

**“The Growth And Development Of Internet Trading
And Commerce – The Legal Issues”**

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Thank you

Mr. Devasenathy Pathy Rajah (Known as Mr.D.P. Rajah)

ABSTRACT OF THE THESIS

This thesis is about e-commerce and its related legal problems. The Internet process had created a borderless world with a single open market for the products of businesses. Transactions done over the Internet are done electronically at a very fast speed. Thus businesses using the Internet have gained greater competitive advantages over the traditional business and have cut down cost, increased their market control and had increased profits. In consequence of this, traditional businesses have also adopted the Internet process in order to remain competitive.

However because of the technical process used, many new legal problems have surfaced that is affecting e-commerce from being a success. The main legal problems are jurisdictional problems, contractual law problems, personal privacy problems, Intellectual property right problems, and new forms of crime that are all affecting businesses done online. The constant development of new Internet technology had merely further compounded these legal problems. All these are retarding the development of e-commerce and is affecting the confidence of all parties connected with e-commerce.

This thesis also discusses the various national and international steps that ought to be taken to reduce the problems facing e-commerce. It also discusses how the ADR system may play a more important role than the present traditional form of legal system to resolve many of the technological orientated legal problems surrounding e-commerce. The success of e-commerce depends on establishing law and order in the cyber space and does not solely depend on the development of Internet technology alone.

1. INTRODUCTION AND DEVELOPMENT OF THE INTERNET

A) INTRODUCTION

This whole thesis is about business done through the Internet and its relationship with the law. The thesis relates how e-commerce has created an alternative means of doing business through the Internet. It also relates how the various off-line businesses all over the world are fast competing to adopt new business models via the Internet for their activities.

The emphasis is on the development of new business models through the Internet related e-marketing of products and services, which has inevitably created new social, security and legal problems. Issues relating to contract and delivery of e-commerce products and services are discussed in this thesis.

E-commerce had created new legal, regulatory and enforcement problems. The law has not been able to cope with the problems due to the fast and continuous changes in

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technology. These problems are discussed in this thesis. This thesis also covers a review of the various strategies adopted by various governments to regulate e-commerce activities.

This thesis discusses how the Internet had changed the way of life of the people and how governments have taken steps to promote an e-government with a fully developed Internet population. Businesses have adopted new business models to remain competitive in the changing world where the Internet had created an open and transparent global market system.

The data collected for this thesis is from the Internet, which had been identified as having the world's biggest library with the most updated information. Data on National and International surveys, reports, analysis and events of the past and the present e-commerce activity, on technology, on security and on new business models are all available on the Internet. The legal problems faced by e-commerce and the strategies to solve them are all available from the Internet in the form of articles and opinions from people all over the world.

The main legal problems were in not having proper laws to enforce law and order situation in the cyberspace. There is also a lack of international co-operation among nations to develop a proper legal system for the cyberspace activities. There is also no proper coordination among nations on the enforcement of law and order activities in the cyberspace. This resulted in an unstable e-commerce environment and resulted in consumers and businesses in losing confidence in the e-commerce process. The main areas of the law facing problems were on the issues relating to 1) jurisdiction, 2) choice of law 3) conflicts of law 4) cyber crime 5) intellectual property rights 6) breach of privacy rights 7) law of contract and 8) on anti-trust laws.

These transitional problems have destabilized the economies of dot com and the high-tech businesses. The negative economic effects caused by this transitional problems has spread and is causing a chain like effect on other businesses resulting in the general economic slowdown in the US, which slowdown has also affected the rest of the world.

Finally there is no doubt that e-commerce business would be the main form of business in the future but it would have to be adopted with care to limited the risks involved. The thesis discusses the steps that have to be taken to instill confidence in the e-commerce process by a) developing cooperation among nations in formulating new international treaties and laws to regulate e-commerce, b) in developing new technology that can overcome the technical problems faced by e-commerce and lastly c) In creating a better legal process like the Alternative Dispute Resolution (ADR) system which can operate internationally and which is more acceptable to the parties involved.

B) THE DEVELOPMENT OF THE INTERNET

Commercial activities done through the Internet are fast increasing in number and are replacing the traditional ways of doing things. The use of the Internet had created a cheaper, faster and more convenient mode of doing e-commerce. It is thus natural for the people and for governments all over the world to be excited about the development of the Internet and to adopt it for their use so as to remain competitive in the fast changing international community. The industrial revolution took over about a hundred years to fully mature, but on the basis of the present rate of growth of the Internet population, business and government leaders believed that the Internet revolution would only take 10 years to fully mature.

Computers are now used in most offices for typing and it has replaced the traditional typewriters. The computer, which is a word processor, is far more convenient, faster and more efficient with ability to do multiple functions compared with the normal typewriter. Using e-mails, documents can now be transferred electronically at a faster speed than by using the traditional mailing system. Many governments today have adopted the e-government system to do their functions like providing their services and information electronically. Thus the number of activities, which can be done through the Internet, is constantly increasing.

The Internet is an open international medium for free viewing on the social, political, economic, cultural, religious and other developments from all over the world. It provides a forum for comparison of one's society with the others in the world. As a consequence of this many non-democratic governments fear the spread on the use of the Internet within their own sovereign state. They fear about foreign influence on their population through the Internet. In consequence of this, such states restrict and control the use of the Internet among their population. .

In Malaysia the seeds of the Internet were only sown in 1994 when the first Internet Service Provider - "Jaring " was set up .In 1996 the number of households with Internet facilities were about 15,000 only. However by December 2000 the number of household with Internet facilities had increased to 2 million. As at the last data taken in December 2000 the number of people hooked to the Internet in Malaysia was 35% from a population of 22 million. The declared policy of the Malaysian government is to provide universal Internet facility to all Malaysians by the year 2005.

The improvement in the digital divide situation in all the other countries had also been remarkable. According to a research from Jupiter MMXI, the European domestic online population is growing and it is also using the Internet for longer periods. The total time spent on line in UK, France and Germany has increased by 94%, 225% and 226% per month respectively. The British Internet market is the largest in the continent. The number of Britons accessing the internet has finally crept above the 50% mark although on the average they only spend about seven hours a month when compared to thirteen hours by the Germans. According to British National Statistics, about 23 million people

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use the Internet and of this 48% were women. With this rate of growth the British government's objective of creating a universal access to the Internet for the British could be achieved by the targeted year of 2005. The universal Internet users are by far the highest among the 16 to 24 age group.

A recent study showed that US to have the worlds most Internet connection to households with three out of four Americans having Internet access and with women surfers accounting for about 52% of the surfers. In Asia, Singapore has the highest number of households connected to the Internet at 47% while Taiwan has 40% of the households with Internet facilities. The Asia-Pacific regions rate of growth will outpace the US within the next 5 years says a Jupiter media report with one -third of all internet consumers worldwide by the year 2005. The internet population in China is at 20 million while India's Internet population is at 15 million currently.

While most nations had impressive improvements in the digital divide situation Cuba and the Eastern European nations Internet growth rate had been comparatively low. Cuba had just entered into the World of Internet with the creation of 300 web sites and 15,000-privileged web surfers. Cuba had acknowledged the importance of the Internet but limits net surfers for political reasons. It however allows 60,000 people to have e-mail account but with no right to surf web sites other then it's own 300 web sites. In Eastern Europe the situation is better than in Cuba but there are limited facilities to increase the Internet population. Consequently the Internet population in Eastern Europe is small with Russia leading with 4.1 million surfers only. This is about 3% of its population. The other Eastern European nations are in a worse off position

The internet and the internet economy started off as an American affair but the shift in expectations and strategy had made it international with the world's population being quickly wired and a substantial piece of the internets traffic is now originating from nations outside the US. This international traffic growth is also reflected in the rapid increase in the number of ISP outside the US.

While all want to take advantage of the new process of doing things electronically it is the business community that is most excited about the Internet process. Businesses have adopted new business models for marketing, sales and delivery of their products and services .A literary review of the e-commerce activities would show that e- commerce have in fact become a fertile ground for fraud by companies and by individuals. A discussion on this is best done with reference to events in the United States, which has the largest development of e-commerce activity in the world. Mr.Harrington the US Federal Trade Commission (FTC) Bureau chief for Consumer Protection when addressing the US Congress in May 2001 told the legislative body that in year 2000 the number of complaints received on e- commerce fraud by the Federal Trade Commission was over 25,000 and that this was 180 % more then the previous year.

Many fraudulent activities involving e- commerce had also been reported in other parts of the world .In Malaysia the e-commerce fraud cases were 22 in the year 1999 but in the

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year 2000 it rose to 236. Similar increases had been reported in Hong Kong, Korea and in Taiwan. The Internet had enabled the culprits to cloak themselves in anonymity, which made it difficult for law enforcement authorities to act fast before the perpetrators disappear.

As per reports from the FTC more than half the fraud and deception involved old-fashioned scams that have been retooled for the new Internet medium. Traditional scams such as pyramid schemes and false product claims thrive in the net. The structure of the internet itself had given rise to new high-tech scams which were not possible before the internet was introduced. The e-commerce market place is still young and the FTC had only been policing the electronic market for about 6 years.

The FTC keeps data from many sources on the criminal activities done in the Internet in respect of commercial activities. These data are given to many nations including Canada and Australia, to pull up the regular culprits and allow identifying schemes by region or by subject. Many enforcement authorities surf the net to identify specific types of claims or solicitation that is not in the consumer's interest. Warnings are given to the offending sites to correct the deception and fraudulent activity. Actions are taken against these sites if they do not comply with the warnings given through cooperation with international and national enforcement agencies. In the year 2001 up to May the FTC had logged more than 27 Surf Days and had identified over 60,000 Internet sites making dubious claims.

The very nature of the Internet makes enforcement of the net difficult. Many of the problems are due to the net's global reach situation. Many fraudulent operators are able to strike quickly, victimize thousands of consumers and disappear without a trace by using anonymous e-mail, short-lived web sites and by having a false domain name registration.

The development of the Internet had created uncertainty as to what law is to apply to a transaction. Businesses need to know about cross-country legislations relating to the Internet. The Internet is an international medium and not a national medium and as such international laws would apply. However since e-commerce involves new issues of law there is a lack of guidance by way of case laws and legislation. More than half of the world's nations have not yet formulated or passed any law pertaining to the Internet. Thus businesses must not only ensure compliance with their law of origin but also with the laws of each consumer nation. It is impossible for businesses and for consumers to know all the legal systems of the world.

A very serious and controversial legal issue in respect of e-commerce is the protection of consumer's privacy rights. In June 2001, the chief executive of e-bay Inc. Mr. Whiteman in an address to the US Congress outlined the importance of passing legislations to outlaw the practice of businesses "harvesting" e-mail addresses from other businesses. Unscrupulous e-mail marketers using automated "robots" were able to visit business sites several times a day and record the e-mail addresses of every user who had logged into the business network. The marketers then send solicitation to the users. Users are not aware of the methods employed by marketers in "harvesting" consumers e-mail addresses have

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thus accuse businesses of selling users personal information to the marketers. Congress was requested to pass "anti- harvesting" legislations aimed at curbing these unsolicited commercial e-mails. Nothing positive however resulted from Mr. Whiteman's appeal.

With the development of the Internet the US had encouraged businesses to go on-line, as it is the US policy to develop the US economy that is 90% service orientated economy with a 10% high technology manufacturing economy. The middle and low-end manufacturing industries would be exported and be placed in overseas markets. The European Union 's policy was to have a 50% each of manufacturing and servicing economy. In a framework of this nature the US tends to be more aligned towards business while the EU tends to be more balanced in the protection of the rights of consumers and businesses. Thus consumer protection laws affecting businesses are more readily passed by the legislatures in Europe then in the US. At the recent ministerial meeting in June 2001, Telecommunication ministers from the EU's 15 member states agreed that consumers should have the right not to have their e-mail boxes flooded with advertisements and other marketing materials. There was however a division on how to accomplish this. The difference was between the "opt in " and "opt out " method .In the "opt in " method marketers could only send e-mail to customers after getting customers' consent for the same. In the "opt out" method marketers could send out e-mails unless the consumer informs the marketer to stop the same.

There is no accurate statistics as to the value of e-commerce business in the future. However most conservative estimates are that by the year 2003 the turnover value of the international e-commerce activity would be in the region of US one trillion .The chief factor that would hamper this development would be the absence of proper laws to regulate and give confidence to e-commerce. In this thesis we shall look at how various e- commerce activities are developing and as to how the existing laws at this transitional point of time are inadequate.

2. LITERATURE REVIEW

This chapter sets out the approach adopted for the literature needed to do this project paper. The first consideration is the collection of data. This involves discussion on the source of data, the availability of data including historical data and whether the data is secondary or primary, how it was collected, the cost and the time and the problems involved in collecting data, the problems in vetting the data for getting the correct and relevant information, and the personal preference in the application of the data collected. Some of the information for this project is from personal knowledge and observation.

The second consideration is in respect of the analysis of the data. This involved selections of the data collected for determination of the issues relevant to the subject matter of the thesis and for doing a comparative study of the relevant issues as faced by e-commerce.

The third consideration is in respect of getting appropriate literature on the solutions that are being considered, or being applied to overcome the issues hampering the growth of e-commerce and on the problems connected with the collection of such literature.

Issues Relating To Data Collection are as follows: -

The cyber law, e-commerce and the Internet are all recent innovations. Their existence came into being about 10 years ago. As such historical data is limited to the last 10 years only. In Malaysia there is very little literature about the Internet even in the national libraries.

Although there is no historical data the Internet has a bulk of information on all recent issues involving the net. The Internet has been described as the world's single biggest library. In the case of e-commerce, Internet technology and on the Internet law a lot of information is published daily by many Internet newsletters such as E-Commerce Times, Asia Internet.com, E-commerce and Newsbytes dot com. The subscriptions are free and subscribers receive daily update on all Internet events.

There are also many articles and literature written by leading cyber lawyers and by people involved in the e-commerce business. The main Internet legal articles are from gigalaw.com, megalaw.com and articles by Professor Michael Guest of Canada in his home page the "globe.com".

Almost all international bodies have their websites made available for the access to the general public. The UN body on International Trade (UNCITRAL) has its own website on e-commerce and on the law relating to it. The World Trade Organization (WTO) has its own website in reference to e-commerce and suggested laws relating to it. The World Intellectual Property Organization (WIPO) has its own website containing e-commerce decisions on domain name disputes.

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Government authorities and institutions have e-commerce and cyber law materials made available in the net. The Malaysian Ministry of Multimedia, the Ministry of Trade and the Multimedia University has information on e-commerce and on the cyber law. Almost all governments now have their own websites. The materials available in the net are continuously increasing in volume especially with the vast developments in the Internet technology.

Universities are continuously publishing articles on e-commerce and on law relating to it. The Warwick University and Washburn University have their own publications like Electronic Law Journal and Washlaw web. News media and magazines like the New York Times, The Times and the Economist are just some of the papers and magazines, which carry a lot of Internet and related news and articles.

Research for the proper information from the Internet is a time consuming process in terms of vetting the volume of data available. The process is not expensive for one to view magazines and other media and news items that are all available for free viewing in the net. Search engines like Goggles. com or GoTo. com can assist in a quick further search to gather the needed articles.

The Analysis Of The Data Collected.

The analysis of the data was the biggest problem in this thesis. The material available is large in volume as there is a large base to research from. Many of the data available may not be accurate. Most of the preferred data is from the US and EU because that is where most of the developments are taking place. Some of the information involved personal knowledge about developments that are taking place locally in Malaysia. The analysis is more on qualitative comparisons of events rather than on quantitative comparison.

Relevancy of the literature collected is very important. This thesis is not strictly a thesis dealing with e-commerce alone. It is neither a thesis dealing only with the cyber law. It is neither a thesis dealing with only Internet technology. It is a thesis dealing with the interaction between e-commerce, the law and the Internet technology and on the resultant effect of this on national and international businesses and communities. Here again we have to take into account that technology is continuously changing fast and this requires corresponding changes in the Internet law and on e-commerce practices. Any delay in keeping abreast with the technological changes creates new legal and e-commerce problems that affect confidence in the e-commerce process. The data for all these cannot be satisfactorily or immediately obtained from journals. Many journals become outdated due to fast technological changes in the Internet. As such the best resource is from daily Internet newsletters and from materials published daily by professionals like Professor Michael Giest of Canada. The main issues relating to the interaction between e-commerce, the law and technology comes from the following:

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- a. E-Commerce Times, newsbytes and News Factor Network are Internet daily newsletters where not only daily e-commerce events are reported but opinion from prominent dot com business leaders and community leaders are reported.
- b. The Internet version of New York Times periodically carries analysis of Internet issues especially on issues relating to the Law and technology that affects e-commerce.
- c. The CNN .com also carries periodic analysis of e-commerce issues
- d. The Cyber Rights and Cyber Liberties specialize on breaches of privacy rights and on matters relating cyber crime.
- e. The American Bar Association home page has regular updates on issues such as jurisdiction, e-commerce, and intellectual property rights and an analysis of the issues and suggestions for improvement of e-commerce problems.
- f. The Competition Bureau of Canada provides periodic reports on issues that affect consumer rights and protection and how Canada is proposing to solve these issues and
- g. E-Europe an Internet gives current information and analysis of e-commerce events in Europe
- h. The Times Magazine, The Far Eastern Economic Review and the Economist are some of the magazines that give detail and critical analysis of the e-commerce development through out the world.

Many of the e-commerce legal issues are analyzed by a number of Legal authorities. Professor Michael Giest appears to be the foremost Internet legal authority analyzing legal issues affecting e-commerce. His articles are strictly on how the law is as applied to the Internet and on the interpretations given in the courts in the US, Canada and in the EU nations. Gigalaw and Megalaw sites in the Internet on the other hand are sites where lawyers write articles on the law as applicable to the net but with limited academic arguments and depth.

The best literature on the physical and structural changes being made by nations to strengthen their e-commerce foundation is obtained from the various national news media found in the Internet. Thus the most recent information on the development of Malaysia's Multimedia Super Corridor to cater for the needs of the Internet business community is obtained from the local news media The Star that is available in the Internet. In the United States of Americans developments in the Silicon Valley are reported in the New York Times. In India the cities of Bangalore and Hyderabad have developed special facilities for e-commerce and the latest and best information is obtained from The Times of India. Thailand's plan to construct similar high-speed Internet facilities at the resort island of Phuket is reported in the Bangkok Post. Internet news medias provide the latest

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and the most reliable information about structural and physical changes being made to accommodate e-commerce

The cyber law made its appearance only about 8 years ago when problems relating to the net surfaced. However since the Internet process involves technology and since technology had been constantly changing both the Internet process and the law relating to it have to be viewed together by considering the latest technological changes and their effect on the Internet process. Thus Malaysian e-commerce law that was introduced in 1999 is now in the process of being changed because Malaysia wants to incorporate the new developments on technology relating to the issue of digital signature.

The main regions of the world where the Internet and the cyber law are making its impact are in Northern America and in the European Union. Thus it is natural to refer to Data from the US, Canada and the EU when writing this thesis. The Internet is full with information about the legal problems as they appear in these core countries. A comparative study is also being done on how these core nations resolve their legal problems relating to e-commerce. There are conflicts in the laws as applied by these core nations and this conflict hampers the development of e-commerce. The rest of the world including Asia merely adopts with amendments the e-commerce case laws, statute laws, and regulations as developed by the competing core nations. While many developing nations have a few e-commerce legislations more than half of the world's nations have no cyber laws at all. Data on all these facts are available from the Internet itself. Thus when the "I Love You " virus attacked many international commercial web sites and Internet service producers and when the source was finally traced to the Philippines there was nothing the law could do to act against the perpetuator because there was no relevant cyber criminal law in the Philippines at the material time.

Data analysis was mainly from Internet articles, newsletters, from e-mails sent by businesses and international consumer bodies, from material found in internet libraries, from web site messages and articles by enforcement agencies, from court decisions published in the internet, from complaints web sites, from e-commerce sites and from chat done via the internet. Analysis of data was done on the problems facing e-commerce especially on consumer privacy rights, breach of intellectual proprietary rights, breach of security affecting e-commerce, jurisdictional and conflict of law issues, misleading and fraudulent advertisements over the net and finally on the enforcement, evidential and procedural legal problems facing the net. The Internet is also the main source of the latest information on the steps taken to overcome the legal and related technological problems affecting e-commerce. Although the methodology applied got most of its materials from the Internet a lot of information was also obtained from the local news media and from magazines.

The Conclusion on Literature Review

The e-commerce process has given rise to transitional problems. The insecurity created in e-commerce transactions, the problems of technology not being perfect and issues relating to the law and procedure have all affected economic stability and created a lack of confidence in both the consumers and in the businesses. This had given rise to the present world economic slowdown, which is discussed in detail in chapter 7 of this thesis.

The legal systems of many nations had also been affected by the problems created by technology in the Internet. The legal system had been found not to be fully suitable to handle many of the Internet's problems especially on matters involving cross-border disputes and on matters involving advanced Internet technology. Thus the ADR system is steadily being developed to replace the present court system as a forum for the settlement of e-commerce disputes. The data for all these are found in the Internet newsletters as these newsletters give the latest information and development on e-commerce. Many of the newsletters also have articles on the analyses done to solve these problems. They also contain information on the latest surveys done about Internet issues and on opinions on the said issues.