# Cyber Paranormal: Conflict of Law Issues in E-Commerce Consumer Contracts

Sheela Jayabalan

ABSTRACT

*The advancement of information and communication technology (ICT) has taken commerce to a trans border or cross border heights which sees no boundaries on the globe. In an e-commerce transaction via the Internet, a consumer located in Malaysia can browse the World Wide Web and purchase goods from any part of the world with the click of the mouse. Cross- border transactions used to be the concern of big enterprises and wholesalers. The Internet has transformed this fact with thousands of consumer contracts or business to consumer contracts (B2C) being made every day with suppliers and purchasers almost inevitably situated in different parts of the world. The interconnectivity nature of the Internet dismembers the borders of the globe. Traditional norms to assert jurisdiction in the instance of a breach of a contract such as, the place where the contract was made or the place of performance of the contract or the domicile of the contracting parties have become meaningless. Is the Internet which is known as the cyberspace really a place without borders and beyond the reach of laws? Because, a legal system is confined to its territory. Whereas, the infrastructure of the Internet sees no border. Question arises as to; how is the law of a state to apply when Internet penetration is not confined to one jurisdiction but penetrates into multitude of jurisdiction? Thus, the aim of this article is to highlight the conflict of law issues that the Internet gives rise to consumer contracting for the sale of goods via the Internet in the Malaysian perspective. Is the conflict of laws principles or private international law in Malaysia equipped to deal with cross border transactions for the sale of goods via the Internet? Does the conflict of laws in Malaysia give any significance to consumer transactions?*

**Keywords:** E-*Commerce, Conflict of Laws, Consumer protection, Jurisdiction, Internet*

## Introduction

Internet contracting involves international or trans border transactions. Naturally, any disputes arising as a result of Internet contracting often involves the laws of more than one country. When litigation is brought to court with a foreign element present, the court must ask itself three principal questions before it can proceed to consider the merits of the case which are as follows (PM North,1974);

i. can and will the court exercise jurisdiction over the subject-matter of the dispute and the persons involved in the dispute?;
ii. which law should be applied by the court to the facts before it? Is it the law of its own country or the law of another country? ; and

ISSN 1675-1302

iii. to what extent should the court take cognizance of foreign judgments and decisions by the courts of a different jurisdiction?

Providing the answers to these three questions is the function of the body of rules known as conflict of laws. The body of rules under the conflict of laws or private international law determines whether a local court can assert jurisdiction which involves a foreign element or when 'the court is seized of a suit that contains a foreign element' (PM North, 1974). It is a universally known maxim of jurisprudence that a sovereign is supreme within his own territory. The sovereign has exclusive jurisdiction over everybody and everything within its territory and over every transaction that is there effected. The sovereign can refuse to consider any law but its own. However, the adaptation of this maxim was acknowledged as impractical to the modern civilized world where nations have long found that they cannot shield behind the cloak of territorial sovereignty just because the legal system is indifferent with one another.

It is even more impractical in the current cyber world where the Internet enters "foreign places to chat, see, meet, do research, arrange, shop, sell, in short to conduct so many daily activities, means that world has shrunk, the global village has more than ever become a reality (Uta Kohl, 2007)." Hence, reciprocity between the nations is necessitated for the well being of the society on the whole and by allowing the reciprocity, one nation does not derogate or relinquish the sovereignty of its state (Uta Kohl, 2007).

Malaysia being an ex-colony of the British rule, the body of rules under the private international law or conflict of laws in Malaysia derives from the English common law. Private International Law or conflict of laws in Malaysia which generated from English common law has not gone through any reformation as compared to the development in the United Kingdom. Hickling and Wu Min Aun therefore states that, the law is in danger of fossilisation if it continues to lag behind those from which it had been founded (Hickling and Wu Min Aun, 1995). This statement is even truer in the ever changing agglomeration of linked computer networks i.e. the Internet. The global reach of the Internet allows e-commerce to advertise, sell, and support products and services using a Web store front around the clock for customers' worldwide. Thus, according to cyber jurists, the courts, firstly, must ascertain as to whether it can assert personal jurisdiction over the non- resident business whose contacts with the forum state described as 'virtual' in the cyber arena could lawfully be governed by territorial based sovereigns because the nature of the Internet destroys the importance of physical location (David Johnson and Post, 1996). States will face difficulties in regulating the Internet because law is defined by control over physical territory. Therefore, the corpus of this article analyses how does the Internet being a conduit of communication affect conflict of laws principles? The discussion will focus on the terrains of conflict of laws principles in Malaysia (jurisdiction, choice of law and enforcement) and its applicability to e-commerce contracts via the Internet and consumer protection.

## Conflict of Law Issues

### a) Adjudicative /personal jurisdiction

Firstly, the issue which needs to be apprehended by the local courts when faced with a cross-border or trans border dispute is whether the local courts can assume jurisdiction over a person who is not a resident in their country i.e. can the local courts entertain the case under the law of its own state (the law of the forum, or *lex fori*). Jurisdiction means the authority or power that a

ISSN 1675-1302

court has to rule on cases brought before it. The basic concept of jurisdiction is that courts will apply their own domestic laws to determine whether it possesses the necessary jurisdiction to try a case. In Malaysia, courts jurisdiction was governed by;

i. Section 23 (1) of the Courts of Judicature Act 1964 and
ii. Order 11 rule 1 (1)(c) of the Rules of High Court 1980

Section 23 of the Courts of Judicature Act 1964 provided as follows:

> Subject to the limitations contained in Article 128 of the Constitution, every High Court shall have jurisdiction to try civil proceedings where-
> (a) the cause of action arose;
> (b) the defendant or one of several defendants resides or has his place of business;
> (c) the facts on which the proceedings are based exist or alleged to have occurred;
> within the local jurisdiction of the Court…

The interpretation and scope of section 23(1) Courts of Judicature Act was provided in the case of *Bank Bumiputra Bhd v International Tin Council & Anor* (1987) which held that:

> It is the general rule that the jurisdiction of the courts over persons is territorial. It is restricted to those upon whom its process may be served within the territorial jurisdiction of the courts….To this general rule there are exceptions, to be found in Order 11 of the Rules of High Court (1980). Order 11 gives the court the discretionary jurisdiction to allow for process of the court to be served outside its territorial jurisdiction. For the discretion to be exercised the action must fall within one of the sub-paragraphs of Order 11 rule 1 or rule 2.

Order 11 rule 1 (c) of the Rules of High Court 1980 stated that, if the defendant is either (i) ordinarily resident within the jurisdiction of the court; or (ii) domiciled within the jurisdiction of the court; or (iii) carrying on business within the jurisdiction of the court, then the courts are thus given the discretionary power to allow for the process of the court to be served outside its territorial jurisdiction.

The jurisdiction of the courts is only extra-territorial where overseas foreigners are sued as co-defendants with local residents as illustrated in the case *of United Malayan Banking Corporation Bhd v Soo Lean Tooi & Ors* (1984, 1MLJ), where it was held that, "there can be no doubt that Parliament intends to confer on the High Court extra-territorial jurisdiction in cases where more than one defendant is being sued, so long as one of the several defendants resides or has his place of business within Malaysia."

Both the Courts of Judicature Act 1964 (Act 91) and the Rules of High Court 1980 was repealed and replaced with the Rules of the Court 2012. Rules of the Court 2012 however does not change the fact that extra territorial jurisdiction can only be invoked if it is evident that the nonresident defendant or place of business of the contracting party is within the territorial borders of Malaysia. Order 11 rule 1 of the Rules of the Court 2012 states that the service of a notice of a writ out of the jurisdiction is permissible with the leave of the Court in following cases:

> (a) Order 11 rule 1 (C), if in the action begun by the writ relief is sought against a person domiciled or ordinarily resident or carrying on business within the jurisdiction;

ISSN 1675-1302

> (b) Order 11 rule 1 (F), if the action begun by the writ is brought against a defendant to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which
> (i) was made within the jurisdiction;
> (ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of jurisdiction; or
> (iii) is by its terms, or by implication, governed by the law of Malaysia

Therefore, extra territorial jurisdiction can only be invoked in instances as provided in both Order 11 rule 1 (C) and (F) of the Rules of Court 2012 which denotes physical presence of the non- resident defendant/s or business location or place of business of the contracting party within the territorial borders of Malaysia. Anyone who enters Malaysia comes within the jurisdiction of the Malaysian High Courts. Subject to the requirements of Order 11 rule 1 (C) and (F) of the Rules of Court 2012, a person can be sued with the service of the writ of summons which requires physical presence. Both provisions of Order 11 rule 1 (C) and (F) of the Rules of Court 2012 would limit the scope of the Malaysian courts when an e- commerce contract is entered into via the Internet because the physical presence of the defendant in Malaysia or the place of business to carry on business is in Malaysia, is a pre requisite in exercising jurisdiction over the non- resident defendant. Whereas in an e-commerce contract concluded via the Internet, the trader in most circumstances is not identifiable or the location of the trader and the web site accessed by a consumer can be in two different locations. Thus, the provisions in Order 11 of the Rules of the Court 2012 are not feasible to assert jurisdiction over a non resident defendant (e-trader) in an e-commerce contract concluded via the Internet.

Julian Ding in his book states that in Malaysia, "it cannot be doubted that a court's jurisdiction is territorial in nature and in this regard jurisdiction must mean or be related to the territory of Malaysia. He reiterated his assertion on the law before the repeal of Order 11 rule 1 (c) of the Rules of High Court 1980 by quoting Hickling and Aun in their book entitled 'Conflict of Laws in Malaysia', who used the same language of Order 11 but substituted "the jurisdiction" with "Malaysia" which infers jurisdiction to be territorial in nature in Malaysia (Julian Ding, 1999). He also opines that Order 11 rule 1 (c) of the Rules of High Court 1980 can accord extra-territorial jurisdiction to the Malaysian courts, only if, the courts were to take a liberal approach and construe "carrying on business within the jurisdiction" to include trans-border contracts constituted via the Internet, as stated in his words, "The courts should be prepared to consider and accept the proposition that if the web site enables the creation of contractual rights and liabilities, then it should be considered as being within jurisdiction since Malaysians are able to access and interact with the web site." He states that only if the courts in Malaysia were to take a liberal approach, the aggrieved parties will have recourse to the Malaysian courts for relief and remedy. However, this 'liberal approach' as opined by Julian Ding is not easy to be comprehended in reality. For example, in *Cleveland Museum of Art v Capricorn Arti* (1990, 2 Lloyd's) it was held,

> That an established place of business in Great Britain requires an identifiable place at which the business is carried on with some physical indication that the business has a connection with particular premises, a condition which could not be fulfilled by a virtual place of business in the WWW.

ISSN 1675-1302

Sad to say the replacement i.e. the Rules of Court 2012 upon the repeal of the Rules of High Court 1980 and the Courts of Judicature Act 1964, does not take into consideration the trans border nature of e-commerce transactions. In Malaysia, territorial borders were the basic factor for determining jurisdiction of the courts as inferred from Order 11 of the Rules of High Court 1980 and Section 23 of the Courts of Judicature Act 1964 and still are under the Rules of Court 2012. Whereas, electronic commerce is not territorially based. Computer networks is said to render geographic boundaries increasingly 'porous' and 'ephemeral' (Dan L.Burk, 1997). Cyberspace is opined to increase the porosity of the physical boundaries because an Internet user may enter a forum without the sovereigns' awareness.

Adding on to the muddle that the Internet has created to the laws on jurisdiction is the customary commercial practice that common law has developed in deciding jurisdiction and choice of law in the instance of a breach of a contract. In conventional contracting, the jurisdiction of the courts is also determined by factors such as, the place where the contract was made or the place of performance of the contract or the domicile of the contracting party. Otherwise, more often the parties to a commercial contract will include a specific clause specifying the jurisdiction and choice of law. They will decide which court should adjudicate their dispute and which law should govern their dispute. This autonomy is given to the contractual parties under the notion of the doctrine of freedom of contract. However, doubts arises as to whether the freedom of contract is exercised in a B2C contract? Are the terms in a contract incorporated into the contract on the basis of mutual agreement and equal bargaining power especially when the current trend in commerce is the usage of standard form contracts, where terms as to the jurisdiction of the courts and choice of law is determined by the business concerned. Furthermore, if the contracting parties have not inserted in their contract the choice of forum clause, how are the contracting parties to decide on the jurisdiction of the courts on the basis of where the contract took place?

Therefore, in Malaysia, in the event that a dispute were to arise when contracting via the Internet, applying Order 11 rule 1 (C) and (F) of the Rules of Court 2012 the courts in Malaysia can only assume jurisdiction, if

i) the web-site is located within a server in Malaysia; or
ii) defendant is carrying on business in Malaysia; or
iii) the defendant is a resident in Malaysia.

A consumer in Malaysia can be dragged to the court of another country in circumstance of a dispute. A consumer in Malaysia takes a very heavy risk when entering into an e-commerce contract via the Internet because in circumstances of a dispute the consumer may be required to bring a suit for breach of contract in the court of another country as imposed in the contract, with the accompanying risk of exposure to enormous legal costs and legal liability.

Though, the mechanism of constituting contracts in the real world is not identical with Internet contracting but transactions between human beings are still transactions between human beings regardless of the mode of contracting such as fax, telex, post or phone. The characteristic of the Internet is stated to be indefinite and borderless, nonetheless its accessibility is based on territorial borders. Thus, jurisdiction of a state does not become fictional over e-commerce transacting via the Internet because accessibility of the Internet penetrates through the borders of the state. Regulating the Internet shall not be in a state of conundrum provided the state has got the capacity through the law of its country to induce or force compliance. Thus, the law of a state must be apt to deal with any disputes arising from an e-commerce contractual dispute.

ISSN 1675-1302

## b) Choice of law

Once the courts determine that it has jurisdiction to hear a proceeding, the next question to be decided is 'which substantive law should be applied to decide the merits of the dispute' i.e. the choice of law or also known as the proper law (PM North, 1974). The proper law of a contract is simply the legal system which regulates the contractual relationship between the parties to the contract. Its origin is stated to be "the fidelity of the Victorian judges to the Benthamite dogma of *laissez faire*," i.e. freedom of contract" (PM North, 1974). The choice of law will be that of intended by the contracting parties. Another theory of 'what should be the proper law or choice of law' is the law of the country that the contract may be regarded as localized. In other words, the choice of law should be that of the country in which its elements are most densely grouped will represent its natural seat and the law to which in consequence it belongs.

In Malaysia the Contracts Act 1950, does not lay down any ground rules to determine the 'choice of law' in the event of a dispute in a contract. Thus, by virtue of the Civil Law Act 1956, English common law governing 'proper law' or 'choice of law' will be the law governing the choice of law or proper law in Malaysia which posits on freedom of contract. Therefore the determining factor for choice of law or the proper law in the event of a dispute in a contract is;

(i) the courts will enforce the parties express choice of law. Since 1796, it has been recognized that at the time of making the contract, the parties may expressly select the law by which it is to be governed. They can do so by a simple statement that the contract shall be governed by the law of a particular country *(Gienar v Meyer* (1796) 2 Hy. Bl. 603) or

(ii) if there is no express choice of law then the court will look into the intention of the contracting parties to imply the choice of law; or
(iii) if the courts cannot determine the choice of law because there are no express provisions nor can it be implied, then the courts will determine objectively the system of law which has the closest and most real connection to the transaction (*Bonython v Commonwealth of Australia* (1951) A.C. 201.

Dicey and Morris very neatly drew the line between the second and the third test. This third test comes into application only if the second test fails to imply the intention of the contracting parties. In the second test, the surrounding circumstances were considered in order to ascertain the parties' actual intention, in the sense of what they would have said if asked at the time. In the third test, the surrounding circumstances were considered to determine, objectively and irrespective of the parties intention, with which system of law the transaction had its closest and most real connection, and that process involved the application of a rule of law, not process of construction.

The three tests as stated above in determining the proper law, reliance is on the basis of what the contracting parties had expressly stated or that of inferred from the contract or conduct of the parties or as imputed from the intention of the contracting parties. In other words the proper law is permeated on the notion of freedom of contract. It is the contracting parties who decides what the 'proper law' is or the law they intend to adjudicate their contract in the event of a dispute. If the contract states the express choice of law, the court determining the dispute will be as per the express provisions. The courts will honour the choice of law chosen by the contracting parties provided, "the intention expressed is bona fide and legal and provided there is no reason for avoiding the choice on the ground of public

ISSN 1675-1302

policy as illustrated in the case of *Vita Food Products Inc v Unus shipping Co Ltd*." (1939, AC 277).

In the absence of an express choice, the courts will infer the proper law by construing the intention of the contracting parties based on the facts and the circumstances surrounding the negotiation of the contract. The factors taken into consideration by the court to infer the implied choice of law are as follows;

i) where the parties provide that any disputes should be submitted to adjudication or arbitration in a particular country which is an indication that the law of that country is the proper law by implication;
ii) the language in which the contract is drafted;
iii) the place the contract is to be performed and the place payment is to be made;
iv) the locations and places of business of the parties;
v) the currency in which payment is to be made; and
vi) the maturity of the legal principles in a particular legal system over the relative infancy of another.

However these factors are not conclusive. They are merely guiding factors for the courts to infer the proper law to the desirability of the contracting parties. In the absence of an express or implied choice of law, "the courts has to impute an intention or determine for the parties the proper law, which, as just and reasonable persons they ought to or would have intended if they had thought about the question when they made the contract" as illustrated in *Mount Albert Borough Council v Australasian Assurance Society Ltd* (1938, AC 224). The proper law in such a circumstance is "that with which the transaction has its closest and most real connection." In *Amin Rahseed Shipping Corp v Kuwait Insurance Co* (1938, 2 All ER 884), the requirement that the transaction should have its 'closest and most real connection' is decided by weighing multitude of factors to impute the proper choice of law.

Dicey and Morris noted that search for the inferred intention (implied choice of law) and the search for the system of law with which the country has its closest and most real connection is "a fine one which is frequently blurred". Dicey and Morris observed that in practice, the courts often moved straight from the first stage to the third stage because, "the test of inferred intention and close connection test merge into each other, and because before the objective close connection test became fully established the test of inferred intention was in truth an objective test designed not to elicit actual intention but to impute an intention which had not been formed."

However the English common law principles on choice of law as discussed above does not distinguish in approaching a contract with a consumer or non consumer because the common law principles on determining the proper law goes back in time of the Roman Empire in 817 as noted in a book by Friedric K. Juenger describing the origins of the conflict of laws (Friedric K.Juenger, 2005). He stated that,

> When St. Agobar, Archbishop of Lyon, wrote to Louis the Pious, 'it often happens that five men, each under a different law, may be found walking or sitting together," which promulgated the issues on conflict of laws because the five men of different legal system posed legal diversity which raised conflicts of laws questions. He questioned which law should govern the marriage of a Lombard with a Roman, or the contracts of a Visigoth with a Hispano-Roman? Apparently, rules of considerable complexity were developed to deal with interpersonal choice of law problems. Eventually, however, imaginative legal minds found a more elegant solution. The

ISSN 1675-1302

> *professio uris*, a declaration originally meant to evidence the parties' ethnicity could be employed in a fictitious manner: by professing to belong to a particular ethnic group, a party could in effect stipulate the law it wished to govern.

By condoning this practice, the courts implicitly recognised the principle of party autonomy. It is this party autonomy which is practiced under the notion of 'freedom to contract' when parties enter into contracts which is in fact one of the continental maxims adopted in England on the topic of private international law i.e. that of Huber the most influential purveyor whose idea of selecting the law of the place the "parties had in mind" to govern a contract which Mansfield endorsed still lingers on in the English "proper law" doctrine (G. Cheshire & P.North, 1974). Thus, it is this common law principle that has been engulfed and practiced as the private international law in Malaysia. The antiquity of the principles of conflict of laws makes no mention of consumer protection or consumer welfarism because trading or commerce then was more prevalent among merchants i.e. business to business (B2B) and not B2C.

Furthermore, the epitome of contracting being the doctrine of freedom of contract was regarded as a fundamental right for parties to contract. This notion of freedom is actually a privilege to consumers because it advocates freedom to the parties to choose the proper law they wish to govern their contract in the circumstance of a dispute and the courts are to honour the contracting parties' desire. However, as noble as the law seems to be, the doctrine of freedom of contract which gives the contracting parties the choice to determine the proper law in a dispute is not viable in the context of a consumer contract entered via the Internet. Should the contracting parties be allowed to choose any law in the world however alien it may be to the factual character of the contract without any check and balance? This would be a very dangerous proposition in the context of consumer contracting via the Internet especially in a standard form contract because this freedom would encourage 'forum shopping' which could be to the disadvantage of the consumer. Furthermore, in a B2C contract via the Internet the repercussion would defeat the rationale of practicing the actual freedom of contract because as stated by P.North in his book, "judged by the standard of common sense, however, it is not so attractive, since it may, if capriciously exercised, subject the parties to law that is unrealistic to the point of absurdity."

In Malaysia, consumers contracting via the Internet are left in a state of conundrums as to where they for the following reasons. Firstly, if for example, a consumer in Malaysia has agreed to an express choice of law of another country when contracting via the Internet, the consumer is agreeing to the legal system of another country which could be to the disadvantage of the consumer. A consumer who is presumed to be the weaker party would have to submit to the law of another country which may not be favourable to the consumer and that the consumer may have no knowledge whatsoever. Furthermore, the cost of litigation in another country, hiring a lawyer versatile of another country's legal system and being dragged to the court of another country adds on to the detriment and disadvantage of the consumer. Secondly, the guiding factors to determine implied choice of law as well the factors taken into consideration to determine the search for the system of law with which the country has its closest and most real connection cannot be left under a fitful light. The determination and ascertainment of the choice of law cannot be left to the 'implied intention of the contracting parties' or to the objective test of "closest and most real connection" especially in a consumer contracting via the Internet. There must be coherence in the law which provides congruent guidance with the interest and welfare of the consumers in mind. There must be a non exhaustive list providing guiding factors to determine the proper law or choice of law with the welfare of the consumers in a B2C contract.

ISSN 1675-1302

Malaysia would seem to be a paradise for businesses to conduct commerce via the Internet because since its private international law does not inculcate consumer protection it opens the door ways for consumer manipulation and exploitation. Furthermore, with no consumer protection accorded to consumers under the private international laws, the law in Malaysia may be chosen as the proper law or choice of law as there are no sanctions for example on the usage of unfair terms in standard form contracts against consumers as Malaysia conforms to the sacrosanct of the doctrine of freedom of contract. This would give an outright victory to the manipulative business/traders because of the weak state of the law in Malaysia.

Hence the development of conflict of laws rules with the aim of protecting its citizens in Malaysia should be done by the enactment of new laws which takes into account the new phenomena of the Internet trading which is cross-border in nature. Consumers protection cannot be achieved by orthodox approaches premised on territorial borders and fossilised doctrines impractical to the modern world to resolve trans-border problems vis a vis the Internet.

### c) Enforcement of Foreign Judgments

It is a universally accepted principle that a sovereign state is not allowed to engage "in public acts on the territory of another State without the latter's permission," (Helmut Steinburg, 1987). 'Public acts' are in reference to an act by its nature which entitles only the officials of a local state to enforce its laws on the territory of another State because enforcement power is strictly territorial. Otherwise, no State, its organs or individuals acting on its behalf can enforce judgment in the jurisdiction of another State. As appropriately said by Lombois (Calude Lombois, 1979);

> The law may very well decide to cast its shadow beyond its borders: the judge may well have a voice so loud that, speaking in his house, his condemnations are heard outside; the reach of the police officer is only as long as his arm for he is a constable only at home.

The trans border nature of e-commerce contracts may require a judgment obtained in one country to be enforced in another country. Because Internet trade is likely to involve parties who are both far apart and have little knowledge of the whereabouts and value of their opponents assets, thus making enforcement necessary in the majority of disputes. However, the problem posed by a foreign judgment is the enforceability of the judgment in another country. Every country has its own enforcement laws. For example, English judgments can be enforced in any other European Union countries through international regulations such as the Brussels Regulation 2002. In Malaysia, the reciprocal of enforcement agreement is governed by the Reciprocal Enforcement of Judgment Act 1958 which is modeled upon the United Kingdom Foreign Judgments (Reciprocal Enforcement) Act 1933 is restricted to only a few countries such as United Kingdom, India, Hong Kong, Sri Lanka, and Singapore (Hickling & Wu Min Aun, 1995).

In e-commerce transactions via the Internet, enforceability is not limited to one legal system and the regulations of a single jurisdiction but that of the jurisdiction of wherever the Internet penetrates. 'Consumer protection' is at stake if the laws protecting the welfare of the consumers cannot be enforced because of the unenforceability in another jurisdiction no matter how comprehensive the law can be. As put by Chris Reed, "it is a comparatively an easy task for a legislator to draft a law which applies to a particular activity undertaken via the Internet,

ISSN 1675-1302

but much more difficult to frame the law so that it is enforceable in practice," (Christopher Reed, 2000). Moreover, laws which are unenforceable are stated to have two major defects. Firstly, the law would fail to deal with the mischief which the law seeks to remedy. And secondly, the knowledge that the law is unenforceable weakens the normative force of other laws. For example, in a B2C transaction a consumer sues a foreign defendant (business) who is running its business locally for breach in the Malaysian courts and gets judgment in his favour. The judgment can be enforced against the foreign defendant because it is running its business locally.

If a consumer (plaintiff) sues a foreign defendant in a foreign court and gets judgment against the defendant who has assets in this country (Malaysia), the consumer can enforce the judgment in the Malaysian courts against the defendant if the requirements of the Reciprocal Enforcement of Judgments Act 1958 (revised 1972) are satisfied. Section 99 of the Act provides;

i) there is a reciprocal arrangement between Malaysia and the country of the defendant to enforce the judgment in Malaysia i.e. that of the United Kingdom, India, Sri Lanka, Hong Kong, New Zealand and Singapore;
ii) The judgment given must be that of a superior court;
iii) The judgment must be final and conclusive;
iv) by virtue of the defendant country's law, the judgment of the Malaysian courts is enforceable in the defendant's country; and this judgment must be monetary judgments; AND

In Malaysia, provided these requirements are satisfied, the judgment can be registered and enforced as against the defendant as the 'judgment debtor' by virtue of the procedure set forth in Order 67 of the Rules of High Court 1980. Order 67 of the Rules of High Court provide;

(1)An application for registration must be supported by an affidavit

(a) exhibiting the judgment or a certified or otherwise duly authenticated copy thereof and where the judgment is not in the English language , a translation thereof in that language certified by a notary public or authenticated by affidavit;

(b) stating the name, trade or business and the usual or last known place of adapt or business of the judgment creditor and the judgment debtor respectively, so far as known to the deponent ;

(c) stating to the best of the information or belief of the deponent,

(i) that the judgment creditor is entitled to enforce the judgment;

(ii) as the case may require, either that at the date of the application the judgment has not been satisfied, or the amount in respect of which it remains unsatisfied;

(iii) where the application is made under the Act, that the judgment does not fall within any of the case in which the judgment may not be ordered to be registered under section 4(2) of the Act;

(iv) where the application is made under the Act, that at the date of the application the judgment can be enforced by execution in the country of the original court and that, if it were registered, the registration would not be, or be liable to be, set aside under section 5 of that Act'

The registered judgment shall be set aside if;

i) the original court had no jurisdiction or

ISSN 1675-1302

ii) the defendant is not given sufficient time to enable him to defend the foreign proceedings; or
iii) it was obtained by fraud; or
iv) the enforcement is contrary to the public policy in Malaysia; or
v) the rights under the judgment are not vested in the person applying for its registration.

For countries which do not fall within the ambit of the Reciprocal Enforcement of Judgments Act 1958 (revised 1972), monetary judgments can only be enforced under common law principles where the plaintiff has to;

a) file a new suit; or
b) obtain a summary judgment, the procedure as set forth in Order 14 of the Rules Of High Court 1980.

A plaintiff can only file a new suit if the courts of the plaintiff's country has jurisdiction to hear the case. The courts have jurisdiction if, as illustrated in the case of *Emanuel v Symon* (1908), Buckley LJ Stated that, in actions on personam there are five cases in which the courts of this country will enforce a foreign judgment;

i) where the defendant is a subject of the foreign country in which the judgment has been obtained;
ii) where he was resident in the foreign country when the action begun;
iii) where the defendant in the character of the plaintiff has selected the forum in which he was afterwards sued;
iv) where he has voluntarily appeared; and
v) where he has contracted to submit himself to the forum in which the judgment was obtained.

However, it seems to be accepted that mere presence of the defendant in the jurisdiction is sufficient foundation for the judgment to be enforceable. In Malaysia, the jurisdictional rules as provided in the Rules of High Court 1980 and the Courts of Judicature Act 1964 requires;

i) the cause of action arose within the local jurisdiction of the court;
ii) where the relevant facts occurred within that jurisdiction;
iii) where land the ownership of which is disputed is situated within that jurisdiction; and
iv) the physical presence of the defendant or defendants place of business should be in Malaysia.

If the local courts lack jurisdiction, the consumer wanting to sue a foreign trader has to sue in the foreign trader's home country with no assurance of success. As questioned by Julian Ding, "would a consumer be interested to commence litigation in the vendor's home country?"(Julian Ding, 1999) He reiterates by saying "it is unlikely as the result then would be that the consumers would be subjected to improper business deals due to their inability or unwillingness to litigate a dispute."

Another troubling factor which should not be discounted is the fact that, the business can always assume as another entity in another country in online trading. In such a circumstance the judgment cannot be enforced against the foreign defendant which has

ISSN 1675-1302

registered itself as a different business as it is assumes itself to a different entity under company law principles. Thus, a judgment is useless as against the business.

Enforceability of the judgment is pertinent in a B2C transaction. A judgment in favour of the consumer is futile if it cannot be enforced. The whole proceedings brought by the consumer would be a waste of time, cost and effort. Countries around the world need to come to an understanding on the enforceability of judgments as consumers' welfare and interest is a common factor worldwide. As put by the former High Court judge, "I often wonder why countries cannot get together to remedy such a situation so that innocent judgment creditors can obtain the benefit of the court action/s. Can it be national jealousy or lack of interest by the so called officials?" (Dato Syed Ahmad Idid, 2002).

## Conclusion

In a civil dispute, multi jurisdictional activities will typically include a determination of which jurisdiction's law should govern the resolution of the dispute, whether the court can assert jurisdiction and how successful the plaintiff can have the judgment enforced against a defendant located in a different jurisdiction. However, should the three areas of conflict of laws be seen under three different paradigms because it is encroached in three separate limelights? Whereas the three areas of private international law i.e. jurisdiction, proper law/choice of law and enforcement of judgments as discussed above are inter- twined and inter-related.

It would be difficult for a court to get a true picture of foreign law (Ole Lando, 1995). In the common law countries the parties often use expert witness to convince the court. Ole Lando citing Max Rheinstein's observation of an investigation he had made of about 40 cases reported in case books on conflict of laws issues; "where American courts have applied foreign law in which Rheinstein found that in 32 of these cases, foreign law was applied wrongly. In four cases the result had been very doubtful, and in four cases the result had been correct, by a mere coincidence."

Ad hoc approaches on a case to case basis are not appropriate for a B2C e-commerce contracts. Continuity in applying common law principles would demarcate case outcomes "like a chameleon, changes hues from case to case," (Friedrich K. Juenger 2007). This repercussion would defy the whole notion underlying the purpose of law to achieve justice, fairness and consistency. A mind shift in the concepts of private international law or conflict of law issues is in dire need of a change in Malaysia not only because of the borderless nature of the Internet but for the evolution of a new way of life in the unfolding age of information and knowledge.

## References

Berman, P.S. 2002. The globalization of jurisdiction. *University of Connecticut Scholl of Law Articles and Working Papers*.

Barlow, J.P. 1996. Declaration of the Independence of Cyberspace. http://www.eff.org/pub/Publications/JohnPerryBarlow/Barlow0296.declaration-final. [23.9.2007]

ISSN 1675-1302

Boyle,J. 1997. Foucault in cyberspace: surveillance, sovereignty and hardwired censors. 66 *University of Cincinnati Law Reviews* 177.

Bacon, De Dignitate Et Augmentis Scientarum, engl. 1869. Translation, Works V (edited by J. Speddings et al.). London . 8th Book. Titel 1. Aphorism 8.

Boland, B.I. & Gwin, D. 2000. The Internet and Personal Jurisdiction Under The Constitution: In What State, Exactly, Is The Internet Located? *Bostan Bar Journal*. 44 B.B.J.16.

Burk, D. 1997. Jurisdiction without borders. *Virginia Journal of Law and Technology*.

Debussere, F. 2002. International jurisdiction over e-consumer contracts in the European Union: Quid Novi Sub Sloe? *International Journal of Law and IT*.

Dato Syed Ahmad Idid, 2002. Enforcement of foreign judgments and arbitral awards. 3 *Malayan Law Journal 143.*

Demowo, O.A. 1999. *Information Law in Australia*. Dyrmont, NSW: LBC Information Service.

Endeshaw, A. 2001. *Internet and E-Commerce Law*. Singapore. Prentice Hall.

Edwards, C. 2004. Article 2 of the Uniform Commercial Code and consumer protection: the refusal to experiment. *St. John Law Review*.

Forder, J. & Quirk, P. 2001. *Electronic Commerce and the Law*. Australia. Wiley.

F.A.Mann.1973. Studies in International Law. Oxford: Clarendon Press.

Gillette, C.P. 2005-206. Pre-approved contracts for internet commerce. 42 *Houston Law Review*.

Johnson, D.R. & Post, D. 1996. Law and Boarders – The Rise of Law in Cyberspace 48 *Stanford Law Review* 1367.

Juenger, F.K. 2005. *Choice of Law and Multistate Justice*. United States: Transnational Publishers.

Julian Ding. 1999. *E-Commerce*. Malaysia: Sweet Maxwell Asia.

John Goldring, J. 2004. Consumer protection, the nation state, law, globalization, and Democracy. *Cardozo Journal of International and Comparative Law*.

Katsh, M.E. 2007. Cybertime, cyberspace & cyberlaw. *Journal of Online Law*. htpp://wartog.cc.wm.edu/law/publications/jol.htm.

ISSN 1675-1302

Ole Lando. 1995. Some features of the law of contract in the Third Millennium.

htpp://frontpage.ebs.dk/law/commissiononeuropean_contract_law/literature/lando.(6/15/2006), p 5.

M Ethan Katsh. 1989. *The Electronic Media and the Transformation of Law*. Boston: University of Massachusetts Press.

P.M.North. 1974. Cheshire's Private International Law. London. 9th Edn, Butterworth's.

Reed, C. 2000. *Internet Law: Text and Materials*. London. Edinburgh. Dublin: Butterworths.

Samtani Anil. 2001. E-commerce in Asia: the legal, regulatory, and policy issues. *International Journal of Law and IT*.

Schu, R. 1997. Consumer protection and private international law in internet contracts. *Electronic Law Journals.*

Uta Kohl. 1999. Legal reasoning and legal change in the age of the Internet – Why the ground rules are still valid? *Electronic Law Journals*.

---

Sheela Jayabalan/FUU/UiTM
jsheelathana@yahoo.com.my

ISSN 1675-1302