**"The regulation of cyberspace and the loss of national sovereignty"**

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## ABSTRACT

The modern commercial law grew out of the custom and usages of the merchants, the Law Merchant. Some of these customs were written down, and became a code of international commercial customs. Although the substantive law and procedures of the common law world broadly reflected the international character of trade, it was also influenced by the insular tendencies of the law. This was particularly prevalent during the nineteenth and twentieth centuries.

The advent of modern electronic trade conducted through cyberspace has however meant that the law has once again been required to adopt a more international perspective, through the adoption of international treaties and conventions. This paper looks at the authentication of documents for use abroad, as applied in New Zealand, as an example. From this example it examines some of the implications for national sovereignty of the advent of new international electronic communications laws.

## 1 INTRODUCTION

Throughout the course of human history the practical realities of international trade meant that much business was conducted at a distance, with only limited opportunities for face-to-face contact between merchants. Many transactions were conducted by agents, whilst many relied upon correspondence. Each form of trade was, however, regulated by rules of private international law, including the custom and usages of the merchants, the Law Merchant, or *lex mercatoria*. Gerard de Malynes regarded Law Merchant as customary law approved by the authority of all kingdoms and not as law established by the sovereignty of any prince (de Malynes, 1622). It was the "law of all nations" (*Luke v Lyde* (1759) 2 Burr 882; 97 ER 614, per Lord Mansfield, CJ). The modern commercial law grew out of Law Merchant (Trakman, 1983; Benson, 1989), which continues to develop (Berger, 1999).

All law is prima facie territorial (*American Banana Co v United Fruit Co* 213 US 347, 357 (1909)). But many international laws were recognised by the common law, albeit often at the instigation of Parliament (as with the Statute of the Staple 1352-3 (27 Edw III stat 2 (Eng)), just as the laws of war involved both domestic and international elements (Roberts & Guellf, 2000; Best, 1980). Although the substantive law and procedures of the common law world broadly reflected the international character of trade, it was also influenced by the insular tendencies of domestic law. This was scarcely surprising since it was administered in national courts, imbued with the approach of a national legal system (Johnson & Post, 1996). Sometimes the domestic influences prevailed, and the law was but little affected by international developments. Sometimes international developments had a great influence on domestic laws. In part this depended upon the contemporary strength of the individual nation-State, or upon its size and international influence (Floud & McCloskey, 1994).

The advent of modern electronic trade conducted through cyberspace, and the consequent partial weakening of territorial borders, has meant that there is an increased

emphasis upon the international aspects of law. But though the number of international treaties and conventions has increased (see for example, Clift, 1999; Eiselen, 1999), this is only partly a consequence of technological change. The internet is not a novel phenomenon (Goldsmith, 1998). Domestic legal systems have faced before the challenge of accommodating other legal traditions and technological changes. What may be different now is the extent to which the changes which this new technology brings are being decided at international and supranational level, and this has important implications for national sovereignty and independence.

If sovereignty means the "final authority within a given territory" (Hinsley, 1986; Krasner, 1988), then the contemporary growth of internationalisation, especially that brought about by the internet, must have serious implications for State sovereignty. Whilst the *lex mercatoria* impinged upon domestic sovereignty, in so far as this had developed in the early days of the law merchant, it did so to a limited extent. Perhaps more importantly, the law merchant evolved slowly, and did not impose an expectation of compliance upon any country. It was, and is, a form of customary law. Custom is general State practice accepted as law. The elements of custom are a generalised repetition of similar acts by competent State authorities and a sentiment that such acts are juridically necessary to maintain and develop international relations. The existence of custom, unlike treaty-law, depends upon general agreement, not deliberate consent (Glahn, 1996).

This paper will use one facet of commerce, evidencing or authenticating documentation, to highlight some of the effects of the technology revolution, to emphasis the parallels with earlier practice – and to show the differences.

## 2 EVIDENCING TRADE

The types of agreements entered into in the course of international trade were many. Bills of exchange, for example, were and are unconditional orders in writing, addressed by one person to another, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum to, or to the order of, a specified person, or to the bearer.

Such documents were necessary to expedite trade, but presupposed a degree of trust being reposed in both one's opposing merchant to honour the agreement, and that a written agreement purporting to come from another actually originates from that person. This latter might require authentication. Authentication is a certificate of an act being in due form of law, given by proper authority. In the course of international business it is frequently necessary to attest to the authenticity of a document. The form required however varies according to the nature of the document to be attested, and, to some extent at least, from country to country. In this paper we will look at the influences which have affected the rules governing the authentication of documents, in particular, the international requirements and domestic rules of New Zealand. In doing so we will see how they have been affected by technological changes and the international responses to these.

A document has been judicially defined as "any writing or printing capable of being made evidence, no matter on what material it may be inscribed" (*R v Daye* [1908] 2 KB 333). It is now possible for "writing" to be preserved in non-corporeal forms. Section 2 Commerce Act 1986 states that

"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 any thing 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.

(b) and (e) are particularly important in this context, though since 1986 the use of electronic media for storing and transmitting information has greatly increased. The same technological changes have also affected the legal definition of "document" and "writing". An E-Commerce Strategy was announced in 2000 (Ministry of Economic Development, 2000), and this involved considerable legislative change – though some law changes to accommodate electronic media had already occurred on an ad hoc basis.

For example, "writing" is now defined as

includ[ing] representing or reproducing words, figures, or symbols-

(a) In a visible and tangible form by any means and in any medium:

(b) In a visible form in any medium by electronic means that enables them to be stored in permanent form and be retrieved and read. (Interpretation Act 1999 s 29)

Thus a statutory requirement for "writing" will now be met by communication through electronic means. Where the statute provides that the "writing" must be signed, there is an additional impediment to overcome.

In civil cases the due execution of a document is frequently the subject of a formal admission for the purposes of a particular trial. Proof of due execution is dispensed with when the document is in the possession of the opponent who refuses to produce it on notice (Cross, 1989; *Cooke v Tanswell* (1818) 8 Taunt 450; *Poole v Warren* (1838) 8 Ad & El 582). This is also the case when the opponent produces the document but claims an interest under it (*Pearce v Hooper* (1810) 3 Taunt 605. The due execution of a document might be formally admitted in a criminal case under Crimes Act 1961 s 369). Special provisions are applicable to the verification of documents executed outside New Zealand (Evidence Amendment Act 1952 s 6; Evidence Amendment Act 1945 s 9).

None of these rules were predominantly based on international norms, but were rather domestic laws based upon problems and concerns which almost incidentally had international aspects. Where appropriate steps were taken to ensure compatibility with international practices, where these existed.

There appear to be no legal difficulties in authentication which are unique to electronic documents. Indicia of authenticity such as signatures may have technological equivalents, such as digital signatures. It may also be comparative straightforward to determine the date or accuracy of contents of an electronic document (Law Commission, 1998, para 235). There is nothing in the current law of New Zealand 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 may however require alteration to pre-existing laws (Law Commission, 1998, para 237).

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 (Law Commission, 1998, para 310). But they do not necessarily present a more difficult problem than that presented by non-paper documents, or electronic writing. What does present a real difficulty is that those electronic signatures, unlike traditional signatures, may be used to authenticate documents entered into in a virtual world. Physical borders can no longer function as signposts informing individuals of the obligations assumed by entering into a new, legally significant, place, because individuals are unaware of those borders as they move through virtual space (Johnson & Post, nd). For this reason essentially domestic policy-making and legislation is often inadequate to satisfactorily respond to what has become a trans- or supra-national communications system.

## 3 CONTROL OF ELECTRONIC COMMERCE

The internet, what we call "cyberspace", is an interconnected electronic communications network. It has no physical existence as a whole, though comprised of a large number of individual networks (the result being a conceptual confusion; Goldsmith & Lessig, nd). In essence the internet exists in a virtual world, cyberspace, rather than in the real, geographical, world (Zekos, 1999; Post & Johnson, 1999; Burk, 1996; Reidenberg, 1996, pp 85-87).

Cyberspace does have a common language, allowing different operating systems to speak to one another. At its highest level it is co-ordinated by the Internet Assigned Numbers Authority (IANA) and a central Internet Registry (IR) (Johnson & Post, nd). However, as might be expected of a system which has no physical home, the internet has no controlling body, though the ICANN (Internet Corporation for Assigned Names and Numbers) regulates some aspects of the net. This is the non-profit corporation that was formed to assume responsibility for the Internet Protocol (IP) address space allocation, protocol parameter assignment, domain name system management, and root server system management functions previously performed under United States Government contract by Internet Assigned Numbers Authority (IANA) and other entities. No one country can regulate the internet effectively, as is seen in the internationalisation of ICANN (see for instance, Fishkin, nd) – though it is possible for individual countries to exercise at least partial control the internet within their territory (Qiu, 1999-2000).

Partly because of the international – and unregulated (or self-regulating) nature of the internet, there has been a tendency to claim that the changes we can observe in sovereignty, the State, jurisdiction and law are caused by the internet. It has been said that the very nature and growing importance of the net calls for a fundamental re-examination of the institutional structure within which rulemaking takes place (Johnson & Post, nd). But the globalisation of commerce is not a new phenomenon. Nor would it be necessarily valid to assign to the one cause a range of paradigm changes in society, economics and governance.

It however remains true that our existing international laws are predicated on the existence of the sovereign State. The notions of sovereignty and statehood were once among the most important aspects of public international law. Its heyday was perhaps in the late nineteenth century, when sovereign states enjoyed almost unfettered independence of action. These were subject only to the regulation of their diplomatic and military action, principally by the Law of Armed Conflict, or the Laws of War. International law has been called "the

sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another" (*West Rand Central Gold Mining Co v. The King* [1905] 2 KB 391 quoting Lord Russell of Killowen in his address at Saratoga in 1876. See also Howard, 1994; Gillingham & Holt, 1984).

But the norms of international law, even in the nineteenth century, which saw the acme of the concept of the sovereign nation-State, recognised multiple sources of authority. Many modern philosophers of law (not to mention political scientists) have concluded that using largely nineteenth century concepts of sovereignty as a benchmark of what political authority should be is either teleological at best or wrong at worst (Pennington, 1993, p 121). The traditional juristic theory of territorial sovereignty, with the King being supreme ruler within the confines of his kingdom, originated as two distinct concepts. The King acknowledged no superior in temporal matters, and within his kingdom the King was emperor (Ullmann, 1979). If the Holy Roman Emperor had legal supremacy within the *terrae imperii*, the confines of the empire, theories of the sovereignty of kings were not needed, for they had merely de facto power. In Roman law it was originally considered that the emperor's power had been bestowed upon him by the people, but when Rome became a Christian State his power was regarded as coming from God. In America also God had been recognized as the source of government, although it is commonly thought in a republican or democratic government "all power is inherent in the people".

Sovereignty remained essentially de jure authority (Canning, 1988, pp 465-467). Emperor Frederick I Barbarossa saw the advantages of Roman law and legal science for his ambitions and his inception of absolutism. This led to the growth of royal absolutism, and eventually to the emergence of opposition to this, throughout Europe (Pennington, 1993, p 12). This was not merely power without legitimacy (Canning, 1988, 467-471). Mediæval jurists cared not whether the emperor had jurisdiction and authority over kings and princes, but focused on his power to usurp the rights of his subjects. Whether this power was de facto or de jure was unimportant (Pennington, 1993, p 30). The internet, as a transnational system of communications, has shown signs of developing a distinct legal form. The analogy between the rise of a separate law of cyberspace and the Law Merchant has been observed by Hardy (Hardy, 1994, p 1020). But the Law Merchant evolved, as did other forms of international customary law, through usage and practice. It did not require a central authority, and nor was it inconsistent with sovereignty, de facto or de jure.

But that is not to say that the internet is in any sense a source of authority in its own right. To have sovereignty, a State must have a permanent population (see the judgment of the International Court of Justice in the Western Sahara case, International Court of Justice Reports 12, 63-65 (1975); 59 International Law Reports 30, 80-82). It must have a defined territory (which may however be very small, or even of varying extent; *United States v Ray*, 51 International law Reports 225; *Chierici and Rosa v Ministry of the Merchant Navy and Harbour Office of Rimini*, 71 International Law Reports 283; *Re Duchy of Sealand*, 80 International Law Reports 683). It must also have a government, and it must have the capacity to enter into diplomatic relations (this was expressly outlined in the Montevideo Convention on the Rights and Duties of States, signed 26 December 1933; Hudson, 1931-50 vol 6 p 630). Although the formal application of the Montevideo Convention is confined to Latin America, it is regarded as declaratory of customary international law. The Arbitration Commission of the European Conference on Yugoslavia, in Opinion No 1, declared that:

> The State is commonly defined as a community which consists of a territory and a population subject to an organised political authority (92 International Law Reports 162, 165).

On the Arbitration Commission generally see Craven, 1995. No other entity could be regarded as a sovereign State, whatever its de facto power. But this does not mean that sovereign States alone enjoy a monopoly of power or authority. As the concept of State sovereignty declines, so notions of racial sovereignty have grown. The idea that a given population group is, or ought to be, sovereign within a larger country is not confined to New Zealand (Conley, 1997; Howe, 1998; Krasner, 1988). Yet, sovereign States have clung tenaciously to their rights, rights which have become more precious as they become rarer (For the impact of electronic commerce generally, see Nicoll, 1999).

The notions of sovereignty and statehood are not easily defined or explained. To a large degree this is because they are principally political concepts, rather than merely legal principles. With the growth in both the (horizontal) extent and (vertical) reach of international agreements, treaties, conventions and codes, national independence is becoming less dominant. This tendency is becoming more noticeable in the modern commercial environment, and especially the internet. For if electronic communication is (almost) instantaneous and global, who should regulate it and define its rules? Should it be subject to national regulation within some normative system – as the Law Merchant – or should it be recognised as a uniquely international system which requires international control?

## 4 IMPOSITION OF INTERNATIONAL NORMS

Some legislative provisions have been made to accommodate this new grundnorm of the globalisation of electronic commerce. In Kelsen's philosophy of law, a grundnorm is the basic, fundamental postulate, which justifies all principles and rules of the legal system and which all inferior rules of the system may be deduced (Hayback, 1990). If commerce is now seen to be primarily international in nature, the role of domestic law is restricted. The limitations of paper-based evidential requirements when faced with the requirements of modern electronic communications, are a case in point. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce provides that an electronic signature may be legally effective as a manual signature, but does not define an electronic signature (Art 7). Thus although international treaties or conventions may give some guidance, it remains for the domestic legislature to provide the detail.

The Electronic Transactions Act 2000 (NZ) is based on work carried out by the New Zealand Law Commission, and closely follows both the Model Law on Electronic Commerce prepared by UNCITRAL in 1996 and the Australian Electronic Transactions Act 1999 (Cth) - itself heavily influenced by UNCITRAL (See Gregory, 1999a; Gregory, 1999b). The purpose of the Act is to facilitate the use of electronic technology. This it does by reducing uncertainty regarding the legal effect of electronic communications, and allows certain paper-based legal requirements to be met by using functionally equivalent electronic technology (Explanatory Note to Electronic Transactions Bill). It also provides that every enactment passed before or after the commencement of the Act shall be read subject to Part 3 of the Act (s 14).

The Act is predicated upon the idea that 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 (*Databank Systems Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC); *Corinthian Pharmaceutical Systems Inc v Lederle Laboratories* 724 F Supp 605 (1989); Law Commission, 1998, para 52). These principles may vary from country to country, though there are certain points upon which all jurisdictions agree.

It is these common elements which form the basis for the United Nations Commission on International Trade (UNCITRAL) Model Law on Electronic Commerce. Under article 7 of the Model Law, the elements of the functional equivalent to a signature are the need:

- To identify the person and to indicate that person's approval of the information contained in the data message; and

- For the method to be as reliable as was appropriate for the purpose for which the message was generated or communicated (Law Commission, 1998, paras 316-320, 344-345).

Article 7 only applies where a signature is a requirement of law. Where a signature is not required by law then the normal rules in relation to proving an agreement apply. These general rules allow some flexibility to domestic law. But they also impose some common standards.

Whilst it is not unusual for domestic laws to be influenced by international developments, it is perhaps true that New Zealand - and most other countries - had little choice but to adopt the UNCITRAL model, and alter its domestic laws accordingly. The nature of electronic commerce has some important differences from traditional trade, not least of which is its speed and universality. This latter attribute means that the electronic age poses particular problems for municipal legal systems, and for the States which created them.

## 5 THREAT TO SOVEREIGNTY

The jurisdiction of national courts are based upon the domestic laws of individual countries (Johnson and Post, 1996). Similarly, the legislative jurisdiction of a State is limited to its territory (Brownlie, 1998, pp 301-324; Jennings and Watts, 1992, pp 456-498; Mann, 1964, pp 10-13; Mann, 1984, p 20). This imposes inherent limits upon the scope of national internet regulation. But the advent of cyberspace has not meant the decline of domestic law. Rather it has "pushed the boundaries" (see for example Puurunen, 2000). Border controls on the internet are not impossible to develop and implement (*United States v Montoya de Hernandez* 473 US 531, The Chinese Channel Limited <http://www.chinese-channel.co.uk>; Branscomb, 1993, p 103). Many governments already regulate cyberspace (Framework for Global Electronic Commerce http://www.ecommerce.gov/; Management of Internet <http://www.ntia.doc.gov/>). The legal right of countries to control the internet is undoubted (US v Smith, 680 F 2d 255 (1st Cir. Mass 1982); See also President's Working Group on Unlawful Conduct on the Internet, 2000), but the practical difficulties involved have been considerable. It may be that the most effective means to achieve this is to regulate the architecture of cyberspace (Greenleaf, 1998). Perhaps more importantly, the advent of the internet has encouraged debate as to the proper form of regulation of international trade. Should it be through separate legal systems generally conforming to certain norms, or should there be some form of international regulation? The speed of globalisation through the internet means that the development of customary international law may not be sufficient to meet the news of the new media.

For the most part the internet is international, and its users are not adequately served by existing laws with respect to conflict of laws. The efficacy of the concept of "closest and most real connection" (*McConnell Dowell Constructors Ltd v Lloyd's Syndicate 396* [1988] 2 NZLR 257 (CA)) is also reduced, in that no part of the world is any more directly affected than any other by events on the web, as information is available simultaneously to anyone

with a connection to the internet (Johnson and Post, 1996). In the field of protection of intellectual property rights the same is true (Burk, 2000).

Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility (something which may be related to the relative length of the virtual border, see Johnson and Post, 1996, n17) - and legitimacy - of applying laws based on geographic boundaries (Johnson and Post, 1996). Location remains important, but it is virtual location, rather than physical location - there is no necessary connection between an internet address and a physical location (For a general description of the Domain Naming System, see Burk, 1995). If territorial States are not the sole source of authority for the regulation of the internet, do the other sources – whatever they might be – enjoy a claim to legitimacy?

With the dominance of democratic concepts of government, it might be thought that if the people believe that an institution is appropriate, then it is legitimate (Brook Cowen, 1996). But this scheme leaves out substantive questions about the justice of the State and the protection it offers the individuals who belong to it; which is illustrated by the study of the application of the model to Mummar Qadhafi's Libya (Al Namlah, 1992). It is generally more usual to maintain that a State's legitimacy depends upon its upholding certain human rights (Rawls, 1993; Honderich, 1995, p 477; Swanson, 1995). But does the self-regulation of the internet involve upholding certain human rights? It might be argued that it does, though whether these rights include the right to free speech, or the right of protection against exploitation, is perhaps uncertain.

Further, the internet itself threatens traditional political institutions and perhaps even the very concept of sovereignty itself (Lash, 1996-97; Sanford, 1995-96, p 1170; Buck, 1993-94; Wriston, 1992, the latter examining the challenges to sovereignty posed by the information revolution). Globalisation is not merely a notion, it is a fact. This is particularly so in the economic sphere. As Zekos has written, the real jurisdictional novelty of cyberspace is that it will give rise to more frequent circumstances in which effects are felt in multiple territories at once (Zekos, 1999). Traditional international legal rules on jurisdiction do not fit the internet context, nor do they facilitate international co-operation on international regulation.

The limits of national control of the internet are perhaps exaggerated. Principally that is because nations are increasingly acting in concert to deal with the borderless nature of cyberspace by creating both relatively uniform laws across jurisdictions, and agreements for international co-operation in surveillance and investigation (Overby, 1999; Greenleaf, 1998). A country has no choice but to promote vigorously the introduction of new technology in order to maintain and increase its international competitiveness (cf Serafini and Andrieu, 1981, p 96) - and this may mean the adoption of international norms - such as UNCITRAL, in the drafting of which it has had little if any input. Increasingly, private, non-State parties are regulating cyberspace (Berman, 2000). The resulting uncertainty has led some to argue that law should recognise a separate jurisdiction, or even a separate sovereignty, for the internet (Goldsmith & Lessig, nd).

## 6 EVOLUTION OF INTERNATIONAL CYBERSPACE LAWS

The law merchant evolved over a long time, so that no particular country or era could be said to have had an excessive influence on its development. The process was largely evolutionary and, in so far as it was not imposed by a sovereign State, was democratic. It was

largely created by the merchants themselves (Trakman, 1983), though subject to alteration by individual States (see *The Antelope* (1825) 10 Wheat 66). It may be that the same will be said of the internet, when its definitive history is written. The almost instantaneous global reach of the internet, and the potentially adverse affects of the internet on countries - particularly in economic and social terms - combine to ensure that governments have responded to the challenge of this emerging technology. But they have not responded consistently.

In its broad approach to the internet, the United States of America has chosen to rely on self-regulation (see The White House, 1997), rather than direct regulation. This is subject to exceptions, however, such with respect to internet pornography (Children's Online Protection Act, 1998). An alternative approach to that of self-regulation is a balance of self-regulation and direct regulation, as advocated by the European Union (Common Position Adopted by the Council with a View to the Adoption of a Directive of the European Parliament and the Council on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market 14263/1/99 REV (February 28, 2000) ("Electronic Commerce Directive"). The Directive was adopted by the European Parliament 4 May 2000. A third option would be direct regulation, which also has support, as in China (Qiu, 1999-2000). Thus far there has however been little sign of a global consensus developing as to the appropriate form of internet regulation, domestic, trans-national, or international.

Unlike the *lex mercatoria*, which developed over an extended period of time, just as customary international law has traditionally developed, the growth of internet law may not permit the international community the luxury of time to develop. For this reason States may have little choice but to defer to the views of the majority, or the stronger economic blocks, whatever implications that may have for the longer-term future of State sovereignty.

As Hall has noted, primarily international law governs the relations of independent States, but "to a limited extent ... it may also govern the relations of certain communities of analogous character" (Hall, 1924). Nor is he alone, similar views being expressed by other writers (Schwarzenberger, 1947; Friedmann, 1964). Lawrence also wrote that the subjects of international law are sovereign States, "and those other political bodies which, though lacking many of the attributes of sovereign States, possess some to such an extent as to make them real, but imperfect, international persons" (Lawrence, 1923, p 69). Whereas these scholars tended to define subjects of international law as States and certain unusual exceptions, there are others who go further in opening up the realm of reasonable subjects of the law of nations (Lauterpacht, 1947).

Whether the internet can, or should, become subject to international law is a question the answer to which could be as seminal as the adoption of the Law of Oléron or the resolution of the Thirty Years War at the Treaty of Westphalia - the so-called Diet of Worms (1648). Perhaps the response of governments to the age of electronic communications cannot be limited to the piecemeal adoption of laws in response to individual problems.

## 7 CONCLUSION

The internet and the advent of almost instantaneous communications have had and will continue to have major effects upon international trade law. In particular, evidential rules founded on former paper-based procedures have proven to be not flexible enough to accommodate the advent of the internet and contracts made in cyberspace. Just as the law merchant evolved to accommodate contracts negotiated between parties who were physically apart, so cyberspace law must do so for the electronic age.

Traditionally, the formation of legal norms for conducting trade was by States, subject to certain principles accepted by the international community. But this has proven inadequate for the control of electronic commerce, because this can be said to be truly international, having no physical presence.

The new environment has necessitated an increased degree of international co-ordination, if not co-operation. Unlike the evolutionary development of the *lex mercatoria*, the advent of electronic communications has resulted in the enforced adoption of international norms, such as the UNCITRAL Model Law on Electronic Commerce.

This poses a threat to State sovereignty. It is no longer possible for the nation-State to be the sole, or even prime, regulator of economic norms. Decisions respecting the forms of law will be made not at the national level, but internationally. These will be made by political blocks such as the European Union and the United Nations, and, in some instances, by non-governmental organisations. The result could be the evolution of an international cyberspace law. But there are wider implications for national legal systems which cannot be ignored.

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