

MAGISTER LEGUM DISSERTATION

THE LEGAL CONSEQUENCES OF INTERNET CONTRACTS

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Examinable Copies Submitted on 21 November 2003

This dissertation is submitted in accordance with the requirements for the degree LL.M in  
the Faculty of Law at the University of the Free State.

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# ***FOREWORD***

By the author

Computers have always been a passion of mine. My interest in technology began in the mid 1980's when video arcade games such as "asteroids" and "pacman" made their way onto the scene. Later, I was privileged enough to receive a *Commodore 64* Personal Computer from my mother (whose skills of negotiation on the day rivaled those of the best litigation attorneys!) – one of the first desktop computers commonly available on the South African market. It is with a great deal of nostalgia that I recall the countless hours spent tinkering with the machine. My liking for computers continued throughout my school career, where I took Computer Science as an extra subject.

As time went by, technology began to improve in leaps and bounds and I began to experience the most frustrating lesson that any computer-minded person can learn – no matter how technologically advanced the gadget, a cheaper, faster and better model will be on the market the next day.

I soon learned that gathering knowledge about computers would undoubtedly be cheaper - not to mention much more practical - than trying to keep abreast with the ever-changing face of technology.

After school I decided to continue my studies in the field of law. In spite of this, my keenness for and interest in computers was not to be extinguished. As my knowledge of the law began to grow, I began to dabble with the idea of somehow combining my elected field of training and my passion for technology.

At first I contemplated pursuing a career in the law of patents and trademarks with respect to computer components and software, but was somewhat put off by the prospect of having to obtain a further degree or qualification after having studied for five consecutive years straight after school. Somewhat confused about what to do next, I decided to commence my articles of clerkship with a view to becoming qualified as an attorney.



This Master's degree is aimed at the unification of my two true passions – computers and the law. I would like to make use of the opportunity to thank all those who offered their encouragement or assistance in making this possible.

Just to provide an indication of the speed at which developments take place in the field of Information Technology, the Electronic Communications and Transactions Bill appeared at the beginning of 2002, having a tremendous impact on the content of my thesis – both the written and unwritten portion thereof!

Fortunately, the Bill also had beneficial consequences (as shall be seen later in later chapters) in that it codified and, in many respects, corroborated and confirmed (to my delight) the research that I had been doing and the conclusions that I had reached in its absence.

But the Bill was almost as controversial as it was useful. There was an outcry from many corners of the community about the attempts being made in the Bill to “regulate” the Internet and the domain name unique to South Africa: “.za”. The logic behind their problem was that the Government had no place in the regulation of the Internet and that it was overstepping its authority in purporting to do so.

Another problem that reared its head was the legal requirement making it compulsory for Certification Authorities (involved with the issuing and control of digital certificates) to apply for registration with a Government body established especially for that purpose.

In spite of these problems and in spite of increasingly amplified protest from those opposed to the Bill, it was signed into law on 21 July 2002 by President Thabu Mbeki in a fancy ceremony using a smart card and thumbprint to sign it digitally.

Nonetheless, this dissertation will discuss the provisions of the new Act as far as it is relevant to the subject matter herein contained.

It is my hope that the content of this dissertation may add to the usefulness of the Act in shedding some well-needed light onto the topic of the legal consequences of online actions.

## **ACKNOWLEDGEMENT**

I would like to acknowledge the financial support of the National Research Foundation (NRF) for granting the Master's Scholarship, which greatly assisted in making this LL.M degree a possibility.

# CHAPTER I

## GENERAL INTRODUCTION

### 1.1. General introduction

We live in a time where almost every aspect of our lives is influenced by technology in one form or another with computers and information technology (IT), looking set to play ever-increasing rolls in our daily routine.

Because computers exercise such a vast influence on daily activities (regulated by conventional legal rules), Van der Merwe<sup>1</sup> is of the opinion that information technology warrants the creation of a separate branch of law. This school of thought has in fact existed internationally for some time and it may indeed be accepted that a new branch of law has come about.

The law relating to computers and the Internet goes by a variety of names across the globe. Cyberlaw, a term which is sometimes used, was derived from the word “cyberspace” first coined by author William Gibson in his 1984 novel “*Necromancer*” - referring to the intangible world which exists within the realm of the World Wide Web. IT Law is another description, which is commonly used to describe the field of law. According to Van der Merwe<sup>2</sup>, the term “Computer Law“ represents the convergence of a number of different, but nevertheless related, legal fields.

Irrespective of the formal name, the law relating to the Internet is an incredibly wide field, incorporating fragments of a vast number of orthodox fields of law. Every aspect of the law, which could - even vaguely - have a computer-related flavor to it, may be construed as forming part of the greater concept.

For reasons, which shall become increasingly apparent below, this work could obviously never purport to comprehensively address every facet of the topic and shall instead focus exclusively on the law of contracts and its relationship with cyberspace.

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<sup>1</sup> Van Der Merwe 1998:1-12

<sup>2</sup> Van Der Merwe 1998:1-12

The reason for this choice is chiefly due to the substantial need for development in the field of IT law. Since contracts are arguably the most important and widely spread sources of legal rights and obligations, they are almost certainly the most likely to encounter in cyberspace. Very importantly, online contracts by no means effect only lawyers and computer experts – in truth it is Joe and Jane Public who should be equipped to identify potential trouble on the Internet and to take the necessary steps to prevent and avoid it.

Countless contracts are concluded over the Internet very single day, often - and somewhat amazingly - without the contracting parties ever so much as sparing a thought about the consequences or legal validity thereof.

Until now, surprisingly little has been heard from people who have experienced problems arising from online transactions and agreements and the fact that few complaints have been aired via the mass media by no means implies that no problems exist. There are numerous studies and surveys that are aimed at discovering the reasons behind the failure of individuals and companies to publicize Internet related losses or problems, but these will be dealt with later.

This thesis is centered at the investigation of the common law requirements for contracts as supplemented by the Electronic Communications and Transactions Act of 2002, with a view to ascertaining whether or not these principles can be manipulated or extended to successfully meet the challenges of modern technology. In addition to this, it must be borne in mind that the common law principles were formulated numerous decades before the invention of the Internet and computers.

Each common law requirement will be examined very closely so that it can be determined what the effect will be once an attempt is made to apply it to a set of facts involving the information technology. The role of the Act, where applicable, will naturally be examined as well.

The ultimate aim would be to strive towards the eventual determination and formulation of a set of basic legal guidelines pertaining to online contracts. Once this has been done, the rules can be subjected to the usual legal and academic scrutiny and criticism so that they may eventually be passed down to law students and, with time, (and in a somewhat simplified form) be assimilated into general public knowledge together with the possible content of future legislation on the point.

In so doing, it is almost certain that basic knowledge will make the Internet a safer and more pleasant place to communicate and conduct business – something that will undoubtedly benefit a lot of South Africans.

# CHAPTER II

## BACKGROUND TO THE INTERNET

### 2.1. What is the Internet?

The Internet can best and most basically be described as a worldwide system of computers, which are all interlinked to one another using networking technology and a common computer language<sup>3</sup>. Authors such as *Smith*, define the Internet even more simply as a “network of computer networks”<sup>4</sup>. As the field of law and the Internet has grown in popularity and application, the need to provide a definition of the Internet in commercial contracts has come into play. Among the more common definitions thereof in standard contractual definition clauses includes: “A network of computer networks accessible via an Internet Service Provider or ISP”.

The original standard of communication or language used to connect the Internet was called Network Control Protocol or NCP<sup>5</sup>. Ethernet, a protocol for many local networks emerged in 1974 as an outflow of Harvard University’s Bod Metcalfe’s dissertation on “Packet Networks”<sup>6</sup>. This dissertation was initially rejected for not being analytical enough. Later, NCP was replaced by a more sophisticated format called TCP/IP or Transmission Control Protocol/Internet Protocol<sup>7</sup>.

Contrary to popular belief, the Internet and the World Wide Web are, not the same thing<sup>8</sup>. The Internet is the physical collection of networks of computers, while the World Wide Web is the vast library of documents and information available on the Internet<sup>9</sup>. E-mail and Internet chat facilities are other examples of services, which are available as a spin-off of the Internet<sup>10</sup>. In addition to this, it is possible to transfer files over the Internet using FTP or File Transfer Protocol.

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<sup>3</sup> Buys ea 2000:11-12

<sup>4</sup> Smith 1997:1

<sup>5</sup> [www.wdvl.com/Internet/History/](http://www.wdvl.com/Internet/History/)

<sup>6</sup> Howe 2001:3

<sup>7</sup> Sterling 1993:1-6

<sup>8</sup> Griffiths 2002:7-12

<sup>9</sup> Buys ea 2000:11-12

Connection or access to the Internet is possible via an ISP or Internet Service Provider. Every computer connected to the Internet is assigned a unique number – called an IP address – for the purposes of identification. IP addresses usually consist of four to twelve digits, ranging from 0 to 255 and separated into groups by periods (e.g. 192.255.6.145). In 1984, the introduction of *Domain Name Servers (DSN)*. This introduced some tiering into US Internet addresses such as .edu (educational), .com (commercial), .gov (government), .org (international organizations) and a number of codes for countries (eg. ".za" for South Africa)<sup>11</sup>.

All the information available on the World Wide Web is in a computer language called HTML (Hyper Text Mark-up Language) and requires software called a web-browser to interpret. A URL or Universal Resource Locator is the most common way in which addresses are provided on the Web (e.g. *www.cnn.com*)<sup>12</sup>.

The Internet may thus be regarded as a massive, globally interconnected collection of computers, into which a user may gain entry and be able to glean access to information on any other computer connected to the Net.

## **2.2. Brief History of the Internet**

During the early 1960's the Cold War between the United States and Russia was rife. In 1962 Paul Baran<sup>13</sup> of the RAND Corporation in the United States of America was commissioned to consider how US authorities would be able to communicate in the event of a nuclear attack disabling the traditional means at their disposal<sup>14</sup>.

The Advanced Research Project Agency (ARPA) of the United States Department of Defence, developed the idea by creating a small computer network known as ARPANET. The idea behind the development of such a network was to ensure that a communication system was in place, which had no "central hub" or point of control and that would continue to function even if a portion thereof was damaged or unable to operate.

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<sup>10</sup> Hofman ea 1999:18-21

<sup>11</sup> Griffiths 2002:8

<sup>12</sup> Griffiths 2002:11

<sup>13</sup> Kristula 1997:1

<sup>14</sup> Sterling 1993:1-6

The system functioned by inter-linking all the computers in the network, thus enabling information to be transferred from one to another via a great number of different possible routes; with the result that if one route was not available, another could always be found to guarantee the proper delivery of the information.

The first person to use ARPANET was Charley Kline at UCLA who sent the first packages as he tried to connect to Stanford Research Institute on October 1969. The attempt crashed at he reached the “G” in “LOGIN”<sup>15</sup>.

In October 1972 a demonstration of ARPANET was held at the International Computer Commercial Conference (ICCC) held in Washington DC<sup>16</sup>. At this conference 40 computers in different locations were linked<sup>17</sup>. In 1973 the first international connections to ARPANET were established between the University College of London in England and the Royal Radar Establishment in Norway<sup>18</sup>.

In 1974, TELENET, the first commercial version of the ARPANET was developed with 62 linked computers<sup>19</sup>. By 1974 the term “Internet” had been used for the first time<sup>20</sup>. ARPANET developed into the Internet<sup>21</sup>. In 1976, Queen Elizabeth II of England became the first head of state to send an e-mail message<sup>22</sup>.

In March 1990 the ARPANET was decommissioned<sup>23</sup> and the Internet began to gain even more momentum, with the birth of the World Wide Web in 1991.

In 1991 the number of Internet hosts broke the 600 000 mark. By 1996 there were approximately 40 million people making use of the Internet in almost 150 countries, although today it will comprise many more with more and more people going online every day<sup>24</sup>.

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<sup>15</sup> Howe 2001:6

<sup>16</sup> Leiner et al 2000:3-4

<sup>17</sup> Griffiths 2002:7-8

<sup>18</sup> Anderberg 2003:6

<sup>19</sup> Sterling 1993:1-6

<sup>20</sup> Anderberg 2003:7

<sup>21</sup> Leiner et al 2000:4

<sup>22</sup> Anderberg 2003:7

<sup>23</sup> Anderberg 2003:11

<sup>24</sup> Sterling 1993:1-6



### **2.3. Influence of the Internet on the Global Community**

The advent of the Internet was arguably the most important advance in a comparatively short but prolific world-history of technological advances.

The idea of creating a global network of interlinked computers has had an incredible influence on society. It is mind-boggling to realize that the Internet has the ability to enable the instantaneously transfer of information between users, irrespective of where they are situated around the planet.

In addition to this, the Internet has irreversibly changed modern man's outlook on a number of matters, of which communication methods may be noted as one of the most poignant examples.

During the 1800's, communication over long distance was limited to written correspondence and was an excruciatingly time-consuming process of delivery by ship, horse and/or foot. In 1837, the telegraph<sup>25</sup> was patented followed by the invention of the telephone by Alexander Graham Bell in the late 1870's – which expedited matters to some degree.

Today, communication has taken on a completely different face. Using the Internet and e-mail facilities, users are now able to send information anywhere across the globe at the click of a mouse button.

So accustomed to the convenience of speed are modern users of computers, that having to wait a mere couple of seconds - as opposed to days or even months just a few years ago - for an e-mail message to be sent, is considered to be a torturous and wholly unacceptable waste of time.

In addition to text messages, the Internet makes it possible to send sound clips, photographs or even video images to other Internet users at the click of a mouse. Video conferencing via the Internet even enables people to speak to one another, whilst viewing a video link of the other person - something which was until recently relegated to science-fiction movies!

Instant delivery, directly into the "inbox" of the other user's e-mail program also assists with the protection of privacy and ensuring proper receipt of important documents – unlike faxes, which are prone to getting lost and often exposed to the threat of being intercepted by others.

Despite than the transfer of information, the introduction of e-commerce – or commercial trading over the Internet – has brought about a massive increase in the number of agreements concluded in cyberspace.

E-commerce enables people to visit online shopping malls and purchase almost any item conceivable. From underwear to antiques, thousands of transactions are concluded daily. Credit cards are the orthodox form of payment used for the conclusion of these transactions and delivery is arranged in lieu of having to collect the merchandise.

Online shopping is extremely advantageous as it enables shoppers to buy goods from vendors outside South Africa, from the comfort of their studies, with minimal effort and without having to incur the expense of travel.

Similar to the Ancient Library of Alexandra, destroyed by Christian fundamentalists around 1000BC, the Internet has made vast libraries of information available to people, for the purposes of doing research on any imaginable topic under the sun. In the Sunday Times article dated 5 March 2000, headed “*The Net is helping us to live smarter, too*”, the author mentioned that access to information and self-enrichment was at the hilt of M-Web’s advertising campaign. M-Web’s latest campaign is targeted at revision and preparation for matric examinations.

Sadly, but as a direct result of a rather tragic characteristic of human nature, it was just a matter of time before Internet users began to conceive of harmful uses for the World Wide Web. The spread of computer viruses via e-mail became (and still is) rife and occurrences of defamation and breach of immaterial property rights began to present themselves ever more frequently and for every useful site on the Internet, there appear to be hundreds of crude and inappropriate others.

#### **2.4. The Regulation of Cyberspace**

“Regulation” in this context, should be regarded as the control, which is exercised over access to the information contained on the World Wide Web as well as the regulation of information made available on the Internet. The physical regulation of the telephone lines, broadcasting and computer systems making the Internet possible<sup>26</sup> is beyond the scope of this chapter, suffice to mention that “regulation” is one of the most controversial topics contained in the Act.

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<sup>25</sup> Varney 1997:1-3

<sup>26</sup> Hofman ea 1999:393-420

It is somewhat interesting to notice that the World Wide Web is often (and somewhat comically) compared to the old “Wild West”. The chief reason for this, being due to the lawless nature thereof caused by the ability for unlimited global entry to the net and more particularly, the inability of countries to exercise proper control over the content to which its citizens have access. From a practical point of view, penalties implemented by a lawmaker will be extremely difficult to implement.

By way of an example, there are thousands of sites available on the Internet, which may contain information banned in certain countries but permitted in others. Since the information is freely available on the World Wide Web and cannot be effectively “blocked” out by those countries in which it is disallowed, inhabitants of those parts of the world will continue to have unrestricted access to it as long as they are connected to the Internet.

Could this mean the final deathblow to all forms of censorship and regulation of content? Apparently not. The viewpoint adopted by South Africa appears to be that just because information is available on the Internet, does not make it lawful to partake thereof.

The *Films and Publications Act 65 of 1996* was one of the first pieces of South African legislation amended in 1999 to provide for the protection of children (under the age of 18 years) against sexual exploitation on the Internet. In addition to this, the Act<sup>27</sup> goes even further and makes it a punishable crime to *knowingly* import, possess or create child pornography.

In 2001, the Sunday Times featured a report by Penny Sukhraj about an employee of Telkom was arrested and tried for viewing child pornography on the Internet.

Internationally, very little legislation and law is in place to regulate activity on the Internet. While a handful of first-world countries such as the United States and the European Union have started laying in place laws and regulations, the majority, have not.

The position in South Africa is no different. Not only is our country’s legislation grossly inadequate to deal with matters of an online nature, but there appears to be an alarming sort of

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<sup>27</sup> Section 27

blissful ignorance amongst among Internet users, fueled by, what can best be described as an attitude of carelessness throughout the legal fraternity.

Perhaps carelessness is too harsh a term; the reluctance by the legal brotherhood to take steps to address the glaring gap is most probably due to apprehension brought about by lack of knowledge or experience. In life it is normally the case that people tend to procrastinate matters containing an element of uncertainty. Again, the importance and necessity of the development of rules and regulations comes into play.

In as far as the current means of regulation is concerned the tendency in South Africa is to rely on the *Electronic Communications and Transactions Act* as supplemented by the Common Law and law of precedent.

Though it is true that the Common Law principles are both excellently formulated and have stood the test of time, the important question is whether they can be applied to technology not even conceived of in the wildest imaginations of the drafters.

As was the case with the *Films and Publications Act*, the South African Legislature has slowly but surely come to realize the need for certain legislation to be amended to allow for the digital age.

To address the surge in online commercial transactions, the South African Law Commission was commissioned to investigate legislation aimed at the regulation of e-commerce.

The result of the arduous process of research was the *Green Paper on Electronic Commerce for South Africa*<sup>28</sup>, brought out on 20 November 2000. The public was invited to offer their input so that the Green Paper could be refined and any possible gaps filled.

The Green Paper was divided into four themes and thirteen chapters, dealing with a wide range of issues, such as security, privacy, consumer protection, domain naming and electronic payment systems.

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<sup>28</sup> [www.polity.org.za/govdocs/green\\_papers/greenpaper/index.html](http://www.polity.org.za/govdocs/green_papers/greenpaper/index.html)

At the start of 2002, the Electronic Communications and Transactions Bill B 8B of 2002<sup>29</sup> was tabled.

The Bill, unlike the Green Paper, is divided into fourteen chapters, dealing with a wide variety of related topics.

Chapter I contains definitions, the object of the proposed act as well as guidelines to its application. Chapter II provides more detail with respect to the information regarding policy and government framework. Chapter III is particularly interesting and deals with the legal requirements for data messages. Chapter IV touches upon e-government while Chapter V deals with cryptography providers. Chapter VI discusses the process of authenticating service providers as well as establishing an accreditation authority. Chapter VII is, another interesting one dealing with consumer protection and is particularly aimed at the conclusion of online contracts and online merchandising. Chapter VIII deals with the protections of personal information, while Chapter IX deals with the protection of critical database information. Chapter X creates the domain name authority as well as its administration and functioning. Chapter XI deals with the limited liability of service providers for the actions of their users and clients. Chapter XII makes provision for cyber inspectors as well as granting them powers to inspect search and seize. Chapter XIII touches upon cyber crime, particularly in relation to the interception and/or interference with data as well as extortion, fraud and forgery. Chapter XIV contains general provisions and information.

As already mentioned very briefly in the Foreword, on 21 July 2002 the Bill was enacted by President Thabu Mbeki signing it with a digital signature effected with a smart card and thumbprint. It came into effect on 30 August 2002 after the commencement date was published in the Gazette (Proc R68 GG 23809 of 30 August 2002 (*Reg Gaz* 7449))<sup>30</sup>.

According to Pretorius and Visser<sup>31</sup>, the overall objective of the Act was to enable and facilitate electronic transactions by providing for their enforceability and creating clarity regarding important surrounding issues. In so doing, public confidence in electronic transactions was also a primary objective.

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<sup>29</sup> [www.polity.org.za/pdf/ElectronicComm.pdf](http://www.polity.org.za/pdf/ElectronicComm.pdf)

<sup>30</sup> Stassen 2002:47

<sup>31</sup> Pretorius ea 2003:2

In addition to this, there has been much excitement in legal circles regarding the enactment, particularly regarding the removal of a great deal of legal uncertainty that existed before. In his article in the De Rebus, Jacques Jansen states:

*“Much legal uncertainty has now been removed by the enactment of the Electronic Communications and Transactions Act 25 of 2002. One might say that the egg which was e-commerce has hatched and, with the infrastructure and legal certainty which is provided for by the Act, will almost certainly grow into the flying Microsoft ostrich”<sup>32</sup>.*

While the latter portion of his quote may appear somewhat confusion, the important bit is that he appears to have utmost confidence in the fact that the Electronic Communications and Transactions Act has come to miraculously save us from all the problems that existed previously.

Not all people share the optimistic outlook of Jansen, and, as will be explained in Chapter 4, some regard the Act as confusing and easily capable of incorrect interpretation. In addition to this, the Act must not be viewed as a miracle “cure-all” for South African Internet-related law as there are a number of matters expressly excluded from the Act. This will also be discussed in more detail in Chapter 4.

The Act attempts to achieve these objectives in the following manner:

- Promoting widespread access to electronic means,
- Helping in the creation of legal certainty regarding previously vague areas of the law surrounding computers and technology,
- The regulation of cryptography and the accreditation Authentication Service Providers,
- The protection of consumers,
- The protection of privacy,
- Ensuring electronic access to government and government services,
- The creation of computer and technology-related crimes,
- The limitation of liability of Online Service Providers (OSP’s),
- The creation of a national policy on the ownership and management of the domain name “.za”.

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<sup>32</sup> Jansen 2002:16-17

The Act is practically identical to the 2002 Bill and is also divided into a number of chapters. Very few amendments have been included in the move from a Bill to formal legislation.

## **2.5. Brief Summary of the Electronic Communications and Transactions Act**

The following is a cursory summary of the various chapters of the Act:

### ***Chapter I : Interpretation, objects and application***

This chapter contains a section with definitions of certain terminology as well as setting out the aforementioned main aims and objectives of the Act.

### ***Chapter II : Maximizing benefits and policy framework***

This chapter is aimed at spreading the benefits of the Internet by promoting universal and affordable access.

### ***Chapter III : Facilitating electronic transactions***

This chapter of the Act is of great importance for the purposes of concretizing the concept of “writing” seen in relation to information contained on a computer in data, voice or other electronic format.

Part one of Chapter III deals with the legal recognition of data messages and records and provides for data messages having the same status as traditional writing under the circumstances provided for in the chapter. This part also deals with the concept of evidentiary weight as well as the legal recognition of electronic signatures that comply with the Act’s requirements.

Part two of Chapter III deals with aspects in relation to the formation of contracts on the Internet by spelling out the meaning and implications behind concepts such as the “sending” and “receiving” of data messages.

### ***Chapter IV : E-Government***

This portion of the Act makes provision for concepts such as e-filing and deals with the production of electronic documents as well as the integrity of information. It provides for the eventual issuing of licenses and permits via electronic means.

***Chapter V : Cryptography Providers***

This chapter deals with Internet security and the control that will be exercised over providers of cryptography services by the Department of Communications.

***Chapter VI : Authentication Service Providers***

In addition to cryptography and security on the Internet, another important aspect that will be essential in the quest to create confidence in consumers and users of technology is determining the authenticity and identity of parties to a transaction on the Internet. The Act makes provision for the Department of Communications to house an authority for the voluntary registration of certificates to provide at least some form of surety regarding the authentication of parties. In addition to this the Act contains criteria for the accreditation of products, software and services that support advances electronic signatures.

***Chapter VII : Consumer Protection***

Possibly the most important chapter in the Act for the man on the street, this Chapter provides various means of consumer protection, including making it obligatory for web site owners to exhibit certain information for the benefit of potential customers as well as making provision for the setting aside of the transaction during a set “cooling-off” period.

***Chapter VIII : Personal Information and the Protection of Privacy***

This Chapter of the Act deals with the protection of privacy and the prohibition on the collection of personal information by institutions or persons. The Department of Communications is authorized to enforce the provisions of the Chapter.

***Chapter IX : The protection of critical data***

This Chapter of the Act relates to the registration of databases containing information that may compromise the national security or social wellbeing of the country and allows the Minister to prescribe regulations surrounding the registration and storage thereof.

***Chapter X : Domain Name Authority and Administration***

Chapter X provides for the establishment of a Section 21 company to regulate the “.za” domain name and to act as the relevant authority. The aim of this authority is to take control of the issue surrounding domain names in South Africa (.za) and to have a national policy in force to prevent issues such as cyber-squatting.



In addition to this, the Chapter makes provision for alternative dispute resolution in the event of disputes arising in relation to domain name issues.

#### ***Chapter XI :Limitation of Liability of OSP's***

This Chapter regulates the liability of Online Service Providers (OSP's) by setting out a variety of rules and regulations in relation to their responsibility for the actions of those making use of their services.

#### ***Chapter XII : Cyber Inspectors***

This Chapter deals with the appointment of cyber inspectors by the Department of Communications and spells out their powers and duties in relation to the monitoring and investigation of matters incidental to the enforcement of the Act.

#### **Chapter XIII : Cyber Crime**

This Chapter creates criminal offences in relation to information systems. The offences relate to aspects such as unauthorized access to data as well as intercepting with it and matters such as computer-related fraud, or forgery.

### **2.6. Principles and Objectives of the Electronic Communications and Transactions Act**

The aforementioned creates a strong and broad framework for the implementation of the Act in a successful manner that is in line with international standards.

Pretorius and Visser<sup>33</sup> mention that the Act is based on three principles:

- “Functional equivalence” or “media neutrality”. This principle implies that transactions should be recognized irrespective of whether or not they are concluded via traditional paper-based means or whether they have been concluded electronically.
- “Technology neutrality”. This means that the Act should not purport to regulate or prescribe the type of technology used.
- “Compatibility with international best practice”. This principle denotes the fact that the Electronic Communications and Transactions Act draw heavily upon certain international resources.

These international resources include the Model Law on Electronic Commerce with Guide to Enactment 1996, with Additional Article 5*bis* of the United Nations Commission on International Trade Law (UNCITRAL) – referred to as “The Model Law”<sup>34</sup>. Various sections of this Model Law will be discussed in more detail hereinunder.

The United Nations Commission on International Law or UNCITRAL, is the core legal body within the United Nations system in the field of international trade law. UNCITRAL was tasked by the General Assembly of the UN to further the progressive harmonization and unification of the law of international trade.

In terms of General Assembly resolution 2205 (XXI), this was to be done by<sup>35</sup>:

1. *"Co-ordinating the work of organizations active in this field and encouraging co-operation among them;*
2. *"Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;*
3. *"Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;*
4. *"Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;*
5. *"Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;*
6. *"Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;*
7. *"Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;*
8. *"Taking any other action it may deem useful to fulfil its functions."*

For the purposes of electronic transactions concluded over the Internet, the model laws produced by UNCITRAL are of inestimable value and are often useful in the resolution or avoidance of

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<sup>33</sup> Pretorius ea 2003:2

<sup>34</sup> [www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/doc.html](http://www.jus.uio.no/lm/un.electronic.commerce.model.law.1996/doc.html)

<sup>35</sup> [www.uncitral.org/en-main.htm](http://www.uncitral.org/en-main.htm)

numerous stumbling blocks associated with international contracting. For this reason, these model laws will be referred to again in the portion of this work dealing with the pitfalls of conflicts in law relating to international agreements concluded online.

It is not only South Africa that has taken note of the Model Law on Electronic Commerce when drafting its domestic legislation, numerous other countries followed the same route, for instance:

Australia – the *Electronic Transactions Act of 1999*

Canada – the *Uniform Electronic Commerce Act of 1999*

Singapore – the *Electronic Transactions Act 25 of 1998*

United States – the *Uniform Electronic Transactions Act of 1999*

Bermuda – the *Electronic Transactions Act of 1999*

Mauritius – the *Electronic Transactions Act of 2000*

Philippines – the *Electronic Communications Act of 2000*

# CHAPTER III

## THE INTERNET'S EFFECT ON SOUTH AFRICAN AND GLOBAL LAW

### 3.1. Influence of the Internet on Global Law

There is absolutely no doubt that the advent of the Internet will have a marked effect on global legal principles. The Internet, legally speaking, is the ultimate in dualism. On the one hand it represents what is arguably the greatest advance in technology the planet has seen, and on the other, it wreaks total havoc with the legal systems in the international community.

Due to the borderless and international nature of the Internet viewed in conjunction with the increasing amount of e-commerce taking place over the World Wide Web, basic legal principles will have to be formulated (or present ones amended) to account for the changes brought about by the Internet.

Countries with little or no laws regulating transactions over the Internet may eventually become targeted as “international safe-havens”, for people wishing to conduct illicit activity without legal repercussions. The changes necessitated in a particular country will depend largely on the existing legal infrastructure as well as a variety of factors, such as the level of technological development, number of Internet users and estimated frequency of problems arising.

As previously mentioned Cyberlaw touches upon a wide range of legal fields, from criminal law to the law of defamation and contract. Each country will have to conduct an investigation into its own domestic laws to determine, which of those will be effected by the Net. Once this has been determined, it will have to be decided whether it is possible to amend existing legislation to accommodate the digital influence or whether completely new legislation will need to be investigated and developed.

Types of changes required, may vary from amendment of legislation to the enactment of brand new law to the variation of Common Law principles which are in opposition to accepted principles of IT Law.

Irrespective of the precise level of variation required very few countries will, be able to escape the influence of the Internet and they may only elect to ignore its vast influence at their own peril.

### **3.2. Effect on South African Legal Principles**

As discussed above, certain governments appear to exhibit a far greater urgency with respect to the process of getting their house in order for the digital age than others.

The United States of America and the European Union have already enacted a multitude of new legislation aimed at bridging the gaps in their domestic law. These acts have codified legal principles relating to the protection of children<sup>36</sup> on the Net, criminalizing certain illicit activity<sup>37</sup>, intellectual property rights<sup>38</sup> as well as addressing rather prickly privacy issues<sup>39</sup>.

If one considers that America and Europe are arguably two of the most technologically advanced regions in the world, this would not come as too much of a surprise. Other countries, however, tend to lag behind to a degree. There may be a variety of explanations for this, the most poignant possibly being that the less a country is effected by the new technology, the less eager the government will be to take remedial steps and the adage of “don’t fix it if it ain’t broke” is in point.

In line with this principle, South Africa’s response has admittedly fallen somewhat short of enthusiastic. Again, this inertia can most likely be attributed to the impressive fact that SA has been exposed to the Internet for some time now without any serious and insurmountable legal hurdles. This, in turn, could be as a result of the semi-paranoid level of care adopted by the average South African Internet user.

Today people appear to be much more comfortable with the idea of the Internet and e-commerce. The inevitable consequence of this is an increase in online activity. Needless to mention, the incidence of online crime and illegal activity may grow proportionally unless something is done to circumvent it.

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<sup>36</sup> For example the Children's Internet Protection Act (CIPA), adopted by the Federal Communications Commission (FCC) on March 30, 2001

<sup>37</sup> Virginia *Computer Crimes Act* of 1999

<sup>38</sup> The Digital Millennium Copyright Act of 1998 (USA)

<sup>39</sup> For example the *Electronic Communications Privacy Act* in the Unites States

In South Africa, the changes required will fall into 3 main categories :

### **3.2.1. Existing legislation**

The influence of the Internet may extend to touch a number of pieces of existing legislation. Acts, which are affected, will have to be amended so as to incorporate the necessary rules and information to bring them in line with the digital age.

The legislature has already commenced this strenuous task with respect to legislation such as the *Films and Publications Act 65 of 1996*, which was amended in 1999 to extend its protection to the prevention of the exploitation of children as well as criminalizing child pornography.

This was done in the following ways:

- By inserting a comprehensive definition of “child pornography” as: *any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children,*
- By amending the definition of “publication” to include: *any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet,*
- By amending the objectives of the Act to make the exploitative use of children in pornographic publications, films or on the Internet, punishable.
- By amending Section 27 of the Act to make a person be guilty of an offence if he or she knowingly—
  - (a) *creates, produces, imports or is in possession of a publication which contains a visual presentation of child pornography; or*
  - (b) *creates, distributes, produces, imports or is in possession of a film which contains a scene or scenes of child pornography.*

There are myriads of other acts and pieces of legislation, which require urgent attention. The *Computer Evidence Act 57 Of 1983*, which was antiquated to the point of being completely obsolete, has been repealed *in toto* by the *Electronic Communications and Transactions Act*<sup>40</sup>.

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<sup>40</sup> Section 92

The *Computer Evidence Act* was previously formulated to provide for the admissibility of evidence generated by computers in civil proceedings, but had numerous loopholes and shortcomings. No provision was made for criminal proceedings – leaving many more questions than answers. In addition to that, the act was completely silent with respect to the use of e-mail or Internet websites as evidence.

The Copyright and Trademark acts are in similar need of an amendment to bring them up to speed, with the digital age.

The *Interception and Monitoring Bill 50 of 2001*<sup>41</sup> intends to bring the *Interception and Monitoring Act 127 Of 1992* in line with international norms and also makes provision for the prevention of communications such as e-mail<sup>42</sup>.

### **3.2.2. New legislation**

New legislation will be necessary when there is a lacuna in the law or in cases where amendment is not possible or practical for some or other reason.

The *Telecommunications Act 103 Of 1996*<sup>43</sup> was enacted with a view to the regulation of telecommunication activities, of which the provision of Internet access and e-mail service forms a part<sup>44</sup>.

Other legislation recently accepted into law was the eagerly awaited Electronic Communications and Transactions Act, which contains much needed clarification on a wide variety of topics. One of the most useful functions of the Act is the authentication and acceptance of contracts and documents in data message form.

In the past, (one of the most serious shortcomings of the now repealed *Computer Evidence Act*) the *Best Evidence Rule* was applied, in result of which made it risky for businesses to scan paper records into electronic format for storage.

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<sup>41</sup> [www.polity.org.za/html/govdocs/bills/2001/imb.html](http://www.polity.org.za/html/govdocs/bills/2001/imb.html)

<sup>42</sup> Swart 2001:1-3

<sup>43</sup> [www.polity.org.za/govdocs/legislation/1996/act96-103.html](http://www.polity.org.za/govdocs/legislation/1996/act96-103.html)

<sup>44</sup> Hofman ea 1999:400-402

Now, the emergence of the *Electronic Communications and Transactions Act* has made it possible (in theory) to get rid of messy paper archives by converting all the files to digital information. As will be discussed further on, there are some critics of the Act that point out that the specific wording of the relevant sections does not expressly provide for this to be done. If this turns out to be true, then scanned documents may not have the same evidentiary weight in court as the original document.

### **3.2.3. Common law principles**

The sources of law in South Africa comprise legislation, common law, case law and academic legal writings<sup>45</sup>. Common law as the *ius commune*, is a dynamic and living system of law, which has the potential to be forged by legislation and the functioning of the courts of law.

Certain common law rules and principles pertain almost directly to IT-related issues and may need to be developed.

### **3.3. Flexibility of the Common Law**

As mentioned, the South African common law is by no means static or stagnant and may be adapted as the need arises in accordance with the principles of equity.

#### **3.3.1. The Best Evidence Rule**

An example of an accepted principle of common law, pertaining to the field of computers and the Internet is the *Best Evidence Rule*<sup>46</sup>, according to which courts requires the best evidence (i.e. the original documentation) and will only accept copies if the original is destroyed or unable to be obtained. The problem with evidence such a computer print-outs is that they can not really be classified as original or duplicate – causing potential complications if the weight thereof is challenged by the opposing party.

The *Electronic Communications and Transactions Act*<sup>47</sup> attempts to address the problem by laying down special rules pertaining to the “best evidence” available with respect to computers and IT.

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<sup>45</sup> Du Plessis 1992:70-75

<sup>46</sup> Hoffmann ea 1994:114-116

<sup>47</sup> [www.polity.org.za/pdf/ElectronicCommunications.pdf](http://www.polity.org.za/pdf/ElectronicCommunications.pdf)



**Section 14** of the Act deals with the previously prickly problem of the requirement of originality in relation to data messages.

According to Section 14, where the law requires information to be presented or retained in its original form, that requirement is met by a data message if :

- (a) the integrity of the message from the time it was first generated has been assessed,<sup>48</sup> and
- (b) the information is capable of being displayed or produced to the person to whom it is presented<sup>49</sup>.

**Section 14(2)** of the Act sets out the requirements for assessment of data messages, and states that when the integrity of a message must be assessed, the information must have remained unaltered and complete (except for normal endorsements or changes arising in the normal course of communication. This must be considered in the light of the purpose for which the information was generated as well as all other relevant circumstances.

**Section 17** of the Act deals with the production of documents or information, and also relates to the aforementioned question regarding original papers for the *best evidence rule*.

**Section 17** states that where the law requires a person to produce a document, this requirement can be fulfilled by the production of a data message or the document in electronic form, provided that the reliability requirement is met as provided in Subsection (2) thereof.

**Section 18** of the *Electronic Communications and Transactions Act* deals with the question of “certified copies”<sup>50</sup>. Under normal circumstances there would be an “original” version of a document and there would be “copies” thereof. With respect to computer print-outs, the question could be raised regarding the status of the documents so produced. Are they originals or are they copies?

The **Section 18(2)** states:

*Where the law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, that requirement is met if the person provides a print-out certified to be a true representation of the document or the information.*

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<sup>48</sup> Section 14(1)(a) of the Act

<sup>49</sup> Section 14(1)(b) of the Act

<sup>50</sup> Stassen 2003:47

In addition to this, it now becomes possible to “certify” a document that is in electronic form provided that it is the same as a physical copy thereof.

This is done in terms of **Section 18(3)**, which states:

*Where a law requires or permits a person to provide a certified copy of a document and the document exists in paper or other physical form, that requirement is met if the an electronic copy of the document is certified to be a true copy thereof and the certification is confirmed by the use of an advanced electronic signature.*

**Section 19** of the Act contains even more radical departures from the usual understanding and interpretation of certain legal phrases.

**Section 19(2)** states that where the law contains an expression, whether used as a noun or verb, including the terms “document”, “record”, “file”, “submit”, “lodge”, “deliver”, “issue”, “publish”, “write in”, “print” or other words or expressions of similar effect, must be interpreted so as to include or permit such form, format or action in relation to a data message unless otherwise provided by the Act.

**Section 19(3)** deals with the requirement of seals and states that where a seal is required by law on a document, that requirement will be met if the document indicates that it is required to be sealed and includes the advanced electronic signature of the person by whom it is to be sealed. (An advanced electronic signature is an electronic signature that has results from a process accredited by the Accreditation Authority as provided for in Section 37 of the Act)

**Section 19(4)** states that where a document is required to be sent by registered post, it will be sufficient to send the document to the South African Post Office via e-mail to be forwarded to the recipient.

Naturally, the actual implementation in practice of these subsections will be far more complicated than the actual wording thereof and remains to be seen.

In spite of this, the *Electronic Communications and Transactions Act* does not *expressly* or specifically address the question of print-outs being used as evidence in courts and leaves the

reader wondering whether or not the aforementioned sections are intended to apply to such instances too.

This view would indeed be correct if one were to have regard to Section 11(1) read with Section 11(3)(b), which states that information is not without legal force merely because it is in electronic form, but it must be accessible in a form in which it may be read such as a print-out.

This is cemented by the same requirement being present in Section 14 (discussed above) with respect to the production of an “original”.

Nonetheless, it is interesting to note that the Act does not expressly address the question of best evidence, leaving the door open for academic criticism in this regard. I am of the view that although the Act does not provide specifically for printouts of scanned documents to be used as a substitute for the original, there Act is sufficiently wide to construe such a rule – especially in the absence of the *Computer Evidence Act*.

### **3.3.2. Previous Position in Terms of the Repealed Computer Evidence Act**

Before the enactment of the *Electronic Communications and Transactions Act*, the process of authenticating computer-related evidence in order for it to be admissible in court was a cumbersome and complicated process.

In terms of Section 2 of the old *Computer Evidence Act*, an affidavit was required to authenticate the evidence. The affidavit was long, detailed and contained a variety of information including:

- confirmation that the computer used was able to perform functions such as the storage and retrieval of data and instructions,
- confirmation that the computer was able to process data according to mathematical and logic rules,
- confirmation that the computer was able to save the data after being processed,
- confirmation that the computer was able to produce information based on the results of the processing,
- the source of the data and instructions provided to the computer as well as the details of who entered said information into the system,
- the type of information entered into the computer,
- what the computer is programmed to do with the information thus entered,

- confirmation that the computer can make print-outs of the information as required and that the information contained in the print-out is correct and that the data and instructions upon which it was based was accurate and entered correctly,
- confirmation that the computer was not malfunctioning at the time and that there were no disruptions or other form of interference with the normal working thereof,
- confirmation that no reason exists to doubt or distrust the correctness of the information or the reliability of any portion thereof.

As regards the deponent to such an affidavit, it would have to be someone in whose personal knowledge all the relevant facts therein contained would fall. This is not always an easy task due to the fact that in more cases than not, the various facts fall within different areas of expertise and are intricately seldom known by the same person. In addition to this, the old affidavit required the deponent to confirm the proper functioning of the relevant computer system, which may be very difficult, even for those with expert technical know-how.

Coming back to the issue of the common law, it is important to remember that the Constitution plays a role in the development of the common law. The Section 39(2) of the Constitution of the Republic of South Africa, Act 108 of 1996, provides that: *“when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”*.

Any changes made to the common law and which, may be brought about by computers and/or the field of information technology must be done in such a way as not to offend the Act.

# CHAPTER IV

## SOUTH AFRICAN COMMON LAW REQUIREMENTS FOR A VALID CONTRACT

### 4.1. South African Common Law Requirements for a Valid Contract

Since this dissertation concerns investigating the validity of contracts concluded over the Internet, it is essential to briefly overview the requirements for a valid contract so that they can be examined individually in the context of Cyberlaw.

It is important to remember that consensus alone is not sufficient for the conclusion of a lawful and binding contract<sup>51</sup> and that it is thus necessary to distinguish between a contract that has been concluded and a valid contract. This is crucial in the context of cyberspace and online-type agreements, because it is easy for agreements to be reached and “contracts” concluded without necessarily complying properly with all the requirements for validity.

In addition to offer and acceptance (forming the basis of **consensus**) the requirements<sup>52</sup> for a valid contract are that the parties must have the required **contractual capacity**, the **performances** undertaken at the time of contracting must have been possible, the contract as well as its purpose and object must be **lawful** and all necessary **formalities** must have been complied with. In addition to this the performances must be such that they are determined or determinable with a degree of **certainty**.

The Electronic Communications and Transactions Act will also have to be consulted to investigate any developments in relation to new requirements for online contracts. While it is essential to investigate the Act, it also has to be borne in mind that the Act has not stood the test of time and may be altered by a declaration of unconstitutionality for whatever reason.

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<sup>51</sup> Van Rensburg ea 1994:211

<sup>52</sup> Van der Merwe ea 2003:8

#### **4.1.1. Offer and Acceptance**

South African law of contract relies on an invitation to bring about the creation of an obligation (called an offer) and the affirmative response (referred to as the acceptance)<sup>53</sup>. Merely because the acceptance of an offer has *prima facie* taken place does not mean that consensus has been reached. “Consensus”, is a rather complex notion in itself and the requirements for it to be present shall be investigated in more detail below. Whether or not there is consensus (in the simple sense) may be deduced purely from the facts surrounding the offer and acceptance of the agreement at hand.

An **offer** is defined by Van der Merwe<sup>54</sup> as “*an expression of will, made with the intention of creating an obligatory relationship on certain or ascertainable terms with another (the addressee), and brought to the attention of the addressee, so as to enable him to establish the contract by accepting the offer as it was made.*”

The question relating to whether or not an advertisement, amounts to an offer in the legal sense of the word or merely an offer to negotiate shall be discussed later, as this is very relevant with respect to online contracts.

Generally speaking, offers may be accepted or rejected by the other contracting party. In addition to this, the offer may be revoked at any time prior to acceptance<sup>55</sup>. Revocation is only effective once it has been communicated to the other party<sup>56</sup>. An offer lapses automatically after a reasonable amount of time, unless it has been accepted<sup>57</sup>. The offer may contain conditions regarding the time, manner and place of acceptance.

**Acceptance** is defined by Van der Merwe<sup>58</sup> as “*a declaration of will which indicates assent to the proposal contained in the offer*”.

It is important that the parties must have the *intention* to enter into a binding contract. Acceptance must be unconditional and comply with any conditions set out in the offer, regarding how, when and where acceptance must occur. If the person to whom the offer is made does not wish to

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<sup>53</sup> Van der Merwe ea 2003:48

<sup>54</sup> Van der Merwe ea 2003:50

<sup>55</sup> Van der Merwe ea 2003:53

<sup>56</sup> *Yates v Dalton* 1938 EDL 177

<sup>57</sup> *Dietrichsen v Dietrichsen* 1911 TPD 486 at 496

accept the offer in its present form, but makes suggestions as to possible amendments the offer, is deemed to have been rejected and a counter-offer made. It should however be borne in mind that not every suggestion regarding the original offer may be construed as a rejection thereof. A mere inquiry intended to clarify or cast light upon certain aspects of the offer is not to be understood as a rejection thereof or a counter-offer.

As appears from the aforementioned, the concepts of offer and acceptance are much intertwined with the Common Law requirement for the validity of a contract, namely consensus. Due to the similarity between the concepts, a lack of consensus may frequently be due to a problem with the “offer and acceptance” portion of entering into an agreement. If a party to a contract feels that he has been induced into accepting a contract, which he allegedly would not have accepted under other circumstances, then it is surely questionable whether consensus is present.

#### **4.1.1.1. Misrepresentation**

Consensus cannot be obtained by improper means and that it should amount to an actual and proper meeting of the minds of the parties. Furthermore, *mistakes* existing with respect to the consensus can creep in and are a major source of problems relating to the conclusion of contracts. What is more - mistakes may often be brought about by action or omission of the other party. Such action or inaction is referred to as a misrepresentation.

Misrepresentation may be divided into two main categories: **wrongful** (*skuldige*) **misrepresentation** and **innocent** (*onskuldige*) **misrepresentation** and may be caused fraudulently by *commissio* or *omissio*<sup>59</sup>.

**Wrongful or intentional misrepresentation** constitutes a delict and as such must contain all the usual elements<sup>60</sup> associated with a delict. This form of misrepresentation may be subdivided into two further sub-categories: *negligent misrepresentation* and *intentional misrepresentation*.

**Innocent misrepresentation** contains no elements of negligence or intention, but may still lead to an absence of consensus.

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<sup>58</sup> Van der Merwe ea 2003:54

<sup>59</sup> Van Rensburg ea 1994:201-207

<sup>60</sup> Van Rensburg ea 1994:201-202

Concepts such as “**puffing**” and the conclusion of a contract based on the opinion of another person are to be taken into account with respect to the wrongfulness aspect of the delict. “Puffing” entails the practice of making something out to appear better than it really is and is a process often used in commerce and advertising. Normally puffing will not be wrongful<sup>61</sup> unless it goes beyond *simplex commendatio* or simple commendation<sup>62</sup>. This concept is relevant in the area of commercial activity and conclusion of contracts over the Internet.

“**Materiality**”, or the question as to whether the misrepresentation goes to the root of the contract or not, is merely one of the factors in the determination of the wrongfulness.

In a similar vein, a person who concludes a contract, acting on the **opinion** of another person which is not necessarily based in fact, will struggle to prove that the facts were supplied to him “wrongfully” should they turn out to be incorrect at a later stage. For this to be the case though, the person expressing the opinion must expressly state that the information is merely opinion and not certainly truth.

#### **4.1.2. Consensus**

For a contract to be concluded, it is only logical that the parties must come to an agreement regarding the matters contained in and surrounding the contract. Arriving at a consensus involves the process of making and accepting an offer to conclude a contract (as briefly discussed *supra*).

Academics have propagated various theories in order to determine at exact point at which consensus is deemed to be in place. Van der Merwe mentions that the notion that contracts are, in their simplest form, based on offer and acceptance was developed into a theory called the *will theory*.

##### **4.1.2.1. The Will Theory**

In accordance with the **will theory**, parties shall be bound to contracts in so far as “*there is an actual meeting of the minds*” of the parties<sup>63</sup>. (Again it is relevant to mention that the consensus requirement and the information relating to offer and acceptance are very much interrelated.) In terms of the will theory, consensus has the following basic elements<sup>64</sup>:

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<sup>61</sup> *Cockroft v Baxter* 1955 4 SA 93 (C)

<sup>62</sup> *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A) at 418

<sup>63</sup> Van der Merwe ea 2003:19

<sup>64</sup> Van der Merwe ea 2003:19-21



- The parties must **agree on the consequences** they wish to create. In other words the parties must agree on the nature of the obligation to be incurred, viz., the identity of the other party as well as the nature of the performance(s) to be received or rendered.
- The parties must **intend to bind themselves legally**. Where parties agree to something in a joking fashion or with out the intention to be legally bound to the agreement, no consensus is present.
- The parties must be **aware of the agreement**. In terms of this element, the parties must be aware of their respective offer and acceptances.

#### **4.1.2.2. Other Theories**

Other theories such as the declaration theory and the reliance theory also exist. According to the **declaration theory**, the parties are bound to the provisions of the contract based not on their mutual subjective intentions, but rather on objective, coinciding declarations thereof<sup>65</sup>.

The **reliance theory**, on the other hand differs from both the will theory and the declaration theory in the sense that the contractants are bound on actual consensus or the reasonable reliance that there is such consensus<sup>66</sup>.

The declaration and reliance theories are however not really supported in our law. Returning for a minute to the will theory, it is clear that an actual meeting of the minds of the parties is essential for consensus. This is deduced from the facts relating to and surrounding the offer and acceptance of an agreement. Understandably, there are numerous factors, which would have an influence on the formation of consensus in this particular sense.

#### **4.1.2.3. Factors Influencing Consensus in Terms of the Will Theory**

Mistakes occurring in one or both of the parties can influence consensus. While many different types of mistakes may occur, the following are the general categories into most of which may fall:

- (a) *Error in corpore* – a mistake relating to the object of the performance.
- (b) *Error in personae* – a mistake relating to an error with respect to the identity of the parties between whom the agreement is reached.

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<sup>65</sup> Van der Merwe ea 2003:34

<sup>66</sup> Van der Merwe ea 2003:35

- (c) *Error in motive* – a mistake relating to an error with respect to the reason why a person decided to conclude a contract.
- (d) *Error in qualitate* – a mistake relating to the true nature or quality of the object of the performance.

Generally speaking, the fact that one or both of the parties to an agreement may have been suffering under a misconception does *not* automatically exclude the reaching of consensus.

#### **4.1.2.3.1. Iustus Error**

The concept of *iustus error* is also frequently applied in our courts where a person who appears to have concluded a contract on the face of it wishes to avoid or escape being bound thereby. The aforementioned concepts of *error in personae*, *error in qualitate* etc., are incorporated into the doctrine of *iustus error*<sup>67</sup>. The doctrine has a two-phase approach. Before a party relying on a mistake may use the error to escape from the binding nature of a contract, it must be proved that the error was both, *material* or *essential* enough to justify the exclusion of consensus between the parties as well as being *reasonable*.

##### **4.1.2.3.1.1. Materiality**

As far as the “material” leg of the investigation is concerned, the question is whether or not the mistake raised by the party is serious enough to warrant avoiding being bound by the contract.

In the matter of *Trollip v Jordaan*<sup>68</sup>, the appellant purchased a farm from the respondent and, while the deed of sale contained the correct description of the land to be sold, the estate agent had pointed out the correct property, but with slightly incorrect boundaries to the appellant. The court refused to set the contract aside, holding that the mistake was not material.

As opposed to this, in the matter of *Allen v Sixteen Stirling Investments*<sup>69</sup>, the court was faced with a rather interesting set of facts. The parties had signed a deed of sale for a stand at a coastal resort. Unlike the *Trollip* case, the incorrect stand was pointed out to the buyer – being one that was closer to the sea than the one for sale. The court decided that a mistake in the nature of a mutual *error in corpore* had taken place, since the purchaser had indicated that had he known that

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<sup>67</sup> Van der Merwe ea 2003:38-40

<sup>68</sup> *Trollip v Jordaan* 1961 1 SA 238 (A)

<sup>69</sup> *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D)

the stand pointed out to him was not the one for sale, he would never have agreed to the contract. The contract was declared void *ab initio* by the court as being material.

#### 4.1.2.3.1.2. Reasonableness

As mentioned above, the mistake upon which the doctrine of *iustus error* rests should not only be material in nature, but also reasonable. As far as the “reasonableness” requirement is concerned, a number of considerations play a role in the determination, including the type of mistake that resulted in the error. The following general distinctions can be drawn:

- *Unilateral mistakes* occur where one of the parties labors under a misapprehension surrounding the matter, while the other party is aware of the mistake being made<sup>70</sup>.
- *Mutual mistakes* occur where both of the parties are under the wrong impression of the other’s intention and neither of the two, are aware of the other’s mistake.
- *Common mistakes* occur where both parties to an agreement are laboring under the same incorrect supposition of a fact, existing external to the minds of the parties. Because in the case of common mistakes, consensus (although with respect to the wrong facts) is actually present, the contract cannot be void due to dissensus.

As seen above, the subject matter dealing with mistakes should be read together with the section of this dissertation dealing with misrepresentation<sup>71</sup>, as a large number of mistakes flow from misrepresentation in one form or another.

With respect to the question of dodging the effect of a contract using the doctrine of *iustus error* a number of classic excuses are often raised by the parties. These include that they were never given an opportunity to read the contract and thus are unaware of the content thereof, and, in the case of tickets, the explanation used is that the conditions and terms of the contract were never specifically brought to their attention. Clearly, these attempts touch upon the requirement of consensus. In the first case, the party trying to challenge the contract is alleging that because he was not given an opportunity to read the agreement, he could not possibly have formed the intention to be bound by the terms thereof, which were unknown to him. In the so-called “ticket cases” (which will be dealt with in a bit more detail later because of their usefulness in relation to Internet contracts), the argument is similar. The party will allege that consensus is lacking

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<sup>70</sup> Van der Merwe ea 2003: 24-25

<sup>71</sup> 43-44 *supra*

because he or she was never given a chance to peruse the content of the contract so as to decide whether or not to accept.

Naturally, a distinction must be drawn in cases like these between parties that themselves fail to peruse a contract and parties who are required to sign a contract whilst not being allowed to see the terms thereof. Clearly, in the first instance, the party cannot complain subsequently while consensus may indeed be lacking in the latter case.

#### **4.1.3. Contractual Capacity**

This requirement for the validity of a contract refers to the presence of capacity to act on behalf of the parties thereto. Three categories exist with respect to contractual capacity (or capacity to act) – **full capacity** to act, **limited capacity** to act and persons **without any capacity** to act whatsoever.

Persons with no capacity to act will not be able to conclude a valid contract at all and all contracts “concluded” by such persons will be void *ab initio*. An example of a person with no capacity to act is a child under the age of seven (referred to as an *infans*).

Minors over the age of seven as well as unrehabilitated insolvents, prodigals and persons who are suffering from a mental illness fall into the category of persons with limited capacity to act<sup>72</sup>.

#### **4.1.4. Legality**

From the outset, it must be taken into account when considering this requirement for the validity of contracts that it is an established principle of our law that parties should have the greatest amount of freedom to contract as possible. Freedom to contract implies that a party is free to select with whom and on which terms to contract. Freedom to contract is tempered to some degree by the contractual requirement of **lawfulness** or **legality**. Generally speaking, illegal agreements are void in the sense that they do not create valid and binding obligations on the parties. Legality, as a requirement for the validity of agreements or contracts, relates to the fact that a contract may not be entered into in contravention with any statutory provision or with the common law.

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<sup>72</sup> Christie 2001:259-312

#### **4.1.4.1. Illegality Due to a Contravention with Statutory Provisions**

Statutes may expressly prescribe that contracts concluded in contravention of any or certain of their provisions are void<sup>73</sup>.

Examples of such prohibited contracts are the prohibition placed on the sale of drugs in terms of the *Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971* and the regulations placed on the sale and distribution of alcohol in terms of the *Liquor Act 27 of 1989*. Such contract can obviously never be valid and are therefore always void *ab initio*.

Even though a statute does not expressly prohibit the conclusion of a contract, it is still possible that agreements concluded in contravention of any prohibited conduct in terms of the relevant statute may be void. This is especially so where, a criminal sanction is placed preventing certain activity<sup>74</sup>. For this reason it is clear that an examination of potentially relevant legislation may be in order to determine the legality of a particular contract.

#### **4.1.4.2. Illegality Arising out of a Contravention of the Common Law, Public Policy or *Boni Mores***

In the matter of *Sasfin (Pty) Ltd v Beukes*<sup>75</sup>, Smalberger JA accepted that the term “common law” (relating to the legality requirement of a contract), could be taken to include legality arising from a contravention of public policy or the *boni mores* of society. The three terms are thus capable of being used interchangeably, according to the honorable court. According to Smalberger JA, in the case of *Eastwood v Shepstone* 1902 TS 294 at 302 : “*Now this Court has the power to treat as void and to refuse in any way to recognize contracts and transactions which are against public policy or contrary to good morals.*”

This “power” is not to be exercised too frivolously or too easily, as it is essential to recognize and uphold the freedom to contract as far as possible. Even though the court’s power is not to be exercised “frivolously”, when one enters the realm of what is deemed to be in the good morals of society, it is a rather subjective judgement call that needs to be exercised each time. This makes the decision a difficult one and opens the door to inconsistency and the sensitive task of working ones way around the virtual minefield of widely differing views on social morality. Inevitably,

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<sup>73</sup> Christie 2001:391-398

<sup>74</sup> Christie 2001:393

<sup>75</sup> *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 7I – 9A

judgement on morality stirs up emotion in sectors of the society who, harbor diverging views on the point in question – complicating matters even further.

Contracts may be declared struck down on the basis of illegality, based on the following elements<sup>76</sup>, as expounded in both the *Sasfin* case as well as *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) :

1. Public policy favors the utmost freedom of contract,
2. Public policy takes into account the necessity of doing simple justice between man and man,
3. The power to declare a contract or a term in a contract contrary to public policy and therefore unenforceable should be exercised sparingly and only in the clearest of cases,
4. Nevertheless a contract or a term in a contract may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to social or economic expedience, or is plainly improper and unconscionable, or unduly harsh and oppressive.

Christie gives numerous *examples* of contracts which may be illegal and thus unenforceable due to illegality and cites contracts injurious to the State<sup>77</sup>, contracts encouraging crime, delict or unlawful acts<sup>78</sup> and those injurious to the institution of marriage<sup>79</sup> as instances in point.

Gambling contracts used to be unlawful due to their inconsistency with public morality and used to constitute so-called *natural obligations*. These obligations were not enforceable in terms of the law. This meant that although the contracts were not void from the start, any obligations flowing from the contracts could not be enforced by taking the matter to court. This position has changed with the introduction of the *National Gambling Act 33 of 1996* and the *Lotteries Act 52 of 1997*. These Acts make specific provisions for the legality of gambling contracts under certain conditions and circumstances and furthermore make provision for the possibility to lawfully reclaim certain gambling debts incurred in terms of the Acts. Gambling debts not covered by the Acts remain subject to the common law and are thus still unenforceable<sup>80</sup>.

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<sup>76</sup> Christie 2001:400

<sup>77</sup> Christie 2001:404-405

<sup>78</sup> Christie 2001:411-413

<sup>79</sup> Christie 2001:413-415

<sup>80</sup> Christie 2001:435

#### 4.1.4.3. Unreasonableness

Van der Merwe<sup>81</sup> describes the matter as follows: “*The question whether freedom of contract should be limited to effect ‘simple justice’ between contractants does not arise in certain types of contracts only, but may arise for consideration whenever an agreement is alleged to be excessively unfair or unreasonable.*”

An agreement may be construed as “unfair” if it is contrary to the public interest, while the individual parties’ interests and the interests of society must also be taken into consideration. In the case of *Sasfin (Pty) Ltd v Beukes*<sup>82</sup>, the court weighed the sanctity of the principle of freedom of contract against “simple justice between man and man”. In this matter, Beukes was a medical doctor who had concluded a very binding contract with Sasfin.

The court mentioned on page 13H, that, “*He would virtually be relegated to the position of a slave, working for the benefit of Sasfin. What is more, this situation could have continued indefinitely, at the pleasure of Sasfin. Beukes was powerless to bring it to an end.*”

At 10A-B, the court described the contract as “*heavily biased in favour of Sasfin. It was obviously tailored, from Sasfin’s point of view, to cover every conceivable legal loophole, and to provide security for Beukes’ indebtedness to Sasfin – it sought to ensure maximum protection of Sasfin’s rights while at the same time subjecting Beukes to the most stringent burdens and restrictions.*”

In the *Sasfin* matter the court found that the agreement far exceeded the company’s interests that it was intended to protect. The fact that the contract had effectively been placed into “*commercial bondage*” rendered it unfair and thus illegal and unenforceable on the basis of unreasonableness and illegality.

Van der Merwe stipulates that *Sasfin’s* decision must not be interpreted to mean that the unreasonably harsh or unconscionable effect of a term between the parties is *by itself* a sufficient ground for making an agreement illegal. Other facts must also be considered – in the case of Beukes – that the restriction would unreasonably limit the party’s ability to engage freely in commercial or professional activities within the domain of his or her own autonomy<sup>83</sup>.

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<sup>81</sup> Van der Merwe 2003:200

<sup>82</sup> *Supra*

<sup>83</sup> Van der Merwe ea 2003:201-202

#### **4.1.4.4. Illegality with Respect to the Conclusion or the Performance Intended by a Contract**

In addition to the aforementioned principles relating to illegality on the basis of either statutory provisions or common law, it is important to recognize that illegality can take more than one form and covers illegality with respect to both the **conclusion** of the contract as well as the **performance** created in terms thereof. It is conceivable that a contract may be concluded lawfully but may have as its purpose something, which is illegal – thereby tainting the entire contract with illegality. An example of a legally concluded contract with an illegal purpose will be where a pistol is legally purchased from an authorized vendor, but that the parties agree that it should be used to kill a third party.

#### **4.1.4.5. The Consequences of Illegality**

When a contract is illegal due to unlawful performance or due to it being concluded in contravention of an express statutory provision or the common law, the question to be asked is what the consequences should be of such illegality. As a general rule of thumb, if a contract is illegal, then one of the necessary requirements for the conclusion of a valid and binding contract have not been met and strictly speaking, no contract has come into being or the contract is void *ab initio*<sup>84</sup>. Another possible consequence of illegality is to steer away from the harsh consequences of a declaration of voidness and rather move in the direction of unenforceability.

**Unenforceability** means that a claim for performance in terms of an illegal contract will not be allowed in a court. The basis for this is the maxim *ex turpi vel iniusta causa non oritur action* – which, literally translated means “out of a scandalous cause originates no action”<sup>85</sup>.

Further to this, the *in pari delictum* rule also applies in the sense that the rule reflects the policy interest not to allow parties with “unclean hands” to approach the court. The right to reclaim in terms of a contract is subject to the qualification that a party to an illegal agreement, who acted wrongly or “*in delicto*” in concluding the agreement and performing, cannot subsequently attempt to reclaim the performance made<sup>86</sup>. The *in pari delictum* rule applies to cases where one or both parties are in the wrong, but can obviously not find application where a party acted completely properly and thus not *in delicto* whatsoever. The *in pari delictum* rule differs from the principle of

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<sup>84</sup> Van der Merwe ea 2003:183-186

<sup>85</sup> Van der Merwe ea 2003:187

<sup>86</sup> Van der Merwe ea 2003:188-193



*ex turpi causa*, which deals with the unenforceability of a contract, which lacks the element of legality. The *in pari delicto* rule prevents a guilty party from approaching the court to reclaim any performance already made in terms of an illegal contract.

#### **4.1.4.6. Severability of Illegal Contracts**

Severance may roughly be defined as the process of severing an illegal portion from a contract, while maintaining the remainder as lawfully enforceable<sup>87</sup>. This is another attempt at maintaining the validity of a contract and respecting the freedom of the parties to contract to the greatest possible extent. Obviously severance of the bad portion of a contract is to be preferred to the declaration of invalidity of the agreement as a whole. Before severance can be considered, the contract in question needs to be capable of being severed. Clauses or portions, without which the remainder of the contract would make little sense or fall away, will not be capable of severance. In *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A), the offending clauses were held not to be capable of severance by Smalberger JA, : “*Most, if not all, of the clauses which offended against public policy are fundamental to the nature and scope of the security which Sasfin obviously required. They contain provisions, which are material, important and essential to achieve Sasfin’s ends; they go to the principle purpose of the contract, and are not merely subsidiary or collateral thereto. If those clauses were severed one would be left with a truncated deed of cession containing little more than a bare cession.*”

It is thus clear, that the offending portion of an agreement may be removed and the rest enforced, if the portion, which is illegal does not constitute the material or most important portion of the contract.

#### **4.1.5. Possibility of Performance**

With respect to this requirement, the generally applicable rule applicable is *impossibilia nulla obligatio est*<sup>88</sup>. This maxim implies that, at the time when a contract is entered into, the performances due in terms of the said contract must be possible – “possibility” in this sense to judged objectively and not subjectively. As mentioned, the key moment at which the requirement has to be fulfilled is at the point at which the contract is *concluded* and not materialize thereafter<sup>89</sup>.

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<sup>87</sup> Christie 2001:448-449

<sup>88</sup> *Hersman v Shapiro & Co* 1926 TPD 367 at 375-377

<sup>89</sup> Van Rensburg ea 1994:212-213

The maxim *difficultus praestandi neminem excusat* implies that mere subjective difficulty regarding performing in terms of a contractual obligation will not be sufficient make it objectively impossible.

If, at the moment of contracting, the performances intended are objectively or absolutely impossible, then one of the necessary requirements for the conclusion of a contract is lacking and the contract is, strictly speaking, void. This has to effect that none of the obligations relating to the intended performance or to any counter-performance arise<sup>90</sup>. This requirement for the conclusion of a contract must be distinguished from the situation which will ensue should performance become impossible at some later stage after proper conclusion.

Absolute or objective impossibility is not to be taken too literally. Sometimes a performance may be physically possible, but impossible in the eyes of the law. To judge this, the performance must be viewed from the point of view of the general standard of conduct required in business dealings within a particular community. This means that the concept of “economic impossibility” could come to the fore. An example of this is where performance is possible seen objectively, but would be completely unreasonable in relation to the object of the contract. For example, while an agreement to raise the Titanic may be physically possible, the law may view it as legally impossible in certain circumstances<sup>91</sup>.

#### **4.1.5.1. Effect of Impossibility**

The main question relating to impossibility of performance revolves around the relationship between the parties afterwards and who should carry the responsibility for any loss, which may ensue. As a point of departure, it should be remembered that if the performance is objectively impossible at the moment of conclusion, then no contract or obligations arise.

Conflicting authority exists with respect to the way in which any damages resulting from such a contract should be handled. In the matter of *Van der Westhuizen v James*<sup>92</sup>, the court decided to hold the *bona fide* seller of a non-existent farm liable for the costs incurred but the other party in trying to trace the land. By contrast, in the matter of *Lediker and Sachs v Jordaan*<sup>93</sup>, the court

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<sup>90</sup> Van Rensburg ea 1994:212

<sup>91</sup> Van Rensburg ea 1994:212-214

<sup>92</sup> *Van der Westhuizen v James* 1898 5 OR 90

<sup>93</sup> *Lediker and Sachs v Jordaan* 1898 5 OR 107

refused to award damages to the plaintiff, but made it clear that it would have done so had their been negligence on the part of the defendant.

A claim for damages based on such a *causa* should thus be dispensed with in accordance with the requirements of a normal delict<sup>94</sup>.

#### **4.1.6. Prescribed Formalities**

In relation to this requirement for the conclusion of a valid contract, a distinction must be drawn between formalities expressly required in terms of **statute** relating to specific types of agreements and formalities imposed by the **parties themselves**.

Formalities are those preconditions or requirements, with which a contract must comply in order to be valid. Many formalities are possible, the most common of which being those relating to the contract being in writing and signature thereof. A party making an offer may lay down requirements for the acceptance of the offer, in relation to where, when and how the acceptance is to take place. These conditions are **not** to be confused with the formality requirement and in fact have nothing to do with it, but rather fall under the offer and acceptance portion of the discussion.

Non-compliance with formalities laid down either by the parties or in terms of a statute result in the contract being void. This is the case since compliance with the prescribed formalities is a prerequisite for the validity of a contract.

Performances rendered in terms of such a void contract have been made *sine cause* and can thus be recovered or reclaimed in terms of the law of enrichment.

#### **4.1.7. Certainty of Performance**

A further requirement for a valid agreement is that the agreement must bring about certainty regarding its legal consequences. Failure by the parties to clarify the performances in the agreement and/or how the obligations are to operate will result in the contract being *void for vagueness*<sup>95</sup>. A court will not easily declare a contract void on this basis and will only do so in the

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<sup>94</sup> Van der Merwe ea 2003:174

<sup>95</sup> Van der Merwe ea 2003:203

event that all the measures of interpretation have been exhausted and a meaning can still not be attached to the words<sup>96</sup>.

Obligations must either be determined with certainty by an exhaustive agreement<sup>97</sup> or must be determinable in relation to an objective external standard such as “market price”. An agreement to agree on a point at a later stage will not be sufficient<sup>98</sup>.

In the *Sasfin* matter, the Appeal Court rules that the requirement cannot be circumvented by means of waiver, even if the clause was exclusively beneficial to the party wishing to provide the waiver.

#### **4.2. Time and Place of Conclusion of Contracts**

Although the question as to where and when a contract is concluded may at first sound irrelevant even somewhat self-evident, this is not always the case. In many cases, the determination of the exact time and place of conclusion may be absolutely essential in determining the proper legal position in which the parties find themselves.

Determining the precise time and place at which a contract came into conclusion may be important for certain of the following reasons:

##### **(a) Jurisdiction**

It is a commonly known fact that a litigant may take the point that a particular court has no jurisdiction to hear a matter. Although this will normally not be a problem in the High Courts, problems with respect to contractual jurisdiction may occur the lower courts due to strict and binding principles laid down in the *Magistrate’s Court Act 32 of 1944*<sup>99</sup>.

##### **(b) Applicable law**

Another important factor to consider is that the place at which a contract is concluded may, in the absence of a choice of law clause, determine the legal system in accordance with which the matter must be adjudicated.

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<sup>96</sup> Van der Merwe ea 2003:284

<sup>97</sup> Van der Merwe ea 2003:205-206

<sup>98</sup> Van der Merwe ea 2003:206-207

<sup>99</sup> Section 28(1)

### (c) Avoidance of lapsing of offer

A further matter touched by the necessity to determine the exact time of conclusion related to an offer which will lapse at time stipulated by the offeror. It is an accepted fact that an offer will lapse after a reasonable time if it remains unaccepted. It is similarly possible for the party making the offer to prescribe a date and/or time at which the offer will, lapse if not accepted.

If a deadline has been set by the person making the offer and the other party wishes to accept, but fears that his acceptance may be too late, then it is of crucial importance to determine precisely at which moment the contract came into being. Should it be ascertained that the acceptance took place after the deadline - then the offer would have fallen away and acceptance thereof would be impossible. No contract could thus have come into being, and the party interested in accepting the contract would lose out. It is easily conceivable that should such a contract be allowed to pass by without being accepted on time, the interested party may lose a considerable amount of money or even out on the bargain of a lifetime.

#### 4.2.1. Theories

Various theories are employed to determine the place and time for the conclusion of a contract. The reason why it is necessary to be able to ascertain when and where a contract was concluded are clear from the aforementioned discussion. The theories tie in with the basic principles of offer and acceptance in an attempt to determine the exact point at which consensus occurs and should be, read together with the aforementioned portion dealing with offer and acceptance.

##### 4.2.1.1. The Information Theory

The **information theory** relating to the time and place of conclusion is accepted to be the general rule. According to the information theory, a contract is concluded *when and where consensus is reached*, usually at the place where and the moment when a person who has made an offer is actually *informed* that the offer has been accepted<sup>100</sup>. In other words, the information theory appears to revolve around the *subjective knowledge* of the party making the offer, in the sense that the contract only comes into being once such person becomes *aware* that the offer has been accepted. The contract will, therefore, be deemed to have been concluded at the place and time at which the party having made the offer comes to know thereof. Van der Merwe explains further

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<sup>100</sup> Van der Merwe ea 2003:61

that he regards the “cut-off” point between negotiation and binding obligations to be proper consensus<sup>101</sup>.

### **Departures from the Information Theory**

In the past the information theory was employed by our courts, to determine the time and place of conclusion irrespective of whether, the contract was concluded *inter praesentes* or *inter absentes*. Clearly, with technological advances in communication and contracts being concluded by parties via a wide variety of means, the information theory may not always be appropriate.

#### **4.2.1.2. The Expedition Theory**

In 1921, the Cape court investigated the applicability of the information theory in the matter of *Cape Explosive Works Ltd v South African Oil & Fat Industries Ltd*<sup>102</sup> and a different approach was adopted in respect of contracts concluded via the post *inter absentes*.

In the *Cape Explosive Works* case, the court moved in the direction of a new theory, in terms of which a **commercial contract** concluded via post came into being at the time and place that the letter in terms of which the acceptance took place was **posted**<sup>103</sup>.

This theory was aptly termed the “expedition theory”. This is in contrast to the information theory because in terms of the aforementioned theory, the contract would have come into being at the place and time that the party making the offer received the letter of acceptance, opened it and became aware of its consequences. The decision in the Cape court was confirmed in 1939 in the matter of *Kergeulen Sealing & Whaling Co Ltd v Commissioner of Inland Revenue*<sup>104</sup>.

In the *Cape Explosives* matter at page 266, Kotze JP, mentioned the following: “...where in the ordinary course the Post office is used as the channel of communication, and a written offer is made, the offer becomes a contract on the posting of the letter of acceptance”.

By the words “Post office”, being used as a channel, the conclusion may be reached that the expedition theory is restricted to instances of postal contracts in the true sense of the word and *not* to all contracts concluded *inter absentes*.

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<sup>101</sup> Van der Merwe ea 2003:62-70

<sup>102</sup> *Cape Explosive Works Ltd v South African Oil & Fat Industries Ltd* 1921 CPD 244

<sup>103</sup> Van der Merwe ea 2003:61-62

<sup>104</sup> *Kergeulen Sealing & Whaling Co Ltd v Commissioner of Inland Revenue* 1939 AD 487

In spite of this, the expedition theory has been applied to contracts concluded by **telegram** in the matter of *Yates v Dalton* 1938 EDL 177. The application of the expedition theory to telegrams has since been questioned both by South African and English courts<sup>105</sup>.

Contracts concluded by **telephone** (and by modern analogy cellular phones) are dealt with in terms of the information theory and not the expedition theory. The reason for this is that a conversation over a telephone is for all practical purposes the same as being *inter praesentes*. The ratio for the adoption of the expedition theory is varied. On the one hand, there is the idea that if the party making the offer does so by post, he is **tacitly prescribing** that acceptance should take place by post as well. This explanation is however not widely accepted.

The other explanation revolves around the concept of **risk** and on whom the risk should fall. The ratio for the expedition theory in terms of this means of explanation is derived from the fact that in the past, post was (and arguably still is) somewhat unreliable. For this reason, a party choosing to make an offer by post should bear the risk that the acceptance - also sent by post - may never be received. This was furthermore deemed to be fair because the person wishing to accept the offer should not be placed into a position where he does not know whether or not the acceptance has been received and the contract thus finalized.

The theoretical basis for the expedition theory is thus the creation of, what Van der Merwe calls, a kind of “risk liability”<sup>106</sup>.

To make matters even more complicated, it would appear that the use of the expedition theory is not as clear-cut as one would like to think. Owing to the theoretical basis of the expedition theory, being risk placed on the party making the offer, the following would seem to apply:

- The theory, will only include risks typically associated with postal service and will be excluded by any external or abnormal circumstances, which cause disruption.
- A **restriction of the theory** may be justified since the “risks” associated with the postal service are not caused by the party making the offer – although he may be aware thereof.

For these reasons, the courts have found that the moment of expedition of the acceptance will not always and unconditionally apply. In the matter of *A to Z Bazaars (Pty) Ltd v Minister of*

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<sup>105</sup> *Ex Parte Jamieson: In re Jamieson v Sibago* 2001 2 SA 775 (W)

<sup>106</sup> Van der Merwe ea 2003:62-63

*Agriculture* 1975 3 SA 468 (A), the court held that even though the offeree had posted the letter of acceptance, this could be cancelled by another correspondence which would reach the party making the offer before the former one was received. The actual and final intention of the party accepting the offer would thus prevail. In *SA Yster & Staal Industriële Korporasie Bpk v Koschade* 1983 4 SA 837 (T), the court held that the expedition theory would also be excluded if the offer contained a specific provision that the moment of reception would be decisive<sup>107</sup>.

The obvious questions to be asked following this development are the following:

1. What are to be considered as “risks typical of the postal service” and should loss through theft be included in such risks in the South African context?
2. Would e-mail be included under the definition of “post” for the purposes of this theory?

For the purposes of the application of the expedition theory, the following general conclusions may be reached:

- If the party making the offer does so by post (using the Post office as a channel) and the other party accepts the offer by post, the expedition theory is used.
- Once this is the case, the offer has been concluded at dispatch of the letter of acceptance, even though the party making the offer does not even know about its acceptance.
- The risk, relating to the loss of the letter of acceptance, or any delay in its arrival will be borne by the party who made the offer.
- The expedition theory is **not absolute** and shall not apply in instances where it is expressly stated in the offer that acceptance is only valid upon receipt thereof or in cases where the intention of the acceptor to cancel his acceptance is sent to the person who made the offer and reaches the person who made the offer before the letter.

In spite of all of this, the courts<sup>108</sup> have formulated what may be called a “general rule” of sorts, relating to the application of the expedition theory as opposed to the information theory:

*“An implied or presumed mode of acceptance may be prescribed by law in some special situations, as the case of an acceptance by letter through the post, but if the terms of the offer are clear as to the mode of acceptance they prevail. If they are obscure and lack clarity as to the manner of acceptance, the presumption that the contract is concluded when and where the offeror comes to hear of the offeree’s acceptance should prevail.”*

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<sup>107</sup> Van der Merwe ea 2003:65

<sup>108</sup> Per Rose Innes J in *Millman v Klein* 1986 1 SA 465 (C) at 475



#### **4.2.1.3. The Reception Theory**

The reception theory is another theory advanced by some jurists in South Africa and relies on the moment and place of receipt of the acceptance to determine the place and time of conclusion<sup>109</sup>.

This theory would differ from the expedition theory and the information theory in the sense that the contract would be deemed to have been concluded once the letter of acceptance was received by the party making the offer, even though the letter of fax had not even been opened or read – and had hence not come to the attention of the person.

#### **4.2.1.4. The Objective Theory**

Sometimes the conduct of the parties to an agreement may be reasonably interpreted so as to indicate consensus. Kerr deals with this under the heading of “apparent consensus” and states that these will include cases where there are all the appearances that a contract has been concluded but where it may subsequently be shown that there is actually no agreement. Kerr states that the reason for this is that a person’s mind is normally evidenced by his words and/or conduct<sup>110</sup>.

The rule for this theory of contract conclusion is enunciated in *Smith v Hughes*:

*“If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”*<sup>111</sup>

For a party’s objectively interpreted conduct and/or words to be thus binding, a Court must have regard to all the circumstances and decide not only whether the other party’s interpretation was *reasonable* but that it must have been a *necessary inference*<sup>112</sup>.

Should there be no doubt as to the words of the contract or the application of the circumstances to the position, the onus will be on the defendant to show cause why he should not be bound by the contract to which he has apparently given consent<sup>113</sup>. If there is such doubt, then the onus will be on the plaintiff to prove that the defendant is indeed bound to the contract by his behavior or

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<sup>109</sup> Van der Merwe ea 1993:43

<sup>110</sup> Kerr 1998:9

<sup>111</sup> *Smith v Hughes* (1871) LR 6 QB 597 at 607

<sup>112</sup> *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417

<sup>113</sup> *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A)

words. A different view was taken in the case of *Allen v Sixteen Stirling Investments*, however Kerr notes that in this case important authorities were not mentioned and those cited were arguably not directly in point<sup>114</sup>.

#### **4.2.2. Time and Place of Conclusion of Online Contracts**

“Online contracts” are defined by Buys as a “*contract created wholly or in part through communications over computer networks, by e-mail, through web sites, via electronic data interchange and other electronic combinations.*”<sup>115</sup> The question as to the correct theory to apply to Internet contracts and communications was up to recently a difficult and academic task. With no court precedent<sup>116</sup> and the task of deciding which theory to apply in relation to the time and place of conclusion of Internet contracts was vague and left to academic debate.

Although the *Electronic Communications and Transactions Act of 2002* did shed some light on the otherwise dark matter, the problem had not been resolved since the Bill was not binding. After August 2002, the Act came into effect and the position became clarified at last. This will be discussed in more detail later<sup>117</sup>. **Chapter 3** of the Act contains numerous provisions that finally place it beyond doubt that online agreements are in fact valid and enforceable.

Just because the law no longer has any objections to the conclusion of contracts via electronic means in principle (in fact it is allowed via legislation), this does not necessarily mean that every contract thus concluded is automatically valid. The purpose of this work is to examine the individual elements and requirements for the conclusion of a contract and to determine whether the standard requirements are compatible with online contracts. In addition to this, the possibility must be explored that certain of the elements may adapt more problematically than others to online application.

##### **4.2.2.1. Theories of Consensus Applicable to Online Contracts**

From the above discussion, it is clear that the information theory is taken to be the general rule. The information theory relies on the contract coming into being when the offeror comes to *subjectively know* of the acceptance thereof. In South Africa, the information theory is applied irrespective of whether or not the parties are *inter absentes* or *inter praesentes* and irrespective of

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<sup>114</sup> *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D)

<sup>115</sup> Buys ea 2000:161

<sup>116</sup> Van der Merwe ea 2003:66-69

<sup>117</sup> See paragraph 4.2.2.2.

whether the communication is instantaneous or non-instantaneous<sup>118</sup>, unless the contract is a true postal contract – in which case the expedition theory may apply. The position in other countries is slightly different, and perhaps arguably more suited to the eventual adaptation towards contracts concluded online.

#### **4.2.2.1.1. The USA**

The position in the United States is much akin to the position advocated by the authors of chapter 6 in Buys' work, which shall be discussed in more detail later – suffice to say that the position in the USA may be summed up as follows:

The test employed in the United States, unlike the position in South Africa, rests on two legs. In the first instance, acceptance given by telephone or other mediums of substantially instantaneous two-way communication is governed by the same principles applicable to acceptances where the parties are *inter praesentes*<sup>119</sup> (in other words similar to the information theory).

This is different from the position in South Africa, where the information theory is applied *ex lege* as a general rule. Only in cases where a postal contract is concluded can there be an exception. The reason for this is due to the test concluded to determine whether the means of communication at hand could qualify as being capable of placing parties in the same or similar position as though they had been in the presence of the other.

The test used in the USA, implies that before a method of communication can be considered akin to *inter praesentes* communication, it must be substantially *instantaneous* and *two-way*. It must thus be instantaneous or at least *virtually instantaneous*<sup>120</sup>. This is the approach (to be discussed below), which is more advocated in South Africa by the authors of Buys, Chapter 6.

#### **4.2.2.1.2. English Law**

In terms of English Law, the information theory (like the one applied in South Africa) is applied to contracts concluded in all cases where the means of communication is instantaneous – no matter whether or not the parties are *inter absentes* or *inter praesentes*. The expedition theory is applied in English Law in cases where the contract is concluded *inter absentes* **and** where the

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<sup>118</sup> Buys ea 2000:161-165

<sup>119</sup> Buys ea 2000:167

<sup>120</sup> Buys ea 2000:167

means of communication is non-instantaneous. Examples of non-instantaneous means of communication are post and telegram.

#### **4.2.2.1.3. South Africa**

Prior to the clarification that was brought about by the *Electronic Communications and Transactions Act* in this regard, there were three approaches in South Africa when attempting to decide on which theory of contract is applicable to online agreements.

##### **4.2.2.1.3.1. The Approach According to Hawkins v Contract Design Centre (Pty) Ltd**

This case confirms the above statement that the information theory finds application in South Africa with respect to contracts concluded both *inter praesentes* as well as *inter absentes* whether instantaneous or not – except for true postal contracts. Of course, e-mail messages will not pass for postal contracts and the assumption must therefore exist, that the information theory will also apply to contracts concluded online. Naturally, the information theory may conceivably lead to problems, especially where time is of the essence and a positive acceptance is dispatched but lost or delayed until after the lapsing of the offer.

##### **4.2.2.1.3.2. The Inter Praesentes Approach**

This is an approach recommended and put forward by the authors of chapter 6 of Buy's work<sup>121</sup>. Unlike the present position in South Africa with respect to the information theory, the approach functions by making a distinction between instantaneous and non-instantaneous communication. The reasoning behind the seeking of a new theory is to find one that will be able to accommodate contracting online and the use of means of communication, which are not instantaneous but are also not contracts and communications concluded or sent via the post.

This is necessary, because if this is not done, the information theory will apply by default to online contracts in South Africa and may not be the most advantageous or fair theory to apply. For this reason, the approach followed in the USA is advocated for use and application here. If this is done, the result would be that a strict and rigid division would no longer be made between postal contracts (using the expedition theory) and all other forms of contracts (using the information theory), but would require an investigation into the actual nature of the communication at hand.

#### 4.2.2.1.3.3. The Approach According to Buys

It can be mentioned that contracting on the Internet will almost always be *inter absentes* – leaving the only question to be answered whether the type of communication used is instantaneous or not.

Contrary to popular belief, communication over the Internet can take quite a number of forms and differ according to their nature.

Not all means of communication online are instantaneous. Methods of communication such as the IRC (Internet Relay Chat) may well be regarded as instantaneous, because the communication between the parties takes place simultaneously and is “live”.

E-mail may be quick and comparatively reliable, but this does not mean by any stretch of the imagination that it is instantaneous as a reply (similar to a standard letter sent by post) can lie dormant in the inbox of a recipient for ages before being read.

According to Buys<sup>122</sup>, the functioning of e-mail may be summed up as follows:

*“Generally when the offeree elects to use the ‘send’ command the message will be deemed to have been ‘mailed’. The e-mail message travels to the sender’s server. The server acts as a central point for the collection and dispatch of messages from a number of computers, much like a corporate mailroom. The server then sends the message into the Internet much like a corporate mailroom hands a letter over to the postal service. At this point the message is then reassembled by the recipient’s server and placed in the recipient’s mailbox, where it awaits retrieval.”*

The key word in this quote is possibly “*awaits retrieval*”, because from this, it is clear that e-mail is nothing more than its name states – *electronic mail*. Though it is delivered almost instantaneously, does not mean that it will necessarily come to the attention of the recipient at any time soon. In fact, it could end up lying in the recipient’s inbox for a considerable time. For this reason, e-mail may not necessarily be seen as an instantaneous communication form, rather a form – akin to post - only more reliable.

To complicate matters even further, e-mail may under certain circumstances be considered to be more instantaneous. This will cover cases where the person is waiting for the e-mail and receives, same almost immediately.

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<sup>121</sup> Buys 2000:166-167

<sup>122</sup> Buys ea 2000:169

In the premises, the learned authors of the chapter in Buys' work<sup>123</sup> dealing with online contracts, draw the conclusion that the information theory may not do the whole idea of contracting online the requisite justice – due to the inherent potential for problems which may creep in.

The authors were thus of the opinion that the **reception theory** would possibly be best for the purposes of contracting online. The position in terms of the reception theory could be summarized by way of the following example:

- A party owns a commercial website advertising items for sale.
- A potential client visits the website and reacts to the advertisement.
- In South African Law, advertisements do not constitute offers, so the reaction by the client to purchase the item comprises the offer.
- The client sends the offer to purchase to the vendor via e-mail.
- The offer is received and the contract comes into existence once the client has received the vendor's acceptance thereof.
- For the purposes of the reception theory, the acceptance need not come to the attention of the client but should merely be received by him in good order, i.e. even if the e-mail confirming the order (and the agreement) is actually read later.

In contrast to the expedition theory, where the risk is placed on the party who made the offer by post, the **risk** in terms of the reception theory is placed on the party making the acceptance. The “risk” entails that the party has to ensure that the acceptance at least *reaches* the party making the offer before the contract can be concluded.

The problems with the information theory are mainly contained in the fact that online contracting is not instantaneous and having to wait until the acceptance physically came to the attention of the party making the offer may be unfair and prejudicial. These concerns may be addressed to some degree should the reception theory be adopted for online contracting.

#### **4.2.2.2. The Theory Prescribed by the Electronic Communications and Transactions Act**

There is no question that the aforementioned academic debate forwards a very convincing argument for the acceptance of the reception theory with respect to the time and place that a

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<sup>123</sup> Buys ea 2000:168

contract comes into being. To add to the confusion, the Supreme Court of Appeal in *S v Henkert*<sup>124</sup> confirmed that the information theory applies whenever the acceptance is instantaneous irrespective of whether or not the parties were *inter praesentes*.

Thankfully the Electronic Communications and Transactions Act brought a very well deserved and long awaited end to the confusion. **Part 2 of Chapter III** (which deals with Facilitating Electronic Transactions) deals with the communication of data messages, specifically in relation to the formation and validity of contracts.

**Section 22(1)** states that an agreement is not without legal force merely because it was concluded partly or in whole by means of data messages.

**Section 22(2)** provides the crux of the matter. It states that an agreement concluded via the transfer of data messages is deemed to be concluded at the time when and the place where the acceptance of the offer was received by the party who made the offer in the first place.

This is confirmation that the foreign influences have been accepted and that the **reception theory** has been accepted. It would therefore appear that the position in the *Henkert* matter has been superceded by the intervention of the legislature, to the satisfaction of all the proponents of the reception theory. I am of the opinion that the reception theory is indeed the most appropriate in the circumstances and that its results are more fair than the information theory in that the risk is effectively placed on the party responding to the offer as well as the party receiving same. The risk on the person answering the offer is to make sure the message gets to the recipient while the recipient will have to be on the lookout for the answer and ignores it at his own peril.

As regards the finer technical detail of when exactly a data message is deemed to have been “sent” or “received”, the Act goes further and provides a detailed explanation:

**Section 23(a)** states that:

*“a data message, must be regarded as having been **sent** by the originator, when it **enters** an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is **capable of being retrieved** by the addressee.”*

**Section 23(b)** goes on to deal with receipt and states:

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<sup>124</sup> *S v Henkert* 1981 3 SA 445 (A)

*“a data message must be regarded as having been **received** by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is **capable of being retrieved and processed** by the addressee.”*

With respect to the place, from which a data message is deemed to have been received or sent, **Section 23(c)** points out that the data message must be regarded as having been sent from the originator’s usual place of residence or business and as having been received by the addressee, at the addressee’s usual place of residence or business. Naturally, this presumption will be rebuttable and will in all likelihood be sent and received at the point at which the sender or addressee’s computer is at the time of the dispatch or receipt – although this remains to be clarified.

**Section 26(1)** of the Act simply confirms the previous academic theory that the agreement ought to be valid upon receipt of the affirmative answer and that it is not necessary for the addressee to acknowledge receipt.

The ECT Act has therefore confirmed that the reception theory is applicable to contracts concluded via electronic communications and brought an end to the myriad of debate that surrounded the issue prior to its enactment.



# CHAPTER V

## TYPES OF ONLINE AGREEMENTS

### 5.1. Types of Online Agreements

According to the authors of Chapter 6 of Buys'<sup>125</sup> work, the most common form of online contracts, are those in terms of which goods are purchased via the Internet at online-shopping malls or shopping-portals. Contracts formed over the Internet usually fall into three broad categories:

- (a) Contracts for the sale of goods,
- (b) Contracts for the supply of digitized products and
- (c) Contracts for the supply of services and facilities.

In amplification of this view, I am of the opinion that merchant-type contracts that are generally entered into over the Internet may be divided into two main groups: (1) those contracts concluded in reaction to an online advertisement, and (2) those not flowing from an online advertisement.

The difference between the two is crucial, because in South African law, an advertisement is not an offer, which means that the customer makes the offer and the whole process is effectively back-to-front!

When dealing with the actual manner in which a party to a contract indicates his or her acceptance to certain terms and conditions or indicated acceptance to the offer presented, the concepts of “shrink-wrap” contracts, “click-on” contracts and “browse-wrap” contracts become relevant.

**Shrink-wrap, click-wrap and browse-wrap** contracts refer to the way in which the contracts are concluded more so than the content thereof. The way in which courts have dealt with shrink-wrap, click-on and browse-wrap agreements is of particular interest and may shed light on the question as to the manner acceptable for the conclusion of online agreements.

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<sup>125</sup> Buys ea 2000:155-189

Naturally, the manner in which a contract is concluded is not conclusive with respect to the eventual legality thereof, but – as will be clear later – may be the only factor from which compliance with the requirements for the conclusion of contracts may be derived.

### **5.1.1. Shrink-Wrap Agreements**

Shrink-wrap agreements came into being with the advent of software sales increasing rapidly during the eighties and nineties. Together with increased sales came the increased danger of piracy (the illegal copying of computer software) and illegal use of software.

To combat this, “*agreements of use*” had to be concluded with the purchaser of the software in order to regulate the activities of the user and to prevent him or her acting in a way and dealing with the software in a way damaging to the producers thereof. This agreement came in the way of software licenses printed on paper, which was placed within the shrink-wrap of the software package itself – hence the name “*shrink-wrap*”.

The effect of the so-called shrink-wrap user licenses was thus that the purchaser only found out about the terms thereof once the package had been purchased and opened. These types of agreements were somewhat anomalous since they were, so to speak, “forced” upon the purchaser, who was not able to consider the terms of the agreement prior to purchasing the package and did not therefore have an opportunity to decline the purchase.

In spite of this, shrink-wrap contracts seem to have been accepted as legal and binding.

### **5.1.2. Click-wrap agreements**

These, sort of agreements are the online version of shrink-wrap contracts. Numerous articles have been published on the Internet concerning the validity and binding nature of click-on agreements. Since click-on agreements are “the real thing” as far as examples of online contracts are concerned, it is useful to consider them in greater detail.

Click-on agreements are those agreements built into Internet web pages. The purpose of these agreements are wide ranging, but they are commonly used for:

- Accepting term of use, eg. regulating access to websites with an adult content
- Containing exclusion clauses, in an effort to limit or deflect liability from the site owners or administrators

- License agreements

Click-wrap (or “click-on”) agreements are characterized by a window in which the content of the prospective agreement is contained and the “I ACCEPT” and “I DO NOT ACCEPT” buttons – allowing the user to decide whether or not to enter into the agreement. As will be discussed in a considerable amount of detail later, online agreements have certain fundamental difficulties, eg. the identity of the contracting parties, consensus and jurisdiction<sup>126</sup>.

With respect to normal contracts, the assent of a party to the agreement is based, *prima facie*, on the signatures in the case of written agreements. With online agreements, the agreement may be deduced from the action of the person accepting the relevant terms by clicking on the respective icon.

While contracts concluded verbally or by behavior are not necessarily less binding, there may be evidentiary questions. To address this, one of the key aspects of the click-wrap contract is that the user is *physically required to do something* in order for the conditions to be included in the contract. He has to click the accept button<sup>127</sup>.

In the USA, click-wrap contracts have not been accepted without reservation and have in certain cases failed to be binding on the “parties” thereto. In the American case of *Specht v Netscape Communications Corp.*, 150 F. Supp.2d 585 (S.D.N.Y.July3.2001), US District Judge, Alvin Hellerstein ruled that license terms contained in an “agreement” on the website of the defendant company were not enforceable against users who downloaded the free software from the site. The reason for the learned judge’s decision was that the users had *not been required to affirmatively agree* to the terms or were otherwise not aware of the terms at the time of commencing downloading.

This decision gives an important bit of insight into the requirements for a valid online contract, more especially regarding the element of consensus.

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<sup>126</sup> Harris 2001:2-3

<sup>127</sup> Harris 2001:2

In addition to accepting the contents thereof, by physical choice and action, the principle of **preventing surprise** also comes into play. “Surprise” in this sense refers to unknown or harsh terms that are unexpected in a particular type of agreement<sup>128</sup>.

#### **5.1.2.1. Guidelines for Validity of Internet Agreements in the USA**

According to the learned author, the following suggestions and guidelines exist with respect to the conclusion of a successful and binding agreement between persons offering a product for downloading and the user<sup>129</sup>:

- (a) The terms of the contract must be conspicuous and clearly brought to the attention of the user and should not be hidden away in an attempt to disguise or hide them away.
- (b) The user must be presented with a decision to accept or reject the agreement.
- (c) The user’s attention must be brought to any unusual or surprising terms within the agreement.
- (d) The agreement should be as short as possible and in the simplest language possible.
- (e) Payment and/or entry into the site should only be possible after acceptance of the license and conditions.
- (f) It should be easy for the user to exit should he or she not wish to accept the license terms.

In addition to this, it should be noted that mere downloading can, in itself, not be construed as assent to terms contained in the contract and the choice should still be given.

#### **5.1.3. Browse-Wrap Agreements**

A browse wrap agreement is similar to a click wrap agreement and is also found on websites. The main difference between a browse-wrap and click-wrap contract are that the browse-wrap contracts are not as enforceable as click-on contracts. The reason for the difference in enforceability is due to the procedure and layout of the two contracts.

In the aforementioned matter of *Specht v Netscape Communications Corp*, the court determined that for a binding contract to come into existence, the normal requirements for the conclusion had

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<sup>128</sup> Ramsay 2000:3

<sup>129</sup> Ramsay 2000:11-12

to be present and that with respect to the element of consensus – some or other form of *proof* was required that the party had *indeed consented* to the terms thereof.

As was clear in the *Specht* matter, the terms were found not to be binding because the user must be given an opportunity to read the agreement and a further opportunity to either consent or decline.

In the case of browse-wrap agreements, the user is not shown a copy of the contents of the agreement, nor is he given an opportunity to accept or decline them before continuing. For this reason, a user may proceed with his business on the given website without even having accepted the terms of the contract. While it may be true that even with click-wrap agreements, it is not possible to determine whether or not a person has actually read the terms before accepting<sup>130</sup>, an argument may be made that neither can this be done in real life contracts either.

Due to this, it is arguable that browse-wrap agreements would not comply with the guidelines in *Specht*.

On the other hand, **Section 11(2)** of the *Electronic Communications and Transactions Act* read with **Section 11(3)** of the UNCITRAL Model Law on Electronic Commerce incorporating Article *5bis*, seems to create a slightly stronger case for the acceptance of browse-wrap agreements.

For one, **Section 11(2)** prevents terms incorporated into a data message merely by reference from automatically being discriminated against purely on the grounds that they are in electronic format<sup>131</sup>.

In addition to this, **Section 11(3)** takes this slightly further by saying:

*Information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is:*

- (a) referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and*
- (b) accessible in a form in which it may be read, stored and retrieved by another party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.*

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<sup>130</sup> Harris 2001:3

<sup>131</sup> Rens 2003:22-23

## **5.2. South African Requirements for Online Agreements in terms of the Electronic Communications and Transactions Act**

### **5.2.1. Recognition of Data Messages**

To begin with and as mentioned above, **Section 11(2)** of the *Electronic Communications and Transactions Act* appears to prevent data referred to in a data message from being excluded or being prejudiced against by courts simply on the basis it is in electronic form.

### **5.2.2. Consumer Protection**

Further to this, the Act provides an entire section on Consumer Protection. **Chapter VII**, dealing with Consumer Protection only applies to electronic transactions and may be relevant in giving pointers with respect to the valid conclusion of online contracts.

The Chapter provides protection to consumers who engage in online-transactions in the following ways:

**Section 43(1)** compels an online supplier of goods or services for sale, hire or exchange by way of electronic transaction, to make the following information available to consumers on the web site where such goods are offered (*subsections (a) – (r)*):

- its full name and legal status of the supplier
- its physical address and telephone number
- its web site address and e-mail address
- membership to any self-regulatory or accreditation bodies to which that supplier belongs and the contact details of that body
- any code of conduct to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer
- in the case of a legal person, its registration number, the names of its office bearers and its place of registration
- the physical address where the supplier will receive legal service of documents
- a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction
- the full price of the goods or services, including transport costs, taxes and any other fees or costs

- the manner of payment
- any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers
- the time within which the goods will be dispatched or delivered or within which the services will be rendered
- the manner and period within which consumers can access and maintain a full record of the transaction
- the return, exchange and refund policy of that supplier
- any alternative dispute resolution code to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer
- the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information
- where appropriate, the minimum duration of the agreement in the case of agreements for the supply of products to be performed on an ongoing basis or recurrently
- the rights of the consumer in terms of Section 44 read with Section 42(2)(a) – (j)

### **5.2.3. Cooling-Off Period**

**Section 44** makes provision for a “cooling-off” period for consumers who partake in online transactions. In terms of Section 44(1), a consumer is entitled to cancel any transaction concluded over the Internet without giving any reason whatsoever and without any penalty:

- (a) for the supply of goods within seven days of the receipt of the goods<sup>132</sup>
- (b) for the supply of a service within seven days of the date of conclusion of the agreement<sup>133</sup>

According to **Section 43(2)**, a supplier must also provide the consumer with an opportunity to review the entire transaction, correct any mistakes and withdraw if desired.

In terms of **Section 43(3)**, if a supplier fails to comply with either subsections (1) or (2) of Section 43, the consumer may cancel the contract unilaterally within 14 days of receipt of the goods or services in question and full restitution must take place by both parties.

**Section 43(5)** provides that a supplier must use a secure payment system as measured against the accepted technological standards at the time of the transaction. According to **Section 43(6)**, the

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<sup>132</sup> Section 44(1)(a)

supplier is liable for any damage suffered by a consumer due to a failure to comply with Section 43(5).

If a contract has been unilaterally cancelled by a consumer within the required periods then the only charge that the consumer may be required to pay is the direct cost of returning any goods received to the supplier. If payment has already been made, the supplier must refund the consumer within 30 days of date of cancellation.

The **Section 44** “cooling off period” does not, however apply to<sup>134</sup>:

- financial services (*i.e.* Internet Banking transactions)
- goods purchased on auction
- supply of foodstuffs or things for everyday consumption
- for services which began with the consumer’s consent before the end of the seven-day period
- where the price of the goods is dependant on financial market and currency conversion fluctuations
- where the goods are made to the specifications of the consumer, were personalised or can expire or deteriorate rapidly
- where audio, video recordings or computer software were unsealed
- for newspapers, periodicals, magazines and books
- for the provision of accommodation or transport

There is no doubt that the consumer protection afforded, in terms of this Chapter of the Act are formidable - perhaps so formidable that they may face Constitutional challenges by organizations representing service providers or suppliers.

Nevertheless, while it is clear that certain information must be available on the web site, and that the consumer has certain, far-reaching rights in protection of his or her interests - nowhere in the Chapter is there any indication as to the *exact* manner in which, a consumer must indicate his acceptance to the contract or transaction concluded. This brings us back to the click-wrap versus browse-wrap debacle.

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<sup>133</sup> Section 44(1)(b)

<sup>134</sup> Section 42(2)(a) – (j)



**Section 11(3)** read with **Section 11(3)(a)** does, however, shed some well-needed light on the matter. These sections state that information incorporated into an agreement, which is not in the public domain is regarded as having been incorporated into a data message, if the information is referred to in a way that a *reasonable person* would have noticed both the reference thereto and the incorporation thereof. Furthermore, **Section 11(3)(b)** requires the information to be accessible.

Of crucial importance is to realize that South African law obviously differs from that of the United States, which is the source of most of these concepts. As will be discussed further on, when a customer reacts to an advertisement, it is the client that makes the offer and not the supplier of the goods or services. For this reason, the customer's offer shall have to embody and include acceptance of all the required terms and conditions relating to the purchase of the goods or services, so as to enable the supplier to decide whether to accept or not. It is for this reason that we have to distinguish between the broader concept of "acceptance" in relation to consensus and the "acceptance" of the terms and conditions before making an offer.

# CHAPTER VI

## VALIDITY OF ELECTRONICALLY CONCLUDED CONTRACTS

### 6.1. Legality and Validity of Internet Contracts

The purpose of this chapter of the work is to examine each Common Law requirement of a valid contract and investigate whether or not it can be applied to agreements concluded electronically and if so, how.

#### 6.1.1. Consensus

With respect to contracts concluded online, there are two broad categories into which these contracts may fall:

- cases where the customer reacts to an online advertisement, and
- cases where no advertisement is applicable.

##### 6.1.1.1. Contracts Concluded in Reaction to Online Advertising

In contracts such as these, the starting point is to remember and bear in mind throughout that South African Law does not recognize an advertisement as a binding offer on the part of the supplier.

This is substantiated by Van der Merwe's definition of an offer<sup>135</sup> as "*an expression of will, made with the intention of creating an obligatory relationship on certain or ascertainable terms with another (the addressee), and brought to the attention of the addressee, so as to enable him to establish the contract by accepting the offer as it was made.*"

Naturally, no supplier would have the *intention* to bind himself to an advertisement because a number of circumstances may ensue causing him not to wish to follow through on the advertisement any longer. Examples of these circumstances may be that there is a printing error on the advertisement or that the goods to be supplied in terms thereof have run out or become otherwise unavailable.

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<sup>135</sup> Van der Merwe ea 2003:54

In any event, it may be accepted that in South Africa, when a potential client reacts to an advertisement, it is him or her that makes the offer to conclude a contract. The offer is made to the supplier of the goods or services in terms of the advertisement.

In the case of online shopping, a customer may use his web-browser to visit any merchant web site and virtually browse around for what he or she is looking for. Merchant web sites (often also referred to as e-commerce sites) are often in the form of an online shopping mall<sup>136</sup> – which is a single site containing a wide variety of shopping possibilities from a variety of different sources. Some sites may be found on shopping portal sites. A “portal” site is a site that contains hyperlinks to other shopping sites and is the equivalent of choosing between going shopping at mall A or B<sup>137</sup>.

There are many details with respect to online shopping that are beyond the scope of this thesis as well as many advantages<sup>138</sup>, disadvantages and interesting tips. This work is however more focussed on the actual conclusion of the contracts rather than the different types of online media in which they may be presented.

As far as these forms of contracts are concerned, an e-commerce site visited by a potential or interested customer will normally contain numerous advertisements relating to the information on offer.

In terms of the Act, the process regarding the valid conclusion of online contracts will be fairly clear and more, simple than the position before the Act was in place. The reason for the clearer approach is that the Act provides fantastic guidelines relating to the minimum requirements for an e-commerce site, and also sets out the circumstances under which ensuing contracts will be valid. In the absence of the Act, the position otherwise is left to speculation and debate – full of uncertainty and open to much argument. The position with respect to the conclusion of online contracts as envisaged by the Act may be summarized as follows:

1. The customer will visit the site and see the advertisement that he or she wishes to react to.

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<sup>136</sup> For example the gift shop to be found at [www.celtic-corner.com](http://www.celtic-corner.com)

<sup>137</sup> For instance <http://www.freeserve.com/shopping>

<sup>138</sup> Gray 2001:9-22

2. The Act<sup>139</sup> stipulates that the site must contain certain minimum information, enabling the customer to openly and freely decide whether or not to make use of the site.
3. Among the information required to be on the site, any and all terms of agreement must be shown as well as any policies relating to return or exchange as well as the site's privacy policy.
4. The customer can peruse all this information at his leisure and decide whether or not to make use of the site.
5. If the customer decides to react to the advertisement, he or she will follow the procedures stipulated by the site in question to act.
6. Due to South African law specifying that an advertisement is not an offer, the customer's reaction will not be an acceptance to the advertisement, but rather an offer to the supplier by the customer.
7. The customer's offer will *include* any and all information, as well as any terms and conditions that were shown on the site.
8. According to the Act<sup>140</sup>, the reception theory is applicable to online contracts and the contract, will be deemed to have been concluded, at the moment when and the place where the customer receives the acceptance from the supplier that the contract has been concluded.
9. Naturally, this acceptance may also take the form of the provision of the services that have been sought or confirmation or delivery of the goods ordered.

What will make the application of the new law even more exciting and beneficial to legal certainty will be the provisions in Chapter VII (as discussed above). Chapter VII deals with consumer protection and relates to the consequences of the customer's exercise of his right to unilaterally cancel the contract and demand restitution as well as failure by the supplier to perform timeously or properly in terms of the agreement.

As far as proof of agreements concluded in terms of the new law is concerned, regard should be had to **Section 23(a), (b) and (c)** of the Act. These sections set out guidelines as to the meaning of "*sent*" and "*received*" in relation to e-commerce offers and acceptances. The advantage of making use of electronic means for the communication of offer and acceptance is that these forms of communication are, not only able to be proved with relative ease, but can also be tracked

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<sup>139</sup> Section 43(1)(a)-(r)

<sup>140</sup> Section 22(1)-(2)

electronically. This prevents a party from denying that he or she has sent or received a communication founding a contract.

#### **6.1.1.2. Contracts Not Concluded in Reaction to Online Advertisements**

As mentioned, not all, online contracts are reactions to online advertisements. If one browses the Internet, it soon becomes clear that there are many web sites with access restrictions in place. Some of these sites require payment for entry and normally provide a service or access to goods (such as sites of an adult nature that offer graphic images in exchange for paid membership). These sites arguably constitute advertisements to which the interested customers can react and which will be regulated by the principles discussed above under the previous heading.

Other sites contain access restrictions, but do not require payment and provide no goods or services. In these cases, entry to the site is governed and restricted by acceptance of certain terms and conditions of use and entry. Normally, the terms and conditions relate to the manner in which the site may be used and sometimes disclaimers with respect to the content thereof. Many of these sites require “membership” to the site. In most cases, applying for membership means having to complete a form with personal information and will also entail having to accept the aforementioned terms and restrictions of use. While the provision of personal information as a requirement for access may appear harmless, the potential for harm that it carries should not be underestimated.

Because in these kind of cases there is no mention of an advertisement and no goods or services are supplied, the only contract that is concluded is an agreement relating to acceptance of the terms and conditions upon which the site is used or the information therein is accessed.

As mentioned, the majority of these agreements consist of disclaimers as to liability concerning the content of the site as well as manner in which it may be used as well as licensing.

The difference between these, type of agreements as opposed to those concluded in reaction to an advertisement, is mainly legal of nature. With these contracts, unlike in the case of reactions to advertisements, the offer is made, by the host of the web site.

The process to be followed in terms of the provisions of the Electronic Communications and Transactions Act is:

1. The customer visits the web site and notices that before he or she can enter the site, there are certain conditions regulating the access and/or membership is required.
2. The customer is provided with a choice of whether or not to accept the conditions and terms before further progress is permitted.
3. This conditional entry to the site may be construed as an offer to the potential user.
4. If the user decides to accept the terms and conditions and enter the site, the offer is accepted.
5. In matters such as this, **Chapter VII** of the Act will not apply to protect the potential users. The reason is simply that they are not “consumers” as intended by the Act.
6. This implies that the web site host will be under no legal obligation to make any information available to the potential user – possibly making the choice of whether or not to accept the conditions and terms of use even more difficult.
7. Once in place, **Section 22** of the Act will apply and will make the Reception Theory applicable to contracts of this nature.
8. The contract will thus be concluded when and where the party making the offer (*i.e.* the web site host) receives the acceptance from the client.

#### **6.1.1.3. When Constitutes Proper Online Acceptance?**

In all instances of online contracting it obviously necessary for a party to indicate his or her intention by performing a binding act of acceptance. The question is how this is to be done effectively? In the case of ordinary paper contracts, signature provides a strong *prima facie* indication of consensus. In the case of oral contracts, the parties can present verbal evidence as to the existence of the contract and may even have witnesses to substantiate possible circumstantial evidence to the point. But what is the position with respect to online agreements?

It must be borne in mind that the term *acceptance* is ambiguous and may be used to refer to the following:

- In the case of online **contracts concluded in reaction to advertisements**, where there are conditions and terms involved, “*acceptance*” refers to the act of agreeing to any terms and conditions, which may exist. Once accepted, these become incorporated into the offer made. In these cases – acceptance (in the true law of contract sense) comes from the supplier who placed the advertisement.
- In the case of online **contracts where there is no advertisement**, “*acceptance*” is true acceptance of the direct offer made by the web site host and not acceptance of the terms included in the offer.

Although this may sound confusing, it is an important part of concluding valid and binding contracts over the Internet, and will therefore be discussed in more detail.

#### **6.1.1.3.1. Proper Acceptance of Contracts in Reaction to Online Advertisements**

In these cases, the customer who is interested in reacting to the advertisement needs to make the offer to the supplier. Often, there are terms and conditions applicable to the sale of goods or supply of services that the supplier requires the customer to accept before the deal can be processed.

In terms of the Act, the supplier's site will have to contain all the information needed to enable the customer to read, study and decide whether or not to accept. The Act falls short on this aspect and does not give any guidance as to what is required from the user to indicate acceptance.

The question in point is how does the customer indicate to the supplier his acceptance to the terms and conditions forming part of the offer to be made? Various methods are available but in order to effectively prove, that a user has agreed to the incorporation of any terms into the offer, some physical act is required to indicate agreement. Normally this is done by way of requiring the user to use the mouse to click on the "I AGREE" or the "I DO NOT AGREE" buttons. The fact that all the required information is by law presented to the user will make it very difficult for him or her to prove at a later stage that an uninformed decision was made.

Obviously, there is no way of proving that the user has actually read the content of any agreement or conditions, but the same may be said of normal contracts. The main thing is to make the information clear to the user, explain to him or her that it must be accepted and that the content is ignored at own peril.

In the absence of a directive from the Act, the guidelines as set out in *Specht v Netscape Communications Corp.*, 150 F. Supp.2d 585 (S.D.N.Y. July 3, 2001) as expounded above are very useful. They provide important information relating to the proper manner in which a user should be required to indicate assent online.

The fact that entry to the site should be dependant upon the user physically making the decision to accept or decline the terms and conditions - is a strong indication that the user at least must

have known that the idea was to read the content thereof. Pleading ignorance thereafter will not be easy. This increases surety and certainty in the contracting parties.

One section of the ECT Act does have to do with the issue to a degree. Section 20 deals with Automated Transactions where agreements are, concluded by an electronic “agent” acting on behalf of the other party. Since acceptance of terms and conditions is such a function (and in fact so might be the entire acceptance of many Internet contracts) this section applies. **Section 20(d)** states: “*A party interacting with an electronic agent to form an agreement is not bound by the terms of the agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation.*”

Furthermore, **Section 20(e)** states that *no agreement* is formed where a natural person interacts directly with the electronic agent of another person and has made a *material error* during the creation of a data message. The Section goes on to say that the natural person must be given an opportunity to review the matter and correct the error – or else no contract comes into existence. This may sound a touch harsh, but it is designed to prevent e-commerce dealers from taking advantage of consumers, some of whom may not be conversant with the use of technology.

If a web site merely “informs” a user of the terms and conditions before allowing him to continue automatically without physically indicating consent will *not* be binding and no contract would have come into being. Such a user could easily argue that he expressly disagreed with the conditions but was allowed access in any event.

By thus accepting the content of the terms and conditions set out, the user makes an offer to the supplier and the supplier may assume that the customer’s acceptance forms part of the offer.

#### **6.1.1.3.2. Proper Acceptance of Contracts Not in Reaction to Online Advertisements**

In cases where there is no advertisement, the above-mentioned principles apply as well. The only difference is that in these contracts the type of “acceptance” differs. Here, the offer of entry to a web site on certain conditions (but excluding the sale or rental of goods or services) constitutes an *offer* and the acceptance thereof constitutes conclusion of the contract and not merely an offer.

Despite this, the principles remain the same as far as requiring a potential user to indicate agreement is concerned. It is in instances such as these that **Section 20** of *the Electronic*



*Communications and Transactions Act* will be most applicable. This Section is crucial with respect to seeking to avoid being bound by such contracts, as the majority of these type of contracts do not have a human element involved – merely an electronic agent using the “if/then” function.

One will often find that with these, manner of agreements, the user will not be given an opportunity to correct mistakes or even to negotiate any portion of the conditions that are required to be accepted. It will then be possible to make out an argument that this, unilateral, all or nothing approach may be assailable, but the counter-argument will be equally strong – that the individual has a choice not to accept in the event of a disagreement with the stated terms.

#### **6.1.1.4. Binding Nature of Terms Not Read by the User**

What is the position regarding terms to an online agreement that are not read by the person purporting to have accepted them?

Failure to read the fine print is very common pitfall in all sorts of contracts – both ordinary as well as those concluded over the Internet. The general rule is that a party to a contract, who is given an opportunity to read the contract, but neglects to do so (at all or properly), does so at his or her own peril in accordance with the maxim *caveat subscriptor*.

Will this still be the position in the case of very long, very complicated, very detailed agreements that the user has supposedly agreed to by clicking on “I AGREE” - even though the web site host knows that no reasonable person would have taken the time to actually study it?

##### **6.1.1.4.1. Ticket Cases and Unread Contractual Terms**

The so-called “*ticket cases*” are very much applicable to this question. In most of these cases, the litigants have tried to escape a contract by alleging that they cannot be bound by the content thereof because they were not given an opportunity to read the terms thereof or that the terms were never specifically pointed out to them.

Do the terms of a contract need to be pointed out to a party thereto? Do unusual or particularly onerous terms need to be pointed out specifically? What if a party just clicks on “I ACCEPT” – expressly, electing to ignore the terms and conditions? Can it be said that the party has accepted that which he has not even taken note of?

All these questions are problematic in one way or another and require a brief examination of the law on this particular point, including the so-called “ticket cases”, if and where they may be applicable.

Ticket cases deal with the enigma of unsigned contracts and whether such contracts can be binding on “parties” thereto. Generally, an unsigned written agreement cannot be binding unless other evidence can be adduced to prove the agreement. Unsigned contracts containing terms and conditions are used by many businesses, which conclude contracts with customers in large scale. Examples would be theaters, airlines, railways, busses as well as online contracts. (Naturally this is not possible where writing and/or signature is required by law)

Van der Merwe<sup>141</sup> is of the opinion that it is the matter of *how* the ticket was issued that is decisive in deciding whether the contract is binding or not. According to van der Merwe, if there is *direct evidence* that the customer agreed (or appeared to agree) to the terms of the contract, then he will be bound. This evidence could be that the party read the terms and signified or appeared to signify his agreement therewith.

Obviously, and in the case of online contracts, the situation becomes much more complex where the party denies that they agreed to any contractual terms presented.

In the case of *Durban’s Water Wonderland (Pty) Ltd v Botha and Another*<sup>142</sup>, the respondent’s wife and child were injured in an accident involving a faulty amusement ride at the fun park. The appellant contested that it has a disclaimer, which excluded liability for negligence and loss, which formed part of the contract accepted by the respondent upon purchasing the ticket. The disclaimer was not even contained on the ticket, but was printed on the window of the ticket office. The respondent gave evidence that although she did not see the notice, she was aware that signs like that existed at similar parks.

The court had to decide, whether the respondent was bound by the disclaimer, even though she had not read the content thereof, nor had it been specifically pointed out to her by the park attendants.

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<sup>141</sup> Van der Merwe ea 2003:277-278

<sup>142</sup> *Durban’s Water Wonderland (Pty) Ltd v Botha and Another* 1999 1 SA 982 (A)

The court held that the onus of proving the terms of the contract that it relied upon, rested on the appellant. The court further held, that because the respondent had allegedly not seen the disclaimer notice, and thus had no knowledge of its content, the only way to decide whether or not she could be bound would be to investigate the steps taken by the appellant in bringing the notice to the attention of the visitors.

The court found that the appellant's positioning of the notice (that the notices were "*prominently displayed*") was reasonably sufficient to attempt to bring it to the attention of patrons.

In addition to this, the court held that because the disclaimer did not contain any terms, which would have been unexpected in such a notice, the respondent was validly bound and the appeal was upheld.

Van der Merwe<sup>143</sup> (whose work was written many years before this judgment) comes to a similar conclusion. He stated that in the case of unsigned contracts, the process of deciding whether or not they can be binding on people is based on two legs:

(1) Did the customer know whether there was writing on the ticket and that the writing contained terms of a contract? If so, then the client is bound *even if they did not read the contract*.

(2) Did the party wishing to rely on the contract take reasonable steps to bring the terms to the notice of the other party?

An additional question can be added to ask whether any portion of the contract is unfair or unexpected to the degree that it should have been pointed out to the client?

This goes far towards answering many prickly questions relating to unsigned online agreements.

In summary, the position relating to acceptance of terms in online agreements not read by the client is as follows:

1. Contracts will only be binding on contractants if:
  - The website takes reasonable measures to bring the content thereof to the attention of the client. Placing the content in a position where it is prominently displayed will probably be sufficient.
  - The website makes it clear that the terms and conditions therein contained constitute binding contractual terms.
2. In order to prove that the client actually saw the terms and is aware of the above, an opportunity must be given to them to accept or decline. It is for this exact reason why the

*Specht* case requires a physical choice (a click of the mouse on “I ACCEPT”) to be made by the client.

3. If the contract contains any unusual or unexpected terms, then these might have to be highlighted to the client, or the risk will be had of having those terms declared invalid due to illegality based on unfairness.
4. If the contract is concluded with an electronic agent, as contemplated by Section 20 of the Act provision must be made for the review of contract terms by a natural person, as well as correction of any material errors.

Once this has been done, I am of the opinion that a party to an online contract – whether in reaction to an advertisement or not – will have a tough time escaping liability.

The following is a typical example of a “terms of use” agreement found on almost every adult orientated website – millions of which are scattered around the Internet. The reason why this example is used, is that adult sites are visited by almost every Internet user (whether or not they wish to admit it) and are therefore very applicable :

**WARNING!**

**This is an adults only website. You must read and accept the following before entering.**

You must accept the following agreement before you can continue on this site.

"I certify the following:

- 1) I do not find images or pics of nude adults, engaging in sexual acts or materials of a sexual nature to be offensive or objectionable.
- 2) I am at least 18 years of age and have the legal right to process adult material in my community.
- 3) I will not redistribute the material from this site to anyone. I will not permit any minor to view any material from this site, nor will I allow this material to be viewed by any person who might find such material offensive. If I have minors in my home, I have taken steps to prevent them from accessing adult materials on the Internet.
- 4) I understand the standards and laws of the community, site and computer to which I am transporting this material, and I am solely responsible for my actions.

- 5) If I use the services in violation of the above agreement, I understand I may be in violation of local and/or federal laws and I am solely responsible for my actions.
- 6) By logging on, I will have released and discharged the providers, owners and creators of this site from any and all liability, which might arise.
- 7) Bookmarking to a page on this server/site whereby this warning page is bypassed shall constitute an implicit acceptance of the foregoing terms herein set forth. I have read the above and I agree to the terms and conditions set forth therein."

Specific note should be taken of clause 7, which essentially implies that the agreement will be binding on any person who manages to access the site via a "favorites bookmark". A bookmark is a utility in a web browser to mark a selected site so that it can easily be returned to at a later stage without having to search for it using a search engine.

Clearly, from what was discussed above, this cannot be legally binding on users who are unaware of the provisions of the terms set out above. At very least, a *reasonable attempt* must be made to bring the content thereof to the knowledge of the person accessing the site.

Even if the contract is technical (for example an end user license agreement) then the client will be bound even if the terms are not understood. If the client takes the risk of proceeding whilst knowing that the wording constitutes a contract, he is at risk.

If the law were to allow parties to a contract to escape being held to the obligations contained therein, simply because they claim not to understand the content of certain of the clauses, this will cause chaos. Every Tom, Dick and Sally will be attempting to avoid liability on this ground and the door will be opened to a myriad of fantastical defences and pleas.

### **6.1.2. Contractual Capacity**

As far as the element of contractual capacity is concerned, the position is very interesting with respect to minors. Capacity to contract is of utmost importance with respect to online contracts, and may yet be one of the most overlooked and underestimated elements.

By way of a silly example, the majority of South Africans have most probably seen the television advertisement for McCarthy Call-a-Car. In this 30-second clip, viewers are shown how a young child of around 7 or 8 years of age uses the Internet to purchase a new Isuzu bakkie for his father's birthday. I am prepared to bet that while many people have almost certainly giggled, very few have taken the time to consider what the legal consequences would be if such a situation actually took place.

The surprising reality is that in the technologically advanced society and time in which we live, it is not at all surprising to find very young children able to navigate the Internet with extreme ease. The possibility of these children entering into contracts along the way cannot be excluded completely.

But would these contracts have any binding legal force? What about contracts concluded by people that are completely drunk at the time or under the influence of drugs?

#### **6.1.2.1. Contracts Concluded by Infants**

It is trite law that normal off-line contracts cannot be, concluded by persons who lack the capacity to contract.

Though no authority to this effect exists in my knowledge, I am satisfied that once a party is able to prove that the person who "concluded" the contract was younger than seven, the contract will be void from the start.

The tricky part here is not so much the law, but rather the evidence required. The general rule will be that the party alleging that the contract is void, must adduce proof to this effect. Understandably, allegations such as this may cause intricate factual disputes, which may test the imagination of the court as well as lawyers.

At the end of the day though, the normal degree of proof in civil matters will prevail and the party who alleges that the contractant is an infant will somehow have to prove it.

In most cases, purchasing items over the Internet is a complicated process, requiring at least the ability to read and the co-ordination to use the mouse and keyboard to fill in the necessary information. This may be difficult for a very young child and the chances of a 7-year old child

being able to do this are somewhat debatable. (Obviously though an argument to the contrary may be raised by the opposing party.)

This in itself may make the burden of proving the conclusion of a contract by an infant on the balance of probabilities difficult. To separate the wheat from the chaff even further, e-commerce merchant web sites require the input of banking details – particularly credit card numbers. The chances of an infant somehow navigating his or her way through a web site and then going on to obtain and fill in the credit card number of an adult are so slim as to be discounted almost completely.

Nonetheless, where a complex contract such as the above is concluded, and it can somehow be proved that the mouse operated by a person under the age of seven, the contract ought to be void for failure to comply with the requirement of contractual capacity at the time of contracting. The degree of proof required will prevent would-be fraudsters from guiding their infant children into contracting on their behalf.

The question of “**attribution**” or the relating of an electronic event to a person will be discussed in the portion at the end of Chapter 8<sup>144</sup> dealing with problems relating to online agreements. Attribution deals in more details with the question touched on above in relation to who is held responsible for a contract concluded over the Internet.

#### **6.1.2.2. Contracts Concluded by Minors Older than Seven**

Where an online contract is concluded, by a minor child older than seven years of age the position becomes slightly more complicated. As in the case with contracts “concluded” by infants younger than seven, the focus of this section will be on the proof required. It ought to be considerably more easy to prove that a contract was concluded by a minor in this category because teenagers and older children will generally have no problem understanding and navigating an e-commerce web site.

Once it can be proven on a balance of probabilities that a contract was concluded by a minor, the contract would be deemed to be voidable at the instance of the minor.

### 6.1.2.2.1 *Estoppel*

Naturally, all sorts of technical legal arguments will be adopted by the opposing party, in an attempt to keep the minor bound. The principle of *estoppel* will rank among the favorites.

According to former Chief Justice Rabie, “*Estoppel comes into existence in cases where a person (the representor) has by his words or conduct made a representation to another person (the representee) and the latter, believing the truth of the representor, acted thereon and would suffer prejudice if the representor were permitted to deny the truth of the representation made by him, the representor may be estopped from denying the truth of his representation*”<sup>145</sup>.

The representation made by the representor can be by way of words as well as conduct – which include omissions or silence<sup>146</sup>. However, representations, which occur tacitly will only be binding if there was a duty to speak or to clarify a specific aspect that caused the representor to act on the acceptance thereof<sup>147</sup>.

In the case of contracts concluded over the Internet, the representation will normally occur via the conduct of the representor in indicating his acceptance with the terms and conditions thereof. In these cases, the requirement stretches further in the sense that the representor must reasonably have understood the conduct in the sense contended for him, and that the representor should reasonably have realized that the conduct could mislead<sup>148</sup>. All the necessary circumstances surrounding both the parties must be considered<sup>149</sup>.

Furthermore, estoppel is not a cause of action but is used as a defence and must be clearly pleaded in the papers of the party relying on it<sup>150</sup>.

In the example of the McCarthy advertisement mentioned above, the process would begin with the representor seeking compliance with the contract that had been concluded. Inevitably, this would be denied by the minor and/or his or her lawful guardians. If the representee is unwilling to

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<sup>144</sup> See paragraph 8.3.

<sup>145</sup> Rabie 1995:1

<sup>146</sup> *Universal Stores Ltd v OK Bazaars (1929) Ltd* 1973 4 SA 747 (A) at 761 B-C and *Aris Enterprises (Finances)(Pty) Ltd v Protea Assurance Co Ltd* 1981 3 SA 274 (A)

<sup>147</sup> Rabie 1995:39-41

<sup>148</sup> Rabie 1995:37

<sup>149</sup> *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 2 SA 47 (T) at 51A



accept that no contract exists and insists on proceeding with the contract, summons may ensue for performance or damages flowing from allegations of breach. The minor will inevitably deny the allegations and almost certainly bring a counterclaim to declare the contract void or to cancel the contract on the basis of voidability. Estoppel will normally be pleaded at this point in order to prevent the truth from being raised to his detriment.

The aim of estoppel is to keep the minor bound to the “contract” that was concluded. But was there ever a contract to begin with? Rabie is of the opinion that if an essential element of a contract is lacking, no contract will come into existence. This is clearly correct. Rabie goes on to say that despite the non-existence of the contract, estoppel (if raised successfully) will hold the parties to their obligations<sup>151</sup>.

Can estoppel be used to hold a minor to a contract that he or she concluded even though the contract would not normally be binding and be void or voidable?

The doctrine of estoppel cannot be used in circumstances where its application would produce a result repugnant to the law<sup>152</sup>. Applying this principle, the following is clear:

(1) Under normal circumstances, a child of younger than 7 would not be able to conclude contracts. Should a party manage to prove that a “contract” was “concluded” by an infant, it would be void offline. For this reason, the courts would not allow the doctrine of estoppel to bind an infant, as this would definitely be repugnant to the law. Such contracts would be void and unenforceable.

(2) If a minor between the age of 7 and 21 were to conclude a contract, it may be logical to follow the same conclusion. De Wet and Yeates<sup>153</sup>, however state that there are conflicting decisions in this regard. In *Louw v M J & H Trust (Pty) Ltd* 1975 4 SA 268 (T), it was held that cases, which had in the past decided that minors could be held liable, were incorrect. De Wet & Yeates criticize this approach and deduce that if a minor fraudulently induced the other party into believing that he or she was a major, then estoppel may in some circumstances be allowed to succeed. Under normal circumstances, fault is not a requirement for estoppel though. This leaves the question open to a degree and no final answer may be provided.

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<sup>150</sup> Rabie 1995:7-9

<sup>151</sup> Rabie 1995:10-12

<sup>152</sup> Rabie 1995:105-112

<sup>153</sup> De Wet ea 1978:54-56

### **6.1.2.3. Contracts Concluded by Other Persons with Limited Capacity to Act**

Due to the nature of the Internet, it is not impossible to conceive of contracts being concluded by a variety of people with limited capacity to act. The main reason for this is the anonymity of the Internet, which allows parties to contract without having any idea of the identity or ability-level of the other party involved.

If a person who is suffering from intoxication were to conclude a contract over the Internet, the contract would be *prima facie* binding on the individual, until he was able to prove lack of capacity to contract on a balance of probabilities.

As mentioned in the matter of *Von Metzinger v Badenhorst* 1953 3 SA 291 (T) at 293C, Rumpff J dealt with the issue of intoxication effecting capacity to conclude contracts in the following way: “*Uit wat hier aangehaal is volg dit dat dronkenskap as sodanig van so ‘n aard moet wees dat die betrokke persoon nie net makliker oortuigbaar is nie of meer gewillig is om ‘n kontrak te sluit nie maar hy moet nie weet dat hy ‘n kontrak aangaan nie of hy moet geen benul het van die bepalings van die kontrak nie.*”

This is quite clear and gives a clear indication of the standard and type of proof required by the person trying to have the contract set aside. A similar approach could be followed with respect to persons under the influence of narcotic substances and a similar degree of proof would be required.

From the above, it is quite clear that the requirement of contractual capacity will apply to the conclusion of online contracts in exactly the same way that it applies to agreements concluded in the natural world. The main difference (and possibly the only difference) will be the difficulty in obtaining the correct proof required to prove or disprove allegations made.

Again, the Act provides no clarity or specific direction in this regard.

### **6.1.3. Legality**

As the Electronic Communications and Transactions Act fails to shed any light on this requirement, the existing law will have to be investigated.

For the purposes of discussing the requirement of legality, online contracts can be divided into two broad categories: those where goods or services are hired or purchased (which we shall call commercial contracts) and those which only regulate terms of use and entry to web sites (non-commercial contracts).

#### **6.1.3.1. Commercial Contracts**

With respect to commercial contracts, the agreements concluded will normally relate to the purchase or rental of goods or services. Illegality in relation to these contracts is identical to the requirement as with any other normal contract of a similar nature.

The purchase of goods or services may not contravene common law or statutory law. Any contract concluded over the Internet in terms of which narcotics are purchased from within the country or outside of South Africa will be illegal. Another example will be attempting to conclude a contract in terms of which a person desires to hire an assassin to kill another person.

Let us consider an example. Suppose a South African attempts to purchase drugs from an online site advertising them for sale. Assume that the “client” gives his credit card details to the site owner, who then debits the credit card with R1000.00 with the permission of the owner in accordance with the “agreement”.

Should the seller fail to perform in accordance with his side of the bargain, then the client will not be allowed to take the matter to court to enforce delivery, nor will he be able to reclaim his money.

Because the *ex turpi* and *par delictum* principles are harsh in their effect, online consumers must be extra careful not to conclude or get involved in any illegal contracts.

Another thing to bear in mind is that illegality must be judged in relation to the common law and statutes of South Africa. Attempting to buy dagga from a web site in a country where its sale and use is not illegal will not prevent the contract from being illegal in South Africa. (This may be influenced, of course, on the law in terms of which a contract is concluded and interpreted and will be discussed later.)

### **6.1.3.2. Non-Commercial Contracts**

These contracts will usually entail terms of use and disclaimers for the content of Internet web sites and no goods or services change hands.

These sort of contracts may be illegal if the content would be prohibited in South Africa, for instance attempting to enter a site containing images of child pornography in contravention with the amended *Films and Publications Act 65 of 1996*. The government agencies appointed to the task of regulating this form of crime appear to be clamping down more and more on potential offenders.

In addition, terms of use, which are unfair in the sense that they are extremely and unreasonably binding on a user may also be illegal by reason of unfairness.

### **6.1.4. Possibility of Performance**

With regard to online contracts, the requirement of “possibility of performance” holds true in exactly the same manner that it would with normal contracts. Again, the *Electronic Communications and Transactions Act* provides no guidance.

Any performance agreed to in a contract concluded online must be objectively possible. Of course, this is subject to the proviso that the correct approach to judging the possibility should be in relation to what would be expected in general business in the specific community.

Persons interested in concluding online contracts must bear this requirement in mind before making any performances from their side. Logic would normally be the most useful tool in deciding whether or not a performance would be possible.

While it is impossible to give an exhaustive list of impossible performances in terms of online contracts, any performance, which is not within the power of the other contracting party to perform, and which, may later be raised as having been objectively impossible from the start is dangerous. (*e.g.* a private party purporting to sell admission positions to the NASA space training program).

Because this is an essential element of a contract, the general rule is that the agreement will be void *ab initio* in the event of the performance(s) being objectively impossible.

Unlike the requirement of illegality, which prohibits restitution for parties who have performed in terms of the illegal contract, the requirement of possibility of performance will normally allow the innocent party to reclaim any performance made from his side.

The party's recourse will be on the basis on undue enrichment and will be in terms of the *condictio ob turpen vel iustam causam*<sup>154</sup>.

#### **6.1.5. Prescribed Formalities**

Various pieces of legislation may sometimes require formalities for the valid conclusion of a contract. These formalities may be signature, writing, notarial execution and registration.

The Section 2(1) of the *Alienation of Land Act 68 of 1981*, provides that no alienation of land shall be of force unless it is contained in a written deed of alienation signed by the parties. Similarly, Section 5(1)(a) of the *Credit Agreements Act 75 of 1980*, provides that all credit agreements must be reduced to writing and signed by the parties before it will be regarded as valid for the purposes of the law. Failure to comply with the formalities prescribed by any legislation will have the obvious effect that the contract will not be valid and have no legal force.

Even if there are no statutory formalities applicable with respect to a certain type of contract, the parties are themselves free to prescribe formalities that will be binding on them. These formalities will be agreed to by the parties and, due to the consensual nature thereof, the parties will not be able to diverge from complying with the formalities unless the original arrangement is undone by a subsequent agreement. A common example of formalities set down by the parties to a contract is the clause that any amendments must be in writing and signed by both the parties before they will be binding and valid. This clause acts as a safeguard by preventing the parties from attempting to unilaterally hijack the process and make all sorts of allegations that an oral agreement was entered into, which supercedes the written agreement. As is the case with respect to failure to comply with statutory formalities, non-compliance with party-introduced formalities will also result in the contract being void.

How does the requirement of prescribed formalities fit into the picture with respect of online contracts?

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<sup>154</sup> Van Rensburg ea 1994:219

Unlike the other requirements, this topic does enjoy a degree of exposure in the *Electronic Communications and Transactions Act*.

Before the Act, two concepts would certainly have proved extremely challenging when dealing with contracts concluded online – “writing” and “signature”. The obvious reason for the potential for confusion is that “writing” and “signature” are terms traditionally associated with use in the day to day world and not via electronic means.

**Chapter III** of the *Electronic Communications and Transactions Act* has fortunately spared us from the uncertainty of dealing with these terms without assistance. This chapter is headed “Facilitating Electronic Transactions” and is of immense assistance in clarifying how concepts, traditionally intended for off-line use, are going to be implemented in an on-line situation. **Section 12**, deals with the requirement of **writing** and states:

*“A requirement in law that a document or information must be in writing is met if the document or information is –*

*(a) in the form of a data message; and*

*(b) accessible in a manner usable for subsequent reference.”*

From this it can be concluded that the requirement that a contract be in writing will be met by concluding the contract over the Internet via e-mails. If a contract is incorporated into a computer file then it will comply with the writing requirement as long as the file falls within the ambit of Section 12, mentioned above.

As far as the question of **signature** is concerned, **Section 13** of Chapter III of the Act provides as follows:

*“(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used.*

*(2) Subject to subsection (1), an electronic signature is not without legal force and effect merely on the grounds that it is in electronic form.*

*(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if-*

- (a) *a method is used to identify the person and to indicate the person's approval of the information communicated; and*
- (b) *having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.*

*(4) Where an advanced electronic signature has been used, such signature is regarded as being a valid electronic signature and to have been applied properly, unless the contrary is proved.*

*(5) Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that-*

- (a) it is in the form of a data message; or*
- (b) it is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred."*

The Section clearly deals with both possible cases in the law as far as formalities are concerned – those where signature is required by the law and those where the parties may have stipulated signature as a requirement to the contract or any portion thereof.

Just for the purposes of clarity, an electronic signature is the same as a digital signature. This is also confirmed by Pretorius & Visser's discussion of Chapter 3 in their paper<sup>155</sup>. According to an article on digital signatures in the May 2000 issue of the *De Rebus*, written by Grant Christianson and Wim Mostert, a digital signature is:

*"An item of data which accompanies a digitally encoded message and which can be used to ascertain both the originator of the message as well as the fact that the message has not been modified since it left the originator".*

A brief and simplified summary of what occurs when a digital signature is sent, is the following:

1. A user who wishes to be able to provide digital or electronic signatures must apply to a certification authority for the issue of a digital certificate.
2. On applying, two "keys" are generated – one called the *public key* and one called the *private key*.

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<sup>155</sup> Pretorius ea 2003:7

3. While the public key is freely available, the private key may be kept on the person of the user in the form of a smart card or safely on the computer.
4. These keys are used to encrypt the information in the message to be sent and a form of encryption called asymmetric encryption is used – which entails that only the key which was not used to encrypt the data can be used to decrypt it.
5. A digital signature is not a signature in the true sense of the word, but is a mark that accompanies a message that is, not able to be forged. A digital signature is created by taking the original document to be sent and reducing it into a fraction of its original appearance using a process called “hashing”. According to Christianson and Mostert, these lines are called a “message digest”. Once the data is in the form of a message digest, it cannot be changed back into its original form.
6. The digital signature and the original message are encrypted and sent to the recipient together.
7. The recipient will use his public key to decode the message and “message digest” and then his software will follow the same process as the sender’s did to reduce the message to a “message digest”. The two message digests will be compared and if they are alike, it means that the original message received by the recipient is the same as that sent and no changes or alterations have been effected.

#### **6.1.5.1. Formalities Prescribed by the Electronic Communications and Transactions Act**

With respect to cases where a statute prescribes signature as a required formality, the Act states that if the type of signature is not mentioned, an advanced electronic signature must be used. The Act clearly states that a normal electronic signature will not suffice to comply with the requirements of “signature” as required<sup>156</sup>.

The difference between a normal and an advanced electronic signature is that an advanced electronic signature will be in the form of a digital certificate issued by an institution accredited by the Accreditation Authority, for which provision is made by Section 37 of the Act.

#### **6.1.5.2. Formalities in terms of the Act, Stipulated by the Parties**

The Act provides that where the parties have agreed to require an electronic signature as a formality, there are certain requirements set out with which the electronic signature must comply in order to be valid<sup>157</sup>.

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<sup>156</sup> Section 13(1)

<sup>157</sup> Section 13(3)



The Act is silent regarding the situation where the parties prescribe the formality of a signature, but neglect to stipulate whether or not an electronic signature will be acceptable. I am of the opinion that unless the parties stipulate that the signature must be made by hand, an advanced electronic signature will suffice by analogy to the situation in Section 13(1). The use of other words by the parties, which may serve to indicate that a physical signature is specifically required, may also suffice.

#### **6.1.5.3. How Compliance with Formalities may Influence the Validity of Online Contracts**

From the above discussion it is clear that compliance with prescribed formalities – whether they be prescribed by the law or by the parties themselves – is an essential element of the validity of a contract.

Should formalities be prescribed and the parties fail to comply, then the contract will be of no legal use. This is the reason why the requirement relating to formalities cannot be underestimated with respect to contracts concluded online. The easiest way of addressing this problem would be to do so by using examples.

#### **6.1.5.4. Formalities of Writing and Signature Before the Electronic Communications and Transactions Act**

Before the Act, our law did not recognize a contract in the form of computer data as being in writing. Similarly, our law did not recognize or make provision for electronic or digital signatures. Naturally this posed a variety of difficulties and for these reasons, contracts requiring writing or signatures could not really be concluded online in South Africa with any reasonable measure of success.

For instance, attempting buy a property in Clifton via an exchange of e-mails would have been completely ineffective, as no contract will come into being, due to the absence of one of the essential requirements for validity. Because there is no real question of fault involved, the parties would have been able to claim restitution of any performances made in terms of what they thought was a contract.

Similarly, where a contract contains a clause that only amendments, which are signed or in writing will be valid, it would not have been acceptable under the previously applicable law for

the parties to do so via e-mail. Naturally, if the parties agree that sending e-mail will suffice, then doing so will comply with the formality as laid down by agreement. If no such agreement exists, then a party has full right to refuse to accept any contractual amendment proposed by or accepted via e-mail.

Although those with legal knowledge may have been able to avoid the pitfalls of getting involved with dubious contracts, the average man on the street may easily have been fooled. The exact number of invalid contracts concluded is obviously not known as many of them were given effect to, because the parties themselves did not know that they were potentially invalid.

#### **6.1.5.5. Formalities of Writing and Signature in Terms of the Electronic Communications and Transactions Act**

The position in terms of the Act is radically different because it makes provision (as was seen above) for concepts such as “writing” and “signature” in relation to online transactions. Following the implementation of the Act, contracting over the Internet in South Africa will be a completely different ballgame.

This will open the door to a myriad of options not presently even conceivable. Deeds and court pleadings could be signed and delivered via the Internet. But with an increase in the options available to *bona fide* users will also flow an increase in illegitimate activity by criminals and fraudsters.

The effectiveness of a digital signature relies heavily on the reliability of the certification authority that issues the digital certificate. If moles within the authority begin to make it possible for fraudsters to obtain digital certificates with false information, then it will be almost impossible to rely on an electronic signature. One of the fraud schemes that is rife at the moment is the obtaining of false ID documents. The name, ID number, date of birth and all other particulars are real and identical to those of the targeted individual, the only difference being the photograph. This enables the party trying to commit the fraud to approach the authority and obtain a digital certificate in the name of another person.

Fraud of this nature is difficult to detect, since the South African department of Home Affairs is a shambles at the best of times and many officials are involved in the syndicates themselves. Nonetheless, I am convinced that an equal number of positive consequences will also ensue.

# CHAPTER VII

## PROBLEMS WITH THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT

### **7.1. Problems with the Electronic Communications and Transactions Act in Relation to the Conclusion of Contracts via Electronic Means**

As previously mentioned in Chapter 3, there are a number of jurists who regard the enactment of the *Electronic Communications and Transactions Act* as being the answer to all problems surrounding the issue of IT Law in South Africa.

#### **7.1.1. Not all Contracts Concluded in terms of the Act will be Valid**

One of the most important myths that must be dispelled as soon as possible surrounding the *Electronic Communications and Transactions Act* is the belief (which may be harbored by many – including academics) that due to the Act, all contracts concluded electronically will automatically be valid.

The reason why certain contracts may be invalid is simply because they may not comply with one of the essential Common Law elements for the conclusion thereof. Following the enactment of the Act, it could conceivably happen that the hype surrounding the new legislation could begin to encroach upon or even overshadow the Common Law *essentialia*.

It must not be forgotten that without the *essentialia*, no valid contract can come into existence. This is one of the most important aims of this work - to essentially remind academics and readers alike that simply because the *Electronic Communications and Transactions Act* exists, this does *not* mean that all contracts are going to be valid in law. While this may sound elementary and obvious, it is not.

This unfortunate state of affairs – in terms of which the focus on the *Electronic Communications and Transactions Act* makes it tempting to forget that contracts are not valid unless they comply with the *essentialia* – is expressed in a surprisingly widespread fashion. Even academics such as Andrew Rens may be bordering on this trap by making statements such as “*Roman-Dutch*

*Common Law is sufficiently flexible to allow the creation of valid online contracts and, prior to the enactment of the Act, many thousands of valid contracts were concluded online*<sup>158</sup>.

While it may certainly be convincingly argued that what Rens intended was that even before the Act, online contracts that complied with the Common Law requirements, were valid, this is not expressly stated. Instead Rens appears to shift the focus onto the provisions of the Act and in so doing could easily begin to lose sight of the fact that even an electronically concluded agreement that lacks a vital Common Law requirement will not be valid.

For these reasons it is essential to bear in mind that the purpose of the Act is simply to eliminate obstacles to the conclusion of electronic contracts and not to validate contracts in the absence of compliance with the Common Law requirements.

#### **7.1.2. The Electronic Communications and Transactions Act : Potential for Misleading Interpretation**

In his De Rebus article of October 2002 entitled, “*A new era for e-commerce in South Africa*”, Jacques Jansen’s makes the optimistic statement that “*much legal uncertainty has now been removed by the enactment of the Electronic Communications and Transactions Act 25 of 2002*”<sup>159</sup>.

In addition to this, Jansen proceeds to claim that according to his interpretation and understanding of the Act:

- (1) The common law of incorporation by reference is included in the Act,
- (2) An “electronic agent” (referred to in Section 20 of the *Electronic Communications and Transactions Act*, represents the other contracting party, and
- (3) The concept of offer and acceptance in the Act is in line with the Common Law.

Andrew Rens disagrees. In his follow-up article in the De Rebus, “*Approach with Caution*”<sup>160</sup>, Rens addresses these claims and proceeds to arrive at the conclusion that all three interpretations are not entirely correct.

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<sup>158</sup> Rens 2003:22-23

<sup>159</sup> Jansen 2002:16-17

<sup>160</sup> Rens 2003:22-23

### **7.1.2.1. The Doctrine of Incorporation by Reference**

Andrew Rens clarifies the position and puts an end to the misconception that Jansen was laboring under by stating that the position is more complicated than a cursory perusal of Section 11 of the Act may allow.

**Section 11(2)** of the *Electronic Communications and Transactions Act* states:

*“Information is not without legal force and effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in such data message.”*

Rens is of the opinion that the subsection does not mean that the principle of incorporation by reference is now included in the Act, rather that it does no more than preventing a court from discriminating against data that is referred to<sup>161</sup>.

This approach would appear to be in line with the **UNCITRAL Model Law on Electronic Commerce incorporating Article 5bis**, which states that:

*One aim of article 5 bis is to facilitate incorporation by reference in an electronic context by removing the uncertainty prevailing in many jurisdictions as to whether the provisions dealing with traditional incorporation by reference are applicable to incorporation by reference in an electronic environment. However, in enacting article 5 bis, attention should be given to avoid introducing more restrictive requirements with respect to incorporation by reference in electronic commerce than might already apply in paper-based trade.*

But the *Electronic Communications and Transactions Act* goes even further and in **Section 11(3)** provides:

*Information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is:*

- (c) referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and*
- (d) accessible in a form in which it may be read, stored and retrieved by another party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.*

For these reasons, the position may not be as simple as stated by Jansen and while Section 11 does open the way for data to be incorporated by reference, it does not go so far as to make it a general rule.

#### **7.1.2.2. An Electronic Agent “Represents” a Contracting Party**

In this respect, Rens is once again of the view that the **Section 20** of the *Electronic Communications and Transactions Act* may give rise to the erroneous impression that automated systems used to respond to certain data messages gain “legal personality”<sup>162</sup>. This comment flows from Jansen’s article that describes an electronic agent as “representing the other party to the contract”<sup>163</sup>.

The *Electronic Communications and Transactions Act* defines an electronic agent as “*a computer program or an electronic or other means used independently to initiate an action or respond to data messages or performances in whole or in part, in an automated transaction*”.

This refers to instances where, for instance, commercial web sites respond to orders sent by clients confirming an order that was made.

Although **Section 20** states in no uncertain terms that such contracts may be valid, this should not be interpreted to mean that the “agent” is truly the representative of the owner of the site in question. According to **Section 20**, although these sort of contracts are not, in principle invalid, there are certain requirements that must be complied with. These include the contract not being valid unless the natural person has had an opportunity to review the terms of the transaction.

Rens goes on to mention that the consequences of this section would have to effect that the person using the “electronic agent” can not raise the defence that the “agent” exceeded its mandate.

#### **7.1.2.3. Theory of Offer and Acceptance in line with Common Law**

In his article, Jansen makes the claim that the *Electronic Communications and Transactions Act*, “*reiterates our common law and confirms that a contract is concluded when a data message which contains the acceptance of an offer is received by the offering party*”.

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<sup>161</sup> Rens 2003:22-23

<sup>162</sup> Rens 2003:22-23

<sup>163</sup> Jansen 2002:16-17

As already explained, in detail, in Chapter 4 of this work, this is not the correct position. Without unnecessarily repeating what has already been addressed, the Common Law position differs from the position expounded in **Section 22(2)** of the Act.

In terms of the Common Law, the general rule is that the Information Theory should be implemented and in exceptional cases, the Expedition Theory.

**Section 22(2)** states that:

*An agreement concluded between parties by means of data messages is concluded at the time when and the place where the acceptance of the offer was received by the offeror”.*

This is clearly the Reception Theory, which, unlike Jansen states, differs from the general rule in accordance with the Common Law.

### **7.1.3. Prohibition on Certain Electronic Transactions**

The opinion that since the enactment of the *Electronic Communications and Transactions Act* all contracts concluded via electronic means are valid, is completely incorrect.

Aside from what has already been mentioned earlier in this Chapter regarding the potential for people to forget about the essential Common Law requirements for the conclusion of a contract, the Act itself contains numerous limitations on the conclusion of certain types of contracts.

#### **7.1.3.1. Contracts for the Sale and Long-Term Lease of Land**

A close examination of the *Electronic Communications and Transactions Act 25 of 2002* reveals that contracts for the sale of land cannot be concluded via electronic means. **Section 4** of the Act is headed “Sphere of Application” and contains important information regarding the scope of application of the Act. **Section 4(3)** provides that:

*The sections of this Act mentioned in Column B of Schedule 1 do not apply to the laws mentioned in Column A of that Schedule.*

**Item 2 of Schedule 1** provides that Sections 12 and 13 of the Act are not applicable to the *Alienation of Land Act 68 of 1981*. (Sections 12 and 13 deal with allowing data messages to comply with the requirements of writing and signature)

Because the *Alienation of Land Act* calls for contracts for the sale and long-term lease of land to be in writing and be signed, Item 1 of Schedule 1 read with Section 4(3) exclude the possibility of these contracts from being concluded via electronic means.

This is confirmed in no uncertain terms by **Section 4(4)**, which states that:

*This Act must not be construed as giving validity to any transaction mentioned in Schedule 2.*

**Schedule 2**, in turn, makes specific reference to:

1. *An agreement for alienation of immovable property as provided for in the Alienation of Land Act, 1981 (Act No. 68 of 1981)<sup>164</sup>, and*
2. *An agreement for the long-term lease of immovable property in excess of 20 years as provided for in the Alienation of Land Act, 1981 (Act No. 68 of 1981)<sup>165</sup>.*

In order to illustrate that this is not too obvious or unnecessary, it is interesting to note that even those who have studied the contents of the *Electronic Communications and Transactions Act*, still refer to contracts for the sale of land as examples of agreements that will now be valid<sup>166</sup>.

### **7.1.3.2. Wills**

In addition to contracts for the sale or long-term lease of land in terms of the *Alienation of Land Act*, the Act expressly prevents wills or codicils from being concluded via electronic means.

Once again, **Sections 4(3)** read **Item 2** of **Schedule 1** provide that, Sections 11, 12, 13, 14, 15, 16, 18, 19 and 20 do not apply to the *Wills Act 7 of 1953*. Sections 11 to 20 make the concepts of legal recognition, writing, signature, original, admissibility and evidential weight, retention, notorisation *etc.* applicable to data messages. The fact that these sections do not apply to the *Wills Act* will have the effect that a valid will, cannot be concluded using data messages because the required formalities for a will in terms of Section 2 of the *Wills Act* cannot be complied with.

Section 2 of the *Wills Act*, *inter alia*, prescribes that a will, in order to be legally valid, must contain the signature of the testator and must be attested by 2 competent witnesses. This implies

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<sup>164</sup> Item 1 thereof

<sup>165</sup> Item 2 thereof

<sup>166</sup> Jansen 2002:16-17



that the will must of course be in writing. So, in this instance we have to do with the requirements of *writing* as well as *signature*.

Under normal circumstances, the requirements of writing and signature, would be provided for by Sections 12 and 13 of the *Electronic Communications and Transactions Act*. These sections are, however, amongst those excluded from being applicable to the *Wills Act*.

This will have to effect that a data message cannot be a valid will because it will not comply with the requirements of writing or signature as required by the formalities in the *Wills Act*.

Even though this is the position, the question would however remain whether, in spite of the *prima facie* invalidity, a party has discovered a “will” in the form of a data message can apply for condonation of the non-compliance with the formal requirements of a will?

**Section 4(4)** read with **Item 3** of **Schedule 2** does not really clear this up. All this provides is that the Act must not be construed as giving validity to the execution, retention and presentation of a will or codicil as defined in the Wills Act, 1953 (Act No. 7 of 1953).

Condonation for non-compliance with formalities is deal with by Section 2(3) of the *Wills Act*, which states that:

*If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting thereof, was intended to be his will or an amendment to his will, the court shall order the Master to accept that document, or that document so amended for the purposes of the Administration of Estates Act, as a will, although it does not comply with the formalities for the execution of amendment of wills.*

To answer the question whether or not a computer file purporting to contain a will or an amendment thereto can comply with the requirements of Section 2(3), will require an examination of the exact wording used therein.

Section 2(3) applies to “*a document*” that was “*drafted*”. Without the intervention of the Section 12 of the *Electronic Communications and Transactions Act*, a data message does not qualify as a “document”. For this reason it is not possible that a data message may be regarded as a “will” for the purposes of Section 2(3).

The most likely reason for this decision is to prevent these manner of transactions from being concluded until the country has grown more accustomed to the idea and once it has become more settled. Perhaps in time, Schedules 1 and 2 will be amended or even revoked entirely, thereby extending the scope of the ECT Act considerably.

#### **7.1.3.3. Bills of Exchange**

In addition to contracts for the sale and long-term lease of land and wills, **Sections 4(3)** read with **Schedule 1** of the *Electronic Communications and Transactions Act*, expressly excludes Sections 12 and 13 from being applicable to the *Bills of Exchange Act 34 of 1964*.

Sections 12 and 13 allow data messages to comply with the legal requirements for writing and signature under certain circumstances, and in the absence of the applicability of these sections to the *Bills of Exchange Act*, it is not possible to execute a bill as therein defined.

Again, this is simply confirmed by **Section 4(4)** read with **Item 4 of Schedule 2**, which states that the execution of a bill of exchange as defined in the *Bills of Exchange Act* is not validated by the *Electronic Communications and Transactions Act*.

# CHAPTER VIII

## CONSEQUENCES OF AND PROBLEMS WITH ELECTRONIC CONTRACTS

### **8.1. Consequences of Online Contracts**

Now that the requirements for the valid conclusion of a contract have been investigated and compared to the situation as it would normally occur in relation to contracts concluded online, the question is – what are the consequences of online contracts? What rights and duties ensue and when do these accrue?

#### **8.1.1. Establishment of Rights and Duties**

It should be borne in mind that rights and their corresponding duties only ensue once a valid and legally binding contract is concluded. These are rights and duties flowing from the contract proper and not rights and obligations that may arise from external means such as claims for restitution or those based on enrichment following the invalidity of a contract.

At the risk of simplifying matters to an extent that may be greater than necessary, rights and obligations in terms of contracts concluded over the Internet are little different from those in respect of normal contracts.

The same general rules apply to rights and obligations online as they do in the normal course of events.

##### **8.1.1.1. Rights in terms of Online Agreements**

In the same way as with contracts concluded online, certain rights may flow from the conclusion of a valid contract. Before rights can be attributed to the parties, the contract must be valid in the sense that the essential elements for the conclusion thereof must be in place.

The content of the contract and the terms and conditions will normally be the best source of knowing what the exact rights of a contractant party are. One marvelous advantage of online contracts in this sense, is that there will normally not be any oral portion to the contract, nor will the other party be able to rely on appearances created by action or omission (in a fair number of cases anyway). This is very useful, because the rights and entitlements will be clear and concrete.

Once determined, a party has the right to enforce performance with the rights that he or she is entitled to via the law.

Unfortunately, this is where the whole process becomes slightly more complicated, because enforcing an online contract is by no means as straightforward as determining the validity thereof. This will be discussed below. Sometimes the contract may create a series of complex rights and duties, sometimes even intermingled.

An example of this is a contract of sale. The buyer has a right to receive the goods, but only after he has complied with his obligation to make payment in the amount and manner agreed. Similarly, the seller has a right to receive the purchase price at the agreed time and a duty to deliver the sold *merx* according to the agreement. In cases such as this with **reciprocal obligations**, the principle of reciprocity comes into play. In terms of this principle, the seller of goods (in the above example) may refuse to deliver them to the buyer until the buyer has complied with his portion of the obligation (to pay the purchase price) first<sup>167</sup>.

The case of *BK Tooling Bpk v Scope Precision Engineering (Edms) Bpk*<sup>168</sup> set out the requirements for the right to withhold performance, where the other party has failed to comply with theirs. The party will have to plead that he has already performed properly or that he is ready and able to perform properly. The requirements in terms of the case are:

- That the obligations in terms of the contract are reciprocal, and
- That the parties are bound to perform simultaneously, or
- That the party claiming performance is bound to perform before the defendant.

This right, also called the *exceptio non adempti contractus* may be relaxed under certain circumstances to prevent injustice. In these cases the courts have allowed a limited counter-performance in certain cases. If the contractant is able to prove that the other party has not performed in terms of the agreement, then according to a strict implementation of the above rule, no obligation at all would be due.

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<sup>167</sup> Van der Merwe ea 2003:361-362

<sup>168</sup> *BK Tooling Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) at 415

Obviously this could produce unfair consequences and if a party can prove the following requirements, a court may exercise its discretion to reduce the counter-performance due<sup>169</sup>:

- (1) That the defendant utilised the incomplete performance to his advantage,
- (2) That there are reasons of equity for the court to assist the plaintiff and
- (3) What the cost would be to bring the defective performance up to scratch.

#### **8.1.1.2. Ex Lege Rights**

In addition to rights flowing from the agreement itself, there may be statutory rights in favour of a party to an agreement that operate automatically and without the need for specific consensus.

A good example of these rights in relation to online agreements will be **the Consumer Protection Rights** contained in Chapter VII of the Electronic Communications and Transactions Act. Although these rights were already mentioned in Chapter 5 (under paragraph 5.2.2. dealing with the various types of online agreements), it is apt to deal with them in more detail here.

Chapter VII Consumer Protection rights are far-reaching.

**Section 42** of the Bill provides that the protection only extends to electronic transactions. The section specifically excludes certain types of transactions, such as financial services<sup>170</sup>, goods purchased by way of auction<sup>171</sup>, foodstuffs and perishables<sup>172</sup>, where the goods are personalised<sup>173</sup> or made to specification and audio or video products unsealed by the client<sup>174</sup>.

**Section 43** places a duty on the supplier of goods on via an Internet web site to keep certain information available to users visiting the site. The information required is set out in subsections (a) to (r) of Section 43 and comprises:

- its full name and legal status of the supplier
- its physical address and telephone number
- its web site address and e-mail address
- membership to any self-regulatory or accreditation bodies to which that supplier belongs and the contact details of that body

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<sup>169</sup> Van der Merwe ea 2003:362-368

<sup>170</sup> Section 42(2)(a)

<sup>171</sup> Section 42(2)(b)

<sup>172</sup> Section 42(2)(c)

<sup>173</sup> Section 42(2)(f)

<sup>174</sup> Section 42(2)(g)

- any code of conduct to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer
- in the case of a legal person, its registration number, the names of its office bearers and its place of registration
- the physical address where the supplier will receive legal service of documents
- a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction
- the full price of the goods or services, including transport costs, taxes and any other fees or costs
- the manner of payment
- any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers
- the time within which the goods will be dispatched or delivered or within which the services will be rendered
- the manner and period within which consumers can access and maintain a full record of the transaction
- the return, exchange and refund policy of that supplier
- any alternative dispute resolution code to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer
- the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information
- where appropriate, the minimum duration of the agreement in the case of agreements for the supply of products to be performed on an ongoing basis or recurrently
- the rights of the consumer in terms of Section 44 read with Section 42(2)(a) – (j)

**Section 44** makes provision for a “cooling-off” period during which the client can *without reason* and *without any penalty* cancel the contract, with the only charge being for the return of the goods. In terms of the section, the client thus returning the goods will be entitled to a full refund, which must be effected within 30 days of cancellation.

**Section 47** contains the almost incredible provision that:

*“The protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question.”*

Naturally, these consumer rights are intended to be far-reaching and to instill a sense of confidence in the use of Internet-related means to conclude contracts. For this reason, they are a great example of rights applicable to parties even though no consensus may have been reached with regard to their implementation. Although the consumer protection rights are commendable, the question must be asked what the effect will be of Section 47? It is good and well to provide that the rights are universal, but are they really?

I am of the opinion that the requirement to provide certain types of information to clients contained in Section 43, will only be binding on the hosts of South African web sites and can for obvious reasons not be binding on foreign online vendors.

Similarly, while it may be easy to set out the consumer rights provisions, enforcing them will be a completely different kettle of fish. Take the cooling-off period in Section 44 as an example. If an online vendor refused to return the purchase price of goods returned, it may often be too costly to take legal action against the perpetrator and even the possibility of criminal prosecution would be ineffective for small amounts.

## **8.2. Problems Arising from Internet contracts**

Even once the virtual minefield of validity has been negotiated, the problems associated with online contracts do not stop but sometimes only kick off. While there may be many hurdles standing in the way of the proper conclusion and performance of an online contract, some of the most infamous will be discussed below.

### **8.2.1. Conflict of Law Rules and Jurisdiction**

There are few areas of the law as confusing and painfully complex as Conflict of Law rules in the sphere of Private International Law. This is put very clearly, by Ellison Kahn, in his article in the TSAR aptly entitled "*Ruminations of a Quondam would-be South African conflicts lawyer*"<sup>175</sup>.

Simply stated, Conflict of Law rules are those rules applied by each country in order to determine which system of law will govern a dispute in the event of there being two or more converging systems<sup>176</sup>.

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<sup>175</sup> Kahn 2002:125-129

<sup>176</sup> Forsyth 1996:2-3

Due to the fact that many online contracts involve some sort of foreign element, there is substantial room for the implementation of conflict of law rules. The problem is that each country has its own set of conflict of law rules and a different legal system may apply depending on the country's rules, which are used. Generally, there are two types of conflict of law rules – *multilateral* and *unilateral* rules<sup>177</sup>.

Multilateral conflict of law rules, consist of two parts – the *category* and the *connecting factor*. The category is the branch of law into which the query at hand falls, while the connecting factor is the “flag” which indicates the correct legal system to apply. Multilateral conflict of law rules are neutral in the sense that they do not attempt to make the legal system applicable the *lex fori*, and are prepared to apply the law of other countries. An example of a multilateral conflict rule is that the patrimonial consequences of marriage are determined by the *lex dimicilium* of the husband at the time the marriage was entered into. The category is the consequences of marriage and the connecting factor is the *lex domicilium* of the husband at the time of the marriage.

Unilateral conflict rules, in contrast to multilateral rules, tend to annex the system of the forum in which the matter is heard and only prescribe certain instances in which the system of law from which the matter originates may be used.

According to Forsyth<sup>178</sup>, there are three ways in which the “proper law” or the legal system applicable to a contract can be determined – **choice of law clause**, **tacit choice** and **assignment in the absence of choice**. It is best to discuss the operation of this determination in relation to a practical example:

Assume that Megan, who lives in South Africa, ordered a series of DVD's via the Internet and used her credit card to pay for the transaction. The computer that Megan used to make the order was in her home in Cape Town and the web site belonged to an American company based in California. Megan stumbled across the site one evening and reacted to the large advertisement for DVD's at 50% discount. Upon entering the site, Megan was asked to accept the Terms of Use and Conditions of the site, which she did by clicking on the “I AGREE” button without reading a word thereof. The site promised delivery by courier within 72 hours but two weeks later, with no sign of the goods, Megan realises that there is a problem. In spite of numerous e-mails to the site

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<sup>177</sup> Forsyth 1996:6-9

<sup>178</sup> Forsyth 1996:274-300



web master and “contact us” address, Megan receives no response. Upon checking her banking details, she notices that her credit card has been debited with the agreed amount.

#### **8.2.1.1. Choice of Law Clause**

The parties to an agreement can decide what system of law will govern the contract and the consequences of the contract. This is done in terms of the principle of party autonomy<sup>179</sup> and is similar to the principle of freedom to contract. To complicate things a bit, the choice of law clause must be a valid one and must be contained in a valid contract. This means that there must be a system of law in terms of which the choice of law clause is tested before the conflict of law rules need ever be applied.

In the matter of *Blanchard, Krasner & French v Morgan Evans*<sup>180</sup>, the court indicated that for a clause submitting a party to the jurisdiction of a foreign court to be valid, the requirement is that it must be clear.

Even if the proper law of a contract is foreign law, the law of procedure of the *lex fori* (local court) must be adopted. The reason for this is based on practical considerations because the local court cannot be expected to learn the foreign law as well as the procedure to apply.

To determine the law applicable to Megan’s example, the investigation must begin with an enquiry into whether there was a valid choice of law clause. It is possible that the agreement (the one which Megan did not take the trouble to read) contained a choice of law clause selecting a certain system of law as the applicable system. If such a choice of law clause exists, the next question is whether the contract in which it is contained is valid and furthermore, whether it is a valid choice of law clause.

As far as the validity is concerned, the contract will have to be checked to see whether it complies with all the essential elements of a contract as enunciated above. (In terms of South African law or the *Lex Fori*). Assuming that this is the case and that the contract is valid, the focus turns to the actual clause in question as authority states that a choice of law clause must be *clear* in order to be valid. Once all of these requirements have been complied with successfully, it may be quite possible that Megan could have agreed to the applicability of a foreign system of law.

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<sup>179</sup> Forsyth 1996:275

<sup>180</sup> *Blanchard, Krasner & French v Morgan Evans* 2002 JOL 9763 (W)

### 8.2.1.2. Tacit Choice

In the absence of an express clause to the effect that the parties have agreed on a system of law to regulate the contract, the proper law shall be determined by the presumed intention of the parties. The intention of the parties may be derived from the *lex loci solutionis* (the place where the performances in terms of the contract were to take place), the *lex loci contractus* (where the contract was concluded) or other *induciae* contained in the contract.

In the case of *Guggenheim v Rosenbaum*<sup>181</sup>, the court mentioned the following:

*“... there are indications that the parties intended that our law should govern their contract. Defendant was domiciled in South Africa. His business was located here too. When he entered into the contract he was merely on a short visit to New York and intended returning to South Africa. They agreed that she would follow him here as soon as she could. It was intended that such a move was to be permanent and her home was to be in future in South Africa. One of the reasons why they agreed that the marriage would take place here was that the defendant did not know what the effect of the New York law would be on his marriage. The irresistible inference from all those facts is that both parties intended that the law of South Africa should govern their contract.”*

In other cases like *Stretton v Union Steamship Company Ltd*, the court held *“In the present case the reference to the English Carriers Act in the ticket clearly shows that the defendants had intended the contract to be interpreted by the law of England.”*.

It would appear that to determine the proper law applicable from the tacit inference of the parties and the surrounding circumstances is the way that some courts have interpreted and applied this method.

In the practical example, suppose the terms that Megan agreed to did not contain a choice of law clause or that the clause contained is not enforceable, the next question to ask is whether the system of law applicable to the contract can be determined by inference?

To do this, various factors may be taken into account to determine whether the parties have tacitly agreed on a particular system of law, even though there is no clause to this effect in the contract. In the case of online contracts, the following factors may be relevant and may be taken into consideration:

- Whether the contract contains any wording or terminology from which it can be derived that a particular system of law should apply. If a contract states that payment must be made in US Dollars, there will be a strong indication that the party had intended the foreign law to apply.
- The nature of the agreement entered into and whether, the design of the web site contains any indication that any contracts concluded will be regulated by foreign law. If the contract concerns subject matter that is indigenous to a particular country or if delivery or performance is to take place there, a similar indication will be created.
- The location of the parties at the time that the contract was concluded as well as any relocation that is envisaged by either of the parties.

In addition to these, any other factor that could be used to indicate that a particular system was favoured, by the parties will also have to be considered. In the present example of Megan and the DVD's purchased by her, the main factors that could be present would be payment in foreign currency.

### **8.2.1.3. Assignment of a Legal System in the Absence of Choice**

When there is no agreement between the parties as to the system of law to apply to a contract *and* there is no way in which the intention of the parties can be inferred by from the circumstances discussed above, the law will assign a system of law to the agreement. According to Forsyth, the proper law of such a contract will be the *lex loci contractus*, unless performance in terms of the contract is to take place somewhere else, in which case the law of that place shall apply (the *lex loci solutionis*).

In the case of *Standard Bank of South Africa Ltd v Efroiken and Newman*<sup>182</sup>, the court rejected the more theoretically sensible approach of assigning the closest and most real connection, and relied on “*what ought, reading the contract in the light of its subject matter and surrounding circumstances, to be presumed to have been the intention of the parties.*” This decision is still binding on the courts in terms of the principle of *stare decisis* and was in fact cited in the recent decision of *Blanchard, Krasner & French v Morgan Evans (supra)*.

According to Forsyth, South African conflict of law rules determine that in the absence of a valid and enforceable choice of law clause, as well as any circumstances that point to a certain system, the law will assign an applicable system of law.

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<sup>181</sup> *Guggenheim v Rosenbaum* 1961 (4) SA 15 (W) at 31D-G

<sup>182</sup> *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171

In the example of Megan, assuming that the contract she concluded did not contain a choice of law clause *and* that there were no decisive factors pointing towards either local law or that of the United States, the appropriate legal system would have to be assigned. Assuming Megan approached a South African court for relief, they would apply local law (*lex fori*) to answer the question as to where the contract was concluded. In terms of the *Electronic Communications and Transactions Act*, the reception theory must be applied to determine the time when and place where a contract is concluded. In terms of this theory, a contract comes into existence when and where the acceptance of the offer is received by the person who made it.

This is where matters get complicated... Because Megan reacted to an advertisement on the American web site, South African law stipulates that it was she that made the offer and not the advertiser. Due to this, the moment that Megan received the overseas company's confirmation of order, the contract was concluded in Cape Town, South Africa.

Accordingly, the legal system applicable to the contract, according to the *lex loci contractus* method would be South African law. Should the contract have its performance elsewhere, the system of law will be the place in which the contract is to be performed – i.e. the *lex loci solutionis*. In this example, the contract will be performed in South Africa, by the delivery of the ordered DVD's to Megan. For this reason, it is not necessary to consider the *lex loci solutionis* because the place of contracting is the same as the place of performance.

#### **8.2.1.4. UNCITRAL Model Law**

As has already been discussed, the United Nations has also recognized the potential for problems relating to international agreements and the problem of conflicting legal systems<sup>183</sup>. The United Nations Commission on International Trade Law (UNCITRAL) has formulated a set of rules called the **UNCITRAL Model Law on International Commercial Arbitration** designed for the purpose of harmonizing disputes regarding legal systems.

**Article 1** of the Model Law provides that an arbitration will be international if:

- The places of business of the parties are in different States<sup>184</sup>,
- If any substantial part of the obligations agreed upon in terms of the relationship are to be performed in different State to the States in which the parties have their place of business<sup>185</sup>,

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<sup>183</sup> [www.uncitral.org](http://www.uncitral.org)

<sup>184</sup> Article 5(3)(a)

<sup>185</sup> Article 5(3)(b)(ii)

- The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country<sup>186</sup>.

In terms of **Article 5**, once the parties have agreed to submit themselves to arbitration in the event of a dispute, they are not permitted to approach a court for the resolution of any problems that may arise.

**Article 7** defines an arbitration agreement as:

*“An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”*

The Article goes on to say that an arbitration agreement may take the form of a clause in a contract or may be a separate agreement.

**Articles 19, 20** and **22** confirm that the parties are entitled to agree on the place, procedure and language of the arbitration.

**Article 28** deals with the system of law that will be applied to dispute resolution and states:

*“(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.”*

This is relatively clear and implies, of course, that the parties are free to elect the system of law that will be applicable to the arbitration of any disputes that may arise. Should the parties not agree on a system of law, **Article 28(2)** provides the following:

*“(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”*

What is of utmost importance and interest here are the words in Article 28(2), *“which it considers applicable”*. This is so important because the conflict rules of every country may differ and there may be a dispute in relation to which country’s conflict laws should be implemented. This article removes the danger of this becoming a problem by stipulating that the Arbitration Tribunal will

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<sup>186</sup> Article 5(3)(c)

apply the conflict rules that *it* deems appropriate (and not the individual parties) in order to decide which legal system's rules should govern the matter.

In terms of the **Article 34**, an arbitration award is final and the parties may only apply to a court to have the award set aside under certain circumstances.

*UNCITRAL's Model Law on International Commercial Arbitration* is therefore perfect for inclusion into contracts (via Article 7), in order to prevent disputes arising in relation to parties not being able to agree on a legal system and not wishing to leave the matter to the uncertainty of chance. This may be a possible step towards resolving the problem of differences in international legal systems.

### **8.2.2. Disclaimers**

A disclaimer or exemption clause may be described as an agreement (or portion thereof) between parties, intended to exclude legal liability. In essence, they are used to avoid being held liable for certain consequences. In South Africa, disclaimers are a very common occurrence. Most public parking lots contain a disclaimer limiting the liability of the proprietor thereof in relation to theft or damage and disclaimers of all sorts are contained on public transport tickets and in a multitude of contracts and consumer-related products. Because every disclaimer or exception is formulated for a unique and specific purpose, one will seldom find two that are exactly the same.

Among the problems surrounding disclaimers is that they can often be used to bully the other contracting party into accepting the terms therein contained or refusing to conclude it *in toto*. While the argument may be raised that if a party does not agree to the terms, he or she should merely refuse to proceed with the conclusion. Unfortunately, this is not always possible. In certain cases (for example the renewal of an important contract of lease), the lessor can change the contract to include horrendous disclaimers and blackmail the lessee into accepting it. The *Electronic Communications and Transactions Act*, provides an indirect but small measure of relief to protect online consumers against such activity. This will be discussed later. Due to this, it is not possible to classify disclaimers into general categories. The most relevant legal questions in relation to disclaimers have regard to whether or not they are enforceable in court and their interpretation and legal effect.

### **8.2.2.1. Enforceability of Disclaimers**

In the above discussion on “ticket cases”, the emphasis was on the applicability of terms of contracts that were claimed not to have been read. Because disclaimers constitute terms of an agreement, many of the same principles apply *mero motu*.

From the “ticket cases”, emerged the requirement that for a contract to be binding on a party that has not read the terms thereof, the party relying on the clause must take *reasonable steps* to bring the content thereof to the attention of the target subject<sup>187</sup>. By analogy, this requirement can be made applicable to disclaimers should the party it is intending to bind, claim that it cannot be binding because it was never agreed to.

### **8.2.2.2. Restriction of the Enforceability of Exemption Clauses and Disclaimers**

Even once a disclaimer has clearly been read by a party thereto, or reasonable steps have been taken to bring it to such a party’s attention, this does not mean that it is automatically binding. In the portion of his work that deals with exemption clauses, Christie<sup>188</sup> mentions the example of a company legal adviser who is requested to draft a disclaimer. Because the adviser is keen on protecting his company as best as possible, the clause is almost certain to be as restrictive as can be imagined. This is precisely the type of practice that can often lead to the abuse of the public and the targets of the company in question. Following this, Christie goes on to discuss the fact that the law comes to the aid of potential targets of disclaimers in a number of ways:

#### **8.2.2.2.1. Contra Bonos Mores**

A disclaimer will not be binding on its target if it is contrary to public policy. Numerous cases have reflected the working of this requirement.

In the case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*<sup>189</sup>, the court had to decide on the enforceability of a clause in restraint of trade. The court held that such a clause will not be binding if it is contrary to public policy. In order to determine whether or not a clause was contrary to public *mores*, the court held that the circumstances applicable at the time that enforcement is sought were decisive.

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<sup>187</sup> *Durban’s Water Wonderland* case *supra*

<sup>188</sup> Christie 2001:209

<sup>189</sup> *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 863

The court went on to hold that if a clause were to be unreasonable in nature, it may also be considered to be contrary to public policy. According to *Magna Alloys*, the onus in relation to avoiding being bound, lies on the party attempting to evade liability.

In *Goodman Brothers (Pty) Ltd v Rennies Group Ltd*<sup>190</sup>, a case slightly more in point, the court had to decide on the applicability of a clause that a carriage company has in its standard contract providing that it would “*not accept liability for the handling of certain valuable articles unless ‘special arrangements’ were made beforehand*”. In this matter employees of the company had stolen goods while in transport. The plaintiff instituted action for damages only to be met by the defence of the above exemption clause. The court considered the effect of public policy on the enforceability of the clause, but concluded that it was not applicable because the acts committed by the employees could not be imputed onto the company.

The aforementioned are an indication that disclaimers will not be recognized by courts if they are *contra bonos mores*. The problem is that determining what is contrary to public policy is not an easy exercise. The advice offered by the court in *Magna Alloys* is that all the circumstances need to be considered in order to determine this. This is obviously problematic as it makes the provision of advice to a client extremely perilous. When confronted with a disclaimer, the natural reaction of the majority of clients will be to enquire about the legal consequences thereof. Advising such a client will not be easy when the effect of the clause will eventually depend on the court’s discretion. For this reason, uncertainty will prevail in most cases, which is generally not a positive or desirable outcome.

#### **8.2.2.2 Restrictive Interpretation**

According to Christie, another method employed by the courts in an attempt to temper the potentially harmful effect of unfair disclaimers is restrictive interpretation. When faced by a clause purporting to exclude liability, courts often approach the clause in a strict manner together with the application of the *contra proferentem* principle. This will particularly be done in circumstances where the effect of the clause appears to be inequitable to the eventual outcome of the matter – seen as a whole. As will be seen from the following cases, the courts will often go to great lengths to ensure that a litigant does not get steamrolled by the opposition.

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<sup>190</sup> *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 4 SA 91



In the case of *Essa v Divaris*<sup>191</sup>, the court dealt with facts relating to claim for damages from a lorry that was stored at the defendant's garage when it was destroyed by fire. The defendant raised a disclaimer that the lorry was stored at "owner's risk" in an attempt to avoid liability. In this matter, the court held that unless the plaintiff could adduce evidence to the effect that the defendant has been *grossly negligent*, then the disclaimer would be binding.

In *Galloon v Modern Burglar Alarms (Pty) Ltd*<sup>192</sup>, the court had to interpret a disclaimer purporting to exclude liability for "any damage whatsoever" which resulted from "any reason". In this matter the plaintiff had suffered two burglaries subsequent to the installation of the system. In order to temper the harsh effect of this clause on the plaintiff, the court interpreted the words "any reason" restrictively to mean any physical cause.

Furthermore, the court held that since the defendant had not expressly covered itself for negligence nor used words so wide as to include negligence and all other forms of action, the clause must be construed as to *exclude* negligence from its ambit.

This case is indicative of the fact that, to be binding, disclaimers have to be worded very carefully and must be properly phrased. In addition to this, disclaimers that are vague or poorly worded will be subject to scrutiny by the court.

In *Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd*<sup>193</sup>, the court expounded on this requirement by commenting that the clause "shall not be responsible for any damage to the property of the lessee ... from any cause arising ..." was wide enough to exclude the lessor's liability for damages resulting from failure to maintain the exterior of the leased premises. Had the wording not been as complete, the decision may have been otherwise.

In the matter of *Ornelas v Andrew's Café and Another*<sup>194</sup>, the court was faced with the following disclaimer provision in a case that dealt with the sale of a restaurant as a going concern : "It is hereby recorded that the sellers have not, nor have they either expressly or impliedly given the purchasers any warranty as to the state or condition of the business". To limit the potentially harmful nature of the clause, the court interpreted "state or condition" restrictively to mean only the physical or visible condition of the business and not the financial side thereof.

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<sup>191</sup> *Essa v Divaris* 1947 AD 753

<sup>192</sup> *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 3 SA 647

<sup>193</sup> *Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 1 SA 391

<sup>194</sup> *Ornelas v Andrew's Café and Another* 1980 1 SA 378

In *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others*<sup>195</sup>, the plaintiff entered into an agreement with FEND Security Services (Pty) Ltd in terms of which the latter would furnish security services and security personnel at an hotel operated by the plaintiff. Clause 5.1 provided that such services and personnel would be provided by FEND to “minimise” the loss or damage by fire at the hotel. Clause 5.2 provided that FEND gave no warranty or guarantee that its security personnel would be able to minimise or prevent loss or damage thus caused. Clause 5.3 provided that FEND “*shall not be liable for loss or damage sustained from whatever cause*”. In this matter an employee of the FEND himself set a number of fires at the plaintiff’s premises, resulting in considerable loss.

The court decided that in order to interpret an exclusion clause, the *whole* agreement had to be taken into consideration. For this reason clause 5.3 should be limited in terms of the understanding created by clause 5.1, that FEND would attempt to *minimise* any loss by fire. An employee that purposefully started fires himself could hardly have been complying with clause 5.1 and the exemption clause (in spite of the wideness of 5.2) was limited to the benefit of the plaintiff.

These cases are a good example of the court going to great lengths to protect litigants against the harsh consequences of an exemption clause or disclaimer. Unfortunately, because the decision is in the court’s discretion, it is not always possible to advise or predict accurately ahead of time how it will be dealt with. This leads to uncertainty in certain respects from both the part of the drafter of the clause as well as the persons it is intended to bind.

#### **8.2.2.2.3. Legislation**

In addition to the aspects of *contra bonos mores* and restrictive interpretation, it is possible that legislation may contain further regulatory measures.

Even though its application to disclaimers is doubtful, the *Consumer Affairs (Unfair Business Practices) Act of 1998*, provides for investigations to be concluded into business practices that are harmful and may be prevented by notice in the Government Gazette for six months. Should a particular disclaimer immerge as unfair to consumers, a complaint may be instituted and an investigation may ensue. Nonetheless, it is doubtful whether this legislation will apply to disclaimers as they are usually unique and seldom constitute a standard “practice”.

In addition to this, the National Consumer Forum<sup>196</sup>, hosted by the official government web site host Umwembi, is an umbrella body for approximately thirty consumer rights organisations in South Africa. The NCF accepts and deals with complaints by the public against consumers. Should a South African Internet web site be guilty of conduct that is offensive to consumers by way of containing unfair and harmful disclaimer clauses, this would almost certainly constitute grounds for a complaint to the NCF. Other resources for South African consumers can be found at the South African information site, [www.safrika.info](http://www.safrika.info)<sup>197</sup>, which contains a number of contact telephone numbers for each region as well.

In the United Kingdom, the British Office for Fair Trading<sup>198</sup> has issued a series of Regulations, referred to as the *Unfair Terms in Consumer Contracts Regulations*, the latest of which were adopted on 1 October 1999. The regulations are aimed at shielding the public against unfair terms contained in standard contracts and are extremely useful because they contain simple definitions of otherwise confusing terminology such as *public policy* and *unfairness*. The regulations describe a term in a standard contract as “*unfair*”, if it created a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer, contrary to the requirement of good faith. In addition, “*good faith*” means that businesses must deal fairly and openly with consumers. Standard terms may be drafted to protect commercial needs but must also take account of the interests and rights of consumers by going no further than is necessary to protect those legitimate interests. It should be noted that disclaimers are not prohibited but rather subject to regulation. *Appendix 2* of the Regulations includes a comprehensive list of various types of disclaimers that one may expect to find in consumer-type contracts. The effect of each sort of disclaimer is discussed in brief to explain the effect of the provision to the public in simple terms. The appendix is used to illustrate the potential imbalance that certain types of exemption clauses may cause and mentions, which of the terms will be regarded as fair and which as unfair.

Closer to the home, the *Electronic Communications and Transactions Act*, does not contain direct restrictions on the content of disclaimer clauses contained on Internet web sites but does, however, assist indirectly:

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<sup>195</sup> *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds and Others* 1998 4 SA 466

<sup>196</sup> [www.ncf.org.za](http://www.ncf.org.za)

<sup>197</sup> [www.safrika.info/public\\_services/citizens/consumer\\_services/consumer.htm](http://www.safrika.info/public_services/citizens/consumer_services/consumer.htm)

<sup>198</sup> [www.ofc.gov.uk](http://www.ofc.gov.uk)

**Chapter VII of the Act** (the chapter dealing with consumer protection) requires certain information to be displayed on merchant web sites, but fails to prescribe specific wording of clauses regulated. Furthermore, Chapter VII provides for the right of the consumer or client to cancel the contract during the seven-day “cooling-off period” mentioned in **Section 44**. This can be done without providing a reason and without any penalty.

**Section 43(2)** provides the consumer with an opportunity to review and amend contractual terms, by stating that:

*“The supplier must provide a consumer with an opportunity –*

- (e) to review the entire electronic transaction;*
- (f) to correct any mistakes; and*
- (g) to withdraw from the transaction, before finally placing the order”*

**Section 43(3)** gives the consumer the right to cancel the contract within 14 days of receiving the goods or services should the supplier fail to comply. If the contract is cancelled in any of the aforementioned ways, the disclaimer will simultaneously fall away, providing at least a form of relief not otherwise available.

**Section 20** deals with automated transactions concluded with an electronic agent (*i.e.* computer program) instead of another human being involved. Such transactions will only be valid and come into being if the client has an opportunity to prevent or correct any material errors. This can also apply to the contents of disclaimer terms<sup>199</sup>.

In confirmation though, it must be reiterated that while the consumer is granted certain rights, the Act does not purport to regulate the content of disclaimers, nor does it give the courts any guidance with respect to whether or not a disclaimer should be binding and when it can be ignored.

#### **8.2.2.2.4. “Blackmail”**

In the majority of offline contractual negotiations (with the possible exception of “ticket cases”), the party that is expected to accept the disclaimer will usually be in a position to discuss the contents thereof with the other contracting party and attempt to negotiate an amendment thereof. This is true because the other party is normally available to speak to about the concerns that the party has.

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<sup>199</sup> Pretorius ea 2003:7-8

In an online environment, the position is very different. In these cases, the terms of the agreements are unilaterally imposed and apply on a “take it or leave it” basis. For this reason, an online consumer may have very valid concerns or objections in relation to terms of a disclaimer or exemption clause contained therein but have no means of negotiating a change. This situation could easily result in contractual bullying.

**Sections 20, 43 and 44** of the *Electronic Communications and Transactions Act* (as set out above) provide at least some relief, by providing a statutory “opt-out” clause and an opportunity to cancel the contract in the event of not being satisfied (for whatever reason) or not being given an opportunity to review contract terms.

#### **8.2.2.2.5 Disclaimers Excluding Negligence**

The question regarding whether or not disclaimers or exemption clauses that exclude liability for negligence are valid and enforceable seems to be settled in South African Law.

In the case of *Afrox Healthcare Ltd v C G Strydom*<sup>200</sup>, the respondent had issued summons against a private hospital in Pretoria owned by Afrox. The relevant facts in question were that the respondent had been admitted to the hospital for an operation and post-operation medical care. Following the procedure a nurse applied a bandage to the wound too tightly causing a problem with the respondent’s blood circulation and causing further injury. In the High Court the respondent had sued for damages of R2 Million. On appeal, the appellant relied upon an exemption clause, which read as follows:

*“2.2 Ek onthef die hospitaal en/of sy werknemers en/of agente van alle aanspreeklikheid en ek vrywaar hulle hiermee teen enige eis wat ingestel word deur enige persoon (insluitende 'n afhanklike van die pasiënt) weens skade of verlies van watter aard ookal (insluitende gevolgskaade of spesiale skade van enige aard) wat direk of indirek spruit uit enige besering (insluitende noodlottige besering) opgedoen deur of skade berokken aan die Pasiënt of enige siekte (insluitende terminale siekte) opgedoen deur die Pasiënt wat ook al die oorsaak/oorsake is, net met die uitsluiting van opsetlike versuim deur die hospitaal, werknemers of agente.”*

Clause 2.2 of the exemption clause basically excluded liability for negligence excluding intentional *omissions* of the hospital staff or agents. The exemption clause formed part of the documentation that had been signed by the respondent when he was admitted. Because the conclusion of the disclaimer contract was not in dispute, the Court merely had to decide upon its

enforceability. (The court *a quo* had decided that the disclaimer was not enforceable). In reaching its conclusion, the Court decided that because the cause of action was based upon contract and not delict (because the Respondent alleged that it was a tacit clause of the agreement that he would receive proper care), the onus was on the Respondent to prove that the disclaimer was not enforceable. In this regard, the Respondent raised the following arguments:

- (1) The exemption clause was *contra bonos mores*,
- (2) The clause was not *bona fide*, and
- (3) There was an obligation on the staff at the hospital that admitted the Respondent to focus his attention on the disclaimer clause.

With respect to the issue of public policy, the Court confirmed that while unreasonable contracts that are contrary to public policy are, as a general rule, invalid, the power to declare contracts invalid must be exercised with care and they must be restrictively interpreted. This principle is trite law and has been confirmed in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) and *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A).

In the *Sasfin*-case (9B-F), Smalberger JA used the following words:

*“The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Mildmay 1938 AC 1 (HL) at 12: ...*

*the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds ...*

*In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.”*

The argument was raised that the position needs to be guided by spirit and values of the Constitution. In spite of this, the Court favoured the *stare decisis* principle above the possibility of uncertain individualistic interpretations possibly imposed by judges and decided that the clause was not contrary to public policy. With respect to the argument that the clause should have been brought to the specific attention of the Respondent, the Court heard that the Respondent had not

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<sup>200</sup> *Afrox Healthcare Ltd v C G Strydom* 2002 6 SA 21 (SCA)

read the contract but was aware that the admission forms contained what obviously appeared to be contractual terms.

The Court found that the general rule in cases of not reading a contract is that this is done at own risk unless it contains a terms that one would not expect to find in that type of agreement. The Court held that disclaimer clauses are more the rule than the exception and that the staff, were not under any obligation to point out the content thereof specifically. For these reasons the Court upheld the enforceability of the disclaimer clause.

In *First National Bank Ltd v Rosenblum*<sup>201</sup>, the Respondents had sued FNB for jewelry that had been stolen from a safety deposit box kept at the Bank.

The question at hand was whether a disclaimer on the safety deposit form protected the Appellant from liability. The exemption clauses read as follows:

*"2. The Bank hereby notifies all its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody whether by theft, rain, flow of storm water, wind, hail, lightning, fire, explosion, action of the elements or as a result of any cause whatsoever, including war or riot damage, and whether the loss or damage is due to the Bank's negligence or not."*

*3. The Bank does not effect insurance on items deposited and/or moved at the depositor's request and the depositor should arrange suitable insurance cover."*

Again the Respondent alleged that the disclaimer clause was not enforceable because it did not specifically exclude gross liability nor negligence committed by Bank employees. The Court decided that the risk of an employee committing theft could not have been overlooked by the Bank and that the clause must have been drafted to cover this eventuality as well.

The Court went on to mention that reference to "negligence" in a contract was wide enough to include both negligence and gross negligence. In this regard the Court referred to *Government of the RSA v Fibre Spinners and Weavers*<sup>202</sup> 1978 (2) SA 794 (AD).

The disclaimer clause was once again upheld, further confirming that, while the Courts do approach disclaimers with a degree of caution, the principle of freedom of contract is very often the overriding factor.

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<sup>201</sup> *First National Bank Ltd v Rosenblum* 2001(4) SA 189 (SCA)

<sup>202</sup> *Government of the RSA v Fibre Spinners and Weavers* 1978 (2) SA 794 (AD)

### **8.2.3. Recovery of Damages for Breach**

When a contract has come into being, certain rights and duties are bestowed on the parties. One of the parties fails or refuses to perform his or her obligations in terms thereof, the innocent party that is prejudiced, will have a variety of remedies at his or her disposal.

There are three generally recognised forms of breach of contract – negative malperformance, positive malperformance and anticipatory breach<sup>203</sup>.

Van Rensburg describes **negative malperformance** as “*culpable failure to do something timeously*”<sup>204</sup>. This type of breach may be committed by a debtor (*mora debitoris*), or a creditor (*mora creditoris*). **Positive malperformance** occurs where a party either fails to perform in terms of a contractual obligation, or does so, but improperly. Positive malperformance can only be committed by a debtor, upon whom, a contractual obligation is resting. **Anticipatory breach** consists of repudiation (or positive renunciation) or the prevention of performance and can come from either the debtor or the creditor.

#### **8.2.3.1. Damages as a Remedy for Breach**

As mentioned, various remedies are available to a party that is the victim of a breach of contract. Depending on the circumstances, each type of breach more often than not has more than one remedy that would be appropriate and the injured party will have to elect between the options and select the most advantageous one. In this section, the remedy of damages will be singled out for discussion.

In South African law, a party who has been harmed by a breach of contract will have the right to claim for damages. Damages in the field of contract law are intended to place the victim of the breach in the position that he or she would have been had the contract been performed as agreed. This is known as *positive interesse* and is different from the position in the law of delict, where damages are intended to place a party in the same position he or she would have been in the absence of the unlawful conduct.

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<sup>203</sup> Van Rensburg ea 1994:249-284

<sup>204</sup> Van Rensburg ea 1994:249



### **8.2.3.2. Method of Claiming Damages**

While it is one matter to have a right to damages, it is completely another kettle of fish to claim them in practice. In South African law, there are two processes by which a court can be approached for relief – action procedure and application procedure. Application procedure is quicker and cheaper and is the method where the court is approached by way of a notice of motion with supporting affidavits. No oral evidence is usually heard (although the judge has the authority to direct this be done) and the matter is adjudicated only on the basis of the papers before the court. In addition, motion procedure is not the appropriate procedure in instances where there is a material dispute of fact. Due to the propensity for their being material factual disputes, the application procedure will normally be inappropriate for a claim of damages against a defaulting contracting party and action will have to be instituted.

### **8.2.3.3. General Problems Associated with Damage Claims**

Claims for damages flowing from breach of contract are not simply by any stretch of the imagination. It is only when one considers all the things that can go wrong, that one develops a distinct appreciation for the vast difference between clear-cut rights that exist in the realms of academia and the practice of trying to enforce them in courts.

Practical problems such as high costs, the uncertainty of the outcome, the determination of the quantum and the fact that the damage may be much less than the cost needed to recover it.

### **8.2.3.4. Rule 5 of the Uniform Rules of Court**

While the aforementioned problems are more or less common to each and every claim for damages, claims flowing from breach of online agreements, face a further problem – one that could prove to be even more formidable than all the others combined. When dealing with online contracts, a distinction must be made between those concluded with both contracting parties in South Africa, and those with an international flavour. Contracts with both parties within the country, will probably not be very much different from normal contracts as far as damages claims are concerned. In fact, as will be discussed below, the *Electronic Communications and Transactions Act* has numerous provisions to facilitate this. As opposed to this, major problems exist with respect to those cases where the one party is in South Africa and the other not.

Should the party situated in South Africa be the innocent victim of the breach, issuing a claim for damages is by no means a simple task. Litigation taking place across international boundaries has to follow specific rules and is a highly specialized field, resulting in incredibly high legal fees – often far in excess of those related to domestic litigation.

Effecting service of a summons in a foreign country must be effected in terms of the rules of court<sup>205</sup>. This is a time-consuming and often frustrating process:

**Rule 5(1)** of the **Uniform Rules of Court** provides that save by leave of the court, no process or document whereby proceedings are instituted may be served outside the Republic. Should a party wish to obtain the court's permission, leave must be sought by way of edictal citation in terms of **Rule 5(2)**. Once leave has been granted, **Rule 4(3)** of the **Uniform Rules of Court**, prescribed that the service of any document in a foreign country must be done by a person authorized to do so by being granted a special certificate by<sup>206</sup>. This may include the head of any South African diplomatic or consular mission as well as other diplomatic officials. According to **Rule 4(5)(a)** of the Uniform Rules, any process to be served in a foreign country must be accompanied by a sworn translation thereof in an official language of the target country, together with a certified copy of such process and translation. With domestic litigation, a return of service from a sheriff is sufficient to provide the court with proof that service has been effected. With respect to processes served in a foreign country, **Rule 4(7)** provides that, service will be proved by a certificate from a person duly authorized to have effected service in terms of the rules.

#### **8.2.4. Questionable Viability of Litigation in Relation to Online Contracts**

Above it was mentioned that weighing up the cost of litigation against the eventual merits of success is essential in determining the economic viability of any litigation. In the case of litigation against a foreign opponent, the position is even more important.

Naturally, the question of whether or not to proceed will depend on the circumstances at hand in each individual case and general rules cannot be put into place. Understandably though, if the cost outweighs the benefit, one would be a fool to proceed. A great number of contracts concluded over the Internet will be for the purchase of goods and/or services by private individuals. In the majority of these cases, the items ordered will be of relatively small value as compared to the costs involved in taking legal action for breach of contract.

Financial considerations are the sole cause of countless people to abandon their rights in daily South African life. I am of the opinion that the position with respect to Internet agreements will be even worse and that the majority of cases of breach will be written off as bad debt due to the

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<sup>205</sup> Harms 2002:B20-B22

<sup>206</sup> Rule 4(3)(a)

costs involved. This could well be the reason why comparatively little litigation has been seen with foreign suppliers that have committed some of other breach of contract.

### **8.2.5. The Electronic Communications and Transactions Act**

Numerous provisions are contained in Chapter VII of *the Electronic Communications and Transactions Act* that have an influence on the recovery of damages.

#### **8.2.5.1. Cancellation in terms of Section 43**

**Section 43** of the Act makes provision for a list of information that must be provided on the web site of a supplier offering goods or services for sale or hire. The list is quite comprehensive of nature and will not be repeated again as it has already been discussed above. The importance of this section is that failure by a supplier to comply will result in the consumer being given the right, in terms of **Section 43(3)**, to cancel the agreement within 14 days *after* the goods or services in terms of the transaction have been *received*.

This is an incredible right due to the fact that the consumer could have the goods in his possession for up to two weeks before exercising his or her right to cancellation, but is limited to some degree by **Section 43(4)**. According to this section, if a transaction is cancelled in terms of Section 43(3), there are statutory rights and duties imposed on the supplier as well as the consumer. In terms of **Section 43(4)(a)**, the consumer is obliged to return the performance of the supplier or cease using the services performed. **Section 43(4)(b)** obliges the supplier to refund all payments made by the consumer, less the cost of returning same. The influence that these sections have on the normal contractual remedies are to supplement and strengthen them by codifying them into statute. Should a consumer cancel in terms of Section 43, he or she would be able to claim return of any payments made in terms of the rights granted by the Act. This right would be reciprocal of nature in that the consumer would similarly be compelled to return the performance or cease using the services

Although these rights are clear and extremely useful, numerous questions come to mind:

- May the supplier and/or consumer refuse to comply with his or her duty until the other performs? In the case of normal law of contract, this would be the case, but I am of the opinion that if one examines the content of the section carefully, it becomes clear that the duties described therein are mandatory. Due to this, I am of the opinion that a party will not be able to refuse and will have to comply with the statutory duty even though the

other party does not do so. Should this happen, the party that has performed will probably have to bring an application to court to compel the defaulting party to comply.

- In the event of a supply of services, would the supplier have a claim for damages against the consumer in the event of the consumer failing to stop using the services once the transaction had been cancelled? Although the Act is vague in this regard, I am certain that failure to do so will definitely constitute an unlawful act that can be the basis of a claim for damages.
- Similarly, would a consumer have a claim for damages in the even of the refund, taking place late and loss being incurred? Once again, I am of the opinion that failure to comply with the statutory provisions would be an illegal act upon which a claim can be based.

#### **8.2.5.2. Cancellation During Cooling-Off Period**

In terms of **Section 44(1)** of the *Electronic Communications and Transactions Act*, the consumer is entitled to cancel a transaction concluded on the Internet within the following time limits: (1) within seven days after any goods have been received, or (2) within seven days after services have been rendered. The consumer may not be penalized for making the decision to cancel and no reasons need be given for the decision. At this point it may be useful to mention that **Section 42(2)** of the Act states that certain electronic transactions, e.g. financial services, may not be cancelled in terms of Section 44. In addition to this, **Section 44(2)** stipulates that only *charges* that the supplier may levy are the direct charges for the return of the goods. **Section 43(3)** provides the duty on the supplier to refund any payment made within thirty days of the cancellation.

This time, however, the section provides in **Section 44(4)** that “*this section must not be construed as prejudicing the rights of the consumer provided for in any other law*” – making it clear that a claim for damages for late refund is not excluded. This wording is not contained in Section 43 (discussed above), making the questions set out in the aforementioned paragraph all the more applicable. Should the goods be damaged upon return, the supplier will have a claim for damages. Oddly, but very importantly, the section fails to impose time limits on the return of goods and similarly fails to compel the consumer to cease using the services received prior to return. Since this provision is contained in Section 43 but not Section 44, an argument could be made out that it was the intention of the legislature to exclude it – further complicating the abovementioned problem regarding the non-exhaustiveness of the list in Section 42(2). Because the supplier is compelled to make the refund within thirty days, but the consumer is not placed under any time

constraints for the return, may it be assumed that the consumer is obliged to comply with the supplier's request for return?

Due to the Section 44's wording, it also may happen that the refund may occur before the return of the goods, in which case it may be problematic for the supplier to recover costs for the return of the goods, as the consumer may refuse to pay him or herself.

In short, while this section appears to be extremely useful to consumers, its short and summarized wording may lead to more problems than it alleviates. In addition to this, the only way in which the provisions of this section can be enforced are by way of applications to court. Although applications are costly, it will almost be certain that an innocent party will be entitled to a cost order in the event that it is established that the opposing party is acting contrary to the Act.

#### **8.2.5.3. Damages for Loss Incurred due to Payment System of Supplier**

**Section 43(5)** of the Act, provides that suppliers acting from Internet web sites must use a system of payment (normally credit card portals) that is *sufficiently secure* with reference to accepted technological standards at the time of the transaction and the type of transaction referred to.

**Section 43(6)** states that the supplier is liable for *any damage* suffered by a consumer due to a failure by the supplier to comply with subsection (5).

What is interesting about this section is that it obliges the supplier to constantly keep abreast of developments in the area of payment security and update his system as required. Another interesting portion of this section, is that it imposed liability for *any damage* suffered by the consumer – not only for any money lost as a result thereof.

Payment by credit card over the Internet requires the assistance of a Bank, which will require the supplier to enter into an agreement, registering supplier as an Internet credit card merchant. According to the agreement, the Bank's will stipulate that the merchant take full responsibility for any loss that is caused. This, in combination with **Section 43(6)**, makes the job of dealing with clients via the Internet somewhat onerous, as the section will assist a damages claim by the consumer against the supplier.

## **8.2.6. Alternative Methods of Recovering Monetary Payment**

### **8.2.6.1. Credit Card Chargebacks**

While a claim for damages may be the solution to redress financial loss in terms of the law of contract as well as the *Electronic Communications and Transactions Act*, such a claim is by no means free of problems. As was established from the foregoing discussion, instituting a claim for damages may, in more cases than not, be more troublesome than it is worth and consequently not viable.

Save for damages claims, are there any other avenues available to consumers in South Africa? A detailed examination of the South African banking system revealed an extremely effective remedy, not commonly known to the average client. This remedy is called the “chargeback” system and forms part of an international agreement between banks as well as Visa and Mastercard in cases of unauthorised credit card use.

Due to the nature of credit cards, they can easily be stolen and or copied. Once the details appearing on the face of a credit card have fallen into the wrong hands, there is the possibility that they could be misused for remote transactions without the consent or even knowledge of the owner. As a result, Mastercard, Visa and international banks have reached an agreement that should a credit card holder dispute a transaction on his or her card, a procedure will be followed to refund the card holder. This procedure is known as a “*chargeback*”.

In the merchant agreement, which a bank concludes with a supplier, the supplier undertakes to accept unconditional responsibility for any chargebacks that may occur and gives consent for its banking account to be debited by the bank in question without notification or permission. This is of course subject to informing the merchant that certain transactions have been disputed by the cardholders. Once a chargeback has occurred, the merchant is obviously free to try and disprove the cardholder’s dispute, and will be re-credited if successful.

The different types of credit cards have different rights regarding chargebacks. These are internal rules of each individual bank, but basically boil down to the fact that gold and platinum cardholders will immediately be refunded in almost all cases, even prior to the matter being investigated by the bank concerned.

#### **8.2.6.2. Understanding the Limitations of Chargebacks**

From the beginning it must be stressed that the system of offering refunds to credit card holders under certain circumstances via chargebacks is only of limited scope. A chargeback can only be effected where a credit card transaction has been, disputed by the holder within 6 months of the transaction. Disputes can be lodged for a variety of reasons, the most common of which being that the cardholder denies having concluded the transaction.

The purpose of chargebacks is to encourage confidence in the use of credit cards by providing some form of backup and security to the clients should there be any problems. For this reason, chargebacks cannot be used in cases where a client has processed a transaction but merely has regrets and wishes to be refunded thereafter.

Transactions may however be disputed where the supplier debits an amount, which is different from that authorised by the client when the purchase was made. This sort of dispute may often arise in cases where an online subscription to a web site is purchased for a specified period of time and the supplier continues to debit the customer even once the time period had expired.

Similarly, because a credit card dispute involves a certain amount of *bona fides* between the bank and its customer, fraudulent disputes will be viewed in a very serious light and may even lead to the cancellation of the facilities of the guilty party.

In the case of online transactions where a credit card was used unlawfully, the true owner of the card will be able to cancel the transaction in terms of the *Electronic Communications and Transactions Act* by relying on the seven day “cooling off period” in terms of Section 44 and demand a refund from the supplier. Should the supplier refuse to refund the money, the usual remedy would be an application to court in terms of the section. Customer can save loads of time and money by avoiding litigation against the defaulting supplier, and disputing the transaction with his bank. The major advantage of credit card chargebacks is that they are effective and operate in the same way irrespective of where in the world the transaction was processed.

#### **8.2.6.3. Unsolicited Goods, Services or Communications**

Every South African with a postal address would almost surely have been the target of unsolicited or junk mail at some or other period. With the advent of the Internet, e-mail and sms messages

over cell phones, it was almost inevitable that these forms of communication would be used for similar marketing purposes.

The electronic equivalent of junk mail is known as “spam mail” and could include unsolicited e-mail messages as well as unwanted messages sent via cellular telephone sms service. The chief problems associated with unsolicited mail are twofold:

*Firstly*, certain companies became infamous for their highly unpopular marketing tactics. These tactics, similar to the old *modus operandi* of the Reader’s Digest in relation to normal mail, took the form of dispatching e-mails to people at random and stating that unless the recipient took specific steps to notify them of his or her unwillingness, an agreement will be created. The dangers of this strategy are fairly obvious and involve “contracts” that are completely unfair and unreasonable.

The *second* problem related to spam advertising and distribution is related to an individual’s right to privacy. Whenever an unsolicited piece of mail is received, the immediate question to be asked is where did the sender get the address from in the first place? Who was responsible for giving out the information and were they authorised to do so or not?

The *Electronic Communications and Transactions Act* addresses the issue of unsolicited mail, goods and services in Section 45 thereof. This section is relevant with respect to the recovery of damages, because it may spare a recipient the time, trouble and money of having to resort to legal means to avoid being held liable for “contracts” allegedly concluded by failure to give notice of disinterest. **Section 45(1)** provides that any person who sends unsolicited commercial communications to a person must provide the recipient with the option to cancel any further communications as well as the details of the person or institution from which the recipient’s address was obtained. **Section 45(2)** states that no contract is concluded between the sender and the recipient based merely on the failure of the recipient to respond. **Section 45(3)** and **45(4)** are very important as they make it a crime for a supplier to contravene the Section 45(1) or to send commercial communications to a person who has advised that such communications are unwelcome. If convicted, the guilty party may have the penalties contained in **Section 89(1)** of the Act imposed.

This is where there appears to be a problem with the Act, as Section 89 makes mention of specific sections and the appropriate penalties, but does not include any reference to a contravention of Section 45. Another shortcoming of the Act, is that the heading of Section 45 refers to unsolicited



goods, services or communications, while the contents of the section refer only to communications. It is unclear whether the legislature intended the reader to interpret the Act by reading in “goods” and “services” automatically. What is clear is that this failure could lead to potential confusion and uncertainty - exactly what the Act was intended to remedy. What will be the position where unsolicited goods are sent to a recipient? Will Section 45(1) still apply? Will it be a crime to continue sending the goods upon receipt of an indication from the addressee to stop sending them?

These questions remain unanswered to a large degree, but the law of interpretation of statutes may provide the answer in that, headings are normally only for the purposes of information and not taken into account for interpretation.

### **8.2.7. Claiming Specific Performance**

Specific performance is another one of the remedies available to a party in the event of being the victim of a breach of contract. Specific performance is a remedy that relies on the content of the contract more so than the actual act of breach<sup>207</sup>. When a contract is concluded, the parties agree on certain rights and duties that flow from the agreement. Should a party breach the contract by failing or refusing to perform in terms of a duty imposed by the contract, the innocent party may approach the court for an order compelling the defaulting party to make good. If performance has been made, but is lacking in some or other way, the court may be approached to force the party to fulfil his or her obligations as agreed upon<sup>208</sup>.

According to Van der Merwe, a claim for specific performance can entail two forms – specific performance in the strict sense and “damages” as a surrogate for performance<sup>209</sup>. It must be noted that “damages” in this sense is not the same as damages as a compensatory remedy for loss suffered, but is intended to be a complete or partial substitute to the specific performance per se. Naturally, damages will only be granted, in lieu of specific performance if the court would have granted the main order had it not been for some or other circumstance making it unfeasible.

Specific performance in the true sense may be subdivided into two branches, namely, compelling the defaulting party to perform as agreed and compelling the defaulting party to complete or

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<sup>207</sup> Van der Merwe ea 2003:352

<sup>208</sup> Van Rensburg ea 1994:287-290

<sup>209</sup> Van der Merwe ea 2003:352

rectify a defective performance. The innocent party is entitled to refuse to accept the defective performance, provided that proper performance is still possible<sup>210</sup>.

#### **8.2.7.1. Method of Claiming**

Because specific performance is founded on compelling the other party to fulfill or make good performance in terms of the agreement, the remedy of specific performance will only be available while the contract is still in force. Once the contract has been cancelled, only damages can be claimed, as the other party can obviously not be compelled to perform in terms of an agreement that is not longer in place. Specific performance may be claimed, by approaching the court by way of an application and seeking an order, compelling specific performance. The appropriateness of this method will depend greatly on whether or not there is a material dispute of fact, since the motion procedure is not suited to this type of situation and will result in the court refusing to deal with the matter. As opposed to this method, the innocent party can institute action by issuing summons against the defaulting party and use the so-called “*double barrel*” procedure in terms of which a prayer for specific performance is included and damages are claimed in the alternative. This approach is, well accepted in South African courts and is readily used<sup>211</sup>.

#### **8.2.7.2. Limitations of Specific Performance**

Van Rensburg states that as a *general rule*, the innocent party in the case of breach of contract is entitled to enforce specific performance<sup>212</sup>. However, general rules are always subject to exception and in the case of specific performance, there are a number of instances in which the application of the remedy would be curtailed.

The case of *Haynes v Kingwilliamstown Municipality* dealt with a claim for the provision of a certain amount of water from the dam that supplied the town on a regular basis. In this matter a number of instances are mentioned in which it may not be appropriate for a court to grant an order for specific performance<sup>213</sup>. One of these situations mentioned by the court is “*where damages would adequately compensate the plaintiff*”. Van Rensburg goes on to mention that he doubts whether that consideration could by itself be sufficient to refuse a claim for specific performance and submits that the court may need to adduce further reasons for its refusal. Van Rensburg states that an example of such a reason may be that the balance of convenience is

<sup>210</sup> Van der Merwe ea 2003:352-353

<sup>211</sup> *Custom Credit Corp (Pty) Ltd v Shembe* 1972 3 SA 462 (A)

<sup>212</sup> Van Rensburg ea 1994:287

<sup>213</sup> *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A)

strongly weighted on the side of the innocent party, as the guilty party will suffer far greater prejudice than the claimant will prevent<sup>214</sup>.

In addition to this, Van Rensburg<sup>215</sup> goes on to discuss four more common instances in which it could be expected of the court to refuse an order for specific performance:

**8.2.7.2.1. Where Performance has become Impossible**

Where the performance in terms of the contract has become absolutely impossible or relatively impossible, the court will not be in a position to make an order compelling the defaulting party to perform the impossible.

**8.2.7.2.2. Where the Court would not be able to Supervise and or Enforce the Order**

The usual manner in which a court enforces an order is by the threat of being held in contempt of court. Courts are understandably lax to make an order that will be unenforceable or difficult to enforce. The reason for this would probably hinge on the credibility of the court being tarnished in the eyes of the public at large. Under this heading, Van Rensburg categorizes cases in which services of a personal nature are to be rendered in terms of a contract that is breached. As confirmed by Van der Merwe<sup>216</sup> in his discussion on the same topic, courts are reluctant to order specific performance in such instances, but that this decision is based more on practical than legal considerations.

Other examples under this heading would include orders of specific performance in respect of obligations arising from *locatio conductio operis*. The rationale behind this reluctance is again based on the difficulty that the court would have with enforcing the end product of the performance that it has ordered to be completed. An example of this was the court's refusal to grant an order for repairs to a leased property<sup>217</sup>.

**8.2.7.2.3. Where Damages would Adequately Compensate the Plaintiff**

This point is criticised by Van Rensburg, who argues very persuasively that this consideration alone should not be decisive in the court's decision as to whether or not to grant an order of specific performance, especially in the absence of additional reasons. Attempting to raise this as a defence to a claim for specific performance on its own will be risky.

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<sup>214</sup> Van Rensburg ea 1994:288

<sup>215</sup> Van Rensburg ea 1994:288-289

<sup>216</sup> Van der Merwe ea 2003:354-356

<sup>217</sup> *Nisenbaum & Nisenbaum v Express Buildings Ltd* 1953 1 SA 246 (W)

#### **8.2.7.2.4. Where it would be Inequitable**

As a general rule, a court should refuse to grant an order of specific performance if it will bring about a result that is unfair. The abovementioned case of *Haynes v Kingwilliamstown Municipality* is a good example of this, in that the plaintiff's claim for the release of 250 000 gallons of water a day would have caused great and unfair hardship on the residents of Kingwilliamstown.

All this taken into consideration, it must be mentioned that the final decision will rest in the discretion of the presiding judge<sup>218</sup>.

In the Magistrate's Court, the actions of the magistrate's are prescribed and defined by the provisions of the *Magistrate's Court Act*. **Section 46(2)(c)** of the Act provides the following:

(2) *A court shall have no jurisdiction in matters –*

(c) *In which is sought specific performance without an alternative of payment of damages, except in -*

- (i) *the rendering of an account in respect of which the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette,*
- (ii) *the delivery or transfer of property, movable or immovable, not exceeding the amount determined by the Minister from time to time by notice in the Gazette; and*
- (iii) *the delivery or transfer of property, movable or immovable, exceeding in value the amount determined by the Minister from time to time by notice in the Gazette, where the consent of the parties has been obtained in terms of section 45,*
- (iv) *in which is sought a decree of perpetual silence.*

(Erasmus<sup>219</sup> mentions that the amount mentioned in subsections (i), (ii) and (iii) is presently R100 000.00.)

#### **8.2.7.3. Problems with Claiming Specific Performance in terms of Online Transactions**

From all of the above it is clear that specific performance is a very useful remedy, but that it is subject to numerous limitations in its use, all of which need to be taken into consideration when deciding what the appropriate remedy is for which to apply. Naturally, the “double-barreled” approach may be the solution to all of these problems and should be used to save legal costs whenever doubt exists. In spite of the limitations, which are applicable to all claims for specific

<sup>218</sup> *Farmer's Co-operative Society v Berry* 1912 AD 343

<sup>219</sup> Erasmus ea 1997:188-199

performance, additional problems may plague such claims when the defendant is not from South Africa. In the previous section dealing with the problems facing litigants in cross-border claims for damages, the provisions of Rule 4 of the Uniform Rules of Court were discussed in an attempt to highlight the complications involved in litigation against a party not from South Africa.

These problems and hurdles apply *mero moto* to the issuing of summons and service thereof against a foreign litigant and will not be repeated in this section.

#### **8.2.7.3.1. Specific Performance and the Electronic Communications and Transactions Act**

The *Electronic Communications and Transactions Act* contains wording, which purports to grant a statutory rights to specific performance to customers in Internet-related transactions. **Section 46** of the *Electronic Communications and Transactions Act* is headed “Performance” and states that “*the supplier must execute the order within 30 days after the day on which the supplier received the order, unless the parties agreed otherwise*”<sup>220</sup>. The section proceeds to mention that “*if a supplier is unable to perform in terms of the agreement on the grounds that the goods or services ordered are unavailable, the supplier must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification*”<sup>221</sup>.

This portion of the *Electronic Communications and Transactions Act*, again provides many more questions than answers. The following are the chief problems with the present wording of the section:

- What meaning will be attached to the term “*execute*” as used throughout the section? Would it be sufficient for the supplier to dispatch the order on day thirty or must the customer have received the order by the thirtieth day? Understanding this is crucial with respect to a proper interpretation and application of Section 46(2), comprising the right to cancel the agreement if the supplier has failed to execute within 30 days.
- Section 46(3) seems to refer to instances where a contract is concluded and the supplier later realizes that he or she does not have the item that is ordered in stock. This is an anomalous predicament that should never occur in South African law, due to the position regarding offer and acceptance in relation to advertisements. In terms of South African law, an advertisement does not constitute a binding offer and no contract comes into being when a client approaches a business wishing to “accept” the advertisement. The precise reason for this is to prevent contracts from coming into existence and it thereafter transpiring that the supplier is out of

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<sup>220</sup> Section 46(1)

<sup>221</sup> Section 46(3)

stock. From a legal point of view, the correct procedure would be for the customer to react to the supplier and make an offer. The supplier would then *first* make sure that the necessary item was in stock before accepting the offer and creating the contract. For this reason it is not supposed to happen that a contract is in place prior to the realization of lack of stock.

In spite of these points of concern, it appears that a customer who has concluded an online transaction would, in terms of Section 46, be able to rely on the statutory right contained therein to claim either specific performance (i.e. delivery of the product ordered in terms of Section 46(1)) or alternatively repayment of the price paid (in terms of Section 46(3)).

A further question, flowing from this, is whether a claim in terms of Section 46 for specific performance will be subject to the same limitations in law applicable to non-statutory claims. This is more difficult to answer, as no precedent exists for such a situation. In order to offer an opinion regarding the above requires an examination of the nature of the legal limitations to specific performance claims. In certain instances, the limitations are based on practical rather than legal principles. This is evident by the precedent precluding the granting of such an order in cases where the court would have trouble enforcing the order. Should a customer order a specific object from an online vendor, I am of the opinion that a court could order the supplier to supply the exact merchandise against the threat of being held in contempt. As far as impossibility of performance is concerned, the court question becomes even more complex as the wording of Section 46 mentions nothing of the discretion of the court, implying that the right is absolute. I doubt whether this argument would succeed though, as the court will not easily order a party to perform that, which is impossible and this could potentially override the statutory right. In these cases, the court may decide to award compensatory damages instead and the possibility of claiming for consequential damages would not be excluded.

As far as the limitation regarding unjust orders is concerned, an argument may be constructed that due to the contents of the *Electronic Communications and Transactions Act*, a certain amount of hardship on the part of the defaulting party would not be unfair. The situation would almost certainly be different in cases where there was no fault on the part of the supplier in failing to deliver the goods ordered.

### **8.3. Attribution**

Pretorius and Visser<sup>222</sup> describe attribution as concerning whether or not an electronic event may be linked to a person, as well as the question of whether a data message was actually sent by the person who is indicated as its originator. In addition to this, attribution concerns the circumstances in which one may assume (and consequently act upon) that an event actually originated from that person. This deals with the question of upon *who* should the consequences of the conclusion of a contract, be visited. Although this may seem elementary and possibly even unnecessary to consider, it is in fact very often a complicated exercise that requires careful consideration.

In the paper-based environment the problem would normally concern matters such as forged signatures and the unauthorized use of a letterhead belonging to another individual or entity. In the case of cyberspace, the problem is more complicated. In a previous section of this work<sup>223</sup>, the question of contractual capacity was addressed and the situation was debated regarding the consequences of minors concluding contracts via the Internet. In the same chapter<sup>224</sup>, the question of proof of identity was briefly touched. If a commercial contract is concluded via the Internet, who is deemed to have concluded the contract in the absence of proof? Is it the person who owns the computer that was used? A family member that has access to the computer, or perhaps even the person whose credit card particulars were used to finance the transaction?

Under normal circumstances, personal identification codes and the like may assist in the determination of the responsible person, but this is not always the case. What would happen in instances where a person denies having concluded a contract even though his computer has access control, claiming that someone must have somehow gained access to the code? Who bears the onus of proof?

#### **8.3.1. Attribution in the Ordinary Course**

In terms of the Common Law, when a message or action is sought to be attributed to a person in court, the general rule is that he who alleges must prove<sup>225</sup>.

In *S v Swanepoel*<sup>226</sup>, the court confirmed, for instance, that if a person wants to produce a document, the onus rests upon them to prove the authenticity thereof. In *CRC Engineering (Pty)*

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<sup>222</sup> Pretorius ea 2003:8

<sup>223</sup> See paragraph 4.1.3.

<sup>224</sup> Chapter 4

<sup>225</sup> Pretorius ea 2003:9

<sup>226</sup> *S v Swanepoel* 1980 1 SA 144 (NC)

*Ltd v JC Dunbar & Sons (Pty) Ltd*<sup>227</sup>, the court held that when the authenticity or execution of a document is put in issue, the onus of proof is on the party seeking to rely on the document. This approach was also re-affirmed by Vivienne Lawack-Davis in her unpublished LL.D thesis<sup>228</sup>.

Whether a person created a document, signed it, or both, is resolved by leading the evidence of the person who purported to have done so and may include witnesses to the signature<sup>229</sup> or even handwriting experts<sup>230</sup>.

### **8.3.2. Attribution of Computer-Related Acts**

Pretorius and Visser<sup>231</sup> point out that attribution (or the question as to whether or not an act performed by or via a computer can be said to have been performed by a specific person or entity) is not the same as “authentication”. *Authentication* deals with the issue of advanced electronic signatures and related topics and it is conceivable that even though a data message is properly authenticated, it may not necessarily be attributable to the “sender” in all circumstances. Conversely stated, Pretorius and Visser mention that “*the legal force of an otherwise attributable message is limited by the formal authentication and certification requirements*”.

These “*requirements*” that play a role in attribution are to be found in the **General Usage for International Digitally Ensured Commerce (GUIDEC)**, drafted by the International Chamber of Commerce (ICC) Information Security Working Group, under the auspices of the ICC Electronic Commerce Project<sup>232</sup>. GUIDEC is a useful document that contains a wide variety of on information authentication. The GUIDEC framework attempts to allocate risk and liability equitably between transacting parties in accordance with existing business practice, and includes a clear description of the rights and responsibilities of subscribers, certifiers, and relying parties. According to the background to the GUIDEC document, the underlying policies articulated and promoted in the GUIDEC are:

- to enhance the ability of the international business community to execute secure digital transactions,
- to establish legal principles that promote trustworthy and reliable digital authentication and certification practices,

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<sup>227</sup> *CRC Engineering (Pty) Ltd v JC Dunbar & Sons (Pty) Ltd* 1977 1 SA 710 (W)

<sup>228</sup> Vivienne Lawack-Davis 2000:296

<sup>229</sup> *Annama v Chetty* 1946 AD 142 at 150

<sup>230</sup> Pretorius ea 2003:9

<sup>231</sup> Pretorius ea 2003:9



- to encourage the development of trustworthy authentication and certification systems,
- to protect users of the digital information infrastructure from fraud and errors,
- to balance authentication and certification technologies with existing policies, laws, customs and practices,
- to define and clarify the duties of participants in the emerging authentication and certification system, and
- to foster global awareness of developments in authentication and certification technology and its relationship to secure electronic commerce.

According to the **Chapter VI** of the **Best Practices** section of **GUIDEC**, a message will be *authenticated* if acceptable evidence indicates:

- (a) the identity of the sender, and
- (b) that the message has not been altered since authentication.

**Part 2** of **Chapter VI** deals with **Attribution and the Legal Significance of Authenticating a Message**. On the topic of attribution, the following guidelines are set out:

- A person wishing to rely on the fact that an electronic message is attributable to the sender must do so reasonably. If there is evidence or timely knowledge of alteration or falsification, there can be no question of reasonableness.
- When trying to determine *who* sent a message, the recipient is entitled to reasonably assume that the authentication is accurate. Again, if evidence can be produced that the recipient was unreasonable or may have had reason to doubt the authenticity of the authentication, this presumption will not apply.
- As a general rule, forged messages or messages that have been unlawfully altered create no binding obligation on the sender. If, however, it can be shown that the message was altered or forged due to negligence on the part of the sender in failing to safeguard an authenticating device, the position could be otherwise.

As far as the last point is concerned, the negligence of the sender could be in allowing unauthorized persons access to his computer by compromising his entry code or password. In some situations however, it is conceivable that the sender was not negligent – for instance in cases where family members all have access to the same home computer. This is the classic

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<sup>232</sup> [www.iccwbo.org/home/guidec/guidec.asp](http://www.iccwbo.org/home/guidec/guidec.asp)

problem position where the identity of the sender may be in question – even though the message sent is properly authenticated.

### **8.3.3. Attribution in terms of the UNCITRAL Model Law**

In addition to the GUIDEC guidelines, the **UNCITRAL Model Law on Electronic Commerce of 1996, with Additional Article 5bis**, also has an impact on the concept of attribution. **Article 13(1)** of the UNCITRAL Model Law states that a data message is that of the originator (sender), if it was sent by the originator. **Article 13(2)** creates a **presumption** that a data message is *deemed* to be that of the originator (sender), if it was sent:

- (a) by a person who had the authority to act on behalf of the originator in respect of the data message<sup>233</sup>, or
- (b) by an information system programmed by, or on behalf of, the originator to operate automatically<sup>234</sup>.

**Article 13(3)** states that an addressee (recipient) is *entitled to regard* a data message as being that of the originator (sender) *and to act* on the assumption if:

- (a) the origin of the message was verified by a previously agreed method<sup>235</sup>, or
- (b) the message resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own<sup>236</sup>.

**Articles 13(4) and (5)** confirm that if the addressee (recipient) knew or would have known had reasonable care been exercised that the sender was not the true originator, he would not be entitled to assume nor act upon the knowledge.

Article 13 is very helpful in that it provides assistance in answering some of the most difficult issues in relation to attributing a message to a party. Pretorius and Visser<sup>237</sup>, however, are quick to point out that the purpose of Article 13 is not to assign responsibility but merely to put in place

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<sup>233</sup> Article 13(2)(a)

<sup>234</sup> Article 13(2)(b)

<sup>235</sup> Article 13(3)(a)

<sup>236</sup> Article 13(3)(b)

<sup>237</sup> Pretorius ea 2003:10

certain presumptions in order to assist and facilitate the process. Nevertheless, because of its usefulness, Article 13 has been adopted into the national law of many countries, for instance:

- (a) Bermuda – Section 10 of the Electronic Transactions Act of 1999
- (b) Mauritius – S11 of the Electronic Transactions Act of 2000
- (c) The Philippines – S18 of the Electronic Communications Act of 2000
- (d) Singapore – S13 of the Electronic Transactions Act

In South Africa, the *Electronic Communications and Transactions Act 25 of 2002* followed suite by modeling **Section 25** on certain of the provisions of the GUIDEC guidelines. **Section 25** reads:

***“Attribution of data messages to originator***

*A data message is that of the originator if it was sent by-*

*a. the originator personally;*

*b. a person who had authority to act on behalf of the originator in respect of that data message;*

*or*

*c. an information system programmed by or on behalf of the originator to operate automatically unless it is proved that the information system did not properly execute such programming.”*

**Section 25(c)** also accords with Kerr’s<sup>238</sup> pre-enactment comments on the issue when he stated that mistakes occurring in electronic communications through the malfunction of machines may be visited on the party that installed the machine.

# CHAPTER IX

## OTHER BRANCHES

Cyberlaw, as it is often termed, does not only have an influence on the law of contract but will pervade a wide variety of other legal fields as well. This chapter will not purport to deal with each in any measure of detail, but instead attempt to provide a broad indication of the effect that the digital revolution has had and will continue to have on other fields of legal expertise.

### **9.1. The Internet and Other Branches of the Law**

The following are examples of fields that have been influenced to at least some degree by the Internet and related technological advances:

#### **9.1.1. Criminal Law**

The above statistics from the specialized SAPS Computer Crime Unit, reveal that a number of crimes are committed via the Internet or computer technology. The unit defines computer crime as crime where a computer or computer software is involved in the perpetration or commission thereof, or where the evidence of a crime is to be found on a form of computer storage.

In the majority of cases, the existing definitions of the various crimes such as fraud will be applicable to the online version of the crime. In other instances such as theft, the common law definition requires a physical object to be stolen and does not make provision for the theft of data. In addition to this, when data is “stolen”, the normal *modus operandi* of the thief would be to simply make a copy of the data, as opposed to removing it. Obviously in the case of the theft of a movable form of storage such as CDs, tapes, disks and other forms of removable storage, the situation will be different.

If a person were to be charged with having stolen a computer CD with various data on it, the charge of theft would extend only to the physical disk and not to the content thereof in terms of the present definition. Naturally, however, the replacement cost of the CD in question, may be a extenuating factor in relation to any sentencing that could be imposed.

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<sup>238</sup> Kerr 1998:110-111

As far as statutory crimes committed over the Internet are concerned, the most prevalent would appear to be child pornography, criminalised by the *Films and Publications Act, 1996*. This form of crime makes up a large portion of the statistics of cases dealt with by the Unit. In terms of the *Films and Publications Act* (as amended), a person is guilty of an offence if he or she knowingly<sup>239</sup>—

*(a) creates, produces, imports or is in possession of a publication which contains a visual presentation of child pornography;*

*or*

*(b) creates, distributes, produces, imports or is in possession of a film which contains a scene or scenes of child pornography.*

“Child pornography”, in turn, is defined as “*any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children.*”

There are two interesting parts of this definition:

1. The word “image” refers to visual images and it is not certain whether or not a written account of child sexual exploitation would qualify under the definition.
2. Even images containing models that are over 18 years of age that are shown to be under the age of 18 will qualify as child pornography.

Because of the unregulated availability of just about every conceivable form of image, it is understandable why a large portion of the criminal offences committed over the Internet may be related to infringements of the *Films and Publications Act*. An example that recently surfaced regarding Internet abuse would be a father that was charged with raping his 11-year-old daughter after he used an Internet chat room to pose as a teenager in order to convince her that it was not wrong<sup>240</sup>. In the column it was reported that in the opinion of Superintendent Andre Neethling, of the Johannesburg Police Child Protection Unit, that the father could be charged with child pornography since it does not only consist of pictures but also explicit words. In view of the definition stated above, it is not completely certain whether this is correct.

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<sup>239</sup> Section 27 of the *Films and Publications Act 65 of 1996*

<sup>240</sup> The lead story of the Saturday Star (Gauteng) published on 21 June 2003

In addition the *Films and Publications Act*, numerous other pieces of legislation have incorporated provisions that take into account the fact that illegal activity can also be committed via the Internet. These include the *Interception and Monitoring Act 127 Of 1992* and the *Electronic Communications and Transactions Act*.

### **9.1.2. Intellectual Property Law**

The protection of intellectual property rights such as copyright and patents is not always easy. With respect to any information kept on an Internet web site, the question at hand is usually how to protect the immaterial property rights therein contained? Since any portion of an internet web site can be copied without too much fuss, it stands to reason that any pictures, text or video images with copyright that are posted can be copied by any person so inclined or willing. Although there are limited ways of preventing the copying of material contained on a web site (for instance the user is prevented from being able to select the document because the right mouse button functionality is disabled by the site), there are equally as many ways around it.

A good example of the Internet being used in the breach of copyright is the entire issue surrounding the placing of songs (in the form of so-called MP3 files) onto various Internet sites. Once these files are present on the MP3 domain, they are available for downloading by every visitor to the site. This is a clear infringement of the rights of the artists and record labels in relation to the music and the practice is resulting in a worldwide loss of incredible sums of money.

# Conclusion

It is hoped that the content of this work serves to shed at least a bit of light on the influence of the Internet and other related technology to the field of private law, more particularly the law of contract. The more one obtains a working knowledge of cyberlaw, the more one will come to realize that a complete and detailed publication covering every aspect of cyberlaw in every conceivable field is extremely impractical.

From the above, it should however be clear that in relation to the law of contract, the common law requirements for the conclusion of a valid agreement are able to be applied to contracts concluded via electronic means without too much trouble. Any potential problems with respect to validity will, in most cases, be addressed by the *Electronic Communications and Transactions Act*.

As regards remedies for the breach of contracts and enforcing performance, it was seen that a variety of new problems are experienced in relation to online-agreements, but that many of the existing problems one would expect to find with any agreement also apply. Many of the problems that are expected will be in relation to the enforcement of court orders and judgements rather than setting out the cause of action or basis of any application to be brought.

Even though South Africa is short of legislation in the field of cyberlaw, recent years have shown a great deal of development and a clear indication of the good intentions of the legislature to remedy the deficiency.

As far as the lack of expertise and technical knowledge to prosecute computer-related crime is concerned, there have again been promising developments such as the establishment of the SAPS Computer Crime Unit.

Internationally, similar hiccups exist and we should not be fooled into thinking that South Africa is any worse off than the majority of international communities. Truth be told, it would appear that the only countries that have taken an active stance in the writing of legislation and

international treaties and declarations are the United States, Australia and certain of the countries forming part of the European Union.

In conclusion, it would seem that South Africa is by no means lagging behind other developing countries in the international arena as far as cyberlaw is concerned and that the steps that have been taken to date appear very promising indeed. Furthermore, we are in the fortunate position that our basic common law facilitates rather than hinders the progress of Internet-related law.



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## Summary in English

**P**rior to the enactment of the Electronic Communications and Transactions Act in July 2002, the position in South African law regarding contracts concluded via electronic means was very uncertain. In the absence of applicable legislative guidance, South Africa relied almost exclusively on the flexibility of its Roman Dutch Common Law principles to accommodate the new challenges created by technological advances. While the Common Law succeeded commendably in being able to address the majority of issues raised by the new technology, it became increasingly clear that some of the questions fell beyond the scope of principles designed long before the idea of a computer was ever contemplated.

In July 2002, the Electronic Communications and Transactions Act came into operation.

The thesis begins by examining the Common Law requirements for the conclusion of a legally valid and binding contract and investigates the provisions of the Act in order to shed light on the requirements of “writing” and “signature” in relation to online agreements.

Questions regarding the contractual capacity of parties in relation to electronically concluded contracts are investigated with specific reference to the position in the event of a minor or other person with limited capacity entering into an electronic agreement.

The requirement of consensus enjoys detailed attention. The different types of online agreements, including click-wrap and browse-wrap agreements are examined to ascertain the circumstances under which effective acceptance of an offer will have occurred. The position regarding the acceptance of unread terms is also considered as well as the validity of agreeing to terms referred to by means of a hyperlink, but not displayed.

The various theories relating to when and where a contract is concluded are also examined with a view to determining the correct theory applicable to electronic contracts.

Once the requirements for a valid and binding electronic contract have been determined, the consequences thereof are discussed. The rights and duties afforded by and placed upon parties in



accordance with the Act are investigated, with particular reference to the rights of consumers in commercial transactions.

The enforcement of rights flowing from agreements concluded via electronic means is examined and some of the potential pitfalls facing litigants, ranging from the viability of litigation to high legal costs, are discussed. In particular, the problem of conflicting legal systems in relation to international agreements is addressed and the methods by which the appropriate system can be identified, are investigated.

The question of attribution is examined in addition to the various presumptions applicable in terms of international law as well as the Act, so as to determine upon whom the responsibility for electronically performed acts should be visited.

The limitations of the Electronic Communications and Transactions Act are discussed and particular attention is paid to certain types of transactions and agreements that are prohibited from being concluded in terms of the Act and its Schedules.

In conclusion, a brief overview of the influence of the Internet on other branches of the South African law is included as a reminder of the vast and wide-ranging influence that recent technological advances have had on our society.

## Summary in Afrikaans

Voor die promulgasie van die Wet op Elektroniese Kommunikasies en Transaksies, was die posisie in Suid Afrika ten opsigte van elektroniese kontrakte baie onseker. In die afwesigheid van regulerende wetgewing het Suid Afrika amper uitsluitlik staatgemaak op die buigzaamheid van die Romeins-Hollandse gemeenregtelike beginsels om die nuwe uitdagings as gevolg van tegnologiese voortuitgang te akkommodeer. Terwyl die Gemeenereg daarin geslaag het om die meerderheid van aspekte in terme van die nuwe tegnologie te adresseer, het dit geblyk dat sommige van die vroeë buite die beperkings van beginsels wat ontwerp is lank voordat rekenaars 'n werklikheid was, geval het.

In Julie 2002 het die nuwe Wet in werking getree.

Hierdie verhandeling begin deur die Gemeenregtelike vereistes vir die sluit van 'n regsgeldige en bindende kontrak te ondersoek, asook die bepalinge van die Wet, om die invloed daarvan op die regsvereistes van "skrif" en "handtekening" ten opsigte van Internet kontrakte te bepaal.

Vroeë ten opsigte van die handelingsbevoegdheid van partye wat kontrakte elektronies aangaan, word ondersoek, met spesifieke verwysing na die posisie van gevalle waar minderjariges en ander persone met beperkte handelingsbevoegdheid elektroniese kontrakte sluit.

Die vereiste van wilsooreenstemming geniet ook gedetailleerde aandag. Die verskillende tipes Internet ooreenkomste, insluitende "click-wrap" en "browse-wrap" kontrakte, word ondersoek om te bepaal onder welke omstandighede aanvaarding van 'n aanbod sal geskied. Die posisie met betrekking tot die aanvaarding van ongelese kontraktuele bepalinge word ook ondersoek, asook terme waarna slegs verwys word deur middel van 'n "hyperlink".

Die verskeie teorieë ten opsigte van die plek en tyd van kontraksluiting word ook ondersoek sodat die korrekte teorie ten opsigte van elektroniese kontrakte bepaal kan word.

Nadat die vereistes vir 'n geldige en bindende Internet kontrak bepaal is, word die regsgevolge daarvan bespreek. Die regte en verpligtinge van die partye in terme van die Wet word ondersoek, met spesifieke verwysing na die regte van verbruikers in kommersiële transaksies.

Die afdwinging van regte in terme van Internet kontrakte word ondersoek en sommige van die potensiële probleme wat litigante mag raak word bespreek. Die kwessie rondom botsende regstelsels in terme van internasionale ooreenkomste word behandel en die metodes om die toepaslike stelsel te identifiseer word bespreek.

Daar word ondersoek welke vermoedes in terme van die internasionale reg, sowel as die Wet, van toepassing is om te bepaal wie verantwoordelikheid moet aanvaar vir elektronies uitgevoerde handeling.

Die beperkings van die Wet op Elektroniese Kommunikasies en Transaksies word bespreek met spesifieke verwysing na tipe handeling wat ingevolge die Wet en die Skedules verbied word.

Ten slotte word 'n kort oorsig van die invloed van die Internet op ander takke van die Suid-Afrikaanse reg oorweeg om te dien as 'n herinnering aan die wye invloed van moderne tegnologiese verwickelinge op die samelewing.

# **Key Terms Describing the Subject of this Thesis**

1. Contract
2. Consequences of Contract
3. Validity of Contract
4. Electronic Transactions and Communications Act
5. Cyberlaw
6. IT Law
7. Internet

