising visitors to the site that the owner will not be bound by any communication from a third party, but will inform that party if it accepts the communication (*Gringras* 1997 14).<sup>28</sup>

### Acceptance

- 68 Acceptance is the final and unqualified expression of assent by the offeree to the terms of the offer (*Chitty on Contracts* para 2-016). To be effective, acceptance must be communicated unequivocally to the offeror.<sup>29</sup> Provided the requirements of consideration, intention to create legal relations, and certainty are also present, the contract is binding at common law at the time the offeror

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<sup>27</sup> Gringras defines website as “a collection of colourful documents on the World Wide Web. They can be used as an electronic brochure or be more active performing tasks for their viewers, such as searching databases or taking orders. . .” (1997 387–388). Note too that whether the product could be purchased or delivered through the website might also be relevant.

<sup>28</sup> Note also that where the Vienna Sales Convention applies, there is a presumption under article 14(2) that proposals addressed to unspecified people, such as by means of a website, are invitations to treat.

<sup>29</sup> This may be stated over simplistically: for example, there may be issues involving a “battle of the forms” where each party insists that a contract is to be governed by the terms and conditions of that particular party’s standard form; likewise, cases such as *Clarke v Dunraven*; *The Satanita* [1897] AC 59 (HL) tend to fall outside the normal offer and acceptance model.

receives the acceptance. The offeror is therefore free to revoke the offer at any time prior to receiving acceptance.

- 69 The postal acceptance rule was developed to avoid the “extraordinary and mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received”.<sup>30</sup> Unless the parties intended otherwise the rule required the court to hold that acceptance of an offer concluding a contract was completed upon the letter recording the acceptance being placed in the charge of the post office. On the other hand, if there had been an instantaneous communication between the parties (whether in person or by telephone) the contract would be completed at the time that acceptance was heard by the offeror: this class of case being extended to a telex communication in *Entores Limited v Miles Far East Corporation* [1955] 2 QB 327.
- 70 The House of Lords was asked to review *Entores Limited v Miles Far East Corporation* in 1981 when the appeal in *Brinkibon* came before the House of Lords. In *Brinkibon* Lord Wilberforce said:

Now such review as is necessary must be made against the background of the law as to the making of contract. The general rule, it is hardly necessary to state, is that a contract is formed when acceptance of an offer is communicated by the offeree to the offeror. And if it is necessary to determine *where* a contract is formed . . . it appears logical that this should be at the place where acceptance is communicated to the offeror. In the common case of contracts, whether oral or in writing *inter praesentes*, there is no difficulty; and again logic demands that even where there is not mutual presence at the same place and at the same time, if communication is instantaneous, for example by telephone or radio communication, the same result should follow. (*Brinkibon Limited v Stahag Stahl Und Stahlwarenhandels-gesellschaft mbH* [1983] 2 AC 34 (HL) 41)

The House of Lords held that it should not depart from the principle laid down in the *Entores* case. Their Lordships emphasised in *Brinkibon* the point made by Lord Wilberforce that the *Entores* case was concerned only with instantaneous communication by telex between the principals on either side and that there may be other cases which would provide a number of variations on that

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<sup>30</sup> *Re Imperial Land Co of Marseilles (Harris' case)* (1872) LR 7 Ch App 587, 594. See, generally, *Brinkibon Limited v Stahag Stahl Und Stahlwarenhandels-gesellschaft mbH* [1983] 2 AC 34 (HL) 41; also Myburgh 1993 326; Gardiner 1994 50; and Gringras 1997 24–25. *Chitty on Contracts* suggests the definition of “instantaneous” should depend on whether the sender knows at once of any failure in communication (para 2-031).

simple theme. In concluding his judgment Lord Brandon of Oakbrook referred to these variations and expressed agreement with Lord Wilberforce's view that

when they occur, the problems posed by them must be resolved by reference to the intention of the parties, sound business practice and in some cases a judgment where the risk shall lie. (50)

71 The first question is whether it is appropriate to classify acceptance of an offer using electronic communications as one which falls within the general ambit of an instantaneous communication to which the postal acceptance rule applies. In cases involving a facsimile transmission it is likely that the court will hold that there has been an instantaneous communication to the machine of the offeror in the same way that a telex communication was viewed as an instantaneous communication in both *Entores* and *Brinkibon*. If the communication was made by email the answer depends on whether the email user had direct and immediate access to the person to whom the email is sent or whether the email was sent through the electronic equivalent of the postal service, an internet service provider (ISP), which collected the mail.<sup>31</sup> Users in the former category have a mode of communication which is close to instantaneous while those using an ISP may only communicate as quickly as their telephone access, service provider and personal inclination dictate.

72 In determining whether it is appropriate to clarify the law as to the circumstances in which a person will be held to have accepted an offer by electronic communication it is also necessary to have regard to the terms of the Vienna Sales Convention (applied to New Zealand by the Sale of Goods (United Nations Convention) Act 1994; see para 112). There is no scope under the Vienna Sales Convention for the operation of the postal acceptance rule, unless the parties themselves agree otherwise or there is a usage or custom to that effect. Both offers and acceptances are effected when they "reach" the intended recipient.<sup>32</sup>

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<sup>31</sup> An internet service provider is a company which allows its customers to gain access to or a presence on the internet and world wide web by making a local telephone call with a modem. Most provide email accounts (Gringras 1997 383).

<sup>32</sup> Sale of Goods (United Nations Convention) Act 1994, schedule, articles 15(1) and 18(2). Under article 9 of the schedule, usages and customs which are either prevalent in international trade, or established between the parties themselves, prevail over the presumptive rules provided that their usage or practice is valid under domestic law (see also Honnold 1989 para 122).



73 Article 24 of the Vienna Sales Convention provides:

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention “reaches” the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

Thus, it would appear that an offer made by email would “reach” the offeree at the time it entered his or her mail box and became available to read, although there do not appear to have been any cases which either support or contradict this interpretation. There is no requirement under the Vienna Sales Convention that the intended recipient be subjectively aware of the existence of a message. This approach is consistent with that taken in article 15 of the UNCITRAL Model Law on Electronic Commerce.

- 74 As most of New Zealand’s major trading partners are parties to the Vienna Sales Convention,<sup>33</sup> the provisions of articles 18(2) and 24 of the Convention will apply so that acceptance will only be completed upon the communication reaching the offeror. An issue arises as to whether in the domestic context the same result should pertain. Certainly it seems illogical that different results flow depending upon whether the contract is international or domestic in nature.

### *Consideration*

- 75 In common law jurisdictions (including New Zealand), a contract is not binding unless supported by consideration (although an exception exists where a contract is made by deed; see paras 100–105). The definition of “consideration” is something which has exercised the minds of contract lawyers, academics and judges alike (see *Chitty on Contract* chapter 3; Burrows et al 1992 chapter 4).

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<sup>33</sup> The following states are parties to the Vienna Sales Convention: Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Chile, People’s Republic of China, Cuba, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Germany, Ghana, Greece, Guinea, Hungary, Iraq, Italy, Latvia, Lesotho, Lithuania, Luxembourg, Mexico, Mongolia, Netherlands, New Zealand, Norway, Poland, Republic of Moldova, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Uganda, Ukraine, United States of America, Uzbekistan, Venezuela, Yugoslavia, Zambia; status as at 2 September 1998 according to Treaty Section of the Office of Legal Affairs of the United Nations (treaty information may be accessed at the United Nations’ internet site: <http://www.un.org/Depts/Treaty>).

However, as this chapter is concerned with commercial contracts between businesses, it is probably sufficient to say that the contract must be supported by something of value, such as the promise of a party to provide goods or services, a promise to pay for goods or services, or the foregoing of a benefit (eg, forbearance to sue).

- 76 The need to prove the existence of consideration is essentially unaffected by the advent of electronic communication technology, since the latter represents a revolution in *how* contracts are formed, rather than the *substance* of contracts. In the Commission's view, the law relating to consideration does not require any reform in order to respond to the challenges posed by electronic commerce.
- 77 It is beyond the scope of this report to consider whether it is right to require consideration as an element to be proved in a cause of action based on contract. Given that the need for consideration may easily be circumvented by the use of deeds, and that consideration is not required as an essential element of a cause of action in contract in civil law countries,<sup>34</sup> there may be some justification to reconsider whether consideration should continue to be an essential element of a cause of action based in contract in New Zealand. We leave this point open for submissions. Our current view, however, is that if there is sufficient support to abolish consideration as an element of a cause of action in contract, then that should be considered separately rather than in passing in this report.

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Should the doctrine of consideration continue to be an essential element of binding contracts?

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### *Certainty*

- 78 Certainty as to the terms of a contract is an element of formation. Simply put, an "agreement may be so vague or uncertain that it cannot give rise to a binding contract" (*Chitty on Contract* para 2-099). Thus, for example, a contract may be unenforceable if important terms are not settled at the time of offer and acceptance, but left for future discussion without any means of ensuring agreement. A contract which does not state the price may yet be

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<sup>34</sup> In this regard observations made by Lord Goff of Chieveley in "The Future of the Common Law" are apposite. Lord Goff referred, in passing, to a suggestion made by Professor Jack Beatson at his Inaugural Lecture in Cambridge that the common law could end up "as the Louisiana or the Quebec of Europe": (1997) 46 *Int and Comp LQ* 745.

sufficiently certain if goods are to be supplied at a reasonable price, because a court could make an objective finding as to what constitutes a reasonable price for the goods. But if the contract merely stated that the parties must agree on the price, then there would be no such certainty, and the contract would probably not be enforceable (Burrows et al 1992 53).

79 In *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495 (CA), Richmond P set out three principles for determining whether a court should find that a contract is sufficiently certain to be enforceable:

- (1) If it appears that the true intention of the parties was not to enter into a binding arrangement until and unless certain unsettled terms of their bargain were settled by agreement between them, then no contract can come into existence in the absence of such further agreement . . .
- (2) If . . . the court is satisfied that the real intention of the parties was to enter into an immediate and binding agreement then the court will do its best to give effect to that intention. . .
- (3) Apparent lack of certainty will be cured if some means or standard can be found whereby that which has been left uncertain can be rendered certain. (498–499)

80 Lack of certainty as to the terms of a contract can result from the use of standard forms in contracting, where each party insists that the contract is to be governed by the terms and conditions of that party's standard form. This is known as the "battle of the forms", and can ultimately lead to stalemate if the parties are unwilling to compromise and each form purports to prevail over the other.

81 The Commission does not consider that the requirement of certainty as an element of contract formation causes any particular difficulties in the context of electronic commerce, but we invite comments on this subject.

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Does the requirement that the terms of a contract be sufficiently certain pose any particular problem when contracts are formed electronically?

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## TIMING

### *Revocation of offer*

82 An offer may in general be revoked by the offeror at any time before it is accepted, provided the offeror gives notice to the offeree (*Chitty on Contracts* paras 2-059–2-060). The offer is revoked at the time the offeree receives the notice of revocation: *Byrne & Co*

*Ltd v Van Tienhoven* (1880) 5 CPD 44. Where such notice is given electronically, a question arises as to when precisely the offer is revoked. Is the offer revoked when a message arrives at the offeree's ISP; or when the offeree collects his or her mail from the ISP; or when the offeree actually reads the notice? This question is not of mere academic interest, as the offeree may choose to accept and bind the offeror to the terms of the offer at any time until the revocation is effective, regardless of whether the offeror still wishes to enter into the contract.

83 In general, the most likely time for revocation to be effective is probably when the message "was opened in the ordinary course of business or would have been so opened if the ordinary course of business was followed": *Ealehill Ltd v J Needham (Builders) Ltd* [1973] AC 992, 1011 (note that this depends on the analogy between electronic communication and conventional mail). The fact that the offeree does not actually read the message at the time it arrives will not prevent the revocation from being effective: *The Brimnes* [1975] 1 QB 929. However, there are a number of factual issues which could potentially complicate matters, for example:

- whether the offeree has direct or indirect access to the message (ie, whether email or other communication is delivered directly to the offeree or whether the offeree must take steps to collect messages, such as dialling his or her ISP);
- whether the offeree is experiencing problems in receiving incoming messages (this could be for reasons outside the control of the offeree, such as a power failure); and
- the existence of a time difference between offeror and offeree.

These are all outside the control of the offeror.

84 Many communications software packages allow the sender of a message to check whether a message has been received or read. Although the legal effect of such features is as yet untested, they may at least provide evidence that the offeree has had access to a message.

### *Lapse of time*

85 Offers may be subject to a time limit within which acceptance must occur. In the absence of an express limit, offers are regarded as open for a reasonable period of time (*Chitty on Contracts* paras 2-066–2-067).<sup>35</sup> The definition of a reasonable period of time depends on the circumstances of the transaction, including the

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<sup>35</sup> Article 18(2) of the Vienna Sales Convention also provides that offers remain open for a reasonable time.

subject matter of the offer and the means of communication used. What is reasonable in the context of an offer made by email may be considerably shorter than when the offer is posted conventionally, because email is generally a much faster form of communication.

- 86 If a dispute arises whether an offer has been revoked because of lapse of time calculated from the time at which the offer was made, it becomes important to know exactly when that offer was made. This may be of particular importance when an offer is communicated by email, because of the potential for delays occurring between sender and recipient, and the inability of the sender to know whether the message has been read by the recipient. There is well-settled authority that delay caused by the offeror will not count against the offeree: *Adams v Lindsell* (1818) 1 B & Ald 681. But it appears to be open to argue that delays caused by circumstances outside the control of the offeror may be considered as running against the offeree (Gringras 1997 18; *Chitty on Contracts* para 2-015). For example, an offer which is delayed for hours or even days without fault on the part of either party could be considered as lapsed by the time it arrives.
- 87 There is currently uncertainty in the law regarding the time at which an electronic message is deemed to have reached a recipient when a delay has occurred between sender and recipient without fault on either part. Such uncertainty may have commercial significance when the message is an offer to enter into a contract, and the delay subsequently enables the offeror to either revoke the offer, or argue that it has lapsed. This could be resolved by deeming a message to have been received either at the time it was sent, or at the time it would ordinarily be received but for circumstances outside the control of the parties.

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Should the law be reformed to allocate risk presumptively for electronic messages which are delayed, or should parties be free to make their own arrangements?

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### *Withdrawal of acceptance*

- 88 In theory, acceptance of an offer can be withdrawn at any time before the acceptance is communicated. If it is assumed that the postal acceptance rule does not apply, it would be possible for an offeree to email his or her acceptance, then decide to withdraw acceptance in a separate email sent 5 minutes later, and for the offeror to receive both these messages at the same time. Common

sense dictates that the earlier of these messages (ie, the message which was sent first) should prevail over the later, resulting in a binding contract, although there does not appear to be any authority which confirms this outcome (Gringras 1997 24).

- 89 Alternatively, if it is assumed that the postal acceptance rule does apply when acceptance is sent electronically, then it seems logical to suggest that the acceptance cannot be revoked once sent. Again, there is an absence of authority on the point. However, the authors of *Chitty on Contracts* suggest that such an outcome would not be inevitable, as the offeror must generally accept the risk that his or her offer will be rejected, and has no right to have the offer accepted. If so, an offeree could conceivably email acceptance, then revoke it by telephoning the offeror before the email arrives, although the opportunity to revoke such an acceptance would usually be brief.

### *Reform initiatives*

- 90 The UNCITRAL Model Law on Electronic Commerce provides rules for timing and the place of dispatch and receipt of electronic messages:

#### *Article 15. Time and place of dispatch and receipt of data messages*

- (1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.
- (2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
  - (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
    - (i) at the time when the data message enters the designated information system; or
    - (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
  - (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.
- (3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).
- (4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the

originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:

- (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
- (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.

91 This provision eliminates the confusion caused by the possible application of the postal acceptance rule by deeming messages to be received when they enter the addressee's designated information system. There is no allocation of risk for messages which are illegible; nor is there any provision for situations where the addressee is for any reason unable to retrieve his or her mail. This is consistent with the principle of technological neutrality; the law does not currently allocate risks for such events when communications are recorded and sent using paper, and should not therefore do so when electronic media are used.

92 The 1998 report of the Australian Electronic Commerce Export Group, *Electronic Commerce: Building the Legal Framework*, accepts that rules on the timing of messages may help to avoid confusion, but prefers to define receipt as occurring when the recipient is able to retrieve the message in a form which his or her system is capable of processing, unless otherwise agreed. It also recommends a fall-back position under which the message would be received at the time when it comes to the attention of the addressee (paras 4.5.8–90).

93 Similarly, the proposed article 2B section 2-213(b) of the Uniform Commercial Code provides that electronic messages are effective on receipt, regardless of whether any individual is aware of receipt. "Receipt" is defined in the proposed article 2B, section 2-102 (a)(25)(B) thus:

with respect to an electronic record . . . when it enters an information processing system in a form capable of being processed by a system of that type and the recipient uses or has designated that system for the purpose of receiving records or information. "Receive" has an analogous meaning.

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Should a general statutory provision on timing of electronic messages similar to article 15 of the UNCITRAL Model Law on Electronic Commerce be adopted in New Zealand?

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## ISSUES OF ATTRIBUTION

- 94 The scheme of the UNCITRAL Model Law on Electronic Commerce is to provide a legal framework which can be supplemented by technical regulations where necessary. The *Guide to Enactment* states:

The Model Law is intended to provide essential procedures and principles for facilitating the use of modern techniques for recording and communicating information in various types of circumstances. However, it is a “framework” law that does not itself set forth all the rules and regulations that may be necessary to implement those techniques in an enacting State. Moreover the Model Law is not intended to cover every aspect of the use of electronic commerce. Accordingly, an enacting State may wish to issue regulations to fill in the procedural details for procedures authorised by the Model Law and to take account of the specific, possibly changing, circumstances at play in the enacting State, without compromising the objectives of the Model Law. . .

It should be noted that the techniques for recording and communicating information considered in the Model Law, beyond raising matters of procedure that may need to be addressed in the implementing technical regulations, may raise certain legal questions, the answers to which will not necessarily be found in the Model law but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law which the Model Law is not intended to deal with. (paras 13–14)

Accordingly, the Model Law cannot be regarded as a code to deal with all questions of law arising in a commercial context when business is being done electronically.

- 95 Similarly, the draft papers prepared for the revision of the United States’ Uniform Commercial Code (UCC) also approach the issues by seeking to provide certainty on specific issues arising out of the use of electronic commerce while not purporting to create a code dealing distinctly with electronic commerce issues.<sup>36</sup> In particular, the proposed American changes deal with statute of frauds issues

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<sup>36</sup> Draft discussion paper, *Revision of Uniform Commercial Code* (25 July 1997–1 August 1997, Sacramento California); see <http://www.law.upenn.edu/library/ulc/ulc.htm>. In particular, see proposed amendments to s 2-211 (attribution of electronic record message or performance), s 2-212 (authentication, effect and proof; electronic agent authentication), s 2-213 (electronic transactions and messages: timing of contract and effectiveness of message), and s 2-214 (acknowledgement of electronic message). See also the helpful discussion on the proposed changes to the Uniform Commercial Code in Boss and Winn 1997 1474–1479.



by substituting the concept of a “record” for the concept of “writing”. The term “record” is defined in para 2B-102(a)(31) as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form”. Also, the proposed UCC substitutes the concept of “signing” or a “signature” with the term “authenticate” which, under the draft para 2B-102(a)(2), means

to sign or to execute or adopt a symbol . . . or encrypt a record in whole or in part with present intent to identify the authenticating party or to adopt or accept a record or term or to establish the authenticity . . . of a record or term that contains the authentication or to which a record containing the authentication refers.

96 We explore further the way in which New Zealand law should deal with the concept of an electronic signature in chapter 7. So far as questions of attribution are concerned the most significant arguments in its favour are those adopted by the Australian Electronic Commerce Expert Group in *Electronic Commerce: Building The Legal Framework*. Chapter 2 of that report identified three methods of dealing with legal issues; being the issues identified in the UNCITRAL Model Law on Electronic Commerce. They were:

- encouraging parties to resolve the issues by contract;
- taking no action at this stage and leaving it up to the courts to determine how existing law will apply to new technology; or
- enacting legislation to update the law.

We generally agree with the approach of the Australian report which also stated:

While a contractual approach could be equated with minimising regulatory burdens upon government and business, any potential benefits are likely to be outweighed by the level of uncertainty created and the need for resolution of issues by the courts. Leaving disputes to the courts to resolve in individual cases will only achieve certainty in respect of particular factual situations after litigation, while solutions achieved through litigation are likely to be piecemeal and may not be able to be applied uniformly. In addition, the wide spread scale and impact of the electronic environment will make it very difficult for the issues to be addressed on a case by case basis. (2)

97 We are not persuaded at this stage that it is necessary to enact a statute dealing specifically with the electronic commerce issues identified in the Model Law on Electronic Commerce. If, however, our major trading partners decide to enact legislation which is specific to the needs of electronic commerce (contrary to the New Zealand approach of legislation covering the general rather than the specific) it will be necessary to consider whether we should

follow their lead to ensure uniformity of approach. In those circumstances the question is whether our guiding principle 4 should be given more weight in this context than our guiding principle 2.

98 Reverting to specific questions of attribution, article 13 of the Model Law sets out the circumstances in which an electronic message is attributed to a person or company. In the Commission's opinion, article 13 reflects the likely approach of the common law. To the extent that there is uncertainty, codification along the lines of article 13 could be useful for the avoidance of doubt. On the other hand, the Electronic Commerce Expert Group notes in its report that legislating rules on attribution of electronic messages would not remove any existing obstacle to electronic commerce (para 4.5.75). Rather, such rules would be unique to electronic communications, contrary to our guiding principle 3 (there being no statutory rules for the attribution of *paper* messages). However, we recognise that the potential for electronic messages to be forged (without forensic means of establishing this) may ultimately be a factor in favour of statutory attribution rules.

99 Electronic signature technology provides an obvious solution to problems of attributing electronic messages to a person or company. In chapter 7 we address the issue of electronic signatures, and draw the provisional conclusion that detailed rules for the use of electronic signatures are unnecessary at this time. Accordingly, we do not recommend that rules for the attribution of electronic messages should be enacted at this time. We feel that to do so would be unnecessary and inconsistent with our own guiding principles. However, we welcome submissions as to whether statutory rules on the attribution of electronic messages would promote electronic commerce by eliminating uncertainty.

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Should there be special statutory rules which attribute liability for electronic messages?

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## PROPERTY LAW ACT ISSUES

### *Deeds*

100 Deeds (also known as contracts made under seal) are similar to contracts in that they are promises which are legally enforceable. Unlike contracts they do not require consideration to be proved. Many commercial lawyers draft contracts in the form of deeds in order to prevent any future argument that the contract is unenforceable for want of consideration.

101 The form which deeds must take in order to be enforceable is set out in s 4 of the Property Law Act 1952:

**4 Formalities of deed**

(1) Every deed, whether or not affecting property, shall be signed by the party to be bound thereby, and shall also be attested by at least one witness, and, if the deed is executed in New Zealand, the witness shall add to his signature his place of abode and calling or description, but no particular form of words shall be requisite for the attestation.

...

(3) Formal delivery and indenting are not necessary in any case.

(4) Every deed executed as required by this section shall be binding on the party purported to be bound thereby.

...

102 The requirement that deeds be signed and attested by a witness poses problems for those who wish to continue to draft commercial contracts in the form of deeds in an electronic environment (see chapter 7). Further, under s 5 of the Property Law Act, there remains a requirement that corporations (excluding companies and building societies under the Companies Act 1993 and the Building Societies Act 1965 respectively) affix a seal to deeds. Although the Interpretation Bill cl 28 currently before Parliament includes a definition of “writing” which is intended to allow written documents to be created and stored in any medium, there is no equivalent provision allowing signatures to be appended electronically.<sup>37</sup> Thus, it is not currently possible to create a deed in a purely electronic format.

103 In *A New Property Law Act* the Law Commission recommended the retention of requirements of writing, signature and attestation by a witness, but that the requirement that deeds by corporations must be sealed be abolished (paras 35–39; draft Act s 9). This recommendation was based on the need to maintain some way of

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<sup>37</sup> Note, however, that the courts have been prepared, where convinced that the context so requires, to extend the definition of the term “sign” or “signed” to avoid the need for a hand-written signature: for example, *Goodman v J Eban Limited* [1954] 1 QB 550 (CA) where the English Court of Appeal, by a majority (Sir Raymond Evershed MR and Romer LJ; Denning LJ dissenting) held that a rubber stamp containing a facsimile representation of a solicitor’s signature was sufficient to comply with the requirement of s 65(2) of the Solicitors Act 1932 (UK) which (*inter alia*) required a Bill of Costs to be “signed by the solicitor” before an action could be brought by the solicitor to recover costs due to him or her. See, more generally, chapter 7.

distinguishing legally enforceable documents from those which are not so enforceable; and because abolition of formalities in deeds would do irrevocable violence to the doctrine of consideration (see also the Commission's discussion paper, *The Property Law Act 1952*, paras 44–64). Formalities also encourage caution because of the likelihood that a person making a deed will obtain legal advice.

- 104 We remain convinced that the observation of formalities in signing deeds is useful for these reasons; although the conclusion may need to be revisited if submissions on this report favour the notion of abolition of the doctrine of consideration. The conclusion is consistent with the second of our principles for reform – that the principles underlying the law of contract should not be changed except to the minimum necessary extent. However, this does not mean it should remain impossible for deeds to be created electronically; it is both possible and feasible for the same formalities to be observed by means of electronic signatures if a “functional equivalent” approach is taken.
- 105 Courts have decided that the requirement of a signature may be met where there is evidence of a person's intention to authenticate or be bound by a document. A hand-written autograph may not be necessary. We take the view that it should be possible to make a deed in electronic form provided there is a sufficient evidentiary link between the maker of the document and his or her expression of intention to be bound by its content. These issues are addressed more fully in chapter 7.

### *Assignments – Property Law Act 1952 s 130*

- 106 In addition to the provisions of the Property Law Act relating to deeds, s 130 of that Act requires assignments of debts and things in action to be “by writing under the hand of the assignor”.
- 107 The Commission recommended in *A New Property Law Act* that the safeguards inherent in s 130 of the Property Law Act 1952 be retained. For the reasons given in paras 104–105, we are of the view that, provided there is an adequate intention to be bound by the document, there is no reason why an assignment should not be made electronically. Again, we address this issue more fully in chapter 7.

## THE STATUTORY OVERLAY

### *Statutory regimes*

- 108 Although the law of contract is fundamentally derived from common law, there are a wide variety of statutes which regulate

commercial contracts. Some of these statutes predate the advent of electronic commerce by decades, or even centuries.<sup>38</sup> It is to be expected that these statutes will not easily accommodate changes in business practice. In this part of the paper we examine the effect of those statutes which most influence the conduct of international electronic commerce.

### *The Contracts Enforcement Act 1956*

109 The Contracts Enforcement Act 1956 poses potential problems for the development of electronic commerce. Section 2 requires contracts for the sale or disposition of land, mortgages on land, or guarantees to be written and signed:

#### **2 Proof of contracts relating to land and guarantees**

- (1) This section applies to
  - (a) Every contract for the sale of land:
  - (b) Every contract to enter into any disposition of land, being a disposition that is required by any enactment to be made by deed or instrument or in writing or to be proved by writing:
  - (c) Every contract to enter into any mortgage or charge on land:
  - (d) Every contract by any person to answer to another person for the debt, default, or liability of a third person.
- (2) No contract to which this section applies shall be enforceable by action unless the contract or some memorandum or note thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him.

110 Thus, the law currently prevents those dealing with land, mortgages on land, or guarantees from doing so electronically. If businesses are to enjoy a freedom of choice in the type of documentation used to effect such transactions, reform will be necessary. However, if the safeguards currently inherent in these provisions are to remain then it will be necessary to find a mechanism by which they can be carried out electronically.

111 The Commission provisionally recommended in its 1997 discussion paper *Repeal of the Contracts Enforcement Act 1956* that the Contracts Enforcement Act be repealed without replacement. We remain of that view. However, this may not be necessary for the purposes of facilitating electronic commerce in accordance with the first of the Commission's principles for reform. Adopting a functional equivalent approach to the requirements of writing, as defined in the Interpretation Bill cl 28, and signature would allow

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<sup>38</sup> For example, the requirement of writing in s 2 of the Contracts Enforcement Act 1956 is based on the Statute of Frauds 1677 (UK). See Law Commission, *Repeal of the Contracts Enforcement Act 1956* (NZLC PP30 1997).

compliance with the Act, subject to one qualification. In cases dealing with land (including mortgages or charges over land) it will be necessary for the registration requirements of the Land Transfer Act 1952 to be met also. It is beyond the scope of this report to consider what, if any, changes to that Act should be made to bring about, in essence, an electronic register which would preserve the integrity of the Torrens System. Comment is sought on these issues as they may need to be addressed more fully in the future.

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Should the Land Transfer Act 1952 be amended to allow the register itself and registrable instruments to be in electronic form?

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### *The Sale of Goods (United Nations Convention) Act 1994*

- 112 Section 4 of the Sale of Goods (United Nations Convention) Act 1994 enacts the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Sales Convention), giving it force of law in New Zealand.<sup>39</sup> Section 5 of the Act provides that the Vienna Convention shall have effect in place of any other law of New Zealand to the extent that the law is concerned with matters covered by the Convention, and that the application of a contrary New Zealand law is not expressly permitted by the Convention. All international contracts for the sale of goods involving parties based within contracting states to the Vienna Sales Convention will have their contracts governed by the Convention unless they provide to the contrary.
- 113 Under article 1(1) and 1(2), the Vienna Sales Convention presumptively applies to most contracts for the sale of goods between parties whose respective places of business are located in different states, and those states are parties to the Convention (contracting states). It also applies where the rules of private international law apply the law of a contracting state.<sup>40</sup> The Convention does not apply to the following contracts:
- sale of goods for personal, family or household use (ie, consumer contracts) (article 2(a));

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<sup>39</sup> See footnote 33 as to states which have given effect to this convention.

<sup>40</sup> However, contracting states may make a reservation as to the latter provision, so that the Convention only applies when all parties to the contract have their respective place of business in a contracting state (see Nicoll 1993 306). The USA, China and Denmark had made such a reservation as at 9 June 1992.

- sale of goods by auction (article 2(b));
- sale of goods on execution “or otherwise by authority of law” (article 2(c));
- sale of securities or money (article 2(d));
- sale of ships, vessels, hovercraft, aircraft, and electricity (article 2 (e)–(f));
- sale of goods to be produced or manufactured where the party ordering the goods undertakes to supply a substantial part of the materials, or where the main obligation of the supplier consists in supplying labour or other services (article 3);
- where the operation of the Convention or any part of it is excluded by consent of the parties (article 6).

Although not expressly excluded under the Convention, sales of land are presumably also excluded by definition.

114 Article 11 of the Vienna Sales Convention provides:

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

It is therefore clear that the Convention applies to contracts formed partially or wholly electronically (Nicoll 1995). Article 13 defines “writing” as including telegram and telex, and makes no mention of other means of electronic communication. Article 96 allows a contracting state to make a declaration that offers, acceptances, modifications or terminations must be made in writing where one party to the contract has its place of business in that state. The definition of writing, however, is sufficiently broad to ensure that this requirement will be met when electronic media are used to conclude a contract.

115 The rules for the formation of contracts under Part II of the Vienna Sales Convention are broadly similar to the common law.<sup>41</sup> The one significant point of difference from an electronic commerce perspective, the position with regard to the postal acceptance rule, has been discussed previously (see paras 69–74).

116 An aspect which has not been widely considered is whether an electronic message has reached its recipient if the message is for any reason illegible or unavailable to the recipient. This could

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<sup>41</sup> This is subject to qualification because article 92 of the Convention permits contracting states to opt out of either Part II or Part III of the Convention. As at 9 June 1992, only Denmark, Sweden, Norway and Finland had made such a reservation (see Law Commission, *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand’s Proposed Acceptance*, 82–84).

occur if, for example, the recipient is unable to open attachments because he or she lacks the necessary software, or because access to electronic messages has been interrupted for reasons outside his or her control. The latter question is problematic for the reason that a message may reach the mail box of the intended recipient but remain unread for a considerable period of time, during which an offer or acceptance could be withdrawn. The sender of a message has no means of knowing when the recipient is unable to retrieve his or her mail, short of establishing contact by other means. Bianca and Bonell suggest that analogous problems (delivery at a time when the recipient's business is closed) "must be dealt with on a case by case basis" and that the reference to "good faith" in article 7(1) of the Convention may be relevant to the interpretation of "reach" (Bianca and Bonell 1987 204).

### *Contracts for international shipment of goods*

- 117 Contracts for international shipment of physical goods fall into two distinct categories: shipment by sea and shipment by air. In both cases, New Zealand is party to an international convention which has been given force of law by operation of statute.

### *Shipment by sea: sea waybills, bills of lading and the Hague-Visby Rules*

- 118 Contracts for international shipment of goods by sea are regulated by the Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 24 August 1924 (Hague Rules) as amended by the Protocol of 23 February 1968 (Visby Rules). For convenience these are referred to as the Hague-Visby Rules. The Hague-Visby Rules have force of law in New Zealand by operation of s 209 of the Maritime Transport Act 1994. Parties may not exclude the Hague-Visby rules by consent.
- 119 The actual contract for carriage of goods by sea takes one of two forms: negotiable (a bill of lading) and non-negotiable (a sea waybill or non-negotiable bill of lading). Informal research conducted by Myburgh in 1993 indicated that "only around 8% of transactions are concluded using non-negotiable waybills" (1993 325). Unfortunately, this research has not been updated, as a result of which the proportion of exporters using negotiable instruments is currently unknown.
- 120 Sea waybills can be, and are, issued in the form of electronic documents; according to Myburgh electronic waybills have been in use since the early 1970s. Because they are not negotiable (ie,



the bill itself is not a document of title; see para 122), the problems encountered in generating an electronic equivalent may not be high. However, the potential for growth in the use of sea waybills instead of bills of lading by New Zealand exporters may be limited because they do not allow goods to be traded in transit, and because they offer a lower degree of security to banks financing the transaction. Australian banks apparently advise against the use of sea waybills for this reason (Phillips 1997 9–12).

121 There is no express requirement in the Hague–Visby Rules that bills of lading be produced in paper form (Gliniecki and Ogada 1992 139; see also Faber 1996 239). This probably reflects the antiquity of the original Hague Rules more than a desire to allow for technological advances.<sup>42</sup> Similarly, there is no requirement that the carrier issuing the bill of lading must sign it manually: article 3(3) merely requires the carrier to “issue” a bill (Richardson 1989 41).<sup>43</sup> Part II of the Mercantile Law Act 1908, which sets out the legal status of bills of lading, is similarly silent on the question of medium. It has been argued that references to “possession”, “delivery” and “endorsement” in s 13 of that Act effectively require the existence of a physical document (Myburgh 1993 329). Although, s 13 of 1908 Act was repealed and replaced with new ss 13A–13C by the Mercantile Law Amendment Act 1994, the issue of the medium was not directly addressed. Nor does there appear to have been any judicial consideration of whether an electronic bill of lading would be impliedly excluded by either the Hague–Visby Rules or the Mercantile Law Act.

122 Uncertainty as to the legal status of electronic bills of lading is compounded by practical difficulties. Bills of lading have historically served three functions: a receipt issued by the carrier to the shipper; evidence of the contract of carriage between the shipper and the carrier; and a document of title to the goods (Guest 1997 para 18-007). The latter function renders bills of lading negotiable in the sense that legal title to the goods may be passed between parties while the goods themselves are in transit by transferring possession of the bill of lading. Further, because the bill of lading is a document of title, it can be kept by the shipper (or more often his or her bank) as security, pending receipt of payment. Faber points out that if an electronic message is not a bill of lading

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<sup>42</sup> By contrast, the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules) article 14(3) effectively provides that bills of lading may be issued electronically unless domestic law requires otherwise.

<sup>43</sup> Richardson does state that issuing a bill has been traditionally understood as requiring a signature, but that this is no longer the case.

or document of title as a matter of law, the Hague–Visby Rules will not apply unless they are expressly incorporated into the contract (Faber 1996 239).

- 123 The UNCITRAL Model Law on Electronic Commerce seems to promote a recognition of documents governing contracts for the carriage of goods and transport documentation (articles 16 and 17; see also the *Guide to Enactment* paras 108–122). There seems to remain, however, a perception that electronic equivalents of document of title (such as bills of lading) are less secure than paper-based systems. This perception creates a market-based problem rather than a legal problem.
- 124 Electronic messages raise problems because of the ease with which they can be duplicated or altered. Several attempts have been made to overcome this problem. A system known as the Sea Docs Registry was set up in 1986 which depended on electronic messages being authenticated by a central registry. However, it failed in its first year due to a combination of cost and lack of confidence in the registry (Faber 1996 242; Myburgh 1993 326). A current trial known as Bolero is based on the Comité Maritime International's Rules for Electronic Bills of Lading. This system uses two registries: a title registry to keep a record of the holders of the bill of lading, and a second which provides security and authentication functions.<sup>44</sup> According to a press release issued by the Bolero Project on 20 January 1998, a company is currently being formed in order to trade using the Bolero system.
- 125 The practical barrier to the introduction of electronic bills of lading is the need for an infrastructure to enable the holder to verify the validity of a particular electronic bill, so that he or she can be confident that the electronic bill does in fact represent title to the goods. Paper bills do not require the same infrastructure. This infrastructure could be organised on a contractual basis, as under

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<sup>44</sup> Bolero Project, *Project Summary*, 1997. The contractual nature of the rules underpinning the Bolero Project are summarised in a 1998 paper by Paul Mallon, "The Legal Implications of Electronic Commerce in International Trade – The Electronic 'Bill of Lading'". All legal issues affecting the evidential acceptance of electronic documentation and electronic equivalents to paper-based contractual documents are dealt with as a matter of contract with the problem of lack of privity between the shipper and intended recipient of the goods which a traditional paper-based bill of lading solves by acting as a document of title is addressed by novation of the contract of carriage between shipper of the goods and carrier. It is the contractual nature of the multi-party agreement accepted by all parties dealing within the project that gives it legal recognition.

the Bolero system which requires all parties trading under it to be party to a contractual “rule book”. However, it would also be possible for the state to provide a registry of bills of lading similar to the register of motor vehicle security interests set up under the Motor Vehicle Securities Act 1989. Such a register would be purely facilitative in that it would be optional. But it would have the advantage of neutrality between parties and their banks, which might be of commercial benefit. We invite submissions as to whether this would be a useful or appropriate role for the state in promoting electronic commerce.

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Should there be an optional statutory register to facilitate electronic bills of lading?

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- 126 Other rules exist which contemplate the possibility of electronic bills of lading. Article 14(3) of the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules) makes provision for electronic bills of lading. The latest version of the International Chamber of Commerce *Incoterms* also makes provision for electronic equivalents, although it recognises the difficulty of creating an electronic document of title (*Incoterms* 1990, para 18). To date neither of these regimes appears to have been used in practice.
- 127 The Commission takes the view that the major legal impediments to the use of electronic bills of lading are statutory requirements of writing and signature. Other impediments are essentially market based. Such problems are invariably best resolved by the market. For this reason we do not recommend that New Zealand adopt articles 16 and 17 of the Model Law on Electronic Commerce at this time. However, we invite submissions on this issue.
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Is special legislation necessary to facilitate the use of electronic bills of lading, or is it sufficient to allow for electronic equivalents of “writing” and “signature” and leave other impediments for the market to resolve?

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### *Contracts for shipment of goods by air*

- 128 Contracts for the shipment of goods by air are currently governed by the Carriage by Air Act 1967. Under s 7 of that Act the Convention for the Unification of Certain Rules Relating to International Carriage by Air as amended by the Hague Protocol of

1955 (the Warsaw Convention) and the Supplementary to that Convention (the Guadalajara Convention) have force of law in New Zealand. Article 1(2) of the Warsaw Convention provides that the Convention applies to all international carriage of cargo between contracting states.

- 129 The primary document associated with contracts for carriage of goods under the Warsaw Convention is the air waybill. Article 15(3) effectively provides that air waybills under the Warsaw Convention may be either negotiable or non-negotiable. However, Glass and Cashmore state in *Introduction to the Law of Carriage of Goods* that “in England the business community do not recognise an air waybill as ‘negotiable’” (1989 para 6.28); *Benjamin’s Sale of Goods* states that an air waybill “is not a document of title in the common law sense” (1997 para 21-052). It therefore seems likely that air waybills are used in practice as non-negotiable instruments. Indeed, given the speed of air transport there would seem to be little reason to issue a negotiable air waybill.
- 130 Air waybills function as prima facie receipts and evidence of the contract of carriage: article 11(1). They are therefore the functional equivalent of sea waybills. Under article 5(2) the loss or absence of an air waybill does not affect the existence or validity of the contract of carriage, although article 9 provides that failure to complete an air waybill means the carrier loses the limitation of liability under article 22(2).
- 131 The Warsaw Convention as it applies in New Zealand does not appear to permit air waybills to be issued electronically. Article 5(1) gives the carrier the right to require the consignor to “make out and hand over” an air waybill. Under article 6(1), the waybill must be “made out by the consignor in three original parts and be handed over with the cargo”.<sup>45</sup> This requirement appears on its face to require a physical document to be completed and delivered to the carrier. Each of the original parts must be signed by one or both of the parties. Article 6(4) provides that “the signature of the carrier may be stamped; that of the consignor may be printed or stamped”. There seems to be nothing in the Warsaw Convention to preclude an electronic signature.

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<sup>45</sup> Under article 6(5) the carrier may make out the waybill on the consignee’s behalf.

132 A subsequent amendment to the Warsaw Convention, the Montreal Protocol No 3 (which has not been enacted in New Zealand) removes this problem by amending article 5 as follows:

- (1) In respect of the carriage of cargo an air waybill shall be delivered.
- (2) Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.
- (3) The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph (2) of this Article does not entitle the carrier to refuse to accept the cargo for carriage.

The requirement that the air waybill be signed is unchanged under article 6(3). Article 9 is also amended so that failure to issue an air waybill does not result in the carrier losing its limited liability in respect of damage to the cargo under the Convention. This begs the question whether the availability of an electronic substitute for a paper air waybill has any real meaning, as there is effectively no penalty for failure to issue a waybill at all.

133 The Montreal Protocol No 3 was originally intended to be incorporated into the law of New Zealand by the Carriage by Air Amendment Act 1990. However, this has not occurred; the Order in Council required under s 1(2) of that Act to bring it into force has not been made.

134 We believe that the Montreal Protocol No 3 should be brought into effect in New Zealand in order to remove an unnecessary impediment to electronic commerce. But we invite comments on this matter.

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Is there any justification for continuing the existing requirement that air waybills be printed on paper?

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### *Marine Insurance Act 1908*

135 Contracts for marine insurance in New Zealand must be in writing and signed by the insurer under s 24 of the Marine Insurance Act.

136 As with issues arising under the Property Law Act 1952 and the Contracts Enforcement Act 1956, the issue is whether the require-

ment for a signature by the insurer under s 24 of the Marine Insurance Act can be met by an intention to authenticate the document and be bound thereby (see chapter 7). Again, the requirement that the policy of insurance be “in writing” will be resolved if cl 28 of the Interpretation Bill currently before Parliament is enacted.

## CONCLUSION

137 Generally, we consider the common law of contract to be well-suited to the electronic environment, and not in need of reform. Specific issues such as the time and place of contract formation may need some clarification, and we invite comment on these matters. We regard these as matters of refinement more than reform. However, there are issues relating to the application of a variety of statutes which have supplanted the common law and which are not so easily dealt with. Where statutes do present an impediment to electronic commerce, as in the case of the Contracts Enforcement Act 1956 and the Mercantile Law Act 1908, statutory reform is the only remedy. In many cases this may be addressed simply by deeming electronic documents to be “in writing”. But we welcome submissions as to whether and how statutory reform should be effected in respect of the statutes discussed above and any others we have not identified.

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Are there any statutes which cannot be reformed to permit electronic transactions merely by redefining “writing” and “signature” to include electronic equivalents?

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## 4

# The law of torts

[T]he law of tort is the general law, out of which the parties can, if they wish, contract; and . . . the same assumption of responsibility may, and frequently does, occur in a contractual context. Approached as a matter of principle, therefore, it is right to attribute to that assumption of responsibility, together with its concomitant reliance, a tortious liability, and then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it. (*Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), per Lord Goff of Chieveley, 193)

- 138 **T**HE LAW OF TORTS GOVERNS CIVIL RIGHTS AND DUTIES owed among various members of society. Unlike the law of contract (where obligations are consensual in nature), rights and duties in tort are imposed by law. Sir Ivor Richardson, the current President of our Court of Appeal, recently said:

[T]he law of torts may be viewed as supplementing contract law by devising rules for allocating or spreading losses in situations where it is too costly for potential injurers and potential victims to enter into contractual relationships with each other to make that allocation. . . . And precedential decisions of the courts in common law jurisdictions may supply a level of detail that is costly to duplicate through private bargaining.<sup>46</sup>

- 139 Civil proceedings in tort take the form of an action for recovery of compensatory damages or other available remedies for injuries or losses caused by the acts or omissions of another or others in breach of a right or duty imposed by the law.<sup>47</sup>
- 140 In a commercial context the law of torts is concerned primarily with compensating losses caused to economic interests, whether

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<sup>46</sup> Sir Ivor Richardson, “What can Commercial Lawyers expect of a Legal System?” (8th Inter-Pacific Bar Association Conference, Auckland, 2 May 1998); see also his article “Law and Economics” (1998) 4 NZBLQ 64, 68–71. Compare with Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd* (quoted above).

<sup>47</sup> *Laws NZ, Tort*, paras 1–3; see Todd et al 1997 chapter 25 for a general discussion of tortious remedies available in New Zealand.

physical or intangible, when a right is breached or a duty is not adequately performed. Under the Accident Rehabilitation and Insurance Compensation Act 1992 s 14 and its predecessors, it is not generally possible to bring claims for damages arising out of personal injury in New Zealand. This has had an effect on the way in which the law has developed.

- 141 There is no exhaustive definition of the law of torts. Historically, new torts developed, from time to time, to address social needs arising from the changing nature of society. For example, in *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 (HL) the concept of a duty of care was expanded in a way which addressed the development of (then) modern packaging and distribution methods for consumer goods. Before that the courts had not recognised that a duty to take reasonable care in the manufacturing of products could extend beyond contractual relationships. This was despite the existence of distribution networks involving wholesalers and retailers which did not involve contractual relationships between the manufacturer and the ultimate customer.<sup>48</sup> At the present time new torts seem to be emerging to meet modern society's concerns, for example, invasion of privacy: *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; and harassment: *Khorasandjian v Bush* [1993] QB 727.
- 142 It is perhaps best to start with Lord Atkin's dictum in *M'Alister (or Donoghue) v Stevenson* [1932] AC 562 (HL) in which his Lordship, in discussing the concept of "neighbourhood" for negligence purposes, said:

The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my Neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contem-

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<sup>48</sup> In this context reference can also be made to further development in New Zealand through the Consumer Guarantees Act 1993.



plation as being so affected when I am directing my mind to the acts or omissions which are called in question. (580)

Those observations of Lord Atkin form the basis of our current law of negligence, even though that law has expanded somewhat to meet changing social and policy requirements (see paras 168–169).

- 143 In the context of electronic commerce it is relevant to question whether Parliament should seek to impose restrictions upon the operation of the law of torts because of the prospect of exposing persons trading through the internet to “liability in an indeterminate amount for an indeterminate time to an indeterminate class”: *Ultramares Corporation v Touche* NY Rep 170, 174 (1931).
- 144 Examples of the type of issues raised by electronic commerce conducted over the internet are:
- tensions between desires of internet users that all information be freely accessible and the needs of the commercial community to protect intellectual property rights or communications made in confidence;<sup>49</sup>
  - potential liability in defamation of internet service providers who act as agents for users of the internet – without internet service providers the information on the internet could not be “published” at all in that form;<sup>50</sup> and
  - the potential for damage to be caused to computer systems using the internet through the negligent or intentional spread of computer viruses.<sup>51</sup>
- 145 The second of our guiding principles proceeds on the premise that fundamental principles underlying the law of torts should not be changed but should be adapted, if necessary, to meet the needs of the electronic environment. The question is whether there is any need to adapt the law to take account of technological developments.

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<sup>49</sup> See the judgment of the United States District Court in *American Civil Liberties Union v Reno* 929 F Supp 824 (1996); affirmed on appeal by the US Supreme Court in *Reno v American Civil Liberties Union* 117 SCt 2329 (1997).

<sup>50</sup> For a recent case dealing with defamation in the context of alleged republication of alleged defamatory material contained on a website see *International Telephone Link Pty Ltd v IDG Communications Ltd* (unreported, HC, Auckland, 20 February 1998, CP344/97).

<sup>51</sup> While there is no case directly in point, a duty not to allow a biological virus, such as foot and mouth disease, to be transmitted has been held to exist: *Weller v Foot & Mouth Disease Research Institute* [1965] 3 All ER 560.

146 This chapter considers those torts which are likely to give rise to difficulties in the electronic environment in the context of business-to-business transactions involving international trade. It is necessary to assume that the law to be applied in the international transaction will be the law of New Zealand;<sup>52</sup> accordingly, the law is addressed from that perspective.

## TRESPASS TO PROPERTY

147 Trespass to property is a wrongful interference with goods in the possession of another (Todd et al 1997 para 11.2.1). The interference must be direct and physical, but the defendant need not make personal contact with the goods (eg, it is a trespass to goods if damage is caused by use of a projectile; Todd et al para 11.2.2). It is unclear whether the interference with goods may be unintentional, or whether actual damage to the goods must result in order for the elements of the tort to be established: for example, *Wilson v New Brighton Panelbeaters Ltd* [1989] 1 NZLR 74. However, as the usual remedy for trespass to property is damages for the diminution of value or cost of repairing the goods, it is unlikely that a potential plaintiff will commence proceedings unless his or her property has been damaged. In an electronic environment, the main question which arises is whether it is possible to recover in trespass for damage caused by a computer hacker or a computer virus.<sup>53</sup>

148 The question of whether it is possible to claim damages in trespass for losses caused by hacking or a computer virus raises three basic issues:

- whether hacking or the introduction of a virus into a computer constitutes interference with goods;

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<sup>52</sup> As a matter of New Zealand domestic law, it is likely that an action in tort will only arise in an international transaction if the alleged tortious act occurred in New Zealand, or the alleged tortious act was committed in a foreign country in which it would also be actionable: *Red Sea Insurance Co Ltd v Bouygues SA* [1994] 3 All ER 749 (PC) 761.

<sup>53</sup> Hacking has been defined as electronic or physical penetration of a computer system by an unauthorised user (Gringras 1997 212); in England and Wales a criminal offence is committed by a “hacker” under the Computer Misuse Act 1990 (see generally Gringras 211–227). A computer virus is a generic term for computer code which replicates, not only throughout the storage medium in which it incubates, but also across the network to which that computer is connected. Without anti-viral software a computer connected to the internet poses a threat to all other computers also connected and risks infection from those other computers. The ability to infect a home page with a virus and even a word processing document makes the internet capable of spreading malicious code widely and rapidly (Gringras 1997 228).

- whether there is any liability in trespass for unintentionally transmitting a virus; and
- the nature of the damage caused.

### *Interference with goods*

- 149 The tort of trespass to goods requires direct and immediate interference with the plaintiff's goods by the defendant (Todd et al para 11.2.2; Clerk and Lindsell 1995 paras 13-159–13-161). There is no requirement that the defendant physically touch the plaintiff's goods; for example, in *Hamps v Derby* [1948] 2 KB 311 the defendant interfered with the plaintiff's goods (racing pigeons) by shooting at them.
- 150 Although there appear to have been no cases in which transmission of a computer virus has been held to constitute a trespass to goods, there is a clear analogy between deliberately shooting at personal property with the intention of causing damage to it and deliberately transmitting a computer virus (whether by email or on an infected disc) with the intention of damaging the recipient's computer system. In both cases, the wrongdoer seeks to harm the plaintiff's property by use of a device capable of inflicting damage at a distance.<sup>54</sup> The same result is achieved where a hacker deliberately alters computer files in order to cause inconvenience or damage to the owner.
- 151 There is authority in English criminal cases that altering a magnetic disc constitutes damage to property: *Nicholas Alan Whiteley* (1991) 93 Cr App Rep 25; *Cox v Riley* (1986) 83 Cr App Rep 54. In *Nicholas Alan Whiteley*, the Court of Appeal stated that where "the interference with the disc amounts to an impairment of the value or usefulness of the disc to the owner, then the necessary damage is established" (29). In doing so Lord Lane CJ distinguished between tangible property being damaged and the damage itself being tangible. The decision suggests that such conduct would constitute wrongful interference with goods in civil proceedings.
- 152 Authorities differ as to whether intention is a necessary element of the tort of trespass to goods. The authors of *The Law of Torts in New Zealand* suggest that trespass should be regarded as a purely intentional tort, and that unintended acts should be actionable in

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<sup>54</sup> The interest protected in the tort of trespass is possession. Although the plaintiff is not, in the current scenario, deprived of possession of the computer, the plaintiff is prevented from using that computer, either because the virus has caused it to stop operating, or because the plaintiff fears transmitting the virus to someone else.

negligence (Todd et al 1997 para 11.2.1). However, in *Wilson v New Brighton Panelbeaters* [1989] 1 NZLR 74, 77 Tipping J appeared to assume that unintended interference with goods is trespass provided there is evidence of damage.<sup>55</sup> Similarly, in *National Coal Board v JE Evans & Co Ltd* [1951] 2 KB 861 the English Court of Appeal held that the wrongful interference with the plaintiff's goods must at least be negligent for there to be any liability in trespass.<sup>56</sup>

- 153 On this basis, liability in trespass for wrongfully transmitting a computer virus does not necessarily require knowledge of the existence of the virus on the part of the defendant. It will be sufficient if the defendant *should* have known of the existence of the virus and failed to take adequate precautions to prevent its transmission. This raises the question of what constitutes an adequate standard of care against infection by or transmission of computer viruses; this issue is addressed in paras 172–176. However, unlike the tort of negligence, there is no need to prove that the damage suffered by the plaintiff was foreseeable by the defendant (Todd et al, para 11.2.4; *Mayfair Ltd v Pears* [1987] 1 NZLR 459; see also para 169 of this report).

### *The nature of the damage*

- 154 Damage caused by a computer virus is not of a physical nature. The computer, or rather the storage device (such as a hard disc) within which data is recorded, is not rendered inoperative in any physical sense. Rather, it is prevented from operating properly. It is also possible that data stored on the computer may be lost (Gringras 1997 66–69). The loss caused to a business by virus infection may therefore include:
- the cost of restoring the computer(s) to an operational state;

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<sup>55</sup> It is not necessary for me in this case to discuss the more difficult questions of whether or not an unintentional interference with goods is actionable without proof of damage, and indeed whether damage or asportation is necessary to constitute the tort. . . . (77)

This in turn draws on the earlier case of *Everitt v Martin* [1953] NZLR 298.

<sup>56</sup> In this case, the defendant damaged a buried electricity cable belonging to the plaintiff. However, this interference was not tortious because the cable had been buried on the defendant's land without the defendant's knowledge or consent, and did not appear on any plan. The interference was therefore neither intentional nor negligent. Note also that it is not tortious for a defendant to interfere with goods if he or she is entitled to exercise a self-help remedy, such as removing goods which have been unlawfully placed on his or her land (Laws NZ, *Torts*, para 291).

- the value of any data lost;
  - loss of profits for the time that business or production is incapacitated; and
  - loss of reputation or goodwill.
- 155 The damages available in trespass include the cost of repairing the goods, loss of profits or use of the goods, and in appropriate cases, exemplary damages. Where there is a risk of the interference continuing or being repeated, injunctive relief may also be available (Laws NZ, *Tort*, paras 285–286).
- 156 There is a duty imposed on plaintiffs at common law to take reasonable steps to mitigate losses (Laws NZ, *Tort*, para 43). However, it should be noted that this duty only arises after the damage has been caused. Thus, the law (as well as commercial good sense) requires a business whose computers are infected with a virus to respond quickly. But there would be no penalty for failing to take steps before the damage occurred; for example, losses caused by failure to back up a computer on a regular basis would not constitute a failure to mitigate losses, because that failure occurred *before* the wrongful interference occurred.
- 157 Views have been expressed that a defence of contributory negligence may be available in response to an action based on trespass to goods; for example, in *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30, Thomas J came to that conclusion after analysing the Contributory Negligence Act 1947. This view is not firmly established and has been the subject of academic criticism (Todd et al 1997 para 21.1.4(a)). The law remains unsettled in this area. The Law Commission recommended in its recent report, *Apportionment of Civil Liability* (NZLC R47 1998), that the whole of the law regarding contribution in civil cases be reformed and if that reform is enacted it will be possible to raise contributory conduct by way of defence. Having regard to the views expressed in *Apportionment of Civil Liability* the Commission does not consider it necessary to embark upon a reconsideration of this issue in this context.

## CONFIDENTIAL INFORMATION

- 158 Although the action for breach of confidence has its origins in equity rather than tort, we include it in this discussion because of the likelihood that confidential information will be stored electronically. The extent to which the law is able to protect businesses who store confidential information is therefore of importance.
- 159 Liability for breach of confidence typically (although not necessarily always) arises in equity when information which is

confidential<sup>57</sup> is imparted in circumstances importing an obligation of confidence and that information is used by the confidant to the detriment of the confidor.<sup>58</sup> Remedies include injunctions to prohibit the disclosure of confidential information, orders for the delivery or destruction of the information, and damages.<sup>59</sup> It may not be necessary to prove that the defendant has caused harm to the plaintiff by unauthorised use of the confidential information<sup>60</sup> and the mere threat of improper use is a sufficient foundation for injunctive relief: *Ross Industries (New Zealand) Ltd v Talleys Fisheries* (unreported, HC, Auckland, 5/9/97, CP68/97), 3.

160 Electronic commerce has thrown some aspects of the law relating to breach of confidence into sharp focus. In particular the use of electronic communications technology raises essential questions about the availability of remedy when:

- confidential files are copied from a computer without the owner's consent; or
- electronic communications containing confidential information are intercepted by a third party.<sup>61</sup>

### *Unauthorised copying of confidential information*

161 It is technically possible to obtain information from a computer in a way which does not give rise to liability in conversion or trespass to property. For example, where a computer is part of a network it

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<sup>57</sup> The definition of confidential is broad and encompasses information as diverse as commercial trade secrets or client details, and personal secrets passed between spouses (see Laws NZ, *Intellectual Property: Confidential Information*, paras 22–43; and Meagher, Gummow and Lehane 1992 chapter 41).

<sup>58</sup> See Laws NZ, *Intellectual Property: Confidential Information*, para 17; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413; *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515, 520; and the recent decision of the Court of Appeal in *Maclean & Ors v Arklow Investments Ltd & Ors* (unreported, 16 July 1998, CA95/97).

<sup>59</sup> Laws NZ, *Intellectual Property: Confidential Information*, paras 144–146. See also *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299. Note, however, that because the remedy is equitable, all remedies are discretionary.

<sup>60</sup> Laws NZ, *Intellectual Property: Confidential Information*, para 17; see also *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL), 256, 282.

<sup>61</sup> Questions arising from the accidental communication of confidential information to the wrong person or wrongful use of confidential information by a person who originally acquired that information lawfully are not considered as such issues are not peculiar to the field of electronic commerce.

may be possible for a hacker to penetrate security barriers and copy commercially sensitive or valuable files. In such a case, there may be no damage to the computer or the files on which to base an action for trespass to property. Similarly, because the files are copied rather than stolen, the owner is not deprived of possession, and may therefore be prevented from claiming damages for conversion. In any case, the remedy for conversion would in many cases be unsuitable because the defendant would be required to pay damages rather than destroy or deliver up the information. In the absence of any prior contractual or fiduciary relationship between the owner of the files and the hacker, and assuming the files are not protected by copyright, it is likely that breach of confidence will be the owner's only possible remedy.<sup>62</sup>

- 162 Whether a remedy for breach of confidence is in fact available is, however, somewhat uncertain. The traditional requirement that the information be imparted in circumstances giving rise to an obligation of confidentiality generally concerns a situation where A deliberately gives information to B in circumstances where A intends the information to be confidential and B is aware (or ought to be aware) of that fact. This differs from the scenario outlined above, because the information is not voluntarily imparted, but taken. In its 1981 report, *Breach of Confidence*, the Law Commission for England and Wales concluded at para 4.10:

it is very doubtful to what extent, if at all, information becomes impressed with an obligation of confidence by reason solely of the reprehensible means by which it has been acquired, and irrespective of some special relationship between the person alleged to owe the obligation and the person to whom it is alleged to be owed.<sup>63</sup>

This position was described by the English Commission as a “glaring inadequacy” (para 5.5) and legislation was proposed which, among other things, would have imposed civil liability for improperly acquiring information by using or interfering with a computer or data retrieval system without authority (cl 5(2)(a)(iii) of the Commission's yet to be enacted draft Breach of Confidence Bill).

- 163 Notwithstanding the view of the English Commission, this Commission believes that a person who obtains confidential information

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<sup>62</sup> Nor would copying information constitute theft under current New Zealand law: Laws NZ, *Intellectual Property: Confidential Information*, para 182.

<sup>63</sup> See also the consultation paper of the Law Commission (England and Wales), *Legislating the Criminal Code: Misuse of Trade Secrets*, which discusses the case for criminal liability for certain misuses of confidential information.

by reprehensible means is subject to a duty of confidence.<sup>64</sup> In *Franklin v Giddins* [1978] Qd R 72, 80, Dunn J stated that

it would be extraordinary if a defendant, who acquired by eavesdropping or other improper covert means the secrets of the plaintiff because he would not have been able to get them by consensual arrangement, could defend proceedings by the plaintiff on the ground that no obligation of confidence could arise without communication of the information by the defendant.<sup>65</sup>

164 We believe this to be a correct statement of the law.<sup>66</sup> We note that in *Ross Industries (New Zealand) Ltd v Talleys Fisheries Ltd*, the proposition that a duty of confidence can only arise in the context of relationship of trust or confidence between the parties was specifically rejected by the court. The Commission is of the opinion that an adequate remedy is available when confidential information is stolen from a computer by a hacker. However, we invite submissions as to whether a statutory remedy of breach of confidence should be enacted. In doing so we express a strong provisional inclination to the view that a statutory remedy could not readily be justified for the electronic environment alone. The nature of the electronic environment simply throws the problems into sharper focus.

### *Unauthorised interception of communications*

165 In *Malone v Metropolitan Police Commissioner* [1979] Ch 344, Megarry V-C held that no duty of confidence attaches to information acquired by interception of a telephone conversation:

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<sup>64</sup> Note that the duty is not limited to the party who obtains the information; it can also extend to innocent third parties who subsequently obtain a copy: *Ross Industries (New Zealand) Ltd v Talleys Fisheries*.

<sup>65</sup> The fact situation in *Franklin* is directly analogous. The action concerned early fruiting nectarine hybrids which could only be raised by grafting a cutting (budstock) on to rootstock, which were bred by the plaintiff. The defendant stole cuttings from the plaintiff, grafted them, and made further cuttings from the resulting trees until he had an orchard. Although the possibility remained of bringing proceedings for conversion of the cuttings, the plaintiff preferred breach of confidence because the effective remedy in conversion would be a forced sale of the trees to the defendant. The plaintiff had no intention of letting others benefit from his work, a fact of which the defendant was well aware; rather, he wanted the defendant's trees destroyed. Although there was no prior relationship of confidence between the parties, the court allowed the plaintiff to succeed.

<sup>66</sup> See also Meagher, Gummow and Lehane 1992 para 4109; Laws NZ, *Intellectual Property: Confidential Information*, para 115, and the cases cited there. See also the dicta of Lord Goff of Chieveley in *Attorney-General v Guardian Newspapers Ltd* [1988] 3 All ER 545, 658–659; and Denning 1982 264–268.



It seems to me that a person who utters confidential information must accept the risk of any unknown overhearing that is inherent in the circumstances of communication. . . .

When this is applied to telephone conversations, it appears to me that the speaker is taking such risks of being overheard as are inherent in the system. . . . No doubt a person who uses a telephone to give confidential information to another may do so in such a way as to impose an obligation of confidence on that other; but I do not see how it could be said that any such obligation is imposed on those who overhear the conversation, whether by means of tapping or otherwise. (376)

Megarry V-C was careful to limit the above statement to the facts of the particular case – tapping conducted by the Post Office on Post Office premises at the request of police who in turn were acting pursuant to a warrant (383–384). But it apparently remains open to argue that no obligation of confidence attaches to the person who intercepts electronic communications, because parties who use electronic communication are deemed to have accepted the risk of messages being intercepted.

- 166 Although the Commission acknowledges the law is uncertain, we consider that a person who without authority intercepts a message containing confidential information would be subject to a duty of confidence. In reaching this conclusion, we note that while *Malone v Metropolitan Police Commissioner* has never been overruled, and has not been held inapplicable in New Zealand, it seems to have been limited to its facts in England. In *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 895, Sir John Donaldson MR referred to the decision as “somewhat surprising”, and Meagher, Gummow and Lehane regard it as being wrongly decided (1992 para 4109).<sup>67</sup> However, until such time as a court holds that the interception of electronic communications imposes a duty of confidence on the person who obtains the confidential information, uncertainty is likely to continue. Once again, we invite comment on whether statutory reform is necessary to remove this uncertainty.

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<sup>67</sup> See also Fox LJ in *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 899–900, and the dicta of Swinfen Eady LJ in *Ashburton v Pape* [1913] 2 Ch 469, 475. *Francome* concerned information obtained by means of an illegal wire tap which the defendant, a newspaper, subsequently obtained and attempted to publish. The Court of Appeal ordered an interlocutory injunction prohibiting publication to preserve the position of the parties until trial, but did not consider that *Malone* compelled the court to deny the existence of a duty of confidence (Meagher, Gummow and Lehane 1992 para 4109).

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Is a statutory remedy of breach of confidence necessary to impose civil liability for unauthorised copying or interception of confidential information?

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## NEGLIGENCE

167 Liability for the tort of negligence arises when a duty of care owed to another is breached and loss is caused to that person as a result of the breach. The topic is vast, and the categories of negligence are not closed. It is therefore likely that new commercial and communications practices will in time lead to developments in the law of negligence. For the purposes of this paper, however, we focus on two discrete issues which are of particular relevance to electronic commerce: transmission of viruses and liability for advice.

### *Duty of care*

168 In order to establish liability for a negligent act or omission it is first necessary to establish that the defendant owes a duty of care to the plaintiff. This may be accomplished because the case falls within a recognised duty of care, such as liability for a false statement (eg, an action for negligent misrepresentation: see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] AC 465). If, however, the case falls outside the scope of established duties, it is necessary to consider the principles set out by the House of Lords in *Anns v London Borough of Merton* [1978] AC 728:<sup>68</sup>

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to

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<sup>68</sup> This approach to novel cases has been adopted by the Court of Appeal: see *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Ltd* [1992] 2 NZLR 282, 294; *Connell v Odium* [1993] 2 NZLR 257, 265; and *Fleming v Securities Commission* [1995] 2 NZLR 514, 526–527. Although the courts in the United Kingdom have moved from the position adopted in *Anns v London Borough of Merton*, it has been confirmed that the law of negligence is one area in which the common law of New Zealand is diverging from that of England: *Hamlin v Invercargill City Council* [1996] 1 NZLR 513. Accordingly, the above statement remains an accurate statement of the law in New Zealand.

negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. (751)

169 In the context of electronic commerce, issues of proximity or neighbourhood are especially problematic. Who is one's "neighbour" in an electronic world? It is not unreasonable to regard a computer user as having a relationship of proximity with any other computer user with whom he or she is in contact, whether directly or indirectly. Thus, such a relationship would exist wherever information is transferred from one computer to another, either by means of a network or by the physical transfer of information through memory devices such as floppy discs or compact discs. In the case of an internet website, it would be reasonable to extend the relationship to anyone visiting the site. Indeed, it is at least possible to say that any computer network user should realise that negligence on his or her part may ultimately cause damage to any other user of the network, if a virus is transmitted. Thus, the inquiry regarding the nature of a duty of care on the internet is not likely to be whether such a duty could exist, but rather, the number of people to whom the duty is owed.

170 Indeed, Gripman has suggested in "The Doors are Locked but the Thieves and Vandals are Still Getting In" that a duty of care in negligence should be imposed on a business user of a computer system

to prevent hacker intrusions that can severely damage the corporation itself or other internet-connected third party corporations damaged resulting from the original hacker intrusion. (1997 172)

The types of "hacker intrusion" to which Gripman refers are summarised as:

- infection of a computer network with a virus, and
- intentionally shutting down a computer system so that a company cannot distribute its products (Gripman 1997 170; also Robbins 1993 20).<sup>69</sup>

We return to deal with the steps that can be taken to protect a computer system when discussing the standard of care in paras 172–176.

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<sup>69</sup> See also *Revlon Inc v Logisticon Inc* (unreported, Superior Court of California, Santa Clara County No 705933, complaint filed 22 October 1990). Gripman also refers to *United States v Morris* 928 F 2d 504, 505–506 (Second Circuit, 1991) which involved damage caused by a virus ranging between \$96 million to \$186 million based upon labour costs to eradicate the virus and monitor recovery of the computer system (171); in that regard see also Lyman, *Civil Remedies for the Victims of Computer Viruses* 21 Sw ULRev 1169, 1172 (1992).

- 171 The liability of an internet service provider (ISP) in negligence is problematic. However, unless the ISP can be regarded, properly, as an agent of a user or as having failed to take adequate steps to ensure that users of its services do not infect other users with viruses it is unlikely that an ISP would be liable in tort.

### *Standard of care*

- 172 Where a duty of care exists, there is a legal obligation to exercise a reasonable standard of care:

[S]omething which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do. (*Blyth v Birmingham Waterworks Co* (1856) Ex Ch 781, 784)

Thus, if computer users owe a duty of care to others connected to the same network not to transmit viruses, the question becomes, what is a reasonable standard of care? Liability in negligence does not accrue if a defendant who causes the damage has nevertheless exercised a reasonable standard of care in his or her dealings with a plaintiff.

- 173 In assessing what is a reasonable standard of care, courts may take into account current industry practice and the nature of the particular virus.<sup>70</sup> The extent of the risk may be balanced against the cost and difficulty of taking precautions against that risk. Thus, the reasonableness of any particular set of precautions depends on the nature of the risk. The standard of care may also be elevated if the user claims to be an expert; in such a case, the appropriate standard would be that expected of a reasonable *expert*, in the field in which the user claims to be an expert. It follows from this that a company which regularly conducts business transactions via computer networks, or the operator of a popular website, may reasonably be expected to employ a higher level of precautions than a casual browser.

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<sup>70</sup> This does not imply that a court must necessarily find that industry practice is sufficient to meet the legal standard of care where conformity with best practice guides does not constitute incontrovertible proof that the user has exercised a reasonable standard of care. Such evidence will be taken into account by a court in determining whether the allegation of negligence has been made out: *Bolam v Friern Hospital Management Committee* [1957] 1WLR 582; *Laws NZ, Negligence*, para 5.

- 174 In general, the risk of transmitting a virus is great if the virus is one which affects commonly used computer software. Conversely, the cost and difficulty of installing software to guard against commonly occurring viruses is not great. However, it should be noted that the duty to take adequate precautions is not fixed in time. Rather, it is, “an obligation which keeps pace with the times. As the danger increases, so must . . . precautions increase”: *Lloyds Bank v Railway Executive* [1952] 1 All ER 1248, 1253. Accordingly, merely installing virus protection software may not be an adequate precaution if that software is not regularly updated.
- 175 Determination of an appropriate standard of care is linked to the basic purposes of the law of tort. In a computer context Gripman has summarised these as follows:
- to deter wrongful conduct;
  - to encourage socially responsible behaviour;
  - to restore injured parties to their original condition by compensating them for their injuries (Gripman 1997 176).

There are technical means by which computer systems can be made more secure: examples are firewalls, and encryption technology.<sup>71</sup> It is also possible to acquire anti-viral programs. By acquiring such programmes and educating staff as to the problems that can arise through unauthorised entry to a computer system the possibility of breaching any standard of care may be minimised. It would be wise for those engaged in electronic commerce to take expert advice on protection measures that are open to them to minimise the prospect of being sued in tort.<sup>72</sup>

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<sup>71</sup> Gringras defines a “firewall” as:

hardware, but more usually software, designed to protect network systems from damage by outsiders, while maintaining connectivity. The firewall sits between a local network and the big, wide world (usually the internet). To protect the local network from evil-intentioned intruders, the firewall may admit only designated users, or allow only designated commands to be issued from outside. Balancing flexibility with security is, needless to say, a perennial headache in designing firewalls. (Gringras 1997 382).

Encryption is the mathematical process used to disguise text or data. It takes two forms: those forms are public key encryption and private key encryption (Gringras 381). For further discussion of public and private key encryption see chapter 7.

<sup>72</sup> Gripman provides a useful analysis, in technical terms, of the steps that can be taken to minimise security problems in this context (1997 182–195); that is followed by a specific case study (191–195).

176 Historically, the law has imposed lower standards of care when a defendant is a minor (see, for example, *Spiers v Gordon* [1966] NZLR 897, and *Mullin v Richards* [1998] 1 WLR 1304). However tortious acts on the internet may be carried into effect by children of any age without knowledge of that from other persons operating within the internet at any particular time. Unless a child was too young or immature to form the requisite intent (for an intentional tort) it is likely that liability would exist. A separate duty (actionable at the suit of the injured person) may also arise against the minor's parents for failing to supervise the child's activities properly (Laws NZ, *Torts*, para 27).

### *Damage*

177 A debate has raged for some time as to whether, in an action for negligence, the recovery of "pure" economic loss is possible. In New Zealand the courts have held that the distinctions drawn by the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) do not apply in New Zealand. This view has subsequently been upheld by the Privy Council in a building case which held that the New Zealand courts were entitled to follow their own path in this regard: *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); appeal dismissed [1996] 1 NZLR 513 (PC).

178 The real issue in the context of electronic commerce is whether there are any policy considerations that would justify limiting the scope of a duty of care based on the formulation in *Anns v London Borough of Merton* [1978] AC 728. Some of the issues which need to be addressed in that regard are:

- The seriousness of harm that will be caused and the seriousness of the foreseeable consequences: *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Limited* [1992] 2 NZLR 282 (CA) 295.
- The "floodgates" argument – the courts will not wish to impose a liability that is potentially indeterminate:

A simple requirement that harm be foreseeable may provide no adequate control over the potential ambit of liability, so more restrictive tests may need to be applied. Thus the courts may require specific knowledge or foresight on the part of the defendant of exactly who would suffer harm and how it would come about and what form it would take. (Todd et al 1997 para 4.3.3)

- Reasonable alternative opportunities for self protection – a number of recent decisions support the proposition that it is relevant to take into account the extent to which the plaintiff

could have used adequate alternative opportunities for self protection (Todd et al para 4.3.5; see also *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Limited* and *Henderson v Merrett Syndicates Limited* [1995] 2 AC 145 (HL)). Into this category come concerns that:

- the court should not allow a plaintiff greater recovery in tort than he or she was prepared to pay for in contract;
- whether the plaintiff had or could have some alternative right of recourse against the defendant (eg, where a plaintiff could have bargained for protection in contract); and
- whether insurance is available for the type of loss involved; and if not, why not?

179 Sometimes exemplary damages are sought. Exemplary damages are damages which are designed to punish conduct rather than to provide compensation. They are usually awarded for intentional actions. The Court of Appeal has made it clear that exemplary damages are available in negligence in only the most exceptional cases: *Ellison v L* [1998] 1 NZLR 416 (CA), 419.

### *Causation*

180 In negligence proceedings, the plaintiff is required to prove that there is a causal connection between the defendant's negligent act or omission and the plaintiff's damage. This is not merely a question of determining that the defendant's act or omission is a factual cause of the plaintiff's loss; the plaintiff must also prove that the defendant's negligence and the plaintiff's damage are sufficiently closely connected (see generally Todd et al 1997 chapter 20). In other words, liability is limited on policy grounds when the harm is considered to be too remote from the negligence: *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound (No 1)* [1961] AC 388.

181 In the context of computer networks, the need to prove causation may be of particular importance in cases where a plaintiff's computer or website has been infected several times by the same virus. Multiple infections by the same virus will not usually cause more damage than a single infection; it would therefore be a complete defence to prove that the plaintiff's computer was already infected when the defendant transmitted the virus.

182 The issue of remoteness of damage may arise when the plaintiff's computer or website has not been infected by direct contact with the defendant. Although there would be little difficulty in establishing that the defendant's negligent dissemination of a virus is a *factual* cause of the plaintiff's loss, it may not be a *legal* cause if the

plaintiff is too remote from the defendant (Gringras 1997 73–76). Several factors may be relevant to this issue:

- the number of intermediaries between the defendant and the plaintiff; and
- whether any of those intermediaries acted in such a way as to break the chain of causation.

### *Liability for advice: negligent misstatement*

183 Liability in tort for loss caused by false or negligent advice is not an issue which raises particular problems for those engaging in electronic commerce. However, because advice is a product which can be delivered electronically, it is an area of commerce which can realistically be expected to reap the maximum gain from electronic communications.

184 The duty of care (in the context of negligent advice) has been summarised by Lord Oliver in *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) thus:

[T]he necessary relationship between the maker of a statement or giver of advice ('the adviser') and the recipient who acts in reliance upon it ('the advisee') may typically be held to exist where

- (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given;
- (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose;
- (3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and
- (4) it is so acted upon by the advisee to his detriment. (638)

185 The third requirement that the advisee be known to the adviser, either specifically or as a member of an ascertainable class, would preclude liability where advice is published on a website and relied on by a browser. But the same may not be true if an advisee forwards the advice to a third party who *does* meet the test.

## DEFAMATION

186 The tort of defamation protects the reputation of an individual against false or unjustified allegations. It is established when the plaintiff proves that

- a defamatory statement was made; and
- that statement was about (identified) the plaintiff; and



- the defendant published the statement (see generally Todd et al 1997 chapter 16).

187 There is little doubt that electronic transmission of a defamatory statement which identifies the plaintiff constitutes publication for which the publisher will be liable: *Rindos v Hardwick* (unreported, 31/3/1994, SC WA Ipp J, 164/1994); see 6(1) *Laws of Australia* paras 18–19. Publication merely requires that the defamatory statement be made to a person other than the plaintiff. The statement may be written or spoken as New Zealand law, under the Defamation Act 1992, does not distinguish between different forms of publication. Thus, forwarding email containing a defamatory statement to a person other than the plaintiff, or downloading such a statement from the internet, could give rise to liability in defamation, regardless of the identity of the original maker of the statement. Indeed, a recent case has held that merely publishing the URL<sup>73</sup> address of a website which in turn contains defamatory statements may constitute republication of that article: *International Telephone Link Pty Ltd v IDG Communications Ltd* (unreported, HC, Auckland, 20 February 1998, CP344/97). The main issue is not therefore *whether* liability in defamation can arise from electronic communications, but rather *who* may be liable, and in particular, whether network service providers may be liable for publishing defamatory comments made by their subscribers.

188 Two American cases have considered the liability of network providers for defamatory statements. In *Cubby, Inc v CompuServe Inc* 776 F Supp 135 (SDNY 1991), CompuServe, an ISP, was held not liable for republishing defamatory statements contained in an online newsletter which was written by a separate company. This decision turned on the fact that CompuServe did not exercise editorial control over content in the newsletter; nor did it have knowledge of content:

CompuServe has no more editorial control over such a publication than does a public library, bookstore or news-stand, and it would be no more feasible for CompuServe to examine every publication it carries for potential defamatory statements than it would be for any other distributor to do so. (140)

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<sup>73</sup> The acronym URL stands for uniform resource locator and refers to the standard for specifying an object on the internet, such as a world wide web page or a file on a file transfer protocol (FTP) for example. A URL for the world wide web will have the prefix “http://” denoting that the page uses hyper-text transfer protocol (see Gringras 1997, 387).

189 However, in *Stratton Oakmont Inc v Prodigy Services Inc* NYS 2d Index No 31063/94, [1995] WL 323710, Prodigy (another ISP) was held liable in defamation because it exercised a degree of editorial control over the content of material published on a bulletin board. Prodigy advertised itself as a family-oriented computer network, employed software to screen messages for offensive language before they were published on the bulletin board, and required subscribers to adhere to content guidelines. It also appointed “Board Leaders” to enforce those guidelines, and provided them with the ability to delete messages which contravened the guidelines. This control did not necessarily mean that Prodigy, or any of its agents, had actual knowledge of the defamatory statement, leading at least one commentator to observe that the practical effect is to encourage a “hands off” approach on the part of ISPs (Carey 1997 1634).

190 Defamation law in New Zealand is governed by the Defamation Act 1992. Section 21 of that Act provides that a person who publishes defamatory material as a “processor or distributor”<sup>74</sup> has a defence of innocent dissemination if

that person alleges and proves

- (a) That that person did not know that the matter contained the material that is alleged to be defamatory; and
- (b) That that person did not know that the matter was of a character likely to contain material of a defamatory nature; and
- (c) That that person’s lack of knowledge was not due to any negligence on that person’s part.

Whether a New Zealand ISP could be liable on the same fact situations as arose in *Cubby* and *Stratton Oakmont* would therefore depend on proving lack of knowledge without negligence. The standard of care in such circumstances would need to take into account the relevant standard practice of the industry together with any public policy issues such as whether or not a duty should be placed on ISPs to censor the material placed on their network by their clients, and if so, in what circumstances.

## CONCLUSION

191 We seek submissions as to whether legislation is necessary to limit the boundaries of liability in tort having regard to the problems in defining one’s neighbourhood in an electronic environment. Any

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<sup>74</sup> The definitions of “processor” and “distributor” in s 2(1) of the Defamation Act 1992 are probably sufficiently broad to include computer network service providers (see Todd et al 1997 882).

legislation to limit the boundaries of the law of torts would have to be based firmly on the floodgates principle: that it is necessary to prevent persons trading or operating on the internet from being exposed to “liability in an indeterminate amount for an indeterminate time to an indeterminate class”: *Ultra Mares Corporation v Touche* NY Rep 170, 174 (1931).

- 192 Should submissions be made which can justify the need for legislation to curb potential liability in tort, we will address those issues in our second report. Our provisional view is that legislation would not be feasible because of the difficulty in articulating any restrictions in a sensible and workable manner.

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Are there any policy reasons for limiting the boundaries of tortious liability incurred from the use of electronic communication networks, having regard to the problems of defining “neighbourhood” in an electronic environment?

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## 5 Evidence

The law of evidence should not be subtle and difficult to understand. And fine distinctions should only be tolerated if both unavoidable and . . . easy to make. (*Re M and R (Minors)* [1996] 4 All ER 239 (CA), 254)

- 193 **I**N MAY 1994 THE LAW COMMISSION RELEASED Preliminary Paper 22, *Evidence Law: Documentary Evidence and Judicial Notice*. That paper was released as part of the Commission's evidence reference, the purpose of which is to make the law of evidence as clear, simple and accessible as practicable and to facilitate the fair, just and speedy resolution of disputes. Final recommendations on the evidence reference will be made later this year and will include recommendations on the topic of documentary evidence. The Commission considers that the recommendations it proposes to make in its final Evidence Report will meet the needs of electronic commerce by facilitating the production of electronically generated evidence. In appendix C we set out draft legislation dealing with documentary evidence which (subject to refinement) will form part of the draft Evidence Code in the final report. In this chapter we address not only the recommendations in the final report but also the present state of our evidence law.
- 194 It is a fundamental principle of the law of evidence that all evidence which is relevant to the issues between parties to a cause is, prima facie, admissible. The term "admissible" in this sense means admitted in evidence for consideration by the trier of fact. Therefore, all electronically generated information which is relevant should be admissible in evidence and be considered by any trier of fact in the absence of compelling reasons to the contrary.
- 195 The law of evidence has traditionally made distinctions between "primary" and "secondary" evidence. Primary evidence is "the best evidence, or that kind of proof which, under any possible circumstances, affords the greatest certainty of the fact in question . . ." whereas secondary evidence "is all evidence falling short of

this . . .” (*Documentary Evidence and Judicial Notice* para 152 citing Greenleaf 1972 and Thayer 1898). The law has, therefore, tended to restrict the admissibility of secondary evidence, particularly when primary evidence is available. Thus an original document has been considered better evidence than a copy. The so-called “best evidence” rule was intended to perpetuate this distinction and the “secondary evidence” rule was a natural consequence. Under these rules original documents were usually required to be produced in evidence.

- 196 Electronically generated information does not have an “original” in the sense in which that term is generally understood in the law of evidence. If there was an “original” it is likely to be regarded as the binary digits encoded into the computer after words have been typed on the keyboard.<sup>75</sup> A New Zealander will generally see on his or her computer screen, or printed out on hard copy, a translation of that information into the English language. That translation can properly be regarded as a “copy” of the information stored in the computer.
- 197 Difficulties have arisen in the application of the primary and secondary evidence rules to machine generated evidence: examples are videos and tape recordings. There are conflicting decisions in England as to whether it is necessary for an “original” tape recording or video (rather than a “copy”) to be offered in evidence: compare *Kajala v Noble* (1982) 75 Cr App Rep 149, 152 with *R v Stevenson* [1971] 1 WLR 1. The point has been left open explicitly in New Zealand: *R v Wickramasinge* (1992) 8 CRNZ 478 (CA) at 481 (see also *Documentary Evidence and Judicial Notice* para 156).
- 198 The practical difficulties which are caused by an inability to determine whether a particular item of electronically generated information is an original or a copy means that the law, as it currently stands, is in a state of uncertainty. Fortunately, judges have adopted pragmatic and robust approaches to avoid some uncertainty. Yet, any uncertainty is undesirable in this area of the law.
- 199 Our paper, *Documentary Evidence and Judicial Notice*, was prefaced with the following observations:

The present law in this area is out of date and at risk of failing to keep up with the changes in technology, especially the increasing use of

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<sup>75</sup> Compare with the UNCITRAL Model Law on Electronic Commerce article 8, and the *Guide to Enactment* paras 62–69.

computer systems for the production and storage of documents. Overall, the rules have become too complex and technical. The bulk of statutory law is too detailed – dealing with specific problems as they have arisen rather than approaching the issues from a principled perspective. Much of the law in this area is found in ancient English cases or relatively obscure sections of the Evidence Act 1908 and other statutes. The consequence of these failings . . . is that the rules are not well understood and can operate as a trap for the unwary. In civil cases the rules are often bypassed when counsel consent to an agreed bundle of documents being placed before the court. Though judges have, for efficiency reasons, encouraged this practice, it must be based on satisfactory rules governing documentary evidence. (para 2)

200 The rules relating to documentary evidence to be recommended in the draft Evidence Code will follow the 6 principles identified in the discussion paper:

- . . . documentary evidence rules should:
- enable the court to consider reliable evidence;
- prevent unsatisfactory evidence coming before the court;
- be as simple as possible and easy to use in practice;
- facilitate agreement between the parties on admissibility and other issues concerning documentary evidence;
- enable the court promptly to determine genuine disputes concerning admissibility issues;
- accord with the general principles of evidence law. (para 3)

### *Objective*

201 The Commission’s objective is to address questions of evidence by enabling all relevant electronically-generated information (not rendered inadmissible on public policy grounds, eg, legal professional privilege) to be considered by a trier of fact. A sharp distinction must be drawn between questions of admissibility of evidence and the weight to be attached to the evidence by the trier of fact.

202 Article 9(1) of the UNCITRAL Model Law on Electronic Commerce provides that “nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence” whether on the sole ground that it is a data message or, if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

203 Article 9(2) of the Model Law then addresses the assessment to be made of the evidential weight of a “data message”. The term “data

message” is defined by article 2(a) as “information generated, sent, received, or stored by electronic, optical or similar means, including but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”. In assessing evidential weight, the trier of fact is to have regard to the following factors:

- the reliability of the manner in which the data message was generated, stored or communicated;
- the reliability of the manner in which the integrity of the information was maintained;
- the manner in which its originator was identified; and
- any other relevant factor.

204 Although there is a reference to the term “best evidence” in article 9(1) of the Model Law, the practical effect of the provisions of article 9 (read as a whole) is to remove the “best evidence rule” in circumstances where the Model Law applies (see also the *Guide to Enactment*, paras 70 and 71). Article 9(1) ensures that nothing in the rules of evidence shall deny the admissibility of a data message in evidence in whatever form, while, on the other hand, article 9(2) allows the court to take into account questions of reliability and authenticity in determining the weight to be given to the evidence. No doubt, in general terms, any data message introduced into evidence (other than by consent) would be supported by oral testimony as to its provenance.

205 The Uniform Law Conference of Canada has drafted and recommended adoption of a Uniform Electronic Evidence Act. To date, that draft legislation has not been enacted by any Canadian jurisdiction. Section 3 of the draft Act provides that, subject to various exceptions, a person seeking to introduce an electronic record as evidence must prove its authenticity with evidence showing that the electronic record is what the person claims it to be. The commentary to s 3 states that that provision codifies the common law and extends its application to electronic records (*Consultation Paper on a Proposed Uniform Evidence Act*, 6). However, the Uniform Law Conference of Canada had previously argued that no change to common law authentication procedures was necessary to deal with electronic records (para 18). It is difficult to understand why the Uniform Law Conference thought it necessary to recommend a specific statute dealing with the topic of electronic evidence if that enactment was solely intended to codify the common law. The only explanation can be an intention to clarify the law.

206 The United Kingdom Parliament passed legislation to deal specifically with the reception of evidence from computers.<sup>76</sup> The English legislation was criticised because there was

no intrinsic reason why different regimes should apply to different forms of record-keeping, and every reason why they should not when the different forms are not readily distinguishable upon their face. There may be no obvious difference in appearance between a document produced by the use of a computerised word processing system and one produced by the use of a manual typewriter, nor is there the slightest justification for subjecting them to different hearsay rules. To do so creates nothing but anomaly and confusion. (Tapper 1989 395)

207 The Commission agrees with that criticism. Any reform of the law of evidence to address electronic commerce issues should provide an appropriate (and, preferably, a standard) definition of the term “document” for the courts to apply.

### *Purpose of the evidence*

208 This report is concerned with electronic *commerce*. Commercial disputes will, normally, involve civil issues. For that reason it is proposed to limit discussion of evidence to civil proceedings. It is, however, clear that issues can arise in the criminal jurisdiction, for example, proceedings relating to alleged contraventions of the Customs and Excise Act 1996. In a prosecution under that Act, the New Zealand Customs Service is likely to rely on many pieces of information which have been generated electronically. The Commission’s final report on evidence will address issues arising in both civil and criminal proceedings.

209 Why might someone wish to rely on electronically generated evidence? The answer to that question in a commercial context is twofold:

- It may be necessary to establish an audit trail, either by an internal or external auditor.<sup>77</sup>

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<sup>76</sup> Section 5 of the Civil Evidence Act 1968 and the later Civil Evidence Act 1972; see also, the provisions of s 69 of the Police and Criminal Evidence Act 1984 as described by Lord Griffiths in *R v Shepard* [1993] AC 380 (HL).

<sup>77</sup> See generally Stone, who discusses electronic commerce issues in the context of the functions of an internal auditor (1997 27). For guidance on the effect of the microcomputer on the accounting system and related internal controls and audit procedures see *International Auditing Practice Statement* (October 1987), issued as a supplement to ISA 400 Risk Assessments and Internal Control.



- To assist a tribunal of fact to determine matters in dispute: in this type of case the rules of law governing the admissibility of evidence in a court of law or in an arbitration become relevant.<sup>78</sup>

210 Where parties are engaged in an exchange of views to establish facts or, indeed, in the process of mediation or arbitration, they have the ability to make their own rules as to what information can be used and what weight will be placed on it. When they go to court or to arbitration to resolve a dispute they must abide by the rules of evidence laid down by law or by the Arbitral Tribunal. An internal auditor or an external auditor is likely to want to be satisfied that information in his or her possession or control can be verified to a standard which will be upheld if matters in issue go to court. Whatever the forum or occasion, the criterion of reliability will need to be met if a person is to act upon the basis of the evidence adduced.

### *Discovery*

211 In civil proceedings, a requirement exists for each party to disclose the existence of documents which are relevant to the matters in issue between the parties to the cause (High Court Rules 1985, rule 293; District Courts Rules 1991, rule 315). Usually, the documents will be listed by the party and verified as such on oath. The inspection provisions of the relevant rules of court then apply so that the parties have ample opportunity to inspect the relevant documents and determine whether they wish to introduce those documents into evidence (High Court Rule 306; District Courts Rule 320). The mere fact that a document has been discovered in civil proceedings does not, of itself, mean that the document will be produced in evidence. First, a decision to produce the document in evidence must be made by at least one of the parties. If the document is to be produced in evidence it will normally be produced either by the author of the document or by its recipient, or it will be admitted by consent. Procedures in place in both the High Court and the District Court at present tend to encourage

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<sup>78</sup> Presently, the law is contained in the Evidence Act 1908 and its various amendments. There are also substantive rules of evidence laid down by the common law. Under article 19 of the First Schedule to the Arbitration Act 1996 the Arbitral Tribunal may, subject to the provisions of that schedule, conduct the arbitration in such manner as it considers appropriate. In doing so it has power to determine the admissibility, relevance, materiality and weight of any evidence.

consensual production of agreed bundles of documents both to assist the trier of fact and to save time and costs.<sup>79</sup>

- 212 Both the High Court Rules (rule 293; form 27) and the District Courts Rules (rule 315; form 26) provide for lists of documents to include documents which were formerly in the possession or control of the party but which are no longer, for whatever reason, in that party's possession or control. Thus, files which have been deleted from the computer system will be subject to obligations of discovery, and may even be subject to inspection rights if reconstruction of those files is possible having regard to the computer system in question (High Court Rule 307; District Courts Rule 329).
- 213 What electronically generated records are required to be disclosed by way of discovery in civil proceedings?
- 214 The term "document" is defined in High Court Rule 3(1) and District Courts Rule 3 as follows:

- "Document" means a document in any form whether signed or initialled or otherwise authenticated by its maker or not; and includes
- (a) Any writing on any material:
  - (b) *Any information recorded or stored by means of any tape-recorder, computer, or other device; and any material subsequently derived from information so recorded or stored:*
  - (c) Any label, marking or other writing that identifies or describes anything of which it forms part, or to which it is attached by any means:
  - (d) Any book, map, plan, graph or drawing:
  - (e) Any photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced: (emphasis added)

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<sup>79</sup> A standard direction in place in many High Court Registries in New Zealand is in the following terms:

[S]ubject to admissibility objections by either side, plaintiff is to incorporate all documents into one bundle in chronological order, consecutively page numbered throughout with main bundle as the exhibit (to be used by the witness), one copy for Judge and [ ] copies for defence. The bundle is to commence with index indicating date and nature of each document, by whom produced and page number. Full costs of preparation to be treated as disbursement in the proceedings. The parties agree that, unless expressly stated otherwise on the bundle or at trial leave is given on adequate grounds to argue the contrary, each document in the bundle (i) was signed by any purported signatory shown on its face; (ii) was sent by any purported author to, and was received by, any purported addressee shown on its face; (iii) was produced from the custody of the party indicated in the index; (iv) is accurately described and dated in the index; and (v) is admissible evidence in the proceeding.

The definition set out above is also the definition of “document” under s 2(1) of the Evidence Amendment Act (No 2) 1980, and is further replicated in many other statutes.<sup>80</sup> Part 1 of the 1980 Amendment Act deals with admissibility of hearsay evidence, including documentary hearsay evidence (ss 3–6). But, the need for consistency is highlighted by the Customs and Excise Act 1996 when it changed, inexplicably, a part of the definition of “document” set out above. In addition to making it clear that information “recorded or stored” by means of (among other things) a computer was a document, the definition also includes the word “transmitted”. However, this addition seems superfluous as it is difficult to understand how something may be transmitted without having previously been either recorded or stored on the computer or other device in question.<sup>81</sup> Yet, the change might be perceived as vital in a particular case.

- 215 More problematic is the fact that, save for a definition relevant to production of evidence for use in or by foreign authorities, there is no definition of the term “document” in the principal Evidence Act 1908. And, yet another definition of the same word appears in s 2 of the Evidence Amendment Act 1945 which simply defines it as including books, maps, plans, drawings and photographs. These examples show the need for a consistent definition of the term

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<sup>80</sup> The definition set out in High Court Rule 3(1) is replicated in the Fisheries Act 1996 s 2; Fair Trading Act 1986 s 2; Evidence Act 1908 s 48G; Serious Fraud Office Act 1990 s 2; Commerce Act 1986 s 2; Commissions of Inquiry Act 1908 s 1A; Corporations (Investigation and Management) Act 1989 s 2; Reserve Bank of New Zealand Act 1989 s 2; and Takeovers Act 1993 s 2. Many other statutes adopt the definition of document contained in the Official Information Act 1982 which differs from the High Court Rules definition in that the words “whether signed or initialled or otherwise authenticated by its maker or not” are excluded. Statutes adopting the Official Information Act definition of “document” are the Privacy Act 1993 s 2; Local Government Official Information and Meetings Act 1987 s 2; Financial Transactions Reporting Act 1996 s 2; and Proceeds of Crime Act 1991 s 2. Examples of statutes which contain materially different definitions of the term document are the Crimes Act 1961 s 263; Births Deaths and Marriages Registration Act 1995 s 2; Evidence Amendment Act 1952 s 3; Friendly Societies and Credit Unions Act 1982 s 2; Goods and Services Tax Act 1985 s 2; Law Practitioners Act 1982 s 80; Securities Act 1978 s 2; and Local Government Act 1974 s 248.

<sup>81</sup> The definition of “documents” contained in the Customs and Excise Act 1996 s 2 arose out of a report entitled *Review of the Customs Acts – A Discussion Paper on Border Protection Legislation* (HM Customs August 1989). Compare with the UNCITRAL Model Law on Electronic Commerce article 2(a) which defines the term “data message” as information “generated, sent, received or stored” by electronic (and certain other) means (see also the *Guide to Enactment*, paras 30–32).

“document” to avoid inconsistent interpretation of that base term, particularly in the context of electronically generated information. Distinctions “should only be tolerated if both unavoidable and . . . easy to make”: *Re M and R (Minors)* [1996] 4 All ER 239 (CA) 254.

- 216 What approach should be adopted towards standardisation? The Model Law on Electronic Commerce uses the drafting technique of defining the term “data message” to achieve its end. Is this necessary? In our view the answer is no. It is unnecessary to venture into technically specific language by using words such as “data message”.
- 217 A computer which stores information is no more a “document” than is a filing cabinet contained in the office of a managing director. Just as the managing director may well lock his or her filing cabinet for security reasons, the computer is also locked off from the outside world through the use of a password. In each case it is necessary to gain access to the “filing cabinet” through a private key: in the case of the filing cabinet, the private key is, literally, a key which will open the filing cabinet; in the case of the computer the private key is the password of the author who has access to the computer. In completing discovery of documents one would not list a filing cabinet in the verified list of documents; equally, one should not list a computer.
- 218 Within the computer are stored various files on which information is to be found. The word “information” is the key. It is the information “recorded or stored by means of . . . computer or other device” which is discoverable through the definition of “document” in both the High Court Rule 3(1) and District Courts Rule 3(b). This means that there is an onus, under the present law, on those completing discovery to identify the precise information which is relevant to the dispute and to list it in the verified list of documents.
- 219 The proposed definition of the term “document” in the proposed Evidence Code is:

**Document** means any record of information and includes:

- (a) anything on which there is writing or any image; and
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) anything from which sounds, images or writing can be reproduced with or without the aid of anything else.

The all encompassing language renders it unnecessary to use the device of the Model Law’s definition of “data message” in

article 2(a) (see the *Guide to Enactment*, paras 30–32). The use of the term “record of information” in the definition both emphasises this and ensures consistency of approach with the provisions of the High Court and the District Courts rules. The Commission is of the view that the width of the definition is sufficient to capture electronically-generated information. The robust and sensible approaches of New Zealand judges to arguments which have sought to exclude evidence produced by, or in, a form which was not invented at the time that the definitions were written confirms our view. In these cases the judges have admitted evidence as a “document” under the statutory definition in question.<sup>82</sup>

220 An example of the problems caused by failing to adopt that type of approach is *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652. Vinelott J was faced with an application for access to a complete computer database and the question arose whether a computer database was, for the purposes of RSC Ord 24 of the English rules, a document of which discovery had to be given. The relevant rules of the Supreme Court (UK) do not, in fact, contain any definition of “document”. Although Vinelott J gave a decision and reasons for his decision, the whole question of access to the computer database had been resolved effectively by the parties through co-operation before judgment was delivered. Vinelott J said:

However, these problems arise not at the initial stage of discovery *when disclosure must be made of the extent of relevant information recorded in a computer database*, but when application is made for production for inspection and copying of a document. It is clear in the light of the decision of the Court of Appeal in *Dolling-Baker v Merrett*, [1990] 1 WLR 1205, that the Court has a discretion whether to order production and inspection and that the burden is on the party seeking inspection to satisfy the court that it is necessary for disposing fairly of the case or cause or matter or for saving costs. At that point the Court will have to consider, if necessary in the light of expert evidence, what information is or can be made available, how far it is necessary for there to be inspection or copying of the original document (the database) or whether the provision of printouts or hard copy is sufficient, and what safeguards should be incorporated to avoid damage to the database and to minimise interference with every day use if inspection is ordered.

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<sup>82</sup> For example, *Longcroft-Neal v Police* [1986] 1 NZLR 394 (CA) (videotape held to be a document for the purposes of s 2 of the now repealed Indecent Publications Act 1963); *Snow v Hawthorn* [1969] NZLR 776, 777 (tape recording held to be a document); and *NZI Insurance NZ Ltd v Hinton, Hill and Powles* [1996] 1 NZLR 203, 209 (admission of documents copied from a computer on to compact discs).

As I have said, in the instant case the experts were able to agree the extent of the information available and the extent to which it could be restored and transferred to magnetic tape or diskette, and, in the light of their reports, a programme was agreed. (659; emphasis added)

- 221 From a practical perspective the issue is one that arises at the initial stage of discovery, contrary to what Vinelott J said. It is the obligation of the solicitor acting for the party to disclose all relevant documents in his or her client's possession or control relating to the matters at issue between the parties to the cause.<sup>83</sup>
- 222 Had the *Derby & Co Limited* case arisen for decision in New Zealand, in terms of both the High Court and District Courts rules, the issue would have been approached by reference to the definition of document contained in those rules. The definition of document in those rules puts the emphasis on "information" rather than on the nature of the receptacle (ie, filing cabinet or computer system) in which it may have been stored. This again highlights the need for consistency of approach.
- 223 Only relevant information contained on the computer database should be discovered, rather than the whole database. This information will include historical information which may only be retained on back-up tapes or be capable of reconstruction from the computer's hard drive.
- 224 If the definition of document contained in the Evidence Amendment Act (No 2) 1980 and the High Court and District Courts rules is applied, there is, in our view, unlikely to be any circumstance in which a court would hold that electronically-generated information is not a "document" for the purposes of evidence or court procedure. Likewise, applying the definition of document in the draft Evidence Code, the result is the same.
- 225 In our view, definitions of document should be standardised in legislation to ensure that illogical or aberrant results do not arise. Such aberrant decisions are likely to occur when different words are used to convey the meaning contained in the High Court Rules.

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Are there any circumstances in which it would not be appropriate to use a standard statutory definition of "document" which includes documents in electronic form?

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<sup>83</sup> *Myers v Elman* [1940] AC 282; *Rockwell Machine Tool Co Limited v EP Barrus (Concessionaires) Limited* [1968] 1 WLR 693; see also Stevens 1982 401.

## Getting the evidence in

- 226 When seeking to have evidence admitted in court it is necessary to understand the nature of the evidence and the purpose for which it is claimed to be admissible. In the case of electronically-generated information it is necessary to determine at the outset whether reliance is being placed upon the evidence for the purpose of proving the truth of the matters contained on its face or for some other purpose. Such an analysis is required, among other things, to establish whether the evidence is to be admitted as “real evidence” or as “documentary evidence”.
- 227 Generally speaking, real evidence is evidence which the court can actually see, hear or touch in the form of an exhibit which can be analysed either by the court or by expert witnesses. Examples of electronically-generated evidence which may (potentially) be admitted as real evidence are film strips of radar images: *The Statue of Liberty* [1968] 2 All ER 195, 196; and Partlow Charts (used for recording the temperature in a refrigerated container): *OEM International Limited v The Ship “Wellington Maru”* (1997) 11 PRNZ 142. Provided a proper evidential foundation is laid to show that electronically-generated charts or analyses relate to the item in question then that information may be admissible as real evidence without needing to comply with rules relating to documentary evidence: *OEM International Limited* 144.
- 228 Issues arise as to when electronically-generated evidence will be categorised as “real evidence” or as “documentary evidence”, to which hearsay rules apply. No litmus test exists. It is desirable that any avoidable uncertainty in the law be removed.
- 229 There are also uncertainties in the way courts have expressed presumptions about the reliability of electronically-generated evidence. This includes:
- evidence which relates to the reliability of the machine; and
  - evidence which might offend the hearsay rule.
- 230 The law currently permits evidence from a machine to be admitted if it can be proved that the machine:
- is of a type that is recognised as reliable;
  - is recognised as having been properly constructed;
  - is in good condition at the material time; and
  - was operated by a properly qualified operator (if any) and used correctly.<sup>84</sup>

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<sup>84</sup> *Holt v Auckland City Council* [1980] 2 NZLR 124 (CA) and *Ministry of Transport v Hughes* [1991] 3 NZLR 325.

Provided this evidence is given the machine will be presumed to have done that which it was intended to do.

- 231 In *Marac Financial Services Limited v Stewart* [1993] 1 NZLR 86, it was suggested that, once a contract had been entered into, evidence produced by a computer without human input may only be excluded if the party opposing the admission of evidence can prove that the technology which created it had been recently invented or that its reliability had not been established by use over a period of time. This test creates a presumption that electronically-generated records are reliable in the absence of evidence to the contrary.
- 232 However, in *Ministry of Agriculture and Fisheries v Thomas* [1994] DCR 486, in the context of a prosecution under the Fisheries Act 1983, it was held that, in addressing the question whether technology was recently invented or reliable, it was not the restricted community of users to be taken into account but, rather, the “community at large” (505). In so holding the judge took the view that the reference in the Court of Appeal, by Richardson J (in *Holt v Auckland City Council*), to “a matter of common knowledge” could not include, in the community, only those who might be expected to come across the system concerned in the course of their careers.<sup>85</sup>
- 233 In some cases, questions will arise as to whether electronically-generated or stored evidence is inadmissible under the hearsay rule. Evidence in such cases is likely to be admitted by consent or fall within the “business record” exception to the hearsay rule under the Evidence Amendment Act (No 2) 1980 s 3(1)(b). Hearsay issues arise because the information contained in the electronically-generated record may not be the evidence of the person against whom it is sought to be produced and no witness may otherwise be available to say how the computer was told (programmed) to respond in any given situation.
- 234 Electronically-generated information is a manifestation of the intent of that computer’s owner or user (possibly translated by a programmer or someone expert in the art of reading the particular

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<sup>85</sup> *Ministry of Agriculture and Fisheries v Thomas* [1994] DCR 486, 505 citing from *Holt v Auckland City Council* [1980] 2 NZLR 124 (CA) 128. See also, the Western Australian case of *Zappia v Webb* [1974] WAR 15, 17 to which Judge RL Kerr also referred in *Thomas*.



computer language) and as such would be admissible in most cases.<sup>86</sup> It is more problematic when what is in issue is the reliability of a computer record generated by a third party with which neither of the parties to the case have had any involvement. Under the Law Commission's recommendations for the draft Evidence Code, all documentary evidence (including electronically-generated information) can be admitted without production through a witness if there is no challenge to authenticity under the notice provisions of the Code. In the absence of any other issue existing which would discriminate against electronically-generated evidence, no further changes to the law are required.

### *Authentication*

- 235 There appear to be no legal difficulties in authentication which are unique to electronic documents. An electronic document is not inherently more anonymous than, for example, a typewritten document. Indicia of authenticity (relating to the identity of the creator of the document) such as signatures may have technological equivalents, such as digital signatures. Similarly, the date on which a document is created or amended is not inherently more difficult to prove than any other form of document: indeed, sometimes it may be easier to discover the date on which an electronic document was created than the date on which a hand-written or typewritten document was created. Thus, for example, the sender of an electronic message should be in no worse a position to offer oral evidence to authenticate that message than the sender of a paper message. Further, in cases where a computer (or, presumably, the software package) is not novel or recently invented, the courts may assume the reliability and accuracy of the evidence without resorting to the test adopted in *Holt v Auckland City Council* [1980] 2 NZLR 124 and requiring parties to adduce expensive and time-consuming expert evidence: for example, *Marac Financial Services v Stewart* [1993] 1 NZLR 86.

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<sup>86</sup> Gringras gives some support to this view when referring to “programmed intention” in the context of the question whether a party who has pre-programmed a computer to enter into a contract in any given circumstance can have had the necessary intention to form a binding contract (1997 29; see also Nicoll 1998 48–49; Myburgh 1993 327; and paras 57–64 of this report).

- 236 Long-standing American authority suggests that the authenticity of computer documents may be established by the evidence of a person responsible for the custody and control of the records, notwithstanding that the information contained in the documents may have been entered by someone else.<sup>87</sup>
- 237 We can see nothing in the current law which requires a specific change to be made to accommodate any difficulties in the authentication of computer documents. Specific difficulties caused by legislative provisions requiring “documents” to be “in writing” and “signed” by the parties to a contract are addressed elsewhere.<sup>88</sup>

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Are there any circumstances in which evidence would be inadmissible only by reason of having been created or stored electronically?

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### *Proposed Evidence Code*

- 238 The Commission is of the view that changes to be proposed in its final Evidence Report will provide sufficient clarity to evidence law as it applies to electronic commerce. The draft Evidence Code will enable those engaged in electronic commerce to carry on business without avoidable uncertainty as to whether electronically-generated information can be admitted as evidence in court. The Commission is also of the view that the changes it will propose to the law relating to documentary evidence will meet concerns of professionals such as auditors.
- 239 The present proposals for documentary evidence reform differ from those set out in the draft Act and commentary in the Commission’s 1994 discussion paper, *Evidence Law: Documentary Evidence and Judicial Notice*. Present proposals for documentary evidence are set out in appendix C. The proposals remain subject to review before publication of the draft Evidence Code later this year. Some general conclusions are identified below.

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<sup>87</sup> See generally the Federal Rules of Evidence (USA) s 803(6); *Transport Indemnity Co v Seib* 132 NW 2d 871 (1965), 874–875; and *State of New Mexico for the Use of Electric Supply Co Inc v Kitchens Construction Inc* 750 P 2d 114 (NM 1988) 114, 117.

<sup>88</sup> See chapters 3 (contract) and 7 (electronic signatures); see also, on this topic, the provisions of articles 6 (writing) and 7 (signature) of the UNCITRAL Model Law on Electronic Commerce and the *Guide to Enactment*, paras 47–52 (writing) and 53–61 (signature).

- 240 All relevant evidence will be admissible in a proceeding unless specifically excluded in accordance either with the terms of the draft Evidence Code or any other enactment. Evidence is “relevant” for the purposes of the Code if it has a tendency to prove or disprove a fact that is of consequence to the determination of a proceeding.
- 241 The term “document” means *any record of information* and includes
- anything on which there is writing or any image; and
  - anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
  - anything from which sounds, images or writing can be reproduced with or without the aid of anything else.
- 242 With the consent of all parties, the judge can admit evidence in a proceeding that is not otherwise admissible. This gives the parties a degree of autonomy over the introduction of evidence and accords with the current practices in the High Court and District Courts of requiring agreed bundles of documents to be lodged prior to the commencement of a civil trial.
- 243 If a question arises concerning the authenticity of a document or thing, the court can examine it and draw any inference from it.
- 244 There will be a new rule under which a party to a proceeding can give notice in writing to every other party that it proposes to offer a document, including a public document, as evidence in the proceeding without calling a witness to produce the document: a copy of the document must be attached to the notice. A party to a proceeding who, on receiving a notice, wishes to object to the authenticity of the document in question must give a notice of objection in writing to every other party to the proceeding. If no objection is lodged, or if the court dismisses the objection, the document can be admitted in evidence if it is otherwise admissible. It will be presumed in the absence of evidence to the contrary that the author, recipient, date, and contents of the document are all as stated on the face of the document. This rule will apply equally to information generated by the party and, for example, to information downloaded from a third party’s internet website. If there is an objection to admissibility then evidence will need to be led to prove the point in issue. Costs consequences are likely to result from unwarranted objections.
- 245 It will be possible to introduce into evidence, with leave of the court, a summary or chart of the contents of a voluminous document or voluminous compilation of documents.

- 246 An attesting witness will not need to be called to prove that a document was signed, executed or attested, whether by hand-writing, digital means or otherwise. In the absence of evidence to the contrary the document will be taken to have been signed, executed or attested in the manner shown on its face.
- 247 Where a party offers evidence that was produced wholly or partly by a machine that ordinarily does what is asserted to have been done on the particular occasion then, unless evidence sufficient to raise a doubt about the presumption is offered, it will be presumed that on the particular occasion in question, the machine did what it was asserted to have done. Furthermore, there is an express provision that if information or other matter is stored in such a way that it cannot be used by the court unless a machine, device or technical process is used to display, retrieve, produce or collate it, then the document may be offered in evidence through use of the machine, device or technical process required to view it.
- 248 A translation of a document into the English language will be presumed to be an accurate translation if notice is given to the other party no less than 5 working days before the translation is tendered in evidence and no evidence sufficient to raise doubt about the presumption is offered. This provision will apply not only to foreign languages but also to codes such as programming languages, shorthand and private encryption systems.

## CONCLUSION

- 249 These amendments to the law will, in the Commission's view, meet the demands of electronic commerce. Avoidable uncertainty in relation to the admission of documentary evidence will be removed (guiding principle 1; see paras 30–33). Further, the provisions are expressed in a sufficiently technology-neutral manner to ensure that changes to the law are not restricted only to existing technology but can apply equally to technology yet to be invented (guiding principle 3; see paras 40–42).

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Do the Commission's recommendations for reform of the law of evidence meet the needs of electronic commerce?

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## 6

# Conflict of laws

250 **I**NTERNATIONAL TRANSACTIONS, BY THEIR NATURE, involve the application of the laws of at least two states: in the case of an international sale of goods, those of the seller and of the buyer. Where more than one legal system can potentially apply to any aspect of an international transaction an issue is raised of what is called, generally, “conflict of laws”. Each state has its own system of conflict of laws.<sup>89</sup>

251 The topic is within the realm of private international law: private, because it is not limited in its application to states, and international, because the transaction with which it deals involves more than one legal system. Private international law forms part of domestic law, and in this respect it differs fundamentally from public international law which is concerned with relationship *among* states.

252 There are a number of areas in which different states have the same rules of private international law, and there have been important harmonisation exercises in this field. More fundamentally, the objectives of private international law are generally similar in different jurisdictions, and are strongly influenced by concepts of comity,<sup>90</sup> and mutual respect and recognition of the civil justice systems of other states. The basic objectives of New Zealand’s private international law are practical, and are intended to ensure the principled and efficient resolution of cross-border disputes and to protect New Zealand’s interests both domestically and as a member of the international community. Those objectives are:

- To ensure, so far as possible, that disputes are heard and decided in the state where the hearing can most appropriately and conveniently be conducted, in the interests of the parties and of justice.

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<sup>89</sup> When discussing conflict of laws issues, commentators frequently refer to conflicts between or among “countries” rather than “states” as used here. The term “state” is used in this paper to refer to countries and to states in federated countries such as the United States of America or Australia when their distinctive laws are material.

<sup>90</sup> For a definition of “comity” see *Hilton v Guyot* 59 US 113, 162–164 (1895).

- To avoid multiple hearings of a dispute, or rehearings of a dispute in a second state.
- To ensure, so far as possible, that where a dispute could be heard in New Zealand or overseas, the system of law by reference to which substantive issues are decided does not depend on where the case is heard. Thus, even if substantive laws differ on an issue, if the rules of private international law of the available jurisdictions all refer that issue to the same system of law, the incentive to forum shop is substantially reduced.

253 With the objectives of private international law in mind, the present discussion of conflict of laws is pitched at two levels: at a purely domestic level and in a global context. For a New Zealand Law Commission reporting primarily to a New Zealand audience, including those who sell from or buy into New Zealand, it is convenient to focus on how New Zealand law (both domestic and conflicts rules) approaches some of these issues. But we must not lose sight of the fact that other legal systems involved in the transaction may deal with them quite differently. It is necessary constantly to consider what issues may arise, and what may be their answers, from the standpoint of the legal system of each state which may be or become involved in the litigation and enforcement of any judgment. For the assistance of readers (but not as a substitute for the need for specific advice in any given case) we include a brief comparative law study on the conflict of laws issues in appendix D of this report.

## THE ISSUES

254 There are four broad issues which arise under the heading of conflict of laws.<sup>91</sup> They are:

- whether the court can exercise jurisdiction;
- whether the court will exercise jurisdiction;
- choice of law (or laws); and
- enforcement of foreign judgments.

255 In the context of electronic commerce questions of conflict of laws are put into sharper focus by the fact that one cannot necessarily identify the physical location of the party with whom one is dealing. For example, if a New Zealand retailer of books orders books from Amazon.com (an internet book supplier) what law applies to that contract in the event of a dispute? In what state is Amazon.com located? The presumptive regime set out in the Vienna Sales

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<sup>91</sup> In international transactions, it will also be necessary to consider the law relating to the contract of carriage by sea, air, or (except in the case of island states) road or rail.

Convention (applied to New Zealand through the Sale of Goods (United Nations Convention) Act 1994; see para 112) only applies where both parties to a dispute are located in states that are signatories to the Convention. If Amazon.com was located in a state that is not a signatory to the Convention (eg, Guatemala), the presumptive regime would not apply.

256 Problems involved in the use of the internet were identified by O'Connor J in *Reno v American Civil Liberties Union* 117 S Ct 2329 (1997). In the context of an indecency issue, O'Connor J compared the “real world” with the “electronic world” in the following terms:

A minor can see an adult dance show only if he enters an establishment that provides such entertainment. And should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently his age). Thus, the twin characteristics of geography and identity enable the establishment's proprietor to prevent children from entering the establishment, but to let adults inside.

The electronic world is fundamentally different. Because it is no more than the inter-connection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed “locations” on the Internet. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages, . . . however, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity.

Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already under way. . . . Internet speakers (who use post-material on the Internet) have begun to zone cyberspace through the use of “gateway” technology. Such technology requires Internet users to enter information about themselves – perhaps an adult identification number or a credit card number – before they can access certain areas of cyberspace, . . . much like a bouncer checks a person's driver's license before admitting him to a night club. (909; original footnotes omitted)<sup>92</sup>

257 It is necessary to bear in mind these fundamental differences when addressing conflict of laws issues in relation to electronic commerce. Some issues require complex analysis. Generally, however, once analysed correctly, existing principles of conflict of laws will enable resolution of matters in issue.

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<sup>92</sup> Note that the term “gateway” is defined as a “device that connects two different computer systems or networks, particularly those using different technical standards or communications protocols (Gringras 1997 382).

## CAN THE COURT EXERCISE JURISDICTION?

### *Generally*

258 The first obligation of any court asked to determine a case is to consider whether it possesses jurisdiction to entertain the case under the law of its own state (the law of the forum, or *lex fori*). “Jurisdiction” in this sense is being used to denote the possession of authority over a dispute, and we term it “basic jurisdiction”. Elsewhere in this chapter “jurisdiction” is also used in a second and third sense, each broader than the first. The second refers to the possession of authority over a dispute *and* the decision to exercise basic jurisdiction and uses the word in that sense without adjective. The third refers to the territory over which the court in question has governance. This last case we refer to as “territorial jurisdiction”.

259 Under New Zealand law its courts possess basic jurisdiction only if

- the defendant is present in New Zealand or New Zealand law permits proceedings to be served on that defendant overseas; and
- the case is one which, in the case of a purely domestic transaction, it would have been authorised to entertain.

260 The High Court is a court having general authority to administer justice throughout New Zealand, and is called a court of general jurisdiction: see *Reid v Rowley* [1977] 2 NZLR 472, 483 (which employs the term in the sense of basic jurisdiction). The jurisdiction of the High Court derives from s16 of the Judicature Act 1908 which states:

The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.

(The sense of basic jurisdiction).

261 This provision conferred on the High Court all the legal (or common law), equitable, and probate jurisdiction which the superior courts had in England at that time (see *Laws NZ, Courts*, para 132). Section 16 also preserved the court’s inherent basic jurisdiction, that being the basic jurisdiction (or authority) to enable the High Court to make any order necessary for it to act effectively, subject only to statutory or regulatory provisions to the contrary (see *Laws NZ, Courts*, para 11; *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104 provides an example of inherent jurisdiction springing from s 16).



- 262 Under the common law adopted as part of the law of New Zealand, New Zealand courts have basic jurisdiction over a person resident overseas and events occurring outside the territorial jurisdiction so long as the damage is sustained within New Zealand.<sup>93</sup> However, the more tenuous the connection between the conduct and New Zealand, the less likely a New Zealand court is to consider New Zealand the appropriate forum to determine matters in issue and exercise jurisdiction.
- 263 In contrast, the District Court, not being a court of inherent jurisdiction, is reliant for its basic jurisdiction upon statute in the form of the District Courts Act 1947 ss 29–42A (see generally Laws NZ, *Courts*, para 42). Under s 29 of that Act the District Court's basic jurisdiction in civil matters is generally limited to claims of not more than \$200,000.<sup>94</sup>
- 264 The foundation of basic jurisdiction is proper service on a defendant. Proceedings can be served on a defendant in New Zealand as of right. The law of New Zealand authorises service on an overseas defendant if there are circumstances connecting the defendant to the New Zealand territorial jurisdiction, as set out in rule 219 of the High Court Rules. Rule 219 provides:

Where in any proceeding statement of claim or counterclaim and the relevant notice of proceeding or third party notice cannot be served in New Zealand under these rules, they may be served out of New Zealand without leave in the following cases:

- (a) Where any act or omission for or in respect of which damages are claimed was done or occurred in New Zealand;
- (b) Where the contract sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any proceeding, or for the breach whereof damages or other relief is demanded in the proceeding
  - (i) Was made or entered into in New Zealand; or
  - (ii) Was made by or through an agent trading or residing within New Zealand; or
  - (iii) Was to be wholly or in part performed in New Zealand; or
  - (iv) Was by its terms or by implication to be governed by New Zealand law:

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<sup>93</sup> *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 and *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391. See also *Libman v The Queen* [1985] 2 SCR 178; *Canada (Human Rights Commission) v Canadian Liberty Net* 157 DLR (4th) (1998) 385.

<sup>94</sup> Other tribunals possess statutory jurisdiction; some others may be created in the exercise of the prerogative. All may give decisions affecting legal rights which may give rise to issues of conflict of laws.

- (c) Where there has been a breach in New Zealand of any contract, wherever made:
- (d) Where it is sought to compel or restrain the performance of any act in New Zealand:
- (e) Where the subject-matter of the proceeding is land, stock, or other property situated in New Zealand, or any act, deed, will, instrument, or thing affecting such land, stock, or property:
- (f) Where the proceeding is for the execution of the trusts of any written instrument of which the person to be served is a trustee and which ought to be executed according to the law of New Zealand:
- (g) Where any relief is sought against any person domiciled or ordinarily resident in New Zealand:
- (h) Where any person out of New Zealand is a necessary or proper party to a proceeding properly brought against some other person duly served or to be served within New Zealand:
- (i) Where the proceeding is for the administration of the estate of any deceased person who at the time of his death was domiciled in New Zealand:
- (j) Where the proceeding is brought under the Carriage by Air Act 1967, unless the party to be served is a High Contracting Party to a Convention therein set out:
- (k) Where the proceeding is a proceeding for relief under the Matrimonial Property Act 1963 or the Matrimonial Property Act 1976, and the Court has jurisdiction to hear and determine the proceeding:
- (l) Where the proceeding is brought under the Marine Pollution Act 1974:
- (m) Where the person to be served has submitted to the jurisdiction of the Court.

265 Where the circumstances do not fall within High Court Rule 219, the plaintiff must seek leave pursuant to rule 220 to serve proceedings on an overseas defendant (see generally *Laws NZ, Courts*). Rule 220 provides:

- (1) In any other proceeding which the Court has jurisdiction to hear and determine, any document may be served out of New Zealand by leave of the Court.
- (2) An application for leave under this rule shall be made on notice to every party other than the party intended to be served.
- ...
- (4) Upon any application for leave under this rule, the Court, in exercising its discretion, shall have regard to
  - (a) The amount or value of the property in dispute or sought to be recovered; and
  - (b) The existence, in the place of residence of the person to be served, of a Court having jurisdiction in the matter in question; and

- (c) The comparative cost and convenience of proceeding in New Zealand or in the place of residence of the person to be served.

...

It should be noted that different countries apply different connecting factors to determine whether or not an overseas defendant can be served. Also, New Zealand's rules as to recognition of foreign judgments do not mirror precisely the rules relating to service of New Zealand proceedings overseas.

- 266 The provisions of the District Courts Rules 1992 in relation to service out of the jurisdiction and forum conveniens are identical to the provisions contained in the High Court Rules. Rules 242–243 of the District Courts Rules cover service out of New Zealand, while protest to jurisdiction is covered by rule 139.

### “Long-arm” statutes

- 267 High Court Rule 220 is an example of a long-arm statutory provision. It vests the court with a wide discretion to determine whether or not an overseas defendant can be served if the circumstances do not fit within those stipulated by rule 219: see *Cockburn v Kinzie Industries Inc* (1988) 1 PRNZ 243.

- 268 Some statutes seek to give New Zealand courts basic jurisdiction in respect of conduct which occurs at least in part out of the territorial jurisdiction.<sup>95</sup> It is clear that the courts will interpret strictly statutes which seek to give extra-territorial jurisdiction: unless clear language is used, a state will not be taken as intending to legislate in regard to matters lying outside its territorial jurisdiction: *Mount Albert Borough Council v Australian Temperance and General Mutual Life Assurance Society Ltd* [1938] AC 224 (PC) 243.

- 269 An example of a statute which purports to apply to persons outside New Zealand (and which is likely to be applicable in the electronic commerce environment) is s 3 of the Fair Trading Act 1986:

This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand.

- 270 The question whether representations made on the internet or via other means of electronic communication can constitute “carrying on business in New Zealand” under that provision remains untested in the courts. However, there is potential for the Act to apply to a

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<sup>95</sup> Examples of New Zealand statutes of likely extra-territorial application in commercial transactions are the Fair Trading Act 1986, the Commerce Act 1986, and the Civil Aviation Act 1990.

person who is outside New Zealand if that person offers goods or services for sale over the internet and those goods or services are supplied within New Zealand (Tokeley 1997 65). Australian authority has already established that misrepresentations made from outside Australia by telephone and facsimile to an Australian company constitute “carrying on business within Australia” for the purposes of s 5 of the Trade Practices Act 1974 (Cth): *Paper Products Pty Ltd v Tomlinsons (Rochdale)* (1993) 122 ALR 279, 287.

- 271 It is likely that misrepresentations made from outside New Zealand by email or electronic data interchange (analogous to telephone and facsimile communications) to New Zealand based traders in respect of goods, services or interests in land in New Zealand would fall within the Fair Trading Act 1986. It is more debatable whether the section would cover placement of misleading information on the internet which can be accessed from New Zealand but which does not relate, at the time of placement on the internet, specifically to the supply of goods or services, or the granting of interests in land, within New Zealand (Tokeley 1997 64–65).
- 272 A United States example of a long-arm statute is a statute which provides for personal jurisdiction, via substituted service of process, over persons or corporations which are not residents of the state but which go voluntarily into the state, directly or by agent, to communicate with persons within the state for limited purposes (*Black’s Law Dictionary* 1990 942; see also *International Shoe Co v State of Washington* 326 US 310, 316 (1945)). In this context an issue arises whether internet activity in a state is sufficient to endow that state with basic jurisdiction over the subject matter of the dispute: *Maritz Inc v CyberGold Inc* 947 F Supp 1328 (ED Mo 1996); reconsideration denied 947 F Supp 1338 (ED Mo 1996).
- 273 In France, long-arm statutes rely on the place of legal domicile or citizenship (Park and Cromie 1990 28; see also the French New Code of Civil Procedure article 42).

### *Application to electronic commerce*

- 274 In a New Zealand context it is necessary to focus upon the following questions in determining whether internet activity will be sufficient to confer basic jurisdiction upon a New Zealand court under the High Court and District Courts rules in a suit for breach of contract:
- Was the contract “made or entered into in New Zealand”? (High Court Rule 219(b)(i); District Court Rule 242(b)(i))
  - Was the contract “made by or through an agent trading or residing within New Zealand?” (High Court Rule 219(b)(ii); District Court Rule 242(b)(ii); emphasis added)

- Was there a breach, in New Zealand, of any contract, wherever made? (High Court Rule 219(c); District Court Rule 242(c))

These questions focus attention on the nature of internet activity. If any of these tests is satisfied a New Zealand court has basic jurisdiction over the dispute.

- 275 So far as tortious proceedings are concerned it will be necessary for the court to consider whether any act was done, or whether any omission occurred in New Zealand in respect of which damages are claimed in the proceeding before the court: High Court Rule 219(a) and District Court Rule 242(a); see also *Kuwait Asia Bank EC v National Mutual Life Nominees Limited* [1989] 2 NZLR 43; [1989] 2 NZLR 50 (CA); [1990] 3 NZLR 513 (PC).
- 276 Problems are caused when electronic commerce is in issue because under the law of New Zealand, and many other states, territory is the bedrock for determining basic jurisdiction, and electronic commerce is not territorially based; the physical location of the party is not necessarily relevant to the transaction. The type of problems caused by internet activity can be readily seen from a consideration of materials placed before the United States District Court in Pennsylvania in *American Civil Liberties Union v Reno* 929 F Supp 824 (ED, Pa, 1996) (affirmed on appeal by the Supreme Court: 117 S Ct 2329 (1997); see also 111 Harvard LR 329–349 (1997)). *American Civil Liberties Union v Reno* provides comment on the history of the internet; the nature of cyberspace; the way in which individuals can access the internet; methods by which communication can occur over the internet; and the operation of the world wide web (830–838). See also *Oggi Advertising Limited v McKenzie* (unreported, HC, Auckland, 2 June 1998, CP147/98, 4–9; to be reported in [1998] NZLR) which refers to these matters in the context of a passing off claim arising out of the use of domain names.
- 277 In *Maritz Inc v CyberGold Inc* 947 F Supp 1328 (ED Mo 1996) a direct issue of conflict of laws relating to the internet came before the United States District Court in Missouri. Maritz Inc brought an action against the operator of an internet site (CyberGold Inc) for trademark infringement. At issue was whether a court in Missouri could assume personal jurisdiction for “commission of a tortious act” when the operator had its place of business in California, where the internet server was also located. District Judge Webber held that the Missouri long-arm statute applied and that the proceedings should not be stayed, taking the view that under the Missouri long-arm statute there was a sufficient connection with Missouri for a court in that state to assume jurisdiction in the proceeding before the court (1337).

278 In the United States there have been a series of cases which have discussed the question of whether internet advertising is sufficient to confer personal jurisdiction over an out of state defendant (see generally, Bauman 1997; Flower 1997 851–860). In discussing the cases determined in different states of the United States, Flower referred in particular to the Connecticut case of *Inset Systems Inc v Instruction Set Inc* 937 F Supp 161 (D Conn 1996) in which the court found that personal jurisdiction existed over a Massachusetts corporation in a suit brought for trademark infringement even though the defendant did not maintain an office or have a sales force in Connecticut. The courts took the view that the defendant's use of an internet website for advertising satisfied the minimum contact necessary to establish personal jurisdiction. As Flower points out:

The court also found that this Internet advertising was more purposeful than standard radio or television advertising because once posted, it was available continuously to any Internet user. (Flower 165)

## WILL THE COURT EXERCISE JURISDICTION?

279 When courts in two different states each consider that they have basic jurisdiction the next question is whether one court will decline to exercise its basic jurisdiction and defer to the other. In an extreme case, a court that has determined it will exercise jurisdiction may, upon application of a party, issue an anti-suit injunction, in an attempt to pre-empt access to a court in another territorial jurisdiction. Although undoubtedly available for exercise by the New Zealand courts they have yet to utilise the anti-suit injunction.<sup>96</sup>

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<sup>96</sup> An anti-suit injunction can be sought to restrain proceedings in another jurisdiction where comity requires the forum granting the jurisdiction to have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which such an injunction entails. For an Australian decision on the court's approach to application for an anti-suit injunction see *CSR Limited v Cigna Insurance Australia Limited & Ors* [1997] 189 CLR 345. See also *Laker Airways Ltd v British Airways* [1985] 1 AC 58 (HL); *Midland Bank Plc v Laker Airways Ltd* [1986] QB 689 (CA); *Airbus Industrie GIE v Patel and Ors* [1998] 2 WLR 686; and *Amchem Products Inc v British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96. The case of *Laker Airways v Sabena, Belgian World Airlines* 731 F 2d 909 (1984) provides an example of an American court, by issuing an anti-suit injunction, preserving its ability to determine a dispute involving foreign defendants whose actions outside the American jurisdiction (anti-competitive pricing) may have nonetheless been in breach of American anti-trust laws.

## *The principles*

- 280 In New Zealand, the High Court or a District Court may, on the application of a named defendant, direct that the proceedings be stayed because it is more appropriate for the proceedings to be dealt with in a territorial jurisdiction other than New Zealand (High Court Rule 131; District Courts Rule 139). If New Zealand is regarded as the more appropriate jurisdiction then New Zealand is *forum conveniens*; if New Zealand is not regarded as the most appropriate venue then New Zealand is *forum non conveniens*.
- 281 As with basic jurisdiction, so the laws of different states may vary in their test as to whether or not to exercise jurisdiction. Because each state applies its own domestic rules on the topic regrettable differences in approach emerge which cause difficulties in practice. For example, there is, unfortunately, a fundamental difference of approach between the test applied by courts in New Zealand and Australia to determine which forum is more appropriate.
- 282 The test applied in New Zealand differs according to whether or not the proceedings are served as of right. In general it can be said that where a party is served in New Zealand, the court is inclined to exercise its jurisdiction and, where a proceeding is served on an overseas party, the court is less inclined to exercise its jurisdiction.
- 283 Where the circumstances fall within High Court Rule 219, proceedings may be served on a defendant as of right. It is then open for the defendant to protest a New Zealand court exercising basic jurisdiction. The defendant may in addition, or alternatively, seek to satisfy the New Zealand court that there is another court with jurisdiction to hear and determine the matter, in which the proceeding could be more suitably tried in the interests of the parties and for the ends of justice: the New Zealand court is *forum non conveniens*.<sup>97</sup>
- 284 Where recourse to High Court Rule 220 is necessary to serve a party outside New Zealand, the court must consider, among other things, whether New Zealand is an appropriate forum before granting leave for the plaintiff to serve an overseas party. At this stage, the party being served will not be aware of the application

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<sup>97</sup> This added requirement is not evident from a reading of rule 219; the courts have grafted on to the rules an ability to determine, as part of the question of jurisdiction, whether jurisdiction should be exercised in the particular case having regard to factors which would otherwise be considered in relation to *forum conveniens*: *Kuwait Asia Bank EC v National Mutual Life Nominees Limited* [1990] 3 NZLR 513 (PC) 528–529. See also *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 (HL).

before the court. Accordingly, it is for the plaintiff to persuade the court that New Zealand is *forum conveniens*: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL). Upon the evidence of the applicant, the court may be satisfied that New Zealand is *forum conveniens*, and allow service on the overseas party. Once served, the overseas party has the right to apply for a stay of the New Zealand proceedings on the ground that the New Zealand court is *forum non conveniens*.<sup>98</sup> If the court does not consider that New Zealand is *forum conveniens*, the court will allow the objection to jurisdiction.

285 In Australia a very different approach is taken to *forum conveniens*: the Australian courts will assume jurisdiction *unless* it is shown that Australia is clearly inappropriate as a forum to resolve the litigation: *Voth v Manildra Flour Mills* (1990) 171 CLR 538 (HCA); also *Henry v Henry* (1996) 135 ALR 564 (HCA). Compatibility of approach to *forum conveniens* between Australia and New Zealand is made difficult by this presumption and has led to stalemate in trans-Tasman litigation: *Gilmore v Gilmore* (1993) 10 FRNZ 469. If New Zealand were to adopt the same rule, the potential for stalemate in trans-Tasman disputes would be increased rather than reduced as each court would be likely to assume jurisdiction.

286 Various practical factors are taken into account by the court in determining whether New Zealand is the appropriate forum. In *Kidd v Van Heeren* [1998] 1 NZLR 324, 342–343, citing with approval the content of Laws NZ, *Conflict of Laws: Jurisdiction and Foreign Judgments* para 30, these factors were said to include:

- the relative cost and convenience of proceedings in each territorial jurisdiction;
- the location and availability of documents and witnesses;
- the existence of litigation in another territorial jurisdiction, and the state of those proceedings;
- whether all relevant parties are subject to New Zealand basic jurisdiction, so that all issues can be resolved in one hearing;
- whether the law governing the dispute to be resolved is New Zealand law;
- the existence of a contract which contains an agreement to submit to a particular territorial jurisdiction or a clause relating to the appropriateness of a particular forum;
- the strength of the plaintiff's case;

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<sup>98</sup> *Club Méditerranée NZ v Wendell* [1989] 1 NZLR 216 (CA); this follows the English approach enunciated in, for example, *Spiliada Maritime Corp v Cansulex Ltd*. See also the cases listed in footnote 96.



- where any judgment obtained will fall to be enforced;
- whether the defendant's objection to jurisdiction or application for a stay is brought to gain a tactical advantage, and not because a trial in the other forum is genuinely desired;
- procedural advantages in one jurisdiction;
- a decision in another territorial jurisdiction that it is *forum conveniens*.

287 A further significant factor is whether the defendant accepts the territorial jurisdiction in which proceedings have been issued. Filing a pleading, such as a statement of defence, will constitute submission to jurisdiction and waiver of the right to object.<sup>99</sup>

288 When the parties have agreed, in advance, that a dispute will be resolved in a state other than New Zealand, the New Zealand courts will, unless strong cause to the contrary is shown, stay any New Zealand proceedings to enable the dispute to be resolved in the jurisdiction of the parties' choice: *Society of Lloyd's and Oxford Members' Agency Limited v Hyslop* [1993] 3 NZLR 135 (CA); *Kidd v Van Heeren* [1998] 1 NZLR 324. These agreements are choice of forum clauses as opposed to choice of law clauses (see para 291). As with presumptive choice of law rules (see para 296), we invite submissions on whether a presumptive rule should be enacted dealing with forum by reference to the state to which goods are to be delivered or services provided.

289 In deciding whether or not to exercise jurisdiction, the court needs to bear in mind concepts of comity and practical considerations to ensure, so far as possible, disputes are dealt with in an appropriate way. It is not possible, however, especially when dealing with cases arising from the operation of electronic commerce, to predict with any degree of certainty whether the court will exercise or decline to exercise jurisdiction. With lack of certainty, the issue is whether the law can be made more workable. An option for the short term is to enact in New Zealand a presumptive rule which provides:

- in an international contract for the sale of goods, the courts of the state to which the good are to be delivered *prima facie* be considered *forum conveniens*;

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<sup>99</sup> The very act of applying for a stay of proceedings made by a defendant who has not previously or at the same time filed an appearance objecting to jurisdiction may in some states constitute a submission to the jurisdiction of the state court: *Henry v Geopresco International Ltd* [1976] 1 QB 726; *Williams & Glyn's Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438; and *Laurie v Carroll* (1958) 98 CLR 310, 334–336. This principle was reversed in England by the Civil Jurisdiction and Judgments Act 1982 s 33.

- in contracts for the provision of services, the place at which the services are to be performed will be the forum in which any dispute arising is to be resolved.<sup>100</sup>

290 A more ambitious option is to promote international discussion with a view to formulating a convention likely to be acceded to by most of New Zealand's major trading partners. At this stage, the Law Commission prefers the latter approach in the long term, but calls for submissions on the preferred method of reform.

## CHOICE OF LAW (OR LAWS)

291 The question whether a New Zealand court has jurisdiction is distinct from the question as to the law which governs the rights in respect of the contract or tortious act. Parties to a contract are free to choose the law which will apply to their contract. If parties include a New Zealand choice of law clause this will be treated as supporting a determination that New Zealand is *forum conveniens*. However, if a New Zealand court determines that New Zealand is *forum conveniens*, and the choice of law clause is upheld and specifies a foreign law, then the trial will occur in New Zealand and apply foreign law. Where a question of foreign law is involved that law must be proved as a question of fact in the proceeding by admissible evidence from a witness; in the absence of evidence as to foreign law, it will be presumed to correspond with New Zealand's domestic law.<sup>101</sup>

292 Under New Zealand law the court will give effect:

- subject to questions of public policy, to the system of laws selected by the parties to govern substantive issues;
- in the absence of a choice of law clause, to the system of law to which New Zealand's choice of law rules refer.

293 It is open to the parties to select, subject to issues of public policy, either a particular system of law or something wider by which their agreement should be interpreted. For example, it is not uncommon in international arbitration for the law governing the agreement to be "internationally accepted principles of law governing contractual relations" (Hafez 1998 s1–s15). That phrase is derived from

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<sup>100</sup> It is necessary to distinguish between the provision of goods and the provision of services as difficulties may exist in determining whether a dispute falls to be resolved under the Vienna Sales Convention, due to the difficulty in proving whether a seller of goods over the internet is located in a state which is a signatory to the Convention (see para 255).

<sup>101</sup> See generally Dicey and Morris 1993 230–238; see also the Evidence Act 1908 ss 37–40; and *Mount Cook (Northland) Ltd v Swedish Motors Ltd* [1986] 1 NZLR 720, 726.

s 38(1) of the Statute of the International Court of Justice: see also *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334.

294 The ability of parties to select a particular domestic law in advance which will be applied to contractual disputes gives certainty to the contract. However, where liability arises out of tortious acts or out of specific laws which deal with non-consensual conduct it will not be possible to provide, in advance, for the law of a particular jurisdiction to apply (see generally Prebble 1973 435, 636).

295 Although the parties to any particular dispute are unlikely to have agreed what law is to apply in the event of an action being brought in tort, there are various rules which the court will apply in determining what law applies. Generally speaking, although the issues are much more complex than this, a New Zealand court is likely to apply New Zealand law provided that the alleged misconduct either occurred in New Zealand or occurred overseas in circumstances where both:

- the alleged misconduct would have rendered the defendant liable in tort according to New Zealand domestic law, *and*
- the alleged misconduct would give rise to some form of civil liability in the place where it occurred.<sup>102</sup>

296 In the absence of a choice of law clause and assuming there is a dispute between parties as to the law which is to govern their relations, the broad tests applied by the court make it difficult to predict in any particular case the law which a New Zealand court will determine governs the contract. In line with our proposals for determining forum conveniens (see paras 288–290), we suggest a short-term option to make the domestic law of New Zealand regarding choice of law more certain through the creation of a presumptive rule which provides:

- in an international contract for the sale of goods the contract will be governed, in the absence of a provision to the contrary, by the law of the state to which the goods are to be delivered;
- in contracts for the provision of services, the place at which the services are to be performed will determine the law under which the dispute shall be resolved.

The existence of such presumptive rules will focus attention on the issues by either the parties or their advisers and may encourage

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<sup>102</sup> *Phillips v Eyre* (1870) LR 6 QB 1; see generally Harris 1998 33; *Boys v Chaplin* [1971] AC 356; and *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 (PC).

greater use of choice of law and choice of forum clauses in international contracts.

- 297 Another option for the long-term is to encourage international discussion with a view to formulating a convention likely to be acceded to by most of New Zealand's major trading partners. At this stage, the Law Commission prefers the latter approach, but calls for submissions on the preferred method of reform.

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Should New Zealand adopt presumptive rules as to choice of law and choice of forum, such as those relating to sales contracts provided for by the Vienna Sales Convention?

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## ENFORCEMENT OF FOREIGN JUDGMENTS

- 298 A foreign judgment has no direct operation in New Zealand. However, some foreign judgments may provide the basis upon which a New Zealand court will grant a judgment which will then be enforced in the same way as any New Zealand judgment.
- 299 Problems arise when enforcement of a judgment of a court of state A is sought in state B and the courts of state B (say New Zealand, perhaps because assets exist here) do not accept that the courts of state A possessed jurisdiction to determine the case. The judgment will not be recognised if, under the conflict of laws rules of state B, state A had no jurisdiction to determine the case.
- 300 At common law a New Zealand court may grant judgment to enforce a money judgment given against a defendant by a foreign court whose jurisdiction over the defendant is recognised by New Zealand's rules of private international law,<sup>103</sup> provided:
- the judgment is for a debt, or definite sum of money other than a sum payable in respect of taxes or other charges of that nature, or in respect of a fine or other penalty; and
  - the foreign judgment is final and conclusive.<sup>104</sup>
- 301 There are certain types of judgments given in foreign courts which, as a matter of public policy, a New Zealand court will decline to enforce. Examples are attempts to enforce foreign revenue and

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<sup>103</sup> Dicey and Morris 1993 455–456. For example, *Schibsby v Westenholz* (1870) LR 6 QB 155, 159 and *Adams v Cape Industries Plc* [1990]1 Ch 433, 456–458, 657 (Scott J) and 513–514 (CA).

<sup>104</sup> "Conflict of Laws – the International Element in Commerce and Litigation" (NZLS seminar) 36; see generally, Dicey and Morris, rule 36.

penal law;<sup>105</sup> judgments obtained by fraud; and judgments given overseas in breach of the rules of natural justice, as applied in New Zealand: *Connor v Connor* [1974] 1 NZLR 632.

302 The jurisdiction of a foreign court to give a judgment *in personam* which binds the judgment debtor will be recognised in New Zealand at common law if the judgment debtor:

- was resident in the country at the time proceedings were instituted, and possibly if he or she was merely present in the country at that time;
- was the plaintiff or counter-claimed, in the proceedings in the foreign court;
- submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceeding; or
- had agreed before the commencement of the proceedings to submit to the jurisdiction of that court, or of the courts of that country, in respect of the subject matter of the proceeding (Laws NZ, *Conflict of Laws: Jurisdiction and Foreign Judgments* para 67).

But, as Goddard stated in “Conflict of Laws: The International Element in Commerce and Litigation” in November 1991, a New Zealand court will not impose sanctions of any kind for failure to comply with an order made by a foreign court (35).

303 Further, an action may be brought at common law on the basis of a cause of action estoppel or an issue estoppel created as between the parties to the foreign proceedings which will then result in a judgment of the New Zealand court which can be enforced in the normal way (Laws NZ, *Conflict of Laws: Jurisdiction and Foreign Judgments* para 62).

304 A judgment of a foreign court may be registered in New Zealand if it was given by a court of a state to which the Reciprocal Enforcement of Judgments Act 1934 refers. In addition, some judgments will be recognised under the Judicature Act 1908 s 56(1).<sup>106</sup>

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<sup>105</sup> *Government of India v Taylor* [1955] AC 491 and *Peter Buchanan Limited v McVey* [1955] AC 516; compare, however, the position on insolvency where a revenue claim may be one of a number of debts in a bankruptcy: *Ayres v Evans* (1981) 39 ALR 129; see also the Insolvency Act 1967 s 135. The question of indirect enforcement of revenue or penal claims in the context of insolvency will be addressed in the Commission’s work on cross border insolvency and whether New Zealand should adopt the UNCITRAL Model Law on Cross Border Insolvency. A report on this topic is due to be published in late 1998.

<sup>106</sup> A list of the jurisdictions recognised by Order in Council made under the Reciprocal Enforcement of Judgements Act 1934 is set out in Laws NZ, *Conflict of Laws: Jurisdiction and Foreign Judgments* para 43; see also para 79 on the 1908 Act.

## *Comparative law: major trading partners*

- 305 Over the last 2 decades New Zealand's pattern of trade has reflected an attempt to diversify both its markets and its range of products (*New Zealand Official Yearbook* 1997, 559). The bulk of the country's trade is with Australia, the United States, the European Community and Japan. There are also major trading relationships with the People's Republic of China, Republic of Korea (South Korea), Malaysia, Singapore, Chinese Taipei (Taiwan) and Thailand, as well as substantial trade with countries in the Middle East, notably Saudi Arabia, Turkey and Iran (*New Zealand Official Year Book* 1998 520–526).
- 306 In deciding whether there is a need to legislate in the area of conflict of laws one must consider the laws of our major trading partners to see whether some degree of consistency can be achieved. In that regard, we refer to appendix D. Two points are of note:
- there are no provisions in the UNCITRAL Model Law on Electronic Commerce which deal with issues of conflict of laws;
  - cases involving the sale of goods between parties located in states which have ratified and enacted the Vienna Convention, will be covered by the Convention.
- 307 In the European Union some statutory modification of conflict of laws rules has emerged through the Brussels Convention and Lugano Convention: for example, *Coin Controls Ltd v Suzo International (UK) Ltd & Ors* [1998] 3 WLR 420. The possibility of the adoption of those conventions in this part of the world has been considered by the Australian Law Reform Commission. Its 1996 report, *Legal Risk in International Transactions*, notes that the basis of the Brussels Convention is one of mutual recognition of civil and commercial judgments of Contracting States without any special procedure being required (para 9.22). The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters deals with matters of both jurisdiction and enforcement of judgments in civil and commercial matters and extends the regime established by the Brussels Convention to the whole of Western Europe (para 9.42). Consideration will need to be given to whether the Lugano Convention should be adapted to and adopted in New Zealand.<sup>107</sup> The benefit of subscribing to a document such as the Lugano Convention is that New Zealand's law would be brought into line with the approach adopted by a number of our major trading partners.

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<sup>107</sup> We note that it is not possible to adopt the Brussels Convention because that convention is restricted to the European Community.

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Should New Zealand adopt the Lugano Convention on conflict of laws and recognition of foreign judgments?

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## CONCLUSION

308 The use of electronic commerce has the capacity to enhance business profitability and, therefore, the national economy. To achieve maximum benefits from its use unnecessary costs must be avoided. Unnecessary costs are incurred when disputes arise and arguments ensue over issues such as the law which applies and the state in which the dispute will be litigated. These costs can be reduced by parties providing for the result in their contracts. If parties do not take heed of the need to provide a contractual solution some form of presumptive regime may assist. Also, in the area of recognition of foreign judgments, some benefits may be gained from adoption of a convention such as the Lugano Convention. Ultimately, however, because the internet is a global resource a global solution to the problems caused by conflict of laws rules is preferable. We await comment on the issues we have raised for discussion.

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# Electronic signatures

309 **A** SIGNATURE IS A METHOD OF ESTABLISHING the validity and authenticity of a document. This is done by connecting the content of a document with an individual person (who has signed the document) so that a reader of the document can act on the basis that the document is a valid statement of that person's intent. In law, signatures are also required by statute in order to give effect to legal documents or transactions:

- wills: Wills Act 1837 (UK) s 9;
- deeds: Property Law Act 1952 s 4, see paras 100–107;
- guarantees: Contracts Enforcement Act 1956 s 2, see paras 109–111; and
- bills of exchange: Bills of Exchange Act 1908 s 3, see para 364.

The Companies Act 1993 alone contains over 20 different requirements that company directors sign certificates in various different circumstances (eg, ss 47, 49, 52, 60–61, 69–70).

310 The use of signatures as a physical manifestation of consent or as a requirement of law presents an immediate difficulty for those who would prefer to transact business electronically. How can technology provide a substitute for a signature which will give a similar degree of security both to the person who signs a document, and to the person who acts in reliance on the signed document? And will the law recognise such a substitute when a statute demands that the document evidencing a transaction be signed?

311 This chapter examines the various uses of manual signatures and the legal definitions of what constitutes a signature. We then discuss electronic signatures, and the various approaches to statutory reform which have been adopted or recommended in order to facilitate their use in overseas jurisdictions. Finally, we make recommendations for reform in New Zealand.

## SIGNATURES

312 The *Guide to Enactment* of the United Nations Commission on International Trade (UNCITRAL) Model Law on Electronic Com-



merce (para 53) identifies seven different functions which a signature might perform in a paper-based environment:

- identification of a person;
- to prove that a person was actively involved in the act of signing;
- to associate a person with the content of the document;
- to provide proof of a party's intention to be bound by the content of the signed document;
- to prove that a person intended to endorse the authorship of a text;
- to indicate that a person intended to associate himself or herself with the content of a document written by someone else; and
- that a person was at a particular place at a specified time.

313 To these functions we would add an eighth: to meet a statutory requirement that a particular class of document must be signed in order to be legally valid.

314 The underlying purpose of a signature is to provide evidence of:

- a person's intention to commit himself or herself to a particular position; and
- assurance to the recipient of the document that the person intended to be bound by the statement can be proved to have made the statement.

315 A signature, by making it easier to prove that someone has manifested an intention to say or do something, simply promotes efficient transactions between people by making it difficult for persons who appear to have signed a document to deny that they intended to be bound by what was said in it.

### *What is a signature?*

316 There is no general statutory definition of "signature" in New Zealand. Some statutes give indications of what constitutes a signature for the purposes of that particular statute (Bills of Exchange Act 1908 s 92; Warsaw Convention article 6(4) in the Carriage by Air Act 1967 sched 1). For the most part, however, the question of what constitutes a signature is a matter of common law.

317 The courts will not always require a "signature" to have been made personally by the person intending to be bound thereby. In *Goodman v J Eban* [1954] 1 QB 550, a majority of the English Court of Appeal held that a solicitor's bill of costs had been adequately signed when a facsimile signature was applied through a rubber stamp bearing the name of the firm rather than that of the solicitor (557, 564). However, Romer LJ noted that "neither of the questions

which was argued before us admits of a very confident answer” (563). And Denning LJ came to a different conclusion stating:

In modern English usage when a document is required to be “signed by” someone, that means that he must write his name with his own hand upon it. It is said that he can in law “sign” the document by using a rubber stamp with a facsimile signature. I do not think that this is correct, at any rate, not in the case of a solicitor’s bill. Suppose that he were to type his name; or suppose that he were to use a rubber stamp with his name printed on it in block letters? No one would then suggest that he had signed the document. (561)

318 Denning LJ referred to cases going back to 1620 in holding that someone cannot “sign” a document by putting a seal upon it (561–562), citing in particular *Grayson v Atkinson* (1752) 2 Ves Sen 454, 459.

319 Further, in *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 (HCA) Windeyer J, sitting in the High Court of Australia, referred to a requirement that a summons be issued under the hand and seal of a Justice of the Peace:

To be under his hand, means, I take it, that it must bear his signature. At common law one person may authorise another to sign a document for him: see *London County Council v Agricultural Food Products Limited* ([1955] 2QB 218). But when a document is required by statute to be under a man’s hand or signed by him what is ordinarily meant is that he must personally sign it, with his name or his mark, by a pen or by a stamp. (42)

320 Although the common law has permitted “signature” by a variety of marks or symbols, whether written, printed or stamped on to paper documents, there appears to be no authority which countenances a signature by purely electronic means. Thus, in the absence of a statutory definition of “sign” or “signature” which includes an electronic equivalent, there is uncertainty whether it is possible to meet a statutory requirement of “signature” unless a physical document is created, and a physical mark is made on that document.

### *What is an electronic signature?*

321 Electronic signatures have been variously defined. The following definition was adopted by the Australian Electronic Commerce Expert Group (ECEG) in its 1998 report, *Electronic Commerce: Building the Legal Framework*:

Electronic signatures can be defined as any symbol or method executed or adopted by a party with the present intention to be bound by or to

authenticate a record, accomplished by electronic means. Authentication is generally defined to mean establishing the validity of the identity of a particular entity. Electronic signatures could include a sophisticated biometric device, such as a fingerprint computer recognition system or even the simple entry of a typed name at the end of an email message. This definition focuses upon the legal purposes of the signature, not upon the particular technology used to accomplish the signature. (para 3.1.3)

## DIGITAL SIGNATURES

322 One type of technology which has received much attention is that of digital signatures. Digital signatures operate by using asymmetric cryptography in the form of a public key and a private key, known as a key pair. Essentially, messages are encrypted using a private key which is unique to the sender of the message. The message is unintelligible in its encrypted form, and cannot be altered after encryption. The message is then sent to the recipient who decrypts it using the matching public key. Unlike the private key, the public key component of a key pair is publicly available. A public key may also be used to encrypt a message, which would be decrypted by the corresponding private key. But although such a message would be unintelligible to anyone else it would lack any guarantee as to the identity of the sender because the public key is not unique. The private key encryption programme cannot be replicated or broken from the public key. In other words, messages encrypted by private key A can only be decrypted by public key A, and public key A cannot be used to decrypt any other message.

323 Digital signature technology relies on a particular infrastructure to provide the following functions:

- issuing private keys;
- guaranteeing the uniqueness of each private key;
- guaranteeing the identity of the authorised user of each private key;
- guaranteeing the integrity of each private key;
- cancelling private keys which are compromised;
- distributing public keys;
- guaranteeing that public keys cannot be used to compromise private keys.

The infrastructure is often referred to as a public key infrastructure (PKI) or a public key authentication framework (PKAF) (see generally Standards Australia 1996).

324 Several jurisdictions have passed legislation for the purpose of implementing a digital signature infrastructure. Examples are the

Digital Signature Act 1995 (Utah); the Digital Signature Act 1997 (Malaysia); and the Digital Signature Act 1997 (Federal Republic of Germany). We examine the Utah and German statutes below.

### *Digital Signature Act 1995 (Utah)*

325 The Digital Signature Act 1995 (Utah) defines a digital signature as

a transformation of a message using an asymmetric cryptosystem such that a person having the initial message and the signer's public key can accurately determine whether:

- (a) the transformation was created using the private key that corresponds to the signer's public key; and
- (b) the message has been altered since the transformation was made.<sup>108</sup>

The Utah Act is therefore technologically specific in that only digital signature technology using public key cryptography receives legal recognition. Alternative electronic signature technology is not covered by the Utah Act.

326 Under s 46-3-104(1) of the Utah Act, the Utah Department of Commerce Division of Corporations and Commercial Code (the division) is a certification authority responsible for issuing, suspending and revoking private keys. The division may also license other certification authorities providing they meet security criteria under s 46-3-201. The obligations of certification authorities are also set out in the Act, including extensive auditing and reporting requirements.

327 Section 46-3-401 provides that duly authorised digital signatures may be used to meet statutory requirements of signed writing. Section 46-3-403 provides that messages which bear digital signatures are as valid, enforceable and effective as if they were written on paper.

328 A notable aspect of the Act is that it allocates risks for those who issue, use or rely on digital signatures in respect of transactions governed by the law of Utah. For example, s 46-3-402 provides:

Unless otherwise provided by law or contract, the recipient of a digital signature assumes the risk that a digital signature is forged, if reliance on the digital signature is not reasonable under the circumstances. If the recipient determines not to rely on a digital signature pursuant to this section, the recipient shall promptly notify the signer of its determination not to rely on the digital signature.

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<sup>108</sup> Utah Code Ann S 46-3-103(10). For a detailed analysis of the Utah Act, see paras 3.2.6–3.2.19 of *Electronic Commerce: Building the Legal Framework*.

Similarly, ss 46-3-309–46-3-310 limit the liability of certification authorities who issue private keys. Further, s 46-3-306(6) imposes criminal penalties on anyone who misrepresents his or her identity or authorisation to a certification authority in requesting the suspension of a private key.

*Digital Signature Act 1997 (Federal Republic of Germany)*

329 Section 1(1) of the German statute provides that the purpose of the Act is

to establish general conditions under which digital signatures are deemed secure and forgeries of signatures or manipulation of signed data can be reliably ascertained.

Like the Utah Act, it is technologically specific, defining a digital signature as

a seal affixed to digital data which is generated by a private signature key and establishes the owner of the signature key and the integrity of the data with the help of an associated public key provided with a signature key certificate of a certification authority . . . (s 2(1))<sup>109</sup>

330 The German Act and its subordinate legislation, the Digital Signature Ordinance, provides a code for the establishment and regulation of certification authorities. Under s 3 of the Act, certification authorities must be licensed by the state. However, s 15 provides for recognition of digital signatures issued in another member state of the European Union or contracting state to the Treaty on the European Economic Area, provided the signature is subject to comparable levels of security.

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<sup>109</sup> This Act was passed as Article 3 of the Information and Communication Services Act (Informations-und Kommunikationsdienste-Gesetz) August 1 1997 (Federal Republic of Germany), and includes subordinate legislation in the form of the Digital Signature Ordinance (the Signatureverordnung, decreed under s 16 of the Digital Signature Act and entered into force on 1 November 1997). The original text of the Information and Communication Services Act s 2(1) reads:

Eine digitale Signatur im Sinne dieses Gesetzes ist ein mit einem privaten Signaturschlüssel erzeugtes Siegel zu digitalen Daten, das mit Hilfe eines zugehörigen öffentlichen Schlüssels, der mit einem Signaturschlüssel-Zertifikat einer Zertifizierungsstelle oder der Behörde nach § 3 versehen ist, den Inhaber des Signaturschlüssels und die Unverfälschtheit der Daten erkennen läßt. (translation provided by The Federal Ministry of Education, Science, Research and Technology)

- 331 Neither the Act nor the Ordinance determines the general legal validity of digital signatures. No general right has been created in Germany to comply with requirements of signed writing by use of a duly issued digital signature.<sup>110</sup> Unlike the Utah statute the German Act does not allocate risk for the use of digital signatures.
- 332 The German statute imposes an ongoing obligation on the state to monitor developments in digital signature technology. In particular, s 17 of the Ordinance requires an “over view of the algorithms and pertinent perimeters considered suitable for generation of signature keys” to be Gazetted each year.

## TECHNOLOGICAL NEUTRALITY

- 333 Both the Utah and German statutes share certain characteristics:
- regulation by the state of the technology which may be used to sign documents electronically;
  - regulation by the state of the application process for obtaining an electronic signature; and
  - state control of the issue and revocation of signature certificates through licensed certification authorities.
- 334 The advantages of the legislation used in Utah and Germany are that the users (both sender and recipient) enjoy certainty as to the integrity of a signature: they know that they can accept and rely upon it without question. But this certainty is achieved by legislating for one form of electronic technology which may quickly prove to be inadequate or outdated. Further, it requires certification authorities for those who licence them to keep abreast of the continuing security of encryption technology and to withdraw certificates if necessary. This may introduce costs which could be avoided if the legislation was technologically neutral (*Electronic Commerce: Building the Legal Framework* paras 3.3.1–3.3.9).
- 335 Our own preference in terms of our guiding principle 3 is for technological neutrality. This principle suggests not only neutrality as between paper and electronic-based means of trading and communicating but also neutrality as between different forms of electronic trading and communication. Accordingly, we do not

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<sup>110</sup> However, s 3 of the Ordinance, which sets out the application procedure for digital signatures, does provide that an applicant may use a digital signature instead of personally signing his or her application. As digital signatures in Germany are issued for a finite period of up to 5 years under s 7 of the Ordinance, s 3 really applies to applications for renewal of an existing certificate.

recommend adoption of statutes based on either the Utah or German model but proceed to consider alternative approaches to reform.

### *The Model Law on Electronic Commerce*

336 The UNCITRAL Model Law on Electronic Commerce adopts a different approach to electronic signatures. Rather than attempt to set out a comprehensive code encompassing all aspects of electronic signature infrastructure, use and technology, article 7 provides:

#### *Article 7. Signature*

- (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:
  - (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and
  - (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

337 Article 7 provides that an electronic signature may be legally effective as a manual signature, but does not define an electronic signature.<sup>111</sup> The Model Law is silent on the form an electronic signature may take. It does not necessarily require the implementation of an infrastructure for issuing signatures. Rather, it would make the issue of whether a particular electronic signature met a legal requirement of signed writing a question of fact, dependent upon evidence of the method used to indicate the identity and approval of the signer.

338 The January 1998 UNCITRAL *Report of the Working Group on Electronic Commerce* notes that UNCITRAL is currently in the process of developing more specific rules on electronic signatures, the draft Uniform Rules on Electronic Signatures. When finalised,

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<sup>111</sup> The *Guide to Enactment* states that

any attempt to develop rules on standards and procedures to be used as substitutes for specific instances of "signatures" might create the risk of tying the legal framework provided by the Model Law to a given state of technical development. (para 55)

these are intended to be at least consistent with the Model Law on Electronic Commerce (para 25) and may ultimately be combined with the Model Law to form a draft international convention (para 212).<sup>112</sup> The draft uniform rules adopt the same technologically neutral approach to electronic signatures as the Model Law, with article 1 of the draft providing that electronic signatures may be in the form of digital signatures, any other form that is capable of verification and identifying the person concerned, or as agreed by the parties to a transaction (para 27). The Commission will continue to monitor the UNCITRAL work on electronic signatures.

### *Massachusetts Electronic Records and Signatures Bill 1997*

339 The minimalist approach of the Model Law has been adopted by the draft Massachusetts Electronic Records and Signatures Bill 1997. Clause 3 of the Massachusetts Bill as at 4 November 1997 provides:

- (a) A signature may not be denied legal effect, validity or enforceability solely because it is in the form of an electronic signature;
- (b) If a rule of law requires a signature, or provides consequences in the absence of a signature, an electronic signature satisfies that rule of law.

“Electronic signature” is defined in clause 2 the Bill as:

any identifier or authentication technique attached to or logically associated with an electronic record that is intended by the person using it to have the same force and effect as a manual signature.

Other provisions in the Massachusetts Bill address the legal requirements of writing and the admissibility of electronic records, writings and signatures in a similar way (clause 3 would insert new ss 67 and 69 into the General Laws of Massachusetts).

340 Unlike the Californian statute discussed in paras 342–343, the Bill is not limited to communications involving government bodies. Clause 4 of the Bill provides:

- (a) A contract between business entities shall not be unenforceable, nor inadmissible in evidence, on the sole ground that the contract is evidenced by an electronic record or that it has been signed with an electronic signature. For purposes of this section, “contract” shall

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<sup>112</sup> The United States has now proposed a draft convention based on the Model Law and Uniform Rules; see UNCITRAL Working Paper 77; A/CN.9/WG.IV/WP.77. 25 May 1998.



mean a contract for the sale of goods or services, for the sale or license of digital information, or for the lease of tangible personal property. The provisions of this subsection shall not apply to the extent that their application would involve a construction of a rule of law that is clearly inconsistent with the manifest intent of the lawmaking body or repugnant to the context of the same rule of law, provided that the mere requirement that information be “in writing”, “written”, “printed”, or “signed”, or any other word that purports to specify or require a particular communications medium, shall not by itself be sufficient to establish such intent.

- (b) Nothing in this section shall be construed to prevent a party from establishing reasonable requirements with respect to the method executed or adopted by a party to sign a contract, absent agreement to the contrary.
- (c) Nothing in this section shall be construed to mean that electronic records and electronic signatures do not satisfy legal requirements for a writing or a signed writing in transactions not covered by this section.

341 The Massachusetts Bill closely resembles the UNCITRAL Model Law in that it is entirely technologically neutral and adopts a minimalist approach to electronic signature technology. There is no attempt to legislate standards for certification authorities or to allocate risks between parties using electronic signatures in commercial transactions.

### *California Government Code*

342 The California Government Code was amended in 1995 to allow the use of electronic signatures in communications with “public entities”.<sup>113</sup> Section 16.5 provides:

- 16.5 (a) In any written communication with a public entity, as defined in Section 811.2, in which a signature is required or used, any party to the communication may affix a signature by use of a digital signature that complies with the requirements of this section. The use of a digital signature shall have the same force and effect as the use of a manual signature if and only if it embodies all of the following attributes:
- (1) It is unique to the person using it.
  - (2) It is capable of verification.
  - (3) It is under the sole control of the person using it.

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<sup>113</sup> “Public entities” is defined in s 811.2 of the Code as including

the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

- (4) It is linked to data in such a manner that if the data are changed, the digital signature is invalidated.
  - (5) It conforms to regulations adopted by the Secretary of State. Initial regulations shall be adopted no later than January 1, 1997. In developing these regulations, the secretary shall seek the advice of public and private entities, including, but not limited to, the Department of Information Technology, the California Environmental Protection Agency, and the Department of General Services. Before the secretary adopts the regulations, he or she shall hold at least one public hearing to receive comments.
- (b) The use or acceptance of a digital signature shall be at the option of the parties. Nothing in this section shall require a public entity to use or permit the use of a digital signature.
  - (c) Digital signatures employed pursuant to Section 71066 of the Public Resources Code are exempted from this section.
  - (d) “Digital signature” means an electronic identifier, created by computer, intended by the party using it to have the same force and effect as the use of a manual signature.
- 343 The section is limited in that it only provides that electronic signatures are legally effective as signatures in transactions with public entities. Although the section appears to be technologically neutral, the draft of the Digital Signature Regulations, made under s 16.5(a)(5), allows that only “acceptable technologies” be used (dated 18 November 1997). Under s 22003 of the draft regulations, either digital signature or signature dynamics technologies are currently approved.<sup>114</sup> However, s 22004 allows for new technologies to be added to the list. The draft regulations also provide for licensing of certification authorities for the use of digital signatures, but does not seek to allocate commercial risks for users.

## CONCLUSION

- 344 In our view the needs of the market can be met by making a change to the proposed Interpretation Act by including a definition of the term “signature” to ensure that electronic signatures are acceptable. This could follow the intent of article 7 of the UNCITRAL

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<sup>114</sup> Signature dynamics is a method of literally transforming a manual signature into an electronic form by means of a stylus or electronic pen. The signature is unique, and therefore secure, because the information recorded includes the shape of the signature, the speed of the stylus and the pressure exerted.

Model Law on Electronic Commerce by permitting a signature to be made provided a method is used to:

- identify the person and to indicate that person's approval of the information contained in the data message; and
- authenticate that the method is as reliable as was appropriate for the purpose for which the message was generated or communicated.

The definition could go on, adopting the Californian model, to make it clear that it is inclusive of certain types of currently used electronic technology but can also include different forms of technology which are yet to be invented. This would leave businesses free to make commercial decisions as to the appropriate method for "signing" electronic messages.

345 We regard this change to the law as fundamental in assisting business to make the most of the opportunities provided through electronic technology. It has the dual benefit of solving an immediate problem in relation to the perceived inability to "sign" documents electronically while leaving for mature reflection and consideration the issues relating to encryption and certification authorities for electronic signatures generally. However, we seek submissions on the following questions.

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Should New Zealand adopt a statutory provision similar to article 7 of the UNCITRAL Model Law on Electronic Commerce, which allows electronic signatures to have the same effect as manual signatures?

Should any such reform, if adopted, also specify acceptable standards for electronic signatures, or should standards of security or reliability be left for the market to develop?

Does New Zealand need a domestic electronic signature infrastructure?

Should the state play any role in facilitating the use of electronic signature technology, for example, by assuming responsibility for the implementation of such an infrastructure?

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### Other issues

346 **T**HE PURPOSE OF THIS CHAPTER is to identify, without critical analysis, a number of wider issues that arise through the use of electronic commerce. We have identified six discrete issues that must be addressed to ensure a consistent approach to electronic commerce issues and allow the medium to be used to its maximum potential.

347 We are aware that the issues may raise other concerns and we welcome submissions on those concerns. The issues we raise involve specialist areas of law in which particular bodies (including some with law reform functions) are required to deal. In addition to seeking submissions on how to address these issues, we also seek comment on who should address them. One option is for each government agency responsible to address the particular topic under its control; the other is for the Law Commission to retain a co-ordinating role in an endeavour to maintain a consistent approach to the legal infrastructure for electronic commerce.

348 The subjects which we raise in this context are:

- confidentiality, privacy, and law enforcement
- banking
- intellectual property
- securities law issues
- tax
- storage of records.

#### CONFIDENTIALITY, PRIVACY, AND LAW ENFORCEMENT

349 In the business world it is often necessary to impart confidential information. Sometimes that confidential information will have a proprietary element as intellectual property belonging to one or other of the intending contracting parties. It is important that such information be kept in confidence and that other entities (particularly potential competitors) do not, and cannot, access it. Many people engaged in electronic commerce will wish to encrypt

information imparted by them so that it is not known to the world at large. Electronic signatures and digital encryption technology has much to commend it to the business community for ensuring that confidential communications remain confidential.

- 350 However, there are other social imperatives at work. It is in the interests of the community at large that those responsible for national security and domestic policing of criminal law can access information to detect crime and prosecute criminals. If law enforcement agencies cannot access information passing between two traders it will not, necessarily, be possible to detect illicit trade in arms or the illegal trading of child pornography. Where does the balance lie?
- 351 We seek submissions on this wider issue. How should New Zealand balance the competing interests of privacy and confidentiality of communications with the rights of the community to have proper and adequate policing of its laws?
- 352 We also seek submissions on which agency is best to address this issue. The Privacy Commissioner has an obvious interest in ensuring the confidentiality of personal information but not necessarily the continued confidentiality of intellectual property. The Police, the Serious Fraud Office and national security advisers (including the Government Communication Security Bureau which has responsibility for developing encryption technology within New Zealand) all have countervailing interests. Should one or more of those bodies investigate this aspect of the law or should it be left to the Law Commission, as an independent body, to coordinate responses, consult with relevant government departments and agencies, and report?

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How can the appropriate balance be struck between the legitimate need to protect confidentiality of communications and the equally legitimate need of the community to ensure its laws are properly policed?

Which government agency is best placed to address the need for reform and the nature of any reform?

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## BANKING ISSUES

- 353 Two issues have been identified as requiring comment: electronic money (also known as digital cash) and paperless documentation in international trade transactions.

## *Electronic money*

- 354 The issue of electronic money (EM) has essentially been driven by the cost of using existing forms of payment. Cheques and credit card transactions are expensive, particularly for the vendor who carries the risk of dishonour on one hand and the costs of processing and paying the card issuer on the other. Automatic teller machine (ATM) and electronic funds transfer at point of sale (EFTPOS) transactions also have costs in that they require online processing of transaction, and therefore take time and involve telephone charges. The use of cash involves none of these disadvantages; the only cost is that of keeping it secure and banking it. (The cost to the state of keeping currency in circulation is a hidden cost here.)
- 355 It has been suggested that the future of electronic commerce (on the internet at least) lies in extremely small transactions. In particular, the internet is suited to high volume but very low value transactions, predominantly for the supply of information or the use of online services such as games or reference works (Sneddon 1998 4; Tyree and Beatty 1998 5–6). Although it is perfectly feasible technically to use credit cards or invoicing to sell goods or services over the internet, both have disadvantages which prevent the internet's true commercial potential being realised.<sup>115</sup>
- 356 Two types of EM have been developed commercially: stored value cards and digital cash. Stored value cards are “smart cards”, that is, cards which contain their own digital processor. Cards may be disposable (the card is purchased bearing a value and thrown away when that value has been spent) or reusable (the value on the card must be debited from a bank account by means of a terminal). In either case, the value on the card is spent by transferring it from the card to the recipient by means of a terminal. Because the terminal operates offline (unlike an ATM or EFTPOS terminal) it is cheaper to operate, faster to use, and more portable than EFTPOS terminals. It would also be possible to transfer value through computer networks by means of personal computers equipped with card readers. As Sneddon notes, the latter is a feature of MasterCard's Mondex system (1998 3).

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<sup>115</sup> Credit card transactions because of cost per transaction to the vendor and possibly customer resistance to transmission of details for fear of fraud; invoicing because of the need for a prior contractual relationship between the parties whereby the vendor gives credit to the purchaser, thereby attracting statutory compliance costs (eg, Credit Contracts Act 1981) and risk of default, and also losing the opportunity of sales to casual browsers.

357 Stored value cards seem to be intended as a means of replacing cash as an efficient method of payment for small day-to-day consumer transactions (Sneddon 1998 2). As such the following discussion may be of marginal relevance to this report as a whole. However, there is no technical limit to the amount that can be stored or transferred using stored value cards, and it is therefore possible that such technology could be used for larger commercial transactions.

358 Smart cards may operate by directly transferring credit (in which case stored value could theoretically circulate indefinitely without ever being redeemed for money, and would effectively become negotiable), or in a manner analogous to cheques, by transferring a non-negotiable debt to be honoured by the issuer of the card (Sneddon 1998 2). The reason for different approaches is effectively a trade off between privacy and security. Where negotiable credit is used, there is complete privacy in that no third party can monitor all transactions; if the card is stolen, however, any value stored on that card may be taken leaving the cardholder without a remedy against the issuer (as with the theft of cash). By contrast, non-negotiable schemes offer security in that it would be possible to structure the contract between cardholder and issuer so that the issuer bears the risk of unauthorised transactions; but the issuer will have a complete record of all the cardholder's transactions. Sneddon respectively refers to these systems as unaccounted and accounted, noting that a system may fall somewhere between the two extremes (partially accounted).

359 Digital cash essentially means the representation of money in an electronic form which parties to a transaction can use in a prescribed manner as if it were money (Tucker 1997 47). Tyree and Beatty identify the most basic elements of digital cash as being a message (coin) issued specifying:

- the identity of the issuer;
- the value of the coin;
- the expiry date (if any);
- the unique serial number of the coin; and
- the internet address of the issuer (Tyree and Beatty 1998 6).

The coin would be encrypted using a digital signature to guarantee the identity of the issuer.

360 A coin issued under such a system works in a manner analogous to a bank cheque. The purchaser (P) requests the issuer (I) to supply coins for a certain value. The issuer debits P's account and issues the coins. P then sends the coins to the vendor (V). V sends the

coins to I who verifies that they are genuine and have not already been redeemed (ie, “spent”). I then credits the value of the coins to V’s account. Because the coins may be copied, V must redeem them immediately. Such systems already operate commercially (Gringras 1997 375; Tyree and Beatty 1998 6).<sup>116</sup>

### *The legal status of electronic money*

361 Without delving too far into economic theory and legal history, it seems clear at the moment that no electronic money system currently qualifies as legal tender (Sneddon 1998 1).<sup>117</sup> Sneddon refers to it as “obligation money” and makes the following points:

- unlike currency, privately issued EM is a private obligation which carries the risk that the issuer will default on its obligation to redeem the EM for currency;<sup>118</sup>
- acceptability of EM will not be universal, but (like credit cards) depends on an agreement between payee and issuer that the issuer will accept and redeem EM received by the payee;
- particular issues and complications will arise when redemption is sought in a different country from that in which the EM was issued;
- EM will not (initially at least) be negotiable, and consequently recipients may not acquire good title to it even if they receive it in good faith and for value;<sup>119</sup>
- EM may be refused by any payee subject only to any contractual obligation to accept it which that payee may have assumed.

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<sup>116</sup> Sneddon includes the Mark Twain Bank (USA), Deutsche Bank (Germany), and the St George Bank (Australia) among those banks offering digital currency units (known as ecash) through DigiCash, a company incorporated in the USA, the Netherlands and Australia (1998 4). DigiCash is a private company run from Amsterdam (Gringras 1997 375).

<sup>117</sup> See also the analysis in Quin (1996 224) which uses the definition of money propounded by Mann in *The Legal Aspect of Money* (5th ed). There is no definition of the term “legal tender” in New Zealand statutes. As a matter of common law, however, it generally refers to “the jingle money”: *ex p Danks re Farley* (1852) 2 DeGm & G 936 as applied in *Leeward Holdings Limited v Douglas* [1982] 2 NZLR 532.

<sup>118</sup> This was in fact the case in *re Charge Card Services Ltd*, [1989] Ch 497 where the third party issuer (of physical cards rather than EM) was insolvent.

<sup>119</sup> Although the courts may declare privately issued currency to be negotiable in certain circumstances: *Miller v Race* (1758) 1 Burr 452; 97 ER 398 (a decision of Lord Mansfield) discussed in Quin 1996 225. In that case, the private issuer of a bank note refused to redeem it, claiming it to have been stolen by a highwayman and hence subject to the *nemo dat* principle. The court decided, however, the note was negotiable and could therefore be redeemed by the bearer without considerations of the bearer’s title arising.



The question whether payment by an EM system would constitute an absolute discharge of the payer's liability, or whether a presumption of conditional payment would apply, would fall to be decided on the facts of a particular payment system.

- 362 A final question is the effect of s 25(1) of the Reserve Bank of New Zealand Act 1989 which makes the issue of bank notes the sole right of the Reserve Bank of New Zealand. "Bank notes" are defined in s 2 of that Act as "any negotiable instrument used or circulated, or intended for use or circulation, as currency". If EM is issued in an effectively negotiable form, the question may arise as to whether the issuer would breach the sole right of the Reserve Bank.

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Should issuers of "electronic money" be required to register as banks under the Reserve Bank of New Zealand Act 1989?

Is special legislation necessary, for example, to prevent "electronic money" from being used to launder money, or to protect consumers in the event of issuers defaulting?

Is there any need to be concerned about the international movement of "electronic money"?

Are there any legal or economic implications arising from allowing "electronic money" issued in one country to be redeemed in another?

Should banking issues be addressed by the Law Commission or the Reserve Bank of New Zealand?

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### *Paperless documentation*

- 363 In the context of international trade transactions, the major impediment to the use of electronic documentation is domestic legislation requiring signed paper documents. Initial informal discussions with banks indicate that universal practice in international trade transactions is to adopt the ICC's *Uniform Customs and Practice for Documentary Credits* (ICC, 1993) (UCP 500). Article 20(b)–(c) of the UCP 500 provides:

- (b) Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced:
- (i) by reprographic, automated or computerized systems;
  - (ii) as carbon copies;
- provided that it is marked as original and, where necessary, appears to have been signed.

A document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication.

- (c) (i) Unless otherwise stipulated in the Credit, banks will accept as a copy(ies), a document(s) either labelled copy or not marked as an original – a copy(ies) need not be signed.
- (ii) Credits that require multiple document(s) such as “duplicate”, “two fold”, “two copies” and the like, will be satisfied by the presentation of one original and the remaining number in copies except where the document itself provides otherwise.

It is therefore clear that rules as between banks allow for the use of electronic documents and signatures.

364 In practice, banks use a system known as SWIFT (Society for Worldwide Interbank Financial Telecommunications) to set up lines of credit for trade transactions. SWIFT operates in virtually all countries with which New Zealand businesses trade. Using SWIFT, a line of credit may be established between the vendor’s bank and the purchaser’s bank without the need for paper documentation. However, in order to draw on that line of credit, paper documentation is required to meet domestic statutory requirements such as letters of credit (Bills of Exchange Act 1908) and bills of lading (Mercantile Law Act 1908).

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Are any further steps, beyond redefining “writing” and “signature” to include electronic equivalents, necessary to facilitate paperless international banking transactions?

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## INTELLECTUAL PROPERTY

- 365 We have identified three issues which require attention:
- domain names and trade marks on the internet;
  - liability for breaches of copyright; and
  - breaches of intellectual property in websites by means of hyperlinks and framing.

### *Domain names*

366 A domain name is the unique “address” of a presence on the world wide web (see Gringras 1997 129–131). The format for such sites is generally “http://www.[name].[suffix]”. For New Zealand operators, the usual format is to use the suffix “.co.nz” – but there are other options. For example, the Law Commission’s website is http://www.lawcom.govt.nz. For international businesses, the most sought after domain names are those ending with the suffix “.com”

since this is the oldest and best established suffix, and also one which has no obvious geographical references. Anyone can operate a website anywhere using any name, provided they have registered that name with the appropriate authority. The fact that some domain names contain a geographical reference (eg, “.uk” for the United Kingdom or “.au” for Australia) gives no clue to the geographical location of either the server from which the site is run, or the location of the owner; rather it refers to the issuer of the domain name. Domain names are issued by authorities such as Nominet UK in the United Kingdom, Network Solutions Inc in the United States, and the Internet Society of New Zealand in NZ. They are issued on a first-come-first-served basis, and may be traded like any other commodity. Applicants are not usually required to prove they have any right to use a particular name, as a domain name represents a *technical* right rather than a *legal* right.<sup>120</sup>

367 For businesses wishing to maintain a presence on the internet, either for marketing and advertising, or for conducting business, the ability to register an appropriate domain name is of paramount importance. In particular, a company is likely to want to use a registered trade mark as a domain name in order to maximise public and commercial visits to the site. This raises the question of whether it is possible for a trade mark owner to prevent other people from:

- using that trade mark as part of a domain name, or
- acquiring the right to use a domain name containing the trade mark with the intention of selling that right to the trade mark's owner.

368 It appears that use of a trade mark as a domain name by an unauthorised person or company can constitute either passing off or a breach of s 9 of the Fair Trading Act 1996 (Harrison and Frankel 1996 60). This result was confirmed in a recent decision of the English High Court, *Marks & Spencer plc and Ors v One in a Million and Ors* [1998] FSR 265,<sup>121</sup> in which the deputy judge stated:

Any person who deliberately registers a domain name on account of its similarity to the name, brand name or trade mark of an unconnected

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<sup>120</sup> However, it has been suggested that in allocating domain names on a first-come-first-served basis, without checking that an applicant has a legal right to use a name, the domain name registry may be liable for passing off if, by registering a trade mark as a domain name to someone other than the owner, it is facilitating tortious conduct by the applicant (Hilsgen, “Battle over Internet names” *NZ Infotech Weekly*, No 345, 18 May 1998).

<sup>121</sup> This decision has now been upheld by the Court of Appeal: *The Times* 24 July 1998.

commercial organisation must expect to find himself on the receiving end of an injunction to restrain the threat of passing off, and the injunction will be in terms which will make the name commercially useless to the dealer. (272).

The decision in *Marks & Spencer* has now been applied in the New Zealand courts in *Oggi Advertising Ltd v McKenzie & Others* (unreported, HC Auckland, 2 June 1998, CP147/98; to be reported in [1998] NZLR).

- 369 However, it should be noted this protection of a trade mark only extends to domain names issued to parties within the same jurisdiction. Thus, there would be no way in which a New Zealand trade mark owner, for instance, could prevent a company in Iceland registering and using that trade mark as a domain name, despite the fact that internet browsers using the trade mark to conduct a search would be as likely to find the Icelandic site as the New Zealand site.<sup>122</sup>

### *Liability for breaches of copyright*

- 370 Copyright issues may not strictly relate to international electronic trade, but nevertheless the issues raise difficult questions of liability. The first is the question relating to the liability of ISPs for infringing acts by subscribers; the second, liability of network users for downloading or reading infringing material.
- 371 The liability of an ISP for authorising breaches of copyright was briefly referred to by the High Court of Australia in *Telstra Corporation Ltd v Australasian Performing Rights Association Ltd* (1997) 146 ALR 649. In that case, Kirby J suggested obiter that there is an apparent need for legislative reform to protect ISPs from liability to the owners of copyright material in the event of a subscriber using his or her internet link to breach copyright. Whether it is necessary to reform New Zealand law remains unclear. But commentators have suggested that liability of an ISP to the owner of copyright should only arise when the ISP can realistically exercise some form of control over the material published by its subscribers (Harrison and Frankel 1996 62; Lim 1997 192). This argument is analogous to that accepted by the court in *Cubby, Inc v Compu-Serve, Inc* 776 F Supp 135 (SDNY 1991) in finding an ISP not liable for publishing defamatory remarks made by a subscriber. However, a bulletin board operator who exercises or purports to

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<sup>122</sup> Provided that is, the Icelandic site was not used to conduct business in New Zealand, in which case the owner of the site may become subject to New Zealand law by operation of, for example, s 3 of the Fair Trading Act 1986.

exercise editorial control over the content of a site may be liable for material published on that site, even if he or she is unaware of that particular publication.<sup>123</sup>

372 One complex issue is whether publication on the internet constitutes transmission by a cable programme service under s 4 of the Copyright Act 1994 (Harrison and Frankel 1996 63). In *Shetland Times Ltd v Wills* [1997] EMLR 277, this was decided in the affirmative under s 7 of the materially identical United Kingdom statute, the Copyright, Designs and Patents Act 1988 (see case discussion in paras 377–378).

373 As regards liability for downloading copyright material, s 2 of the Copyright Act 1994 provides:

**Copying**

- (a) Means, in relation to any description of work, reproducing or recording the work in any material form; and
- (b) Includes, in relation to a literary, dramatic, musical, or artistic work, storing the work in any medium by any means; and
- (c) Includes, in relation to an artistic work, the making of a copy in 3 dimensions of a two-dimensional work and the making of a copy in 2 dimensions of a three-dimensional work; and
- (d) Includes, in relation to a film, television broadcast, or cable programme, the making of a photograph of the whole or any substantial part of any image forming part of the film, broadcast, or cable programme;

and **copy** and **copies** have corresponding meanings:

Clearly, downloading copyright material on to a computer hard drive or other storage device constitutes copying for the purposes of that Act. However, merely reading the material published on the net may not qualify (even though a copy of the material is made temporarily on the screen of the person reading the material) if it is an implied requirement that the copy be stored permanently. Even if merely reading an article were to constitute making a copy, there might be evidential difficulties in proving the identity of the person responsible.

374 A more complicated issue arises when the owner of copyright material in one country places the material on a website where it may be copied by anyone, anywhere. In this example, while the

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<sup>123</sup> As occurred in the defamation case of *Stratton Oakmont, Inc v Prodigy Services Co* 1995 WL 323710 (NY Sup Ct. May 24 1995). Harrison and Frankel cite the case of *Playboy Enterprises, Inc v Frena* 839 F Supp. 1552 (MD Fla 1993) as an example of a bulletin board operator being found liable for publication of material in breach of copyright (1996 62) (see also Gringras 1997 155, and Betts 1998 21–23).

there has been no copyright within the owners own jurisdiction, there may yet be an infringement if copyright is owned by different people in other jurisdictions. The owner of the website on which the material was originally published may consequently be liable for authorising publication outside the owners jurisdiction, although it may be possible for the website owner to avoid liability by use of an appropriate warning (Harrison and Frankel 1996 62).

### *Hyperlinks, framing and meta tags*

- 375 Hyperlinks are links embedded in text which allow browsers on the world wide web to move between websites directly without having to search. Hyperlinks do not constitute copying of the original website; it is the browser using the hyperlink who makes the copy when the website document is downloaded to his or her computer.
- 376 The primary issue arising from the use of hyperlinks is whether their use to give browsers access to a website infringes any intellectual property rights owned by the operator of that website (see, for example, French 1998 41; Betts 1998; de Zwart 1997 181). It should be noted that the main reason why this has become contentious is not because of losses caused directly by infringements of copyright material on the internet. Rather, it is because websites are constructed with “gateways” (see footnote 92) through which users must pass in order to reach desired information (pages). These gateways often carry advertising, which the website owner can charge the advertiser for in the knowledge that a known number of browsers access the site each day. Hyperlinks threaten this source of advertising revenue because they allow a browser to bypass the advertising “gateway” and access the desired page directly.
- 377 The use of hyperlinks as a breach of copyright has received judicial consideration in Scotland in *The Shetland Times Ltd v Wills* [1997] EMLR 277. In that case the defender used the pursuer’s headlines as hyperlinks to gain direct access to articles, bypassing pages carrying advertising. (A similar fact pattern was alleged in *Ticketmaster Corporation v Microsoft Corporation* Civ No 97-3055 (DPP) (CD Cal) cited in de Zwart 1997 187–188). In the *Shetland Times* case this was held to be contrary to s 20 of the Copyright, Designs and Patents Act 1988 (UK), a section equivalent to s 33 of the Copyright Act 1994 (French 1998 41). Because both a website article and a hyperlink composed of a quotation from that article constitute a cable programme service for the purposes of s 7 of the Copyright, Designs and Patents Act 1988 (UK) (s 4 of the New Zealand Act), the inclusion of such a hyperlink within another

website constituted an unauthorised inclusion of copyright work (the headline) in a cable programme under s 20.

378 Several points can be made following the *Shetland Times* case. First, there may be a distinction between a hyperlink which is composed of text quoted from the linked site and a link composed only of the name of the site (Betts 1998 8).<sup>124</sup> Betts however, argues that even where the hyperlink itself is not composed of material taken from the copyright work, it may still be considered as authorising a third party (the browser) to breach copyright. Secondly, it may be possible to argue that posting copyright material on a website constitutes an implied licence to link that material to other sites, hyperlinking being the essential feature of the world wide web. Clearly no such argument was made in the *Shetland Times* case, and this argument remains as yet untested (Betts 10).<sup>125</sup> Even if such an implied licence exists it could in any case be expressly revoked. Third, even if the “implied licence” argument is successful, it would nevertheless be possible to stop unwanted hyperlinks by simply warning visitors to a site or page that the owner does not give permission for hyperlinks to be made directly to that page. Finally, because the issue is more about protecting advertising revenue than enforcing intellectual property rights, there should (in theory) be no objection to creating a hyperlink to a “gateway” bearing advertising despite this being legally indistinguishable from creating a hyperlink which by-passes the gateway. In fact, such a link would presumably *increase* the value of the site to the owner by supplying more visitors.

379 “Framing” is a variation of hyperlinking which raises the same issues. When a browser clicks on a hyperlink which uses framing, the linked site appears in an open widow on the linking site. This allows the operator of the linking site to cut out the advertising on the linked site and substitute his or her own advertising. Quite apart from the copyright issues raised, it is possible that this would suggest to the browser a relationship between the linked site and the linking site. This is likely to constitute misleading conduct in terms of the Fair Trading Act 1986 s 9 (Betts 1998 11–12).

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<sup>124</sup> Note that Betts also argues that use of a trade mark as a hyperlink would not be an infringement of that trade mark since the person using that trade mark as a link is not using it to describe his or her own goods or services. However, there may be a different result if the trade mark is registered in a jurisdiction with a restriction on “dilution” of the trade mark, such as the USA (11).

<sup>125</sup> Betts comments that implied licences cannot be unlimited in their scope. However, see Stangret, “The legalities of linking on the World Wide Web” (1997) 6(2) Communications Law, 202, 204.

380 A further issue is the use of trade marks in meta tags. meta tags are text embedded in the programming language of a website which is invisible to the casual browser but which can be detected by internet search engines. The result is that the search engine will record a hit against the infringing website when the browser is conducting a search for a particular trade mark. The objective is of course to get browsers looking for site X to visit a competitor's site instead. Not only is this likely to be misleading conduct under the Fair Trading Act, but may be an infringement on the trade mark since the trade mark is being used in conjunction with unauthorised products (Betts 1998 19–20).

### *Conclusion*

381 Difficult questions of intellectual property law arise in the context of electronic commerce because the scope to infringe against copyright on the internet is limited only by the imagination of those attempting to infringe and the willingness of copyright owners to continue to publish material on the internet. We seek submissions on the issues we have raised and also as to the appropriate body to conduct research into these issues, given that the Ministry of Commerce has responsibility for intellectual property issues.

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Do the laws which protect intellectual property need to be reformed to cope with new forms of electronic communications and publishing? If so, should the Law Commission or the Ministry of Commerce undertake such work?

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## SECURITIES LAW

382 As securities are now traded, and transactions settled, in a paperless environment on the Stock Exchange's FASTER (Fully Automatic Screen Trading and Electronic Registration) securities transfer system,<sup>126</sup> the remaining issue is the application of the Securities Act 1978 to advertisements placed on the internet or otherwise distributed electronically. In correspondence to the Law Commission dated 11 November 1997 the Securities Commission said that it has used its powers under s 38B of the Act (formerly s 44A) to prohibit the publication on the internet of advertisements which

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<sup>126</sup> Securities commenced trading over the improved FASTER system on 18 May 1998.



do not comply with the Act. It should be noted that s 38B is media-neutral in that it allows the Securities Commission to prohibit the “distribution” of advertisements; there is no requirement that advertisements be printed on paper.

- 383 Unlike s 3 of the Fair Trading Act, the Securities Act does not purport to extend jurisdiction extra territorially. The question is whether the Securities Commission should have power to regulate offers of securities to the public which appear on the internet and which are sourced from a jurisdiction other than New Zealand. And, if that jurisdiction was to be granted what realistic options are there for enforcement of those laws?

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Should the Securities Act 1978 be amended to give the Securities Commission jurisdiction over securities offers made to the New Zealand public from overseas? Should this issue be dealt with by the Law Commission or the Securities Commission?

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## TAX

- 384 Tax law presents problems in the electronic environment; in particular problems concerning place of residence, source of income, and the distinction between goods and services. These issues have already been raised by the Inland Revenue Department in *Guidelines to Taxation and the Internet* (<http://www.ird.govt.nz/resource/taxaint/taxaint.htm>, 15 September 1998).
- 385 In international transactions, liability for tax is levied on the basis of both the place of residence of the taxpayer and the source from which the income was derived. A resident of a country is subject to tax in that country on the resident’s entire worldwide income. In addition, where a taxpayer earns income sourced in a country other than its country of residence, that income will be taxable in the country of source, subject to a double tax agreement (DTA). If applicable, a DTA will generally provide that the country of source has no right to tax the income of a non-resident unless the taxpayer has a permanent establishment in the country of source. The questions that arise are:
- Where is a taxpayer resident?
  - Where is the income sourced?
  - What constitutes a permanent establishment?
  - In particular, can a computer server hosting a website be considered a permanent establishment?

- 386 Three tests are used to define whether a permanent establishment exists in the country of source:
- an asset test, which considers whether assets (eg, factories, offices, management) of the taxpayer are located in the country of source;
  - an activity test which considers whether the activities of the taxpayer take place within the country of source (this excludes the use of facilities for the sole purpose of storage, display or delivery of goods, or maintaining a place of business for auxiliary purposes such as advertising); and
  - an agency test, which deems a permanent establishment to exist where an agent carries out activities on behalf of the taxpayer within the country of source (eg, concluding contracts).<sup>127</sup>

Taxpayers can have permanent establishments in several countries.

- 387 Whether a computer can constitute a permanent establishment therefore depends on how it is used. A simple website used to carry advertising for products will not constitute a permanent establishment because advertising is an exempted activity under the activity test. However, a website which is used to take orders, receive payments and deliver a product digitally could be considered as a permanent establishment. This raises additional complications if a business maintains websites on servers in more than one country in order to speed up global response times.
- 388 When income is sourced in New Zealand it is subject to New Zealand income tax, unless a DTA applies and the taxpayer does not have a permanent establishment in New Zealand. Whether income is in fact sourced in New Zealand when a transaction occurs electronically is far from clear. Simcock has suggested that even when delivery of goods occurs in New Zealand, the source of income may still be elsewhere (Simcock 1998 2).
- 389 The distinction between goods and services is important because GST is levied differently on each. According to s 2 of the Goods and Services Tax Act 1985:

**Goods** means all kinds of personal or real property; but does not include choses in action or money:

and

**Services** means anything which is not goods or money:

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<sup>127</sup> See the paper by Eric Roose, "Taxation and internet issues", 15, and the commentary on it by Simcock (4), both delivered to the Inter-Pacific Bar Association in May 1998. These tests have their origins in the OECD Model Tax Convention, which New Zealand (in common with most other industrialised countries, according to Roose) has adopted for its DTAs.

Thus, software supplied with a “shrink-wrap” licence<sup>128</sup> (for example, most PC applications or games) would be classed as services because the right to use the software constitutes the bulk of the price. (The actual medium used to record the software, such as a CD is of little commercial value, and is in any case worthless without the licence. Furthermore, where the software is downloaded from the internet rather than purchased in a box, no physical medium is delivered).

- 390 The distinction for an overseas supplier is vital, because he, she or it is not liable for GST for services supplied in New Zealand, but is for goods (Inland Revenue Department *Guidelines to Taxation and the Internet*). When the service is performed outside New Zealand, the New Zealand resident pays no GST either. Furthermore, the permanent establishment of a purchaser of goods or services supplied by a New Zealand resident is relevant in assessing the amount of GST payable. Goods or services supplied by a New Zealand resident to a non-resident are zero rated for GST, but subject to 12.5 percent GST if supplied to another New Zealand resident.

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Is there a case for special rules for the taxation of electronic transactions? Should such issues be addressed by the Law Commission or the Inland Revenue Department?

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## STORAGE OF RECORDS

- 391 Many statutes require businesses or government agencies to keep a wide variety of records or registers, often with penalties for non-compliance. Examples are the Companies Act 1993 s 87, the Goods and Services Tax Act 1985 s 75, and the Land Transfer Act 1952 s 33, but the list is extensive.
- 392 There is a tendency for modern statutes to allow such information to be recorded and stored electronically. This is of benefit to all parties concerned since a well organised electronic database offers a great reduction in the amount of physical storage space required and improved access to the records. Typical examples of such provisions can be found in the Companies Act 1993 s 190, the

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<sup>128</sup> Typically, the purchaser of computer software does not actually purchase the software itself, but instead purchases a licence to use the software. The licence is usually contained in the packaging, and the purchaser is notified that breaking the shrink-wrap seal on the packaging constitutes acceptance of the terms of the licence (see Gringras 1997 33).

Goods and Services Act 1985 s 75, and the Customs and Excise Act 1996 s 95. Section 90 of the Companies Act 1993 reads as follows:

- (1) The records of a company must be kept
  - (a) In written form; or
  - (b) In a form or in a manner that allows the documents and information that comprise the records to be easily accessible and convertible into written form.
- (2) The board must ensure that adequate measures exist to
  - (a) Prevent the records being falsified; and
  - (b) Detect any falsification of them.

393 Article 10 of the UNCITRAL Model Law on Electronic Commerce is a generic section which would generally allow records to be stored electronically in all cases. It would therefore remove the need for individual statutes to address the issue. It would also have the effect of standardising the rules under which records are stored electronically. Article 10 provides:

- (1) Where the law requires that certain documents, records or information be retained, that requirement is met by retaining data messages, provided that the following conditions are satisfied:
  - (a) the data message contained therein is accessible so as to be usable for subsequent reference; and
  - (b) the data message is retained in a format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and
  - (c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.
- (2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be sent or received.
- (3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

394 The *Guide to Enactment* of the Model Law emphasises that article 10 does not require information to be stored in an unaltered state (paras 72–75). Under para (1)(b) the user may retain the substance of a message rather than its form, provided the information so recorded is demonstrably accurate. Paragraph (1)(c) requires the storage of transmission information (the originator and recipient of a message and the date and time of transmission) only when it is necessary to identify the original message. Such transmission

information would not be required when the message can be sufficiently identified by other means.

- 395 In its 1998 report, *Electronic Commerce: Building the Legal Framework*, the Australian Electronic Commerce Expert Group concluded that article 10 prescribes an appropriate basis for the equivalence of electronic and paper-based record retention requirements (paras 4.5.56–4.5.59 and recommendation 10). Provisionally, the Commission agrees. We would add that although article 10 is technologically specific, it can be regarded as purely facilitative in that it does not require records to be stored electronically. Rather it sets out the standards for those who choose to keep records electronically.

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Should New Zealand enact a provision similar to article 10 of the UNCITRAL Model law on Electronic Commerce, allowing those people or organisations who are required to keep records to do so electronically?

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## CONCLUSION

- 396 The issues discussed in this chapter represent potential legal problems which have been highlighted by the advent of electronic commerce. We invite comments as to whether these problems in fact constitute substantial barriers to commerce, and if so, what forms reform should take. The list is not intended to be exhaustive; we would also welcome comments as to other areas in which the law inhibits trade. Issues so raised will be dealt with in our second report on electronic commerce, to be published in 1999.



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# APPENDIX A

## UNCITRAL Model Law on Electronic Commerce

THIS APPENDIX REPRODUCES Parts One and Two of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce. References to “the Commission” in this appendix are to UNCITRAL.

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### Part one. Electronic commerce in general

#### CHAPTER I. GENERAL PROVISIONS

##### *Article 1. Sphere of application\**

This Law\*\* applies to any kind of information in the form of a data message used in the context\*\*\* of commercial\*\*\*\* activities.

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\* The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages:

“This Law applies to a data message as defined in paragraph (1) of article 2 where the data message relates to international commerce.”

\*\* This Law does not override any rule of law intended for the protection of consumers.

\*\*\* The Commission suggests the following text for States that might wish to extend the applicability of this Law:

“This Law applies to any kind of information in the form of a data message, except in the following situations: [. . .].”

\*\*\*\* The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

## *Article 2. Definitions*

For the purposes of this Law:

- (a) “Data message” means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;
- (b) “Electronic data interchange (EDI)” means the electronic transfer from computer to computer of information using an agreed standard to structure the information;
- (c) “Originator” of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;
- (d) “Addressee” of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;
- (e) “Intermediary”, with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message;
- (f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages.

## *Article 3. Interpretation*

- (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
- (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

## *Article 4. Variation by agreement*

- (1) As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of chapter III may be varied by agreement.
- (2) Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.



CHAPTER II. APPLICATION OF  
LEGAL REQUIREMENTS TO DATA MESSAGES

*Article 5. Legal recognition of data messages*

Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.

*Article 6. Writing*

- (1) Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.
- (3) The provisions of this article do not apply to the following: [. . .]

*Article 7. Signature*

- (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:
  - (a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and
  - (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.
- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.
- (3) The provisions of this article do not apply to the following: [. . .]

*Article 8. Original*

- (1) Where the law requires information to be presented or retained in its original form, that requirement is met by a data message if:
  - (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and
  - (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

- (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.
- (3) For the purposes of subparagraph (a) of paragraph (1):
  - (a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and
  - (b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.
- (4) The provisions of this article do not apply to the following: [. . .]

*Article 9. Admissibility and evidential weight of data messages*

- (1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:
  - (a) on the sole ground that it is a data message; or
  - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

*Article 10. Retention of data messages*

- (1) Where the law requires that certain documents, records or information be retained, that requirement is met by retaining data messages, provided that the following conditions are satisfied:
  - (a) the information contained therein is accessible so as to be usable for subsequent reference; and
  - (b) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and
  - (c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

- (2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be sent or received.
- (3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided that the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

### CHAPTER III. COMMUNICATION OF DATA MESSAGES

#### *Article 11. Formation and validity of contracts*

- (1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.
- (2) The provisions of this article do not apply to the following: [. . .]

#### *Article 12. Recognition by parties of data messages*

- (1) As between the originator and the addressee of a data message, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.
- (2) The provisions of this article do not apply to the following: [. . .]

#### *Article 13. Attribution of data messages*

- (1) A data message is that of the originator if it was sent by the originator itself.
- (2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:
  - (a) by a person who had the authority to act on behalf of the originator in respect of that data message; or
  - (b) by an information system programmed by, or on behalf of, the originator to operate automatically.
- (3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:
  - (a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or

- (b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.
- (4) Paragraph (3) does not apply:
    - (a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or
    - (b) in a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.
  - (5) Where a data message is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.
  - (6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.

#### *Article 14. Acknowledgement of receipt*

- (1) Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.
- (2) Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement may be given by
  - (a) any communication by the addressee, automated or otherwise,  
or
  - (b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received.
- (3) Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.

- (4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time, the originator:
  - (a) may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and
  - (b) if the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.
- (5) Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. That presumption does not imply that the data message corresponds to the message received.
- (6) Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.
- (7) Except in so far as it relates to the sending or receipt of the data message, this article is not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt.

*Article 15. Time and place of dispatch and receipt of data messages*

- (1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.
- (2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:
  - (a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:
    - (i) at the time when the data message enters the designated information system; or
    - (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;
  - (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

- (3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).
- (4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:
  - (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
  - (b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.
- (5) The provisions of this article do not apply to the following: [ . . . ]

## **Part two. Electronic commerce in specific areas**

### CHAPTER I. CARRIAGE OF GOODS

#### *Article 16. Actions related to contracts of carriage of goods*

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

- (a)
  - (i) furnishing the marks, number, quantity or weight of goods;
  - (ii) stating or declaring the nature or value of goods;
  - (iii) issuing receipt for goods;
  - (iv) confirming that goods have been loaded;
- (b)
  - (i) notifying a person of terms and conditions of the contract;
  - (ii) giving instructions to a carrier;
- (c)
  - (i) claiming delivery of goods;
  - (ii) authorising release of goods;
  - (iii) giving notice of loss of, or damage to, goods;
- (d) giving any other notice or statement in connection with the performance of the contract;
- (e) undertaking to deliver goods to a named person or a person authorised to claim delivery;
- (f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;
- (g) acquiring or transferring rights and obligations under the contract.

*Article 17. Transport documents*

- (1) Subject to paragraph (3), where the law requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.
  - (2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for failing either to carry out the action in writing or to use a paper document.
  - (3) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique.
  - (4) For the purposes of paragraph (3), the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.
  - (5) Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.
  - (6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.
  - (7) The provisions of this article do not apply to the following: [. . .]
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APPENDIX B  
Revision of Uniform  
Commercial Code (extracts)

ARTICLE 2 – SALES

SECTION 2-102. DEFINITIONS.

- ...
- (12) “Electronic agent” means a computer programme or other automated means used, selected, or programmed by a party to initiate or respond to electronic messages or performances in whole or in part without review by an individual. [Section 2B-102(a)(12)]
  - (13) “Electronic” means electrical, digital, magnetic, optical, electromagnetic, or any other form of wave propagation, or by any other technology that entails capabilities similar to those technologies. [Section 2B-102(a)(12)]
  - (14) “Electronic message” means a record that, for purposes of communication to another person, is stored, generated, or transmitted by electronic, optical, or similar means. The term includes electronic data interchange, electronic or voice mail, facsimile, telex, telecopying, scanning, and similar communications. [Section 2B-102(a)(14)]
  - (15) “Electronic transaction” means a transaction formed by electronic messages in which the messages of one or both parties will not be reviewed by an individual as a routine step in forming the contract. [Section 2B-102(a)(14)]
- ...
- (25) “Receipt”:
    - (A) with respect to goods, means taking delivery; and
    - (B) with respect to an electronic record, means when it enters an information processing system in a form capable of being processed by a system of that type and the recipient uses or has designated that system for the purpose of receiving records or information. “Receive has an analogous meaning. [Sections 2-103(1)(c), 2B-102(a)(29)]
  - (26) “Record” means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form. [Sections 5-102(a)(14), 2B-102(a)(30)]



**SECTION 2-210. ATTRIBUTION PROCEDURE.**

- (a) An attribution procedure is a procedure established by agreement or mutually adopted by the parties for the purpose of verifying that electronic records, messages, or performances are those of the respective parties or for detecting errors in the transmission or informational content of an electronic message, record, or performance, if the procedure is commercially reasonable.
- (b) The commercial reasonableness of an attribution procedure is a question of law to be determined by the court in light of the purposes of the procedure and the commercial circumstances at the time of the agreement. An attribution procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, key escrow, or any security devices that are reasonable under the circumstances.

Source: Section 2B-110 (May, 1997).

**SECTION 2-211. ATTRIBUTION OF ELECTRONIC RECORD, MESSAGE, OR PERFORMANCE.**

- (a) As between the parties, an electronic message, record, or performance received by a party is attributable to the party indicated as the sender if:
  - (1) it was sent by that party, its agent, or its electronic agent;
  - (2) the receiving party, in good faith and in compliance with an attribution procedure concluded that it was sent by the other party; or
  - (3) subject to subsection (b), the message or performance:
    - (A) resulted from acts of a person that obtained access to access numbers, codes, computer programmes, or the like from a source under the control of the alleged sender creating the appearance that it came from the alleged sender;
    - (B) the access occurred under circumstances constituting a failure to exercise reasonable care by the alleged sender; and
    - (C) the receiving party reasonably relied to its detriment on the apparent source of the message or performance.
- (b) In a case governed by subsection (a)(3), the following rules apply:
  - (1) The receiving party has the burden of proving reasonable reliance, and the alleged sender has the burden of proving reasonable care.
  - (2) Reliance on an electronic record or performance that does not comply with an agreed authentication procedure is not reasonable unless authorised by an individual representing the alleged sender.

- (c) If an electronic message was transmitted pursuant to an attribution procedure for the detection of error and the message contained an error the following rules apply:
  - (1) If the sender complied with the attribution procedure and the error would have been detected had the receiving party also complied with the attribution procedure, the sender is not bound if the error relates to a material element of the message or performance.
  - (2) If the sender receives a notice required by the attribution procedure of the content of the message or performance as received, the sender has a duty to in a commercially reasonable manner review the notice and report any error detected by it.
- (d) Except as otherwise provided in subsection (a)(1) and (c), if a loss occurs because a party complies with a procedure for attribution that was not commercially reasonable, the party that required use of the procedure bears the loss unless it disclosed the nature of the risk to the other party or offered commercially reasonable alternatives that the party rejected. The party's liability under this section is limited to losses that could not have been prevented by the exercise of reasonable care by the other party.

**SECTION 2-212. AUTHENTICATION EFFECT AND PROOF;  
ELECTRONIC AGENT AUTHENTICATION.**

- (a) An authentication is intended to establish the party's identity, its adoption and acceptance of a record or a term, and the authenticity of the record or term.
- (b) Operations of an electronic agent constitute the authentication of a party if the party designed, programmed, or selected the electronic agent for the purpose of achieving results of that type.
- (c) A record or message is authenticated as a matter of law if a party complied with an attribution procedure for authentication. Otherwise, authentication may be proven in any manner including by showing that a procedure existed by which a party necessarily must have executed or adopted a symbol in order to proceed further in the use or processing of the information.

Source: Section 2B-114 (May, 1997).

**SECTION 2-213. ELECTRONIC TRANSACTIONS AND MESSAGES:  
TIMING OF CONTRACT AND EFFECTIVENESS OF MESSAGE.**

- (a) If an electronic message initiated by a party or an electronic agent evokes an electronic response and the messages reflect an intent to be bound, a contract exists when:
  - (1) the response signifying acceptance is received; or
  - (2) if the response consists of electronically furnishing the requested information or notice of access to the information, when the information or notice is received unless the originating message prohibited that form of response.

- (b) Subsection [sic] to Section 2-211, an electronic message is effective when received, even if no individual is aware of its receipt.
- (c) Subject to subsection (d), operations of one or more electronic agents which confirm the existence of an agreement are effective to form an agreement even if no individual representing either party was aware of or reviewed the action or its results.
- (d) In an electronic transaction, the following rules apply:
  - (1) An agreement is formed by the interaction of two electronic agents if the interaction results in both agents each engaging in operations that signify agreement, such as by engaging in performing the agreement, ordering or instructing performance, accepting performance, or making a record of the existence of an agreement.
  - (2) An agreement may be formed by the interaction of an electronic agent and an individual. An agreement is formed if an individual has reason to know that the individual is dealing with an electronic agent and performs actions the person should know will cause the agent to perform or to permit further use, or that are clearly indicated as constituting acceptance regardless of other contemporaneous expressions by the individual to which the electronic agent cannot react.
  - (3) The terms of the contract include terms on which the parties have previously agreed, terms which the electronic agents could take into account, and, terms provided by this article or other law.

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Sources: Sections 2B-204, 2B-203(e) and (f) (May, 1997).

#### **SECTION 2-214. ACKNOWLEDGMENT OF ELECTRONIC MESSAGE.**

- (a) If the originator of an electronic message requests or has agreed with the addressee of the message that receipt of the message must be acknowledged electronically, the following rules apply:
  - (1) If the originator indicated in the message or otherwise that the message was conditional on receipt of an acknowledgement, the message does not bind the originator until acknowledgement is received and [the message] lapses if acknowledgement is not received in a reasonable time.
  - (2) If the originator requested acknowledgement but did not state the message was conditional on acknowledgement and acknowledgement has not been received within a reasonable time [sic] after the message was sent, on notice to the other party, the originator may either retract the message or specify a further reasonable time within which acknowledgement must be received or the message will be treated as not having binding effect. If acknowledgement is not received within that additional time, the originator may treat the message as not having binding effect.

- (3) If the originator requested acknowledgement and specified a time for receipt, the originator may exercise the options in subsection (a)(2) if receipt does not occur within that time.
- (b) Receipt of acknowledgement establishes that the message was received but does not in itself establish that the content sent corresponds to the content received.

Source: Section 2B-205 (May, 1997).

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## APPENDIX C

# Law Commission draft Evidence Code (extracts)

**T**HIS APPENDIX SETS OUT EXTRACTS from the Law Commission's draft Evidence Code relevant to electronic commerce. Note that these provisions are in draft form only, and are subject to further refinement before publication of the final Evidence Report.

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#### 4 Definitions

In this Act

...

**document** means any record of information and includes

- (a) anything on which there is writing or any image; and
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) anything from which sounds, images or writing can be reproduced, with or without the aid of anything else.

...

#### 7 Fundamental principle – relevant evidence is admissible

- (1) All relevant evidence is admissible in a proceeding except evidence that is inadmissible in accordance with this Code or any other Act or is excluded in accordance with this Code or any other Act.
- (2) Evidence that is not relevant is not admissible in a proceeding.
- (3) Evidence is relevant for the purposes of this Code if it has a tendency to prove or disprove any thing that is of consequence to the determination of the proceeding.

Definitions: **proceeding**, s 4

## 8 General exclusion

In any proceeding, a judge must exclude evidence if its probative value is outweighed by the risk that the evidence will

- (a) have an unfairly prejudicial effect; or
- (b) mislead the jury; or
- (c) result in unjustifiable consumption of time; or
- (d) result in unjustifiable expense.

Definitions: **judge, proceeding**, s 4

## 9 Admission by consent

With the consent of all parties, the judge may admit evidence in a proceeding that is not otherwise admissible, but this section does not allow the admission of evidence required to be excluded under section 8.

Definitions: **judge, party, proceeding**, s 4

## 13 Establishment of authenticity of document or thing

If a question arises concerning the authenticity of a document or thing, the court may examine it and draw any inference from it.

Definitions: **document**, s 4

...

## PART 6

### DOCUMENTARY EVIDENCE AND EVIDENCE PRODUCED BY A MACHINE, DEVICE OR TECHNICAL PROCESS

#### 123 Summary of voluminous documents

- (1) A party may, with the leave of the judge, give evidence by means of a summary or chart as to the contents of a voluminous document or a voluminous compilation of documents.
- (2) A party offering evidence by means of a summary or chart must, if the judge so directs on the request of another party or on the judge's own initiative, either produce the voluminous document or compilation of documents for examination in court during the hearing or make it available for examination and copying by other parties at a reasonable time and place.

Definitions: **document, judge, offer evidence, party**, s 4

#### 124 Proof of signatures on attested documents

An attesting witness need not be called to prove that a document was signed, executed or attested (whether by handwriting, digital means or otherwise) as it purports to have been signed, executed or attested.

Definitions: **document, witness**, s 4

### 125 Offering documents in evidence without calling a witness

- (1) A party may give notice in writing to every other party that the party proposes to offer a document, including a public document, as evidence in the proceeding without calling a witness to produce the document. A copy of the document must be attached to the notice.
- (2) A party who on receiving a notice wishes to object to the authenticity of the document to which the notice refers or to the fact that it is to be offered in evidence without being produced by a witness must give a notice of objection in writing to every other party.
- (3) If no party gives notice of objection to a proposal to offer a document as evidence without calling a witness to produce it or if the court dismisses an objection to the proposal, the document, if otherwise admissible, may be admitted in evidence and it will be presumed, in the absence of evidence to the contrary, that the nature, provenance, and contents of the document are as shown on its face.
- (4) A party must give notice of a proposal to offer a document without calling a witness to produce it
  - (a) a sufficient time before the hearing to provide all the other parties with a fair opportunity to consider the proposal; or
  - (b) within such time, whether before or after the commencement of the hearing, as the court may allow and subject to any conditions that the court may impose.

...

### 127 Presumption as to translations

- (1) A party may offer a document which purports to be a translation into English of a document in a language other than English if notice is given to the other party no less than 10 working days before the translation is tendered in evidence.
- (2) The translation will be presumed to be an accurate translation unless evidence sufficient to raise doubt about the presumption is offered.
- (3) If information or other matter is recorded in a code (including shorthand writing or programming codes) or in such a way as to be capable of being reproduced as sound or script, a party may offer a document that purports to be a transcript of the information or matter.

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Definitions: **document**, **party**, **working day**, s 4

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## APPENDIX D

# Conflict of laws: comparative law

- D1 **T**O DETERMINE A DISPUTE of an international nature, the court must decide that it:
- has basic jurisdiction (see para 258); and
  - that it should exercise jurisdiction.

The court in question draws upon the domestic law of the state to make each determination.

- D2 What follows is a summary of some of New Zealand's major trading partners approach to the oft intertwined determinations of basic jurisdiction and forum. This summary has been prepared as an aid for business people and lawyers involved in advising clients dealing with entities in the states involved; it is, however, a brief summary and in each case it will be necessary to obtain expert legal advice from practitioners in the state concerned should these matters assume importance in any dispute or potential dispute.

- D3 Although each state has distinctive rules as to when a matter will fall within its courts' jurisdiction, generally, there are three means of establishing jurisdiction:
- submission to the court's jurisdiction;
  - the existence in a contract between the parties of a choice of jurisdiction clause; and
  - the dictates of statute and case law.

The first two means require introduction.

- D4 A defendant who participates in the substantive court process without objecting to the court's jurisdiction is deemed to have submitted to that court having jurisdiction.

- D5 A choice of forum clause is a clause in a contract between parties specifying the place at which any dispute may be determined. The weight attributed to such a clause depends upon whether the clause is an "exclusive" or "non-exclusive" one. An exclusive forum jurisdiction clause ". . . attempts to restrict the parties to commencing proceedings in the jurisdiction specified in the contract".



In contrast, a non-exclusive forum clause is considered to be “. . . a submission to the jurisdiction of the court specified in the contract rather than a bar to commencing proceedings in alternative fora” (Parks and Cromie 1990 444).

## BASIC JURISDICTION

### *England and Wales*

- D6 In England and Wales, if a writ can be served on a defendant, in accordance with the rules of the English court, the court will regard itself as having jurisdiction. This is so whatever the domicile or nationality of the defendant and however fleeting his or her presence in the country (Parks and Cromie 21–22).
- D7 A writ can be served on a defendant if:
- he or she is present within the jurisdiction;
  - he or she submits to the jurisdiction; or
  - the courts authorise service of a writ out of the jurisdiction under Order 11 of the Rules of the Supreme Court (Fawcett and North 1992 179, 183, 188).

For Order 11 to apply, the plaintiff must satisfy the court that the plaintiff has a good arguable case on the merits, that one of the heads of Order 11 (rule 1(1)) applies, and that the court’s discretion should be exercised to allow service (Parks and Cromie 24–25; Fawcett and North 191–213). The discretionary power to allow service of a writ out of the jurisdiction is exercised on the basis of forum conveniens (see discussion of forum in paras D30–D63) (Fawcett and North 221; Fawcett 1995 209–210).

- D8 In England and Wales, the common law as concerns choice of law in tort was enunciated by Willes J in the case of *Phillip v Eyre* (1870) LR 6 QB 1, 29:

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

The general rule expounded by Willes J applies unless

clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred.

- D9 Malaysia and Singapore have adopted the English approach to establishment of jurisdiction.

## *France*

- D10 In France, articles 14, 15 and 42–48 of the New Code of Civil Procedure set out the basic rules for determining international jurisdiction. The general principle under article 42 is “the territory of the court with jurisdiction is, unless specified otherwise, the court of the place where the defendant is located”. In the case of a private individual, this will be his or her legal domicile or residence. In the case of a corporate entity, the entity is located at the place of its establishment. The claimant can, however, choose either the jurisdiction of the defendant’s residence, the court of the disputed delivery site, or the court of the place where service was rendered. In matters of liability in tort, the claimant may choose between the place where the tortious act was committed, and the place where damage was suffered (Parks and Cromie 28).
- D11 Articles 14 and 15 of the Code lay out circumstances where only French courts have jurisdiction (Parks and Cromie 28). It is also possible for a French court not having jurisdiction from application of ordinary rules to declare that it has jurisdiction when of the opinion that a miscarriage of justice would, otherwise, result or when the dispute referred deals with measures of execution to be performed in France (Fawcett 1995 176).

## *Federal Republic of Germany*

- D12 Statute law prescriptively defines when a German court has jurisdiction. Existence of any of the following will give jurisdiction to German courts:
- submission to jurisdiction via a jurisdiction clause, by agreement in writing, or by a party’s failure to challenge jurisdiction before participating in a German proceeding (Parks and Cromie 29–30; see Zivilprozessordnung (ZPO) s 38–39);
  - the place of performance of the contract is Germany, or obligations arising from the contract were to be performed in Germany, or the contract stipulates Germany as the place of performance of the contract (Parks and Cromie 31; ZPO s 29);
  - claims arising from *Unerlaubte Handlung* – a concept of German law broadly similar to the concept of tort, comprising extra-contractual claims based on the commission of an illegal violation of another party’s legally protected sphere – may be brought before the court in whose district the tortious act was committed (Parks and Cromie 32; ZPO s 32);
  - by the defendant bringing a counter suit before a German court where that suit is connected to the claim of the plaintiff (Parks and Cromie 32; ZPO s 33);

- domicile and related concepts (former domicile being Germany where defendant now has no domicile, extended stay, branch office in Germany) (Parks and Cromie 33; ZPO ss11, 13, 16, 20–21); and
- the ownership of assets by the defendant in Germany (Parks and Cromie 33; ZPO ss 23, 25, 26, 27, 29).

### *Australia*

D13 According to Parks and Cromie in *International Commercial Litigation*, an Australian court has jurisdiction when proper legal service of the originating process has occurred or the defendant has submitted to an Australian court's jurisdiction (38). The requirements of service vary from state to state, however, as a general rule, a plaintiff may serve an originating process in a state other than the state where the court has jurisdiction without needing to obtain the court's leave (42). With respect to service outside of Australia, again, each state has its own rules on when leave is required (46). The various rules relate to some defined connection between the forum and the cause of action, the subject matter, or the defendant (Sykes and Pryles 1991 33), and are broadly modelled on the English Order 11 (Fawcett 1995 80; see discussion in para D7). The commission of a tort is, in all jurisdictions except Queensland, a ground upon which service outside the jurisdiction may be predicated (Sykes and Pryles 39). According to Stone, the classic formulation of the tort rule in *Phillips v Eyre* (1870) LR 6 QB 1 (see discussion in para D8) still holds sway in Australia, although reform is underway (Stone 1992 9, 23). The *Queensland Rules of the Supreme Court* do not refer to torts committed within the jurisdiction but permit service outside the jurisdiction "when any act or thing sought to be restrained or for which damages are sought to be recovered, was done or is to be done or is situate within the jurisdiction" (Sykes and Pryles 42).

### *Japan*

D14 There are no explicit statutory provisions on international jurisdiction in Japan. There are, however, rules determining forum for domestic litigation in the Code of Civil Procedure (the Code), and the principles underlying these rules have been applied by the Japanese courts to deal with international disputes. Accordingly, it is necessary to discuss questions of jurisdiction and forum together as Japanese law does not draw a distinction between the two concepts.

D15 The leading case is that of *Michiko Goto et al v Malaysian Airline System Berhad* (1983) 26 Japanese Ann of Int Law 122. That

Supreme Court decision recognised the wide international jurisdiction of Japanese courts, and identified the following general rules:

- (a) There are no explicit statutory provisions on international jurisdiction in Japan;
- (b) Therefore, international jurisdiction has to be decided in accordance with those principles of justice which would require that fairness be maintained between parties, and a proper and prompt trial be secured;
- (c) Although the provisions on distribution of venue among the local courts as established in the Code of Civil Procedure are not concerned with international jurisdiction itself, they are believed to reflect the above principles. Thus, a defendant should be subject to the jurisdiction of Japan when the conditions meet the provisions for intra-territorial jurisdiction set forth in the Code of Civil Procedure.

D16 In the Code there are two categories of rules concerning jurisdiction: general forum and special forum rules. A prospective plaintiff may choose either the general forum or the special forum (Parks and Cromie 57–58).

D17 A defendant's general forum is determined by his or her or her domicile. If a person is not domiciled in Japan, or if the domicile is unknown, his or her general forum is determined by his or her place of residence. If there is no place of residence, or the place of residence is unknown, it is determined by his or her last domicile (the Code article 2; Parks and Cromie 57).

D18 Where the defendant is a legal entity, the general forum is determined according to the location of its principal office or principal place of business. In the absence of an office or place of business, the domicile of the principal person in charge of the business is utilised (article 4; Parks and Cromie 57–58).

D19 The special forum rules apply to specific transactions, enabling the matter to be brought before an appropriate court, which may not necessarily accord with the general rules of forum. For example, in the case of a suit for payment of a bill of exchange, promissory note, or cheque the suit may be brought before the court situated in the place of payment shown on such bill, note or cheque (article 6). Another example of a special forum rule is that which deals with tortious suits. A suit relating to a tort may be brought before the court of the place where the harmful event occurred. "Harmful event" has been interpreted to cover both the place where the wrongful event occurred and the place where damage was suffered,

if different (article 15; see also *Shinagawa Hakurenga Co Ltd v Houston Technical Ceramics Inc* (1990) 33 Japanese Ann of Int Law 202; Parks and Cromie 58–59; Fawcett 306).

D20 Beyond the rules of the Code, submission to the jurisdiction of a Japanese court may be by way of agreement, the existence of an exclusive jurisdiction specifying Japan as the forum for determination of disputes, or by participation in the court process without protesting against the court having jurisdiction (Parks and Cromie 62).<sup>129</sup>

D21 For a jurisdiction clause favouring a foreign state to be enforceable, it must, in writing, clearly stipulate agreement between the parties on the designated court to have jurisdiction, the designated court must be able to exercise jurisdiction over the dispute (article 31), and the dispute must not be subject to the exclusive jurisdiction of a Japanese court. The approach of the Japanese court to a properly executed foreign jurisdiction clause will be to dismiss the Japanese suit unless the jurisdiction clause is blatantly unreasonable or contrary to public order (Parks and Cromie 61–62). Fawcett put it thus:

the agreement on exclusive international jurisdiction designating a foreign court should be valid in principle unless such a conclusion would lead to an unacceptable result which violates public policy. . . (1995 306)

### *United States*

D22 Rules of jurisdiction in the United States (federal and state) are broad allowing United States courts to assert extra-territorial reach. Overall, a United States court will have jurisdiction to determine a dispute if the prospective defendant or its agents or significant aspects of the transaction have a connection with the United States. The least that this requires is that the defendant should have “minimum contacts” with the territory of the United States court’s jurisdiction, “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”: *International Shoe Co v Washington* 326 US 310, 316 (1945). The “minimum contacts” test requires that “the defendant’s conduct and connections with the forum State [be] such that he should reasonably anticipate being haled in to court there”: *World-Wide Volkswagen Corp v Woodson* 444 US 286, 295 (1980). Jurisdiction over a non-resident defendant may also be pursuant to a general “doing business” test, or a particular transaction or long-arm standard (Parks and Cromie 77–78; Siegel 1982 36).

D23 Alternative means of an United States court having jurisdiction to determine a dispute are: commission of a tortious act within a state, a jurisdiction clause in favour of the United States jurisdiction or a submission to the United States jurisdiction (by participating in action without protesting jurisdiction beforehand) (Parks and Cromie 77; Siegel 1982 79–80, 93).

### *People's Republic of China*

D24 In China rules regulating conflict of laws are stipulated by the 1991 People's Republic of China (PRC) Civil Procedure Law, 1985 PRC Foreign Economic Contract Law, and the 1986 PRC General Rules of Civil Law. These laws stipulate the following rules:

Concerning the legal capacity of a person, the law to be followed among the personal laws of different places, is the law of the place where the person has his domicile;

Concerning marriages, the law to be followed is the law of the place where the dispute of divorce is raised;

On matters of wardship and fosterage, the law to be followed is the law of the place which has the closest connection with the person under wardship and care;

For immovable properties, the law to be followed is the law of the place where the real estate is situated;

On matters of legal succession, it is the law of the domicile of the deceased for moveables, and the law of the place of the real estate for immovables to be followed;

On matters of tort, it is the law of the place where the wrongful act is committed that should be followed;

In matters of contract, . . . the parties may choose the applicable law by themselves.<sup>129</sup>

D25 The “Responses of the People’s Supreme Court to Questions Arising out of the Application of the Foreign Economic Law” supplements statute law (Mu 1993 1).

D26 The Responses elucidate how to determine the law that is to govern a contract by laying down a series of presumptions relating to 13 different types of contract all of which reflect the characteristic

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<sup>129</sup> This is the general position but the “Responses of the People’s Supreme Court to Questions Arising out of the Application of the Foreign Economic Law” provide areas of law when China has exclusive jurisdiction and, where these apply, parties are not free to choose the applicable law: Guojian 1997 650–651; Mu 1993 1–2; Yang 13.

performance theory in international contract law. Those presumptions are not reproduced here for they are not determinative; the court retains a discretion to not apply presumptions if the contract appears to be more closely connected with the law of another country (see Guojian 1997 651–652).<sup>130</sup>

### *Republic of Korea (South Korea)*

D27 There is no provision for jurisdiction in the international sense in Korea; according to Choe's chapter in *Korean Law in the Global Economy* the Korean Code of Private International Law, *Soboe Sapop* (the Code), provides guidelines for adjudicating tribunals on how to solve controversies entailing foreign elements. The Code merely deals with territorial competence (relating to venue) and not jurisdiction. Nevertheless, the provisions of the Code have been applied by analogy to international cases where jurisdiction is in issue. For this reason, relevant provisions of the Code are detailed below (see Choe 1996 443–449):

- A Korean court requires more than personal service to establish jurisdiction; it will insist on being satisfied that its competency stems as the court of defendant's "forum general" (meaning the common or ordinary place where a person may be sued) or when special forum rules apply (Code of Civil Procedure articles 1–36).
- A court is considered as having jurisdiction when:
  - the defendant's domicile is Korean or the defendant resides or has resided in Korea (article 2);
  - if the defendant is a corporate entity, the defendant conducts business in Korea (article 4);
  - the place where the liability is to be performed is Korea (article 6);
  - the place where the defendant's property is located is Korea (articles 9 and 18);
  - the place where an unlawful act was committed (ie, a tort) is Korea (article 16);
  - the parties consent to a Korean court having jurisdiction, provided it is in writing and freely entered into (article 26); and
  - the defendant has participated in the Korean action without beforehand pleading error of jurisdiction (article 27).

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<sup>130</sup> General Rules of Civil Law, articles 142–147.

## *Chinese Taipei (Taiwan)*

D28 The Law Governing the Application of Laws to Civil Matters Involving Foreign Elements (LGACN) sets out the grounds on which a Taiwanese court will have jurisdiction to determine a dispute. If the claim is contractual, article 6 provides:

With respect to the requisite for establishing and the effect of a juristic act whereby an obligatory relation is brought about, the law to be applicable thereto shall be determined by the intention of the party to the act. In cases where the intention of the parties is unknown, and where both of the parties are of the same nationality, the law of their country shall be applicable. If they are of different nationalities, the *lex loci actus* shall be applicable. If the act was done at different places, that place whence the notice of offer was issued shall be deemed as the place of the act. If the opposite party did not know the place whence the notice of offer was issued at the time when the offer was accepted, the place of domicile of the offerer shall be deemed as the place of act. If the place of the act mentioned in the preceding paragraph spans over two or more countries or it does not belong to any country, the *lex loci solutionis* apply. [sic]

D29 If the nature of the claim is tortious, article 9 of the LGACM provides:

An obligation arising from a wrongful act shall be dealt with by *lex loci delicti*; provided, however, that this shall not apply where such act is not considered to be wrongful under the law of the Republic of China.

## FORUM

D30 This section overviews the grounds upon which New Zealand's major trading partners may decline to exercise jurisdiction.

### *England and Wales*

D31 An English court will decline to exercise its jurisdiction if the court is satisfied

that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice. (Parks and Cromie 437 citing *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460,476)

D32 The House of Lords in *Spiliada* considered, exhaustively, principles on which the discretion to determine a dispute should be exercised. The framework for approaching a plea of *forum non conveniens* is outlined by Lord Goff as:



- (a) A stay of proceedings will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action.
- (b) In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay. However, once the defendant has made a *prima facie* case that another forum is more appropriate, the burden shifts to the plaintiff to show that justice requires the case to be tried in England.
- (c) If jurisdiction is founded as of right in England, rather than leave to serve the defendant out of the jurisdiction being required, then the defendant has to show that there is another forum which is clearly or distinctly more appropriate than the English forum.
- (d) In determining the appropriateness of a forum the court will determine how real and substantial is its connection with the dispute. In doing so it will consider a number of connecting factors, including the convenience of witnesses, the law governing the issue, and the places where the parties reside or carry on business.
- (e) If there is no clearly more appropriate forum then no stay will be granted.
- (f) If, however, the court decides that there is a *prima facie* more appropriate forum it will grant a stay unless the plaintiff can show that there is circumstances by reason of which justice requires that a stay should nevertheless not be granted. (Fawcett, 1995 209, citing *Spiliada* 476–478)

D33 Further considerations affecting the appropriateness of a forum emergent from case law are:

- the advancement of the proceedings in the foreign state and political reasons or the quality of the judiciary which will affect the ability of the foreign court to conduct a hearing of the dispute: *The El Amria* [1981] 2 Lloyd's Rep 1191; *The Abidin Daver* [1984] AC 398, 411;
- convenience of the parties: *Cleveland Museum of Art v Capricorn Art* [1990] 2 Lloyd's Rep 166; *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460;
- excessive delay in the conduct of the business of the courts: *Cleveland Museum*; *Irish Shipping Ltd v Commercial Union* [1991] 2 QB 206; *The Vishva Ajay* [1989] 2 Lloyd's Rep 558, 560;
- the unavailability of appropriate procedures and remedies: *Cleveland Museum*; *Charm Maritime v Kyriakou* [1987] 1 Lloyd's Rep 433; *El Amria*;
- the application of limitation statutes barring the plaintiff from proceeding in a foreign court; the expense of conducting the proceedings in each of the courts, particularly translation and

transport costs: *Cleveland Museum*; *Irish Shipping Ltd*; *El Amria* 123–4;

- the existence of concurrent proceedings between the same parties on the same issues in different jurisdictions (*lis pendens*): *Du Pont v Agnew* [1987] 2 Lloyd’s Rep 585, 589; *Meadows v ICI* [1989] 1 Lloyd’s Rep 181, 189; *Cleveland Museum*;
- the existence of related litigation concerning the same issues although not the same parties: *Spiliada*;
- the presence of a foreign choice of jurisdiction clause;
- *res judicata* issues: *Charm Maritime v Kyriakou*; and
- English public policy is in issue: *Du Pont v Agnew* [1987] 2 Lloyd’s Rep 585.

(For discussion of these issues see Fawcett 218, 211–220; Parks and Cromie 437–438; and Fawcett and North 227.)

D34 The court imposes a more stringent criterion than that required for stays when foreign proceedings are sought to be restrained. In the leading case, the decision of the Privy Council in *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, Lord Goff set out the approach to be taken to an application for an injunction to prevent the issue of or restraint of a foreign proceeding as follows:

First, the jurisdiction is to be exercised when the “ends of justice” require it. Secondly, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. Thirdly, an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy. Fourthly, the jurisdiction is one which must be exercised with caution. (Fawcett 229–230 summarising Lord Goff of Chieveley in *Societe Nationale Industrielle Aerospatiale* 892).

D35 As a general rule, to show that an injunction is required, the plaintiff needs to show that “England is the natural forum and that it would be oppressive or vexatious to permit the defendant to continue with the foreign proceedings.”<sup>131</sup> This threshold may be met by the existence of an exclusive foreign jurisdiction clause: *Sohio Supply Co v Gatoil* [1989] 1 Lloyd’s Rep 588, 592.

D36 Singapore and Malaysia have adopted the British common law approach endorsed by the *Spiliada* case (Fawcett and North 222).

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<sup>131</sup> Fawcett, 230; see also Parks and Cromie, 439; *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871; and *Du Pont v Agnew* [1987] 2 Lloyd’s Rep 585.

## France

- D37 A French court may decline to exercise its jurisdiction in three types of situations:
- *Lis alibi pendens*
  - *Connexite*
  - *Exception de chose jugée*.
- D38 The latter exception is the French equivalent of *res judicata*.
- D39 *Connexite* is a stay on the ground of a connected set of proceedings occurring in a foreign court. To establish a plea of *connexite* the court must satisfy itself that “several actions are so intricately connected that it is desirable to examine them together” (Fawcett 181). However, although theoretically available, its use has been limited to domestic litigation.
- D40 The final ground is that of a foreign proceedings already on foot elsewhere. For an application for stay on the ground of *lis alibi pendens* to be successful, several conditions must be met:
- at the time when the action is brought before a French court, proceedings are already on foot before a foreign court which is seised of the dispute pursuant to foreign rules on procedure;
  - both French and foreign courts must consider themselves to have jurisdiction to hear the case; and
  - the same parties, and the same cause of action, must be involved in both sets of proceedings.

The French court then examines the enforceability of any foreign judgment rendered or to be rendered in France. This requires consideration of the regularity of the foreign proceedings. Notwithstanding the preconditions for the grant of the stay having been met, the French court retains a discretion to refuse a stay (Fawcett 181; Parks and Cromie 440–442).

- D41 So far, *forum non conveniens* and restraint of foreign proceedings are unknown to French law. In short, if a French court has jurisdiction by virtue of the applicable law, it cannot declare itself incompetent on grounds of inappropriateness or any ground other than the three identified above (Parks and Cromie 441; Fawcett 175, 177–179).
- D42 Interestingly, jurisdiction clauses granting jurisdiction to a foreign court will be respected by French courts provided the dispute is of international nature and does not concern a matter in which French courts have mandatory territorial competence: *Cie de Signaux et d’Entreprises Electriques (CSEE) v Soc Sorelec* [1986] RC 537. Similarly treated by French courts is submission to the

jurisdiction of a foreign court by the defendant; this is viewed as tacit agreement between the parties to depart from French jurisdiction and extend foreign competence (Fawcett 184).

- D43 As regards injunctions, there is no possibility under French law for the granting of an injunction to stop proceedings started abroad (Fawcett 186).

### *Federal Republic of Germany*

- D44 German courts rarely renounce jurisdiction; statute law defines when a German court has jurisdiction (which must then be exercised) and the narrowly defined areas where it is possible for the German court to defer to the jurisdiction of a foreign court (Fawcett 190).

- D45 The broadest grounds for a German court to dismiss a suit are *lis alibi pendens*, and the existence of an exclusive foreign jurisdiction clause. For *lis alibi pendens* to apply the action before the German court must involve the same parties and the same subject matter as that before the foreign court, the foreign court must have been seised of the matter earlier in time, and any judgment rendered by that court must be enforceable in Germany (Zivilprozessordnung (ZPO) s 261; the prerequisites for recognition are found in s 328; see Parks and Cromie 443). Notwithstanding these requisites having been met, courts still retain a discretion to refuse dismissal of the German suit if exceptional circumstances require it. In practice German courts do generously respect the earlier pendency of a foreign action. Foreign selection agreements stipulating an exclusive foreign forum are also widely respected: judges do not have discretion to look past an exclusive jurisdiction clause appointing a foreign forum, the court can only determine that such a clause is of no effect because formalities stipulated by German law have not been complied with. This is so regardless of the enforceability of a foreign judgment in Germany. (See further Fawcett 190–191, 196–197.)

- D46 There are other circumstances when a German Judge is empowered to dismiss an action, but these are much narrower in scope. For example, the Code on Non Contentious Proceedings allows for a flexible approach to determining the most appropriate forum, and provides an example of where considerations of *forum non conveniens* may enter German law. Adoption and custody matters fall into the non-contentious category. Another example is where a German court is not able to apply the foreign rule, even after adjusting, if necessary, German procedural rules. This is known as international non-competence *ratione materiae* (Fawcett 191–192).

D47 Consistent with statutorily defined rules of jurisdiction, German courts do not have the ability to halt proceedings lodged in a foreign jurisdiction by the issue of an injunction. Instead, a judgment rendered by a foreign court that a German court considers was wrongly possessed of it would simply not be recognised (Parks and Cromie 443; Fawcett 204; Sykes and Pryles 26).

### *Australia*

D48 Australia utilises the doctrine of forum non conveniens to determine whether or not to exercise jurisdiction. Up until the case of *Oceanic Sun Liner Special Shipping Co Inc v Fay* (1988) 79 ALR 9 Australia followed English law authority. Following that case the law on conflict of laws changed (Fawcett 82–85; Sykes and Pryles 88).

D49 The decision of the High Court of Australia in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 was the first to enunciate a distinctive Australian slant to the doctrine of forum conveniens. The High Court decided that where service occurred within Australia a stay of proceedings should be granted only when the forum chosen by the plaintiff was clearly inappropriate; that is, in a clear case where the continuation of the proceedings in Australia would be vexatious and oppressive (Fawcett 85). “Oppressive” was defined as “serious and unfairly burdensome, prejudicial or damaging”, while “vexatious” means “productive of serious, unjustified trouble and harassment” (Parks and Cromie 446). The defendant also needs to establish that an appropriate forum with jurisdiction to hear the dispute existed elsewhere. In cases where jurisdiction had been acquired through service outside the jurisdiction, the onus would instead be on the plaintiff to establish that the chosen jurisdiction was not a clearly inappropriate forum (Fawcett 85). The factors outlined by Lord Goff in the *Spiliada* case were noted to assist the court in its determination of whether or not the forum chosen was clearly inappropriate. However, the use of “clearly inappropriate forum” obviously reduces considerations concerning the appropriateness of alternate forums. Moreover, consideration of public interest factors has been renounced; see, for example, the opinion of Deane J in the *Voth* decision that public interest factors should not be taken into account (Fawcett 87).

D50 In Australia the principle of *lis alibi pendens* – in many countries considered a discrete area of law – is but one factor to be considered when considering the appropriateness of the Australian court (Fawcett 90; Parks and Cromie 446).

- D51 Foreign jurisdiction clauses constitute another means to stay or dismiss a proceeding (Fawcett 93; Sykes and Pryles 78). Australian courts have not departed from the English approach as set out in the cases of *Aratra Potato Co Ltd v Egyptian Navigation Co (The El Amria)* [1981] 2 Lloyd's Rep 119 and *The Eleftheria: Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v The Eleftheria (Owners)* [1969] All ER 641. The English court's approach to an application for a stay based upon a foreign jurisdiction clause is to apply ". . . a strong bias in favour of the special bargaining and holding the parties to their contract": *Lewis Construction Co Pty Limited v M Tichaeur Societe Anonyme* [1966] VR 341. The plaintiff in order to avoid a stay being granted must produce evidence of special circumstances; that burden is a heavy one, especially when the foreign jurisdiction clause is "exclusive" (see Fawcett 93; Sykes and Pryles 78).
- D52 An Australian court has the power to issue an injunction to restrain a foreign proceeding (Fawcett 95). The circumstances in which such a power will be exercised appear to be in line with English authority; there are presently no reported Australian cases concerning applications for an injunction restraining foreign proceedings (Parks and Cromie 447). Generally speaking, a plaintiff pursuing an action in a foreign court will be restrained from doing so if ". . . such pursuit would be vexatious or oppressive" (896). In practice the jurisdiction to issue an injunction has been exercised with great caution (Sykes and Pryles 101–104; Fawcett 95).

### Japan

- D53 In Japan, the rules for declining jurisdiction are in their formative stages. The basis of dismissal was formulated in the *Malaysian Airlines* case as the fourth general rule (the other 3 appear at para D15). The court held that:

(4) Where, upon taking into account international aspects of the case, there are special circumstances which invoke a conclusion on the international jurisdiction derived from (3) that violate the principles of justice as set forth in (2), the conclusion will be altered. (Fawcett 308)

Employing the above exception, a subsequent District Court decision, *Sei Mukoda et al v The Boeing Co Inc* (1988) 31 Japanese Ann of Int Law 216, interpreted the fourth general rule thus:

if venue for local territorial competence provided for in the Code of Civil Procedure is located in Japan, it would be in accordance with the principles of justice and reason to sustain the jurisdiction of the Japanese court in general, unless special circumstances can be found.

Such special circumstances exist where, in the light of the concrete facts of the case, sustaining the Japanese court's jurisdiction would result in contradicting the principles of securing fairness between the parties and maintaining the proper and prompt administration of justice. (Fawcett 308)

D54 These criteria are of similar nature to the forum non-conveniens doctrine. So far, under the exceptional circumstances test, such considerations as unavailability of witnesses and evidence, delay, enforceability of a judgment rendered by a foreign court, impecuniosity of the plaintiff and the availability of compulsory process for attendance of unwilling witnesses have featured: *Sei Mukoda et al v The Boeing Co Inc*. There are minor differences between the two tests: the special circumstances test does not require proof of the existence of another more appropriate forum; public factors – such as administrative difficulties caused by the number of cases – do not affect the discretion to dismiss an action brought in Japan; and Japanese courts do not have the power to stay an action (except in the case of natural disasters and the like) therefore the Japanese courts are unable to keep a proceeding extant until such time as the court is assured that it has been dealt with expeditiously and fairly in the foreign jurisdiction. The Code is supportive of case law in providing that no party may bring another suit concerning a case which is pending before a court (article 231). (See further Fawcett 309–310.)

D55 Two further modes of dismissing an action have been used by Japanese courts. First, use of the doctrine *lis alibi pendens* in conjunction with other “special circumstances” rendering it in the court's view just to defer to the jurisdiction of the foreign court: *Greenlines Shipping Co Ltd v California First Bank* (1985) 28 Japanese Ann of Int Law 243. Secondly, a Japanese case recently adopted the German version of *lis alibi pendens* as a ground for dismissing a Japanese action (Fawcett 310–311). The German version requires not only that the matter be between the same parties, of the same subject matter, and within the jurisdiction of another competent court, but also that any judgment delivered by that foreign court is enforceable in Germany. The latter requirement means the Japanese court assures itself of the foreign courts procedures in conducting the court hearing by Japanese standards. It is difficult, therefore, for a Japanese court to make an early decision on the enforceability of a foreign court's judgment: *Shinagawa Hakurenga Co Ltd v Houston Technical Ceramics Inc* (1990) 33 Japanese Ann of Int Law 202. Remembering the courts' inability to stay an action, it is likely to be only mature actions that are dismissed on this ground. (See further Fawcett 314.)

D56 Japanese courts are not empowered to issue an injunction barring proceedings lodged in a foreign court, even if the Japanese court considers the matter should be determined by it.

### *United States*

D57 United States federal courts utilise the doctrine of forum conveniens. Each state also devises its own forum conveniens rules. In general, both at federal and state level, the defendant seeking to avoid United States jurisdiction must demonstrate that some other forum is more convenient. This is more difficult for a defendant in an United States jurisdiction to establish when it is the plaintiff's home forum; a court does not deprive such a plaintiff of the forum unless "the facts establish such oppressiveness and vexation to a defendant as to be out of all proportion to a plaintiff's convenience, or trial in the chosen forum would be inappropriate because of considerations affecting the court's own administrative and legal problems": *Gulf Oil Corpn v Gilbert* 330 US 501, 524 (1947) (see further Fawcett 402–404).

D58 A number of factors affecting the decision to dismiss or stay an action are enumerated in the leading decision in this area of *Gulf Oil Corpn v Gilbert*. Those factors are divided into two sections: private interests factors and public interest factors. The private interests factors include:

- relative ease of access to sources of proof;
- availability of compulsory process for attendance of unwilling witnesses;
- cost of obtaining attendance of willing witnesses;
- possibility of viewing premises;
- enforceability of a judgment; and
- other practicalities that make trial of the case easy, expeditious and inexpensive.

The public interest factors include:

- administrative difficulties that may result from court congestion;
- interest in having local issues or controversies decided at home;
- judicial interest in deciding cases in a forum that is familiar with the law that governs the case;
- avoidance of unnecessary problems in conflicts of law or in the application of foreign law; and
- the unfairness of burdening citizens in an unrelated forum with jury duty (Fawcett 403).



D59 Other grounds for dismissal of an action are:

- choice of jurisdiction stipulating a foreign court – often considered among the factors affecting the convenience of a forum (Fawcett 407); and
- statutory bars – for example, a state will not lend its courts to the prosecution of crimes committed elsewhere and governed by the penal laws of the other state (Siegel 141).

Forum clauses are ordinarily enforced by the courts, especially if “exclusive”. The forum selection clause is binding on the parties, unless the party seeking to prosecute in a court other than the selected forum can show that its enforcement would be unreasonable, unfair, or unjust: *Bremen v Zapata Off-Shore Co* 407 US 1 (1972) (see further Fawcett 407–408; Parks and Cromie 456).<sup>132</sup>

D60 A court will grant a preliminary or final injunction if it is satisfied that a refusal to grant the injunction will cause irreparable harm to the person seeking the injunction and will not impose undue hardship on the person against whom the injunction is sought. The public interest must also be taken into consideration. There is wide consensus that an injunction should not be lightly granted, comity of nations being an important consideration (Fawcett 423).

### *People’s Republic of China*

D61 In the commercial context, in the absence of a choice of forum clause, the Chinese court under article 5 of the Foreign Economic Contract Law will apply the law of the country which has the closest connection with the contract. This is considered to be “. . . similar to the common law approach” (Yang 1993 13). There is little case law and therefore an absence of elaboration on what constitutes a connecting factor (see further Mu 1993 2; Guojian 1989).

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<sup>132</sup> For example, the court may find a choice of forum clause unreasonable in cases of fraud, undue influence or unfair bargaining power, as well as in situations in which the inconvenience to one party would be so substantial as effectively to deny it a forum entirely (Parks and Cromie 456).

### *Republic of Korea (South Korea)*

- D62 Rules of venue are designed to present the subject matter to the court best equipped to properly, fairly and efficiently hear the dispute. Textbooks referred to on Korean law do not discuss the ability of a Korean court to dismiss an action notwithstanding that it has jurisdiction. It may be Korean jurisprudence has not developed this far however, as Japanese and Korean law were modelled on German law (late nineteenth century), and German law does not prescribe a discretion to dismiss, it is unlikely that Korean courts will differ in approach from their continental predecessor (see further Choe 1996 439, 441–442).

### *Chinese Taipei (Taiwan)*

- D63 It appears that if a Taiwanese court has jurisdiction that jurisdiction shall be exercised (textbooks on Taiwanese law do not disclose grounds for dismissing an action when a Taiwan court is properly seized of it). In fact, there is the ability for a Taiwanese court to embrace a dispute not falling within the jurisdiction of a Taiwanese court and override the jurisdiction of a foreign court where “. . .the law of a foreign court is applicable under this Law, but the provisions therein are contrary to the public order and good morals of the Republic of China. . .” (LGACM article 25).
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# Index

- acceptance 68–74
- acceptance (withdrawal of) 88–89
- assignments 106–107
- attribution of messages 94–99
- authentication of messages 235–237
- basic jurisdiction 258–266, 274–278
- bills of lading 118–127
- causation 180–182
- choice of forum 288–289
- choice of laws 291–297
- confidential information 158–166, 349–352
- connecting factors 264–266
- consideration 75–77
- Contractual Mistakes Act 1977 60
- Contracts Enforcement Act 1956 109–111, 137
- contributory negligence 157
- Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) 128–134
- Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) 307
- copies 161, 195–198, 373
- copyright 370–374
- damage 151, 154–157, 177–179
- deeds 100–105
- defamation 186–190
- digital signatures 322–332
- discovery 211–224, 235
- document 12, 52, 105, 195–197, 211–225, 234, 241–243, 248, 315
- domain names 366–369
- duty of care 142, 168–171, 178, 184
- electronic money 354–362
- electronic signatures 96, 99, 105, 131, chapter 7
- encryption 175, 322–323
- enforcement of judgments 298–304
- evidence code 219, 238–248, appendix C
- Fair Trading Act 1986 269–271, 368, 379, 380
- firewalls 175
- foot and mouth 144
- forum conveniens 266, 280–290, 296
- framing 379
- guiding principles *see* principles for reform
- hacking 148–151, 161, 170
- hearsay 228, 233–234
- hyperlinks 375–378
- inherent jurisdiction 261–263
- inspection *see* discovery
- interference with goods 147–153
- International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague–Visby Rules) 118, 121–122
- internet service provider 71, 82, 144, 171, 188–190, 371
- Judicature Act 1908 260, 304
- jurisdiction 47, chapter 6, 258–290, appendix D
- lapse of time 85–87
- “long-arm” statutes 267–273
- Lugano Convention 307

manual signature 309–320  
meta tags 380  
mitigation of loss 156  
negligence 142, 167–185  
negligent misstatement 183–185  
offer 65–67, 89  
originals 195–198, 202  
passing off 368–369  
principles for reform 13–14, 22–45,  
104, 145, 249  
real evidence 226–228  
Report of the Electronic Expert Group  
to the Attorney General (Australia)  
(ECEG report) 10, 22, 92, 96, 98, 321,  
395  
revocation of offer 82–84  
standard of care 153, 172–176  
territorial jurisdiction 258–262, 287  
timing of messages 69–74, 82–93  
UNCITRAL Model Law on Electronic  
Commerce 10–12, 23, 28, 38, 41, 62,  
73, 90–91, 94, 97–98, 123, 127,  
202–204, 306, 312, 336–338, 344,  
393–394, appendix A  
Uniform Commercial Code 61–63, 93,  
95, appendix B  
Uniform Law Conference of Canada  
205  
United Nations Convention on  
Contracts for the International Sale of  
Goods (Vienna sales convention)  
72–74, 112–116, 255, 306  
viruses 147–157, 169–175, 181–182  
world wide web 4, 187, 276–278,  
375–380

---



