6

E-Commerce

6.1 Introduction

6.1.1 *The development of e-commerce*

In July 1997 President Clinton of the United States remarked in a Presidential Directive on Electronic Commerce[1] that

> The invention of the steam engine two centuries ago and the subsequent harnessing of electricity for communications ushered in an industrial revolution that fundamentally altered the way we work, brought the world's people closer together in time and space, changed the way we organize our economies, and brought us greater prosperity.
>
> Today, we are on the verge of another revolution. Inventions like the integrated circuit, the computer, fiber optic cable, and the Internet are changing the way we work, learn, and communicate with each other.
>
> As the Internet empowers citizens and democratizes societies, it is also changing the way business is conducted: entrepreneurs are able to start new businesses more easily by accessing the Internet's worldwide network of customers; world trade involving computer software, entertainment products, information services, professional consulting, financial services, education businesses, medical diagnostics, advertising, and technical services is increasing rapidly as the Internet dramatically lowers costs and facilitates new types of commercial transactions; engineers, product developers, and managers thousands of miles apart can collaborate to design and manufacture new products more efficiently; businesses can work more efficiently with their suppliers and customers; consumers have greater choice and can shop in their homes for a wide variety of products from manufacturers and retailers all over the world, and they will be able to view these products on their computers or televisions, access information about the products, and order and pay for their choices, all from their living rooms.
>
> According to several estimates, commerce on the Internet will total tens of billions of dollars by the turn of the century and could expand rapidly after that, helping fuel economic growth well into the 21st century.

Only nine years later there can be no doubt about the validity of this prediction. The Internet has revolutionised the way in which business is done in ways that were difficult to foresee even only ten years ago. In just a few years Internet commerce has become a very important part of national and international business.[2]

1 Presidential Directive on Electronic Commerce, 1 July 1997, www.technology.gov/digeconomy/presiden.htm (accessed 26 August 2007).

2 Reed and Angel (eds) *Computer Law: The Law and Regulation of Information Technology* lxi–lxiii; Schneider *Electronic Commerce* 4–5; Todd *E-Commerce Law* 3–10; Hedley *The Law of Electronic Commerce*

continued

In the first South African book on computer law[3] the chapter on computer contracts merely covered contracts for the provision of hardware and software. The discussion of these types of contract, formerly a major part of any discussion on computer contracts, now forms only a relatively minor and settled area of IT law, if it is raised at all.[4] In most commentaries the major part now deals with contracts and contracting in the context of electronic commerce.[5]

During the late 1980s and beginning of the 1990s, it was thought that electronic data interchange (EDI) would form the core of electronic trade in the future, but that was before the Internet revolutionised international communications in a very short period of time.[6] At that time there were major projects aimed at standardising formats for communication that would make the use of EDI more viable worldwide.[7] In South Africa this effort was first promoted by the South African Foreign Trade Organisation and, after the SAFTO's demise, by the South African Bureau of Standards.[8] Internationally these efforts were co-ordinated by the United Nations Economic Commission for Europe.[9] Part and parcel of all of this activity were subcommittees or working parties focusing on legal issues regarding EDI. Kluwer, the Dutch law publisher, even launched a legal journal, the *EDI Law Review*.

EDI is regarded as online communications between existing business partners who had regular dealings with one another, often within closed economic relationships such as those between suppliers and distributors or within a specific industry or business sector such as transport and harbours or electronic goods.[10] EDI also fulfilled an important method of communication in industries in which Just-in-Time forms or supply were becoming important.[11] While EDI remains important in these applications, it has failed to achieve the prominence that was expected initially.

---

and the Internet in the UK and Ireland xxxix–xl, 9–14; Meiring "Electronic transactions" 82–83; Lötz and Du Plessis "Elektroniese koopkontrakte: 'n Tegnologie hemel of hel?" 2004 *De Jure* 1–2; Lloyd *Legal Aspects of the Information Society* 229–233.

3 D van der Merwe *Computers and the Law*.

4 Reed and Angel (eds) *Computer Law* devote a whole chapter to this topic; but see Buys and Cronjé (eds) *Cyberlaw@SA* 2 ed, Todd *E-Commerce Law* and Hedley *The Law of Electronic Commerce and the Internet* where it is not discussed at all.

5 See, for instance, Van Esch *EDI en het Vermogensrecht* 11–14; Pistorius "Contract formation: A comparative perspective on the Model Law on Electronic Commerce" 2002 *CILSA* 138–139; Mann and Winn *Electronic Commerce* 221–222; Lloyd *Legal Aspects of the Information Society* 233–234; Lourens "Electronic commerce – the law and its consequences" 1998 (May) *De Rebus* 64–68.

6 Mann and Winn *Electronic Commerce* 333–336; Eiselen "The electronic data interchange agreement" 1995 *SA Merc LJ* 1–2; Walden *EDI and the Law* xi–xii, 1–2; Van Esch *EDI en het Vermogensrecht* 11–15; Baum and Perritt *Electronic Contracting, Publishing and EDI Law* 1–7. On the American X 12 standards see Baum and Perritt 33–44.

7 Reed and Angel (eds) *Computer Law* 220–225; Mann and Winn *Electronic Commerce* 336–337; Baum and Perritt *Electronic Contracting, Publishing and EDI Law* 34–44; Van Esch *EDI en het Vermogensrecht* 11–15.

8 See Eiselen "The electronic data interchange agreement" 1995 *SA Merc LJ* 3–4.

9 Ibid.; Van Esch *EDI en het Vermogensrecht* 15–19; Mann and Winn *Electronic Commerce* 336–337.

10 Eiselen "The electronic data interchange agreement" 1995 *SA Merc LJ* 1–2; Van Esch *EDI en het Vermogensrecht* 11–14; Mann and Winn *Electronic Commerce* 332, 343; Reed and Angel (eds) *Computer Law* 224–225; Pistorius "Contract formation" 2002 *CILSA* 138–139.

11 Eiselen "The electronic data interchange agreement" 1995 *SA Merc LJ* 3–4; Mann and Winn *Electronic Commerce* 332, 338; Reed and Angel (eds) *Computer Law* 221–222; Lourens "Electronic commerce – the law and its consequences" 1998 (May) *De Rebus* 64–68.

Much of what EDI was trying to achieve was being achieved with ever-increasing success by the Internet.

The Internet provided an avenue for all kinds of communications, and it was realised early in its development that it would become an important business tool in the new global village that was developing.[12] The earliest successes of e-commerce were notoriously achieved by the purveyors of pornography, but pornography has now been overtaken by services and products of every conceivable kind being offered on the Internet. There is hardly any product or service today that is not advertised or sold on the Internet. This has been partly facilitated by the provision of safe payment methods on the Internet enabling payments across borders and all over the world. Many products and services are now also distributed over the Internet, obviating the need for any physical delivery or interaction. The most prominent examples are the sale of software and of subscriptions to electronic magazines and the booking of airline tickets, hotel accommodation and hiring of cars and so on.

6.1.2 *Legal uncertainty*

With the growth of EDI, and later e-commerce, business people felt uneasy about the legality and legal consequences of agreements concluded in this manner.[13] The general sentiment was that the law did not adequately provide for or regulate the conclusion of contracts using these types of communication.[14] The law is notoriously slow to change, partly because its development is usually in reaction to new challenges or changed circumstances.

In its Guide to Enactment of the Model Law, UNCITRAL states that

> The use of modern means of communication such as electronic mail and electronic data interchange (EDI) for the conduct of international trade transactions has been increasing rapidly and is expected to develop further as technical supports such as information highways and the INTERNET become more widely accessible. However, the communication of legally significant information in the form of paperless messages may be hindered by legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity.[15]

---

12 Coetzee "The Electronic Communications and Transactions Act 25 of 2002: Facilitating electronic commerce" 2004 *Stell LR* 501–502; Meiring "Electronic transactions" 82–83; Faria "e-Commerce and international legal harmonization: Time to go beyond functional equivalence?" 2004 *SA Merc LJ* 529; Geist *Internet Law in Canada* 544–545.

13 See, for instance, UNCITRAL "Guide to enactment of the Model Law" paras 1–4; Pistorius "Contract formation" 2002 *CILSA* 129–131; Pistorius "Formation of Internet contracts: An analysis of the contractual and security issues" 1999 *SA Merc LJ* 282; Department of Communications "Green paper on electronic commerce for South Africa" executive summary and chapters 2 and 3; Coetzee "The Electronic Communications and Transactions Act 25 of 2002" 2004 *Stell LR* 502–503; Thomsen and Wheble *Trading with EDI: The Legal Issues* 135–143; Baum and Perritt *Electronic Contracting, Publishing and EDI Law* 308–310; Dugan "Electronic transactions: The quest for clarity" 2001 *New Zealand LJ* 483.

14 Department of Communications "Green paper on electronic commerce for South Africa" executive summary and chapters 2 and 3; UNCITRAL "Guide to enactment of the Model Law" paras 1–4; UNCITRAL UN Convention on the Use of Electronic Communications in International Contracts paras 44–45; Hedley *The Law of Electronic Commerce and the Internet* 4–5; Gabriel "The fear of the unknown: The need to provide special procedural protections in international electronic commerce" 2004 *Loyola LR* 307–308; Reed and Angel (eds) *Computer Law* 199–205; Todd *E-Commerce Law* 169–170; Meiring "Electronic transactions" 82–83; Mann and Winn *Electronic Commerce* 263–264.

15 Para. 2, www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed 26 August 2007).

Commentators focused on the following perceived legal uncertainties:[16]

- **Validity of the agreement.** Can a contract be validly concluded between parties by means of electronic communications?
- **Offer and acceptance.** Does the advertisement for goods or services on a website constitute an offer that is open to acceptance by the world at large or is it merely an invitation to do business, especially if the consumer can negotiate a deal by simply interacting with the website?
- **Automated contracts and agency.** Is it possible to conclude a binding contract where either or both parties use an electronic agent, that is where the communications between the parties are generated on either or both sides by computers without any human intervention?
- **Time and place of contracting.** This issue is closely linked to the previous question: when and where does the contract come into existence? These questions are of importance for determining whether a contract has come into existence, and for the expiry of time periods stipulated. It may also be of importance to determine the applicable legal system with reference to cross-jurisdictional contracts.
- **Formalities.** Is an electronic communication "writing" and is it possible to provide an electronic signature? These issues are relevant when the law prescribes formalities such as writing, signature and notarial execution. Another question arises when an act prescribes delivery of a communication by registered post – can such deliver be done validly by electronic means?
- **Incorporation of standard terms.** So-called "shrink-wrap" agreements in respect of software sales raised a similar issue known as "click-wrap" regarding the incorporation of standard terms in e-commerce: what is required in law to incorporate effectively standard terms and conditions?
- **Jurisdiction.** Much of e-commerce transcends national boundaries. In the case of a dispute, which courts will exercise jurisdiction over the dispute?
- **Applicable law.** Closely aligned to the previous issue, but a separate matter nonetheless, is the question of applicable law. When an international transaction has been concluded, which legal system will govern the relationship between the parties?

Other related issues, such as the evidential value of electronic communications and the requirements in respect of their storage and privacy protection or the protection of personal data are dealt with elsewhere in this book.[17]

16 See, for instance, Pistorius "Formation of Internet contracts" 1999 *SA Merc LJ* 282; Lourens "Electronic commerce – the law and its consequences" 1998 (May) *De Rebus* 64–68; Thomsen and Wheble *Trading with EDI* 135–143; Baum and Perritt *Electronic Contracting, Publishing and EDI Law* 308–310; Walden *EDI and the Law* 1–3; Reed and Angel (eds) *Computer Law* 243–244; Schneider *Electronic Commerce* 311–321; Hedley *The Law of Electronic Commerce and the Internet* 243–244; Todd *E-Commerce Law* 169–182; Lötz and Du Plessis "Elektroniese koopkontrakte" 2004 *De Jure* 2; Pistorius "Contract formation" 2002 *CILSA* 129–130; Daniel "Electronic contracting under the 2003 revision to article 2 of the Uniform Commercial Code: Clarification or chaos?" 2004 *Santa Clara Computer & High Technology LJ* 328–330; Watnick "The electronic formation of contract and the common law 'mailbox rule'" 2004 *Baylor LR* 176; Dugan "Electronic transactions" 2001 *New Zealand LJ* 483.

17 See Chapters 5 and 9 respectively.

6.1.3 *Legislative intervention*

These legal uncertainties were being raised not only in South Africa in respect of South African law, but in most jurisdictions around the world.[18] It is not surprising therefore that the United Nations Commission for International Trade Law (UNCITRAL) recognised this problem very early in the development of the more widespread use of electronic communications. The Commission's response to this challenge was the publication of a Model Law on Electronic Commerce in 1996.[19] UNCITRAL also provided a guide to the enactment of the Model Law.[20]

The stated aim of the Model Law is[21]

> to facilitate the use of modern means of communications and storage of information. It is based on the establishment of a functional equivalent in electronic media for paper-based concepts such as "writing", "signature" and "original". By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication. The Model Law also contains rules for electronic commerce in specific areas, such as carriage of goods.

The Model Law is not a convention and therefore does not find direct application in any legal system, but it does provide an internationally acceptable solution on which national legislatures can base their e-commerce legislation to facilitate greater international harmonisation, especially in view of the fact that much of e-commerce takes place without any concern for national boundaries.[22] Chapter III of the Electronic Communications and Transactions Act[23] (the ECT Act) is based on the Model Law, as is the national legislation of a number of other countries.[24] UNCITRAL has

18 See UNCITRAL Secretariat "Explanatory note" paras 44–45; UNCITRAL "Guide to enactment of the Model Law" paras 1–4.

19 Available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html (accessed 26 August 2007). See also the discussion of the 2003 revision of art. 2 of the American Uniform Commercial Code and the Uniform Electronic Transaction Act (UETA) by Daniel "Electronic contracting under the 2003 revision to article 2 of the Uniform Commercial Code" 2004 *Santa Clara Computer & High Technology LJ* 319; Watnick "The electronic formation of contract and the common law 'mailbox rule'" 2004 *Baylor LR* 176. For an evaluation of the New Zealand Electronic Transactions Act, see Boss "Cyberspace exploration under the New Zealand Electronic Transactions Act 2002" 2005 *New Zealand Universities LR* 724–730; Dugan "Electronic transactions" 2001 *New Zealand LJ* 483; Sawyer "Regulations now in place for NZ Electronic Transactions Act" 2004 *Journal of Intl Banking Law and Regulation* 45. For a discussion of Malaysian law see Jalil "Developments in electronic contract law: A Malaysian perspective" 2004 (20) *Computer Law & Security Report* 117–124.

20 UNCITRAL "Guide to enactment of the Model Law", www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed 26 Augustus 2007). For a discussion of the Model Law see Pistorius "Contract formation" 2002 *CILSA* 129.

21 www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html (accessed 26 August 2007). See also Pistorius "Contract formation" 2002 *CILSA* 131.

22 Faria "e-Commerce and international legal harmonization" 2004 *SA Merc LJ* 532.

23 Act 25 of 2002.

24 Legislation implementing provisions of the Model Law has been adopted in Australia (1999), China (2004), Colombia (1999), Dominican Republic (2002), Ecuador (2002), France (2000), India (2000), Ireland (2000), Jordan (2001), Mauritius (2000), Mexico (2000), New Zealand (2002), Pakistan (2002), Panama (2001), Philippines (2000), Republic of Korea (1999), Singapore (1998), Slovenia (2000), South Africa (2002), Sri Lanka (2006), Thailand (2002), Venezuela (2001) and Vietnam (2005). Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in the United States (the Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law, and enacted in 49 of the

continued

also developed a convention aimed at international transactions, the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005.[25]

The Model Law contains an important underlying principle which guides the interpretation and application of its various provisions, namely that of functional equivalence.[26] This principle is based on analysis of the purposes and functions of traditional paper-based requirements, such as writing and signatures, in order to determine how those objects and functions could best be met with electronic communications techniques.[27] It also embraces the thought that in law it should make no difference what mode of communication is used by the parties: the requirements for and consequences of the communications should be the same or similar.

In Europe the Directive on Electronic Commerce[28] is aimed at preparing Europe for the transition to a knowledge-based economy, by creating a uniform approach to e-commerce throughout the European Union in an attempt to accelerate growth in such commerce.[29] The Directive was adopted because case-law in the various European jurisdictions threatened to fragment the harmony aimed for in the internal European market by providing different solutions to certain legal issues.

Regarding contract-law issues, most of the Directive is of an enabling nature ensuring that electronic contracts are valid and enforceable.[30] The Directive does not prescribe specific solutions, but requires member countries to adapt their legislation in order to give effect to the principles contained in the Directive.

In South Africa the ECT Act has adopted the principles contained in the UNCITRAL Model Law in its own response to the legal challenges of e-commerce.[31] Many of the provisions of the Model Law have been taken over verbatim, but there are a number of provisions in the ECT Act that have to deal with, or provide for, the peculiarities of South African law or introduce more appropriate solutions. Chapter III of the Act deals with the aspects contained in the UNCITRAL Model Law.[32]

---

country's states) and Canada (the Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada and enacted in 11 of Canada's provinces and territories). See also Faria "e-Commerce and international legal harmonization" 2004 *SA Merc LJ* 531 fn. 10; Pistorius "Contract formation" 2002 *CILSA* 129–132 fn. 17.

25 At www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html (accessed 26 August 2007). The convention has been signed by 10 parties but has not come into operation because none of the signatories has yet ratified it.

26 See UNCITRAL "Guide to enactment of the Model Law" para. 15; UNCITRAL Secretariat "Explanatory note" para. 46; Faria "e-Commerce and international legal harmonization" 2004 *SA Merc LJ* 533.

27 See UNCITRAL "Guide to enactment of the Model Law" para. 15 ff. See also Harvey *Internet.law.nz: Selected Issues* 348; S van der Merwe et al. *Contract: General Principles* 62–63; *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* 1982 (2) SA 565 (C) 569E; *Gincrete (Pty) Ltd v Scherringhuisen Construction (Pty) Ltd* 1996 (2) SA 682 (N).

28 2000/31/ec, which came into force on 17 July 2000.

29 Lindholm and Maennel "Directive on Electronic Commerce (2000/31/ec)" 15.

30 Ibid. 21–22.

31 Stassen "Selected aspects of the Electronic Communications and Transactions Act" 2002 (Nov) *De Rebus* 48; Coetzee "The Electronic Communications and Transactions Act 25 of 2002" 2004 *Stell LR* 501–521; Lötz and Du Plessis "Elektroniese koopkontrakte" 2004 *De Jure* 1.

32 During the drafting of the Act, a wide range of foreign legislation was consulted, apart from the UNCITRAL Model Law. This included legislation from Australia, Bermuda, Canada, Germany, India, Ireland, New Zealand, the Philippines, Singapore and the United Kingdom.

6.2 Formation of a contract

6.2.1 *Validity of the agreement*

South African law of contract is based on the principle of freedom of contract.[33] This has two consequences:

- Parties are normally free to negotiate and construct their contract according to their needs. This makes the law of contract a very flexible instrument that can easily be adapted to new circumstances, needs and challenges.
- Unless there are specific requirements in law, the contract need not conform to any specific formalities to be valid and binding. In South African law the prescription of formalities is the exception rather than the rule.[34] Formalities may be prescribed by statute or by the parties themselves.[35]

The ECT Act echoes this principle in Chapter III. Section 11(1) determines that no data message shall be without legal force and effect merely because it is in the form of a data message. This means that any offer and acceptance may be made by means of an electronic data message, unless formalities are prescribed. This is further confirmed by section 22 which stipulates that no agreement shall be invalid merely because it was concluded in part or wholly by way of data messages.

Most of these provisions seem merely to confirm the legal position, in any event. Despite the unease of some business people, the validity of electronically concluded contracts in general was never in issue. The only crucial requirement was that the communication be capable of adequately conveying the parties' intent to be bound to the agreement concerned. The only issue that did present a real problem was the requirement of a signature.[36] The traditional understanding of a signature could not be simply adapted to provide for electronic signatures.[37]

6.2.2 *Offer and acceptance*

6.2.2.1 Introduction

The usual analysis to establish whether a contract has been concluded involves classifying the responses of the parties as offer, acceptance and counter-offer. According to this analysis a valid and binding contract is established by the offeree assenting unconditionally to the offer made by the offeror.[38] The acceptance must mirror the

33 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9E; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras [94]–[95]; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) paras [12]–[13]; S van der Merwe et al. *Contract: General Principles* 11; Christie *The Law of Contract* 12; De Wet and Van Wyk *De Wet en Yeats Die Suid-Afrikaanse Kontraktereg en Handelsreg* 75.

34 *Conradie v Rossouw* 1919 AD 279; *Goldblatt v Fremantle* 1920 AD 123; Christie *The Law of Contract* 105–106; S van der Merwe et al. *Contract: General Principles* 152–154; De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 75.

35 Christie *The Law of Contract* 105–106; S van der Merwe et al. *Contract: General Principles* 153.

36 Christie *The Law of Contract* 114–116; S van der Merwe et al. *Contract: General Principles* 167–171; *Van Niekerk v Smit* 1952 (3) SA 17 (T) 25; *Brach v Citystate Townhouses (Pty) Ltd* 1982 (3) SA 364 (W).

37 See the discussion in Chapter 5, above, on digital and electronic signatures.

38 S van der Merwe et al. *Contract: General Principles* 54–55; De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 27–29; Christie *The Law of Contract* 28–29; Lötz and Du Plessis "Elektroniese koopkontrakte" 2004 *De Jure* 7–11; Pistorius "Formation of Internet contracts" 1999 *SA Merc LJ* 285–287;

continued

offer and not contain any additional or conflicting terms or conditions. If the acceptance does contain such material, it is regarded as a rejection of the original offer and as a counter-offer which the original offeror may then accept or reject.[39]

How electronic communications will be regarded in this process depends on the type of communications used. For legal purposes telefaxes, faxes, e-mails, SMSs and interaction with Internet websites must be regarded as *indirect* communications because there is not necessarily any direct interaction between the addressor and the addressee.[40] The addressor does not know whether the addressee is logged on or receives an e-mail or SMS when it is sent. Often such messages may lie in a post box or inbox for hours or even days before being accessed by the addressee. This fact was not recognised by the court in *Jamieson v Sabingo*;[41] the court described telex and fax as direct forms of communication, relying on the English case *Entores Ltd v Miles Far East Corporation*.[42] The position is now governed, however, by the ECT Act rather than by case-law.

6.2.2.2 Direct forms of communication

There is no doubt that telephonic communications between persons are regarded as direct communications.[43] Voice communications are generally excluded from the application of the ECT Act by the definition of "data message" as

> data generated, sent, received or stored by electronic means and includes –
> (*a*) voice, where the voice is used in an automated transaction; and
> (*b*) a stored record . . .[44]

Whether voice communications are made by telephone or over the Internet using VOIP[45] (through, for example, Skype) should make no difference. They are clearly excluded by the definition of "data message" in the ECT Act. VOIP communications should therefore also be regarded as direct communications. This is in line with the general principle set out in the *Jamieson* case.[46]

When one is dealing with direct communications outside the scope of the ECT Act, the general rule of the law of contract applies, namely that the offer and acceptance are subject to the information theory.[47] According to this approach the offer or

---

Watermeyer v Murray 1911 AD 61 70; *Reid Brothers (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232–241; *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 (A) 532E.

39 Christie *The Law of Contract* 49–50. 62–64; S van der Merwe et al. *Contract: General Principles* 62–66; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) 420; Eiselen and Bergenthal "The battle of forms: A comparative analysis" 2006 *CILSA* 214–215.

40 Christie *The Law of Contract* 78–79. Cf, however, *Jamieson v Sabingo* 2002 (4) SA 49 (SCA).

41 2002 (4) SA 49 (SCA) para. [5]. See also the criticism of S van der Merwe et al. *Contract: General Principles* 72–73.

42 [1955] 2 QB 327 (CA) 337, [1955] 2 All ER 493. See also Reed and Angel (eds) *Computer Law* 200–202; Lloyd *Legal Aspects of the Information Society* 233–234.

43 *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965 (4) SA 475 (E); *Odendaal v Norbert* 1973 (2) SA 749 (R); *S v Henckert* 1981 (3) SA 445 (A) 451B.

44 S 1 of Act 25 of 2002.

45 Voice Over Internet Protocol.

46 *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para. [5]. See also Reed and Angel (eds) *Computer Law* 200–202; Lötz and Du Plessis "Elektroniese koopkontrakte" 2004 *De Jure* 15.

47 *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para. [5]. See also Christie *The Law of Contract* 78–79; S van der Merwe et al. *Contract: General Principles* 55–56; Lötz and Du Plessis "Elektroniese koopkontrakte" 2004 *De Jure* 14.

acceptance becomes valid and effective in law when it comes to the subjective notice of the addressee. Thus, the offer becomes effective when the offeree comes to know of it, and acceptance becomes effective when it is communicated to the offeror. The contract becomes final and binding when the offeror obtains subjective knowledge of the acceptance.[48]

Uncertainty arises when acceptance is made telephonically but not directly to the offeror because of the interjection of a telephone-answering device. Christie is of the opinion that when a party uses a telephone-answering device a situation analogous to the postal rule is created.[49] This view must be rejected, however. The fact that someone uses a telephone-answering device cannot be seen as implicit authorisation for the other party to use an indirect method of communication to communicate her or his acceptance. The risk of the communication should remain with the offeree in these circumstances, to allow for *inter alia* the possibility that the recording is inaudible or the answering machine broken.

Unless there is a clear indication in the offer that the other party is entitled to use indirect means of communications, the other party is not authorised to use such forms of communication. The fact that a party uses a particular method of indirect communication for its offer will usually be regarded as implied authorisation for the addressee to use the same method of communicating acceptance.[50] Use of such forms of communication as fax, telex or e-mail is at the risk of the party using them. In these circumstances the general rule, the information theory, applies to the formation of the contract. Section 22 of the ECT Act has not changed this situation as it refers to the conclusion of the contract by means of "data messages", that is where *both* parties use data messages.[51]

6.2.2.3 Indirect forms of communication

In *Jamieson v Sabingo*,[52] which was decided before the ECT Act[53] came into operation, the court dealt with the conclusion of contracts by means of telexes and faxes. Farlam JA stated:

> [5] ... Although Willis J found (at 777G) that the contract was concluded in Luanda, when the matter was argued before us, Mr Horwitz, who appeared with Mr Kaplan for the appellant, conceded that the case had to be approached on the basis that the contract was concluded in Johannesburg when the appellant received the respondent's letter accepting his quotation. In my opinion, this concession was correctly made. Parties who communicate by telephone, telex or telefacsimile transmission are 'to all intents and purposes in each other's presence' (to use an expression used by Parker LJ in *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 (CA) ([1955] 2 All ER 493) at 337)

48 Christie *The Law of Contract* 68–70; S van der Merwe et al. *Contract: General Principles* 55–56; De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 32–33; *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) 597D–G.

49 Christie *The Law of Contract* 78–79.

50 S van der Merwe et al. *Contract: General Principles* 69–73; Christie *The Law of Contract* 64, 71–74; *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 (4) SA 296 (T) 302; *Smeimann v Volkersz* 1954 (4) SA 170 (C).

51 Christie *The Law of Contract* 181; S van der Merwe et al. *Contract: General Principles* 69.

52 *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para. [5].

53 Act 25 of 2002.

and the ordinary rules applicable to the conclusion of contracts made by parties in each other's physical presence apply, viz the contract comes into existence when and where the offeree's acceptance is communicated to and received by the offeror. This has been held to be the legal position in the case of contracts concluded over the telephone (*Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965 (4) SA 475 (E), approved by this Court in *S v Henckert* 1981 (3) SA 445 (A) at 451B) and contracts concluded by telex (*Entores Ltd v Miles Far East Corporation* (supra), approved by the House of Lords in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34). By parity of reasoning the same principle must apply where the parties are in communication with each other by telefacsimile transmission (see *Gunac Hawkes Bay (1986) Ltd v Palmer* [1991] 3 NZLR 297 (HC)).

Although one must agree with the conclusion that the ordinary rules regarding the conclusion of a contract must apply in the case of telephones, telexes and faxes, the underlying reasoning is not convincing.[54] When parties communicate by telephone, they are communicating directly, almost as if they are in each another's presence. The parties will know immediately whether the acceptance has been received, and any break in communications will be immediately apparent.

However, this is not true in the case of telexes, faxes and e-mails. While transmission is usually almost instantaneous, any difficulties in transmission or receipt of the message may not be readily apparent. Furthermore, there is no certainty that the other party will take subjective notice of the acceptance immediately – such notice depends on when the other party actually reads the fax, telex or e-mail. Whether one should apply the information theory to these forms of communication, as the court did in *Jamieson*, or deal with them as one would with post is a policy question the court seems to have answered in favour of the information-theory approach.[55] In view of the provisions of the ECT Act, however, the conclusion reached by the court in this case is largely of academic interest.

Telexes, faxes, SMSs, e-mails and interaction with websites are all forms of communication that fall within the definition of "data messages" in the ECT Act.[56] The Act clearly, and quite correctly, deals with data communications as indirect forms of communication. When these forms of communication are used, the sending party usually has no means of telling whether the other party takes subjective notice of the message immediately after receiving it. Nor is it possible for the parties to determine that there has been a break in communications or a miscommunication, as they can in the case of voice communications.

---

54 See S van der Merwe et al. *Contract: General Principles* 72–73; Pistorius "Formation of Internet contracts" 1999 *SA Merc LJ* 288–289. Cf Lötz and Du Plessis "Elektroniese koopkontrakte" 2004 *De Jure* 15–17. Although Lötz and Du Plessis "Elektroniese koopkontrakte" 2004 *De Jure* 224 voice the need for a universal electronic communications theory, they do not provide one. It is submitted that the solution provided by the ECT Act is practical and acceptable and provides a universal approach to electronic communications. Reliance on the information theory, as proposed by Lötz and Du Plessis "Elektroniese koopkontrakte" 2004 *De Jure* 232, when one is dealing with automated Internet contracting is unrealistic at best.

55 Christie *The Law of Contract* 181–183; S van der Merwe et al. *Contract: General Principles* 69–71; *Smeimann v Volkers* 1954 (4) SA 170 (C).

56 S 1 of Act 25 of 2002. See also the definition of "data message" in art. 2 of the UNCITRAL Model Law, on which the Act's definition is based; UNCITRAL "Guide to enactment of the Model Law" paras 30–32.

In terms of the common-law dispatch theory or postal rule the risk of a communication's being lost is placed on the offeror rather than the offeree.[57] It must be remembered, however, that it is always within the power of the offeror to determine expressly how and where any acceptance should become effective and to exclude the application of the postal rule.[58] The ECT Act, however, places the risk of electronic communications on the sending party, by making use of the reception theory.[59] In terms of this theory a contract is formed at the time and place at which the offeror receives the acceptance.[60] However, the offeror need not take subjective notice of the reception to make it effective. The introduction of a third theory or approach to communications between absent parties was necessitated by the requirements of modern communications. It is widely recognised that the postal rule is archaic and anomalous, and there have even been suggestions that it be abolished altogether.[61]

The information theory, which is the point of departure in South African law, is best suited to direct communications in which parties can easily determine any problems with the communication. The information theory, however, is not ideally suited to indirect forms of communication because of the uncertainty as to when the offeror will take subjective notice of the acceptance, if at all. The reception theory offers a fairer and more balanced approach to the validity and risk of loss of communications.[62] Determining the moment of receipt of a data message is an objective fact that can be determined more easily and surely than subjective notice. The reception of data messages cannot be manipulated by the receiving party as it can in the information theory. For example, if an offer has been made and remains open for a certain period of time, the offeror could emasculate acceptance by simply not opening the notification of acceptance until after the period runs out.

If VOIP communication or the telephone is used in an "automated transaction", then the voice communication is regarded as a "data message" as defined in the ECT Act and the provisions of the Act apply. An automated transaction is defined as

> an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment.[63]

The voice message in these circumstances is regarded as a data message and should be treated as any other data message in terms of the ECT Act. When VOIP is used as an instant and interactive method of communication with another person, however,

57 Christie *The Law of Contract* 70–71; *Cape Explosives Works (Pty) Ltd v SA Oil and Fat Industries Ltd* 1921 CPD 244; *Kergeulen Sealing and Whaling Co Ltd v CIR* 1939 AD 487. The last case contains a succinct discussion of the various theories used in determining the time and place of contracting.

58 Christie *The Law of Contract* 74–75; *Kergeulen Sealing and Whaling Co Ltd v CIR* 1939 AD 487 503.

59 See especially s 22(2) of Act 25 of 2002: "An agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror". See also S van der Merwe et al. *Contract: General Principles* 73–74.

60 Christie *The Law of Contract* 70–72; *Cape Explosives Works (Pty) Ltd v SA Oil and Fat Industries Ltd* 1921 CPD 244; *Kergeulen Sealing and Whaling Co Ltd v CIR* 1939 AD 487.

61 See, for instance, the criticism in De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 40; *A to Z Bazaars (Pty) Ltd* 1975 (3) SA 468 (A); Watnick "The electronic formation of contract and the common law 'mailbox rule'" 2004 *Baylor LR* 179–184; contra Christie *The Law of Contract* 74–75.

62 S van der Merwe et al. *Contract: General Principles* 73–74.

63 S 1 of Act 25 of 2002.

it should be treated as similar to telephonic conversations – in other words, one should apply the information theory to determine such issues as the conclusion of the contract. Such communications fall outside the scope of the ECT Act.

Offers and acceptances transmitted by telex, fax, SMS or e-mail are also data messages as defined in the ECT Act. Therefore, the provisions of Chapter III apply to the determination of the validity and consequences of these messages. In terms of the common law an offer only becomes effective, with its attendant legal consequences, when the offer comes to the subjective notice of the offeree – in other words, when the offeree has received the offer and read it.[64] Such an offer can therefore always be retracted by a quicker means of communication, provided the retraction reaches the notice of the offeree before the offeree effects a valid acceptance.[65]

When the offeree replies to an offer by means of an indirect method of communication, such communication acquires legal effect and validity according to the so-called dispatch theory or postal rule.[66] In terms of this rule the acceptance becomes valid and binding upon the posting of the letter of acceptance or the dispatch of a telegram. Furthermore, the offeree must have authorised the use of such indirect methods of communication, either expressly or implicitly, and the channels of communications must be operating normally. The offeror's use of a form of communication implicitly authorises the offeree to use the same method of communication.[67] Similarly, in accordance with the common law, the dispatch theory should also have applied to indirect electronic communications.

However, the ECT Act opts for a third approach to these situations, by introducing the reception theory into South African law.[68] In terms of this approach the communication becomes valid and effective when it is *received* by the other party. In terms of section 22 of the Act a contract is deemed to have been concluded at the time and place the acceptance of the offer was received by the offeror.

In terms of section 23 of the ECT Act a data message is deemed to have 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. Furthermore, it is deemed to have been received at the place where that party has its usual place of business or residence. This means that when an acceptance is sent electronically, by fax, telex, e-mail or in an automated transaction, the contract will be deemed to have come into existence when the acceptance is received in the manner described above. The contract will be deemed to have been concluded at the usual place of business or residence of the addressee of the acceptance, normally that of the offeror.

---

64 S van der Merwe et al. *Contract: General Principles* 61–68.

65 Ibid. 59–61; Christie *The Law of Contract* 51–53.

66 Christie *The Law of Contract* 78–81; *Cape Explosives Works (Pty) Ltd v SA Oil and Fat Industries Ltd* 1921 CPD 244; *Kergeulen Sealing and Whaling Co Ltd v CIR* 1939 AD 487.

67 For instance, the fact that the offeror posts its offer in the traditional way (that of the much-maligned "snail mail") usually indicates that the offeree may also use the post as a method to communicate acceptance of the offer. However, an offer delivered by telegram does not authorise acceptance by post. If the offeree used the post in reply to the telegram, the information theory applies. See Christie *The Law of Contract* 71–73.

68 Through s 22(2). See also S van der Merwe et al. *Contract: General Principles* 72–75.

In accordance with the principle of party autonomy, it is always open to the offeror to prescribe the manner in which acceptance should be made.[69] The offeror can stipulate that the agreement becomes final and binding upon dispatch, receipt, or subjective notice of the acceptance or even at the occurrence of some other event such as acknowledgement of receipt by the offeror or authorisation of payment by a third party.

The needs of the particular situation dictate the approach that ought to be taken. Whatever the approach, it is important that the offeror expressly stipulate the manner of acceptance. This is usually done in the offer, the invitation to do business or in the standard terms and conditions of the offeror. The bottom line is that the parties must make their intentions clear from the outset. If there is no provision stipulating the manner of acceptance in the offer, the general rules described above will apply: the contract will be deemed to have been concluded at the time and place at which the offeror receives the communication confirming acceptance.[70]

An offeror may abandon or renounce the right to receive notice of acceptance and make some other event relevant for the purpose of determining the conclusion of the agreement.[71] In commercial contexts the dispatch of the goods by the offeree may be sufficient to determine the establishment of the agreement. When the offeror makes use of an electronic agent,[72] a computer system that responds automatically and without human interference to data messages received, the conclusion of the contract in terms of the common law can be explained as follows:

(a) If the offeror makes use of an electronic agent, receipt by the agent of an acceptance is sufficient to establish consensus. This is so because of the provisions of the ECT Act and because the way the offeror has set up its business website amounts to implicit abandonment of the offeror's right to take subjective notice of acceptance.[73]

(b) If the webtrader (offeree) makes use of an electronic agent, as will be the case with most websites, the contract is concluded either when the client (offeror) receives notification of acceptance or when the website sends the client (offeror) an acknowledgement of receipt. If the website does not stipulate clearly when the agreement will be concluded, which construction should apply will depend on the facts of the particular case. In all of these cases when an electronic agent is used the subjective declaration of the party using the electronic agent is substituted with the electronic response ascribed to that party. If you program a computer to reply on your behalf, you will be held responsible for that reply as if you have made it personally. The other party may reasonably rely on that principle.[74]

69 Christie *The Law of Contract* 71–73; S van der Merwe et al. *Contract: General Principles* 66–67; *Kergeulen Sealing and Whaling Co Ltd v CIR* 1939 AD 487.

70 See ss 22 and 23 of Act 25 of 2002.

71 Christie *The Law of Contract* 68–70; *Bloom v The American Swiss Watch Co* 1915 AD 100; *McKenzie v Farmers Co-op Meat Industries Ltd* 1922 AD 16; *R v Nel* 1921 AD 339.

72 Weitzenböck "Good faith and fair dealing in contracts formed and performed by electronic agents" 2004 *Artificial Intelligence and Law* 89–91.

73 Christie *The Law of Contract* 69; *R v Nel* 1921 AD 339.

74 In accordance with the general approach to consensus based on reasonable reliance, see Christie *The Law of Contract* 24–28; S van der Merwe et al. *Contract: General Principles* 38–42; *Sonap Petroleum (SA) (Pty) Ltd v Papadogianis* 1992 (3) SA 234 (A) 238I–241D; *Saambou Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) 996A–D.

(c) In the case of EDI it often happens that both parties make use of electronic agents. As goods are sold, the electronic inventory may initiate an order for goods automatically without any human interference. The order will also be received electronically, with the actual dispatch of the goods being the first stage in the transaction requiring human intervention or interaction. In these cases the interchange agreement between the parties should deal with contract formation and mistake. In any event, the data messages generated by the electronic agents will be ascribed to the parties responsible for the transmission of the particular message as if those messages had been the subjective declarations of the parties' will.

The legal position when electronic agents are used is now regulated by section 20 of the ECT Act. It reads as follows:

> **20 Automated transactions.**—In an automated transaction –
>
> (*a*) an agreement may be formed where an electronic agent performs an action required by law for agreement formation;
>
> (*b*) an agreement may be formed where all parties to a transaction or either one of them uses an electronic agent;
>
> (*c*) a party using an electronic agent to form an agreement is, subject to paragraph (*d*), presumed to be bound by the terms of that agreement irrespective of whether that person reviewed the actions of the electronic agent or the terms of the agreement;
>
> (*d*) 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.
>
> (*e*) 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 and –
>
> (i) the electronic agent did not provide that person with an opportunity to prevent or correct the error;
>
> (ii) that person notifies the other person of the error as soon as practicable after that person has learned of it;
>
> (iii) that person takes reasonable steps, including steps that conform to the other person's instructions to return any performance received, or, if instructed to do so, to destroy that performance; and
>
> (iv) that person has not used or received any material benefit or value from any performance received from the other person.

Section 20(*a*) to (*c*) restate the common-law position to some extent, but section 20(*d*) has important new consequences for any person making use of an electronic agent.

The website or electronic trading site *must* make allow the customer to review the transaction as a whole prior to the formation of the agreement. The legal effect of this provision is not entirely clear in that it does not declare that, should it not be complied with, the contract will be void; it simply stipulates that the customer is "not bound" by the resulting contract. Whether this situation creates "limping" contracts,[75] such as those with minors, is not certain. A contract entered into by an unassisted minor is binding but *unenforceable* against the minor; whereas paragraph (*b*) simply states that the contract is *not binding*.

---

75 See generally S van der Merwe et al. *Contract: General Principles* 200–204; Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 187–194; Christie *The Law of Contract* 235–237.

This is an important deviation from the common law and should therefore be interpreted restrictively in the case of uncertainty. If it is interpreted as meaning that the contract is unenforceable against the customer, an unacceptable imbalance in the positions of the parties will be created, where one party is bound and obliged to perform but the other party is not. If the provision is interpreted as meaning that the agreement is void, the result is unsatisfactory in that no time limit is set within which the customer must exercise any right to escape the contract, whereas section 20(*e*) sets a specific time limit. Thus the website owner is at the mercy of the customer for an indefinite period and the customer could even reclaim its own performance after the website owner has performed in terms of the inchoate contract.

On a balance it would seem that the more restrictive interpretation, that the agreement is not enforceable against the customer, leads to a more acceptable result. In the event of a more restrictive interpretation the obligation on the customer gives rise to a natural obligation in terms of which the customer cannot be forced to perform but, if he or she does, such performance is valid and cannot be reclaimed. This approach would then lead to a situation that is similar to the common-law position on wagering contracts.[76]

This interpretative approach also makes more sense when one considers the provisions of section 20(*e*). If the contract is regarded as void from the beginning, the provisions of section 20(*e*) become superfluous and meaningless, whereas if the contract is simply regarded as unenforceable section 20(*e*) makes perfect sense.

Practically speaking the website owner must set up its website system to comply with the following requirements to ensure that its contracts are valid and binding:

- ☐ If the agreement is subject to standard terms and conditions, there must be a clear reference to the incorporation of such terms and the customer must be able to access those terms online while he or she is in the process of concluding the agreement.[77] A button with a link to the standard terms suffices. Usually websites also require customers to click on a button indicating the latter's acceptance of the sites' terms and conditions.[78]
- ☐ The system must make provision for a summary of the transaction as a whole that can be reviewed by the customer before he or she finally places the order. Many websites make use of a system in which the customer selects items from the goods available and places them in a virtual "shopping cart".[79] When the customer has finished browsing and selecting goods, he or she is requested to review the items in the shopping cart. The shopping-cart page will display a full list of all items selected, the number of items, the cost of each item, the value-added tax (or general sales tax, as the case may be), the cost of shipment and the total cost of the transaction. Usually the customer is asked to confirm that he or she has taken

76 See generally Christie *The Law of Contract* 377–381; S van der Merwe et al. *Contract: General Principles* 211–212.

77 See s 11(3) of Act 25 of 2002, which deals with incorporation by reference.

78 See generally, in regard to click-wrap agreements, Pistorius "The enforceability of shrink-wrap agreements in South Africa" 1993 *SA Merc LJ* 1; Pistorius "Click-wrap and web-wrap agreements" 2004 *SA Merc LJ* 568.

79 See, for instance, www.amazon.com, www.kalahari.net (both accessed 26 August 2007), and www.kulula.com (accessed 6 August 2007).

notice of the Internet trader's standard terms and conditions, privacy policy and to confirm the selection of items in the shopping cart before proceeding to the payment page, where the customer will usually pay for the transaction by means of her or his credit card.[80]

An important question that arises in connection with e-commerce is whether commercial websites contain offers or merely invitations to do business (where the client can negotiate with the seller by interacting with the website). The point of departure in South African law is that advertisements and similar statements made by sellers do not constitute conclusive offers, but merely invitations to do business.[81] This is true of goods displayed in a window or on the shelves of a supermarket. This rule is of great importance to whether a contract can be concluded by mere response to such advertisements or statements. In most cases, because such statements are not conclusive offers, the customer makes an offer to buy when the goods are presented at the till, rather than the seller's making an offer by displaying the wares.[82]

The same holds true for websites. Unless the website and the statements contained in it clearly convey the intention of the website owner to be bound by any acceptance of the goods or services offered for sale, the website will be interpreted merely as an invitation to do business and no more. However, it is within the power of the website owner to indicate clearly the nature of the website by simply providing the necessary statements on the website.[83] This indication can be made either by a clear provision in the standard terms that the goods displayed on the website do not constitute an offer and that any response by the customer will be deemed to be an offer that may be accepted or confirmed by the website owner or by stipulating that any order is subject to confirmation.

The Kalahari.net website, for instance, contains the following clause in its standard terms and conditions:[84]

12. AGREEMENTS OF SALE

12.1 Placing an item in a shopping basket or adding it to a wish-list without completing the purchase cycle does not:

12.1.1 constitute an agreement of sale between Kalahari and users cannot hold Kalahari liable if such items are not available when the purchase cycle is completed later; and/or

12.1.2 constitute an order for such an item; and

12.1.3 Kalahari may remove such an item from the shopping basket or wish-list if no stock is available.

---

80 www.amazon.com, www.kalahari.net and www.kulula.com are excellent examples.

81 Christie *The Law of Contract* 39–42; *Crawley v R* 1909 TS 1105. This may not necessarily be the case in other legal systems. See, for instance, the Turkish Code which provides that goods are offered for sale with an indication of price constitutes an offer.

82 De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 31; S van der Merwe et al. *Contract: General Principles* 57–58; Christie *The Law of Contract* 39–43; *Crawley v R* 1909 TS 1105.

83 See, for instance, www.kalahari.net (accessed 26 August 2007).

84 These terms are subject to a copyright held by Kalahari.net and are reproduced here with the express permission of Kalahari.net.

12.2 An agreement of sale between Kalahari and a user only comes into effect if and when:

12.2.1 a credit card authorisation is received from the issuing bank; or

12.2.2 a deposit of an electronic transfer is reflected on Kalahari's bank statement (and only if such payment is received within 5 (five) business days after completion of the purchase cycle); or

12.2.3 a direct deposit is reflected on Kalahari's bank statement (and only if such payment is received within 5 (five) business days after completion of the purchase cycle.

12.3 Kalahari reserves the right to refuse to accept and/or execute an order without giving any reasons. Kalahari also reserves the right to cancel orders in whole or in part as circumstances dictate. Kalahari shall only be liable to refund monies already paid by the user.

12.4 Kalahari shall take all reasonable efforts to maintain correct prices. However, should errors occur and items are offered at incorrect prices, kalahari.net will not be obliged to sell goods at such incorrect prices and shall only be liable to refund monies paid.

12.5 Consumers can view or print a full record of the transaction that is maintained for a period of twelve months on the Kalahari website.

These terms make it quite clear that the goods on display on the website are merely an advertisement for such goods and an invitation to do business. The customer's selection of goods and offer to pay constitutes an offer that may be accepted or rejected by the webtrader. Confirmation of payment, by either direct funds transfer or confirmation by the credit-card company, will complete the transaction. From these terms it is not entirely clear when the contract comes into existence, but it would seem to be at the moment the webtrader receives confirmation of payment. The agreement is also subject to cancellation by the webtrader prior to the trader's own performance.

On most websites the conclusion of the contract is achieved through the following sequence of events:

- The goods or services for sale are displayed together with the relevant prices.
- The customer is requested to indicate which items he or she wishes to order by clicking on an appropriate button or by placing the goods in a "shopping basket".
- When the customer is satisfied that he or she wants to purchase the goods, he or she clicks on a button saying "Buy" or something similar.
- The website then usually requests payment particulars, usually credit card or a similar mode of payment.
- Once the seller has received confirmation from the credit-card company or bank that payment will take place, the sale is confirmed by an appropriate message to the customer.

It is important that the conclusion of the contract always be linked to acceptance or confirmation by the seller.

If the website presents an offer rather than a invitation to do business, the website owner runs the following risks:

- The site may be overrun with acceptances the seller cannot meet, potentially putting it in breach of all of those orders it cannot fulfil.

- If there is a clear mistake on the website – a mistake that should be obvious to any reasonable user of the website – in respect of the price, for instance, the website owner need not accept any orders made on the basis of that mistaken statement. A mistake is obvious if new goods usually retailing in the market place for R1 000 are mistakenly offered, because of a typing error, at R10. If the mistake is not readily apparent – for example, when goods are offered for R229 instead of R299 – the webtrader is bound by any acceptances received. Furthermore, if the trader's system operates by automatically checking payment particulars confirming the sale, it might not protect the seller against a reasonable mistake as the webtrader will have created a reasonable impression in the mind of the buyer that the buyer's offer has been accepted in accordance with the reliance approach.

6.2.3 *Automated contracts and mistake*

6.2.3.1 The common-law position

The analysis of offer and acceptance provides some assistance in determining whether parties have, objectively speaking, reached an agreement, but is not always helpful in determining whether there is subjective consensus or whether the agreement is vitiated by mistake.[85] Regarding consensus, the courts have over time developed a set of rules which finely balances the need for certainty and an objective approach, on the one hand, with the need for fairness and justice, on the other, as well as a subjective approach.

The reliance approach to consensus, as set out in *Sonap Petroleum (SA) (Pty) Ltd v Papadogianis*,[86] clearly recognises that there is a need in certain circumstances to qualify the general subjective approach to consensus by holding a person bound to an apparent agreement when he or she by her or his conduct has led the other party to believe that consensus had been reached, on which reasonable belief that other party had relied.[87]

The reliance approach is closely linked to the approach taken by courts regarding mistakes. When, objectively seen, there is an apparent agreement between the parties, a party who laboured under a material mistake will nevertheless be allowed to escape the agreement if that mistake was reasonable (or a *iustus error*).[88] These principles often provide great difficulty in their application to concrete cases. The prospect of mistakes in an online environment when one of the parties is dealing with a so-called electronic agent is obvious. For instance, a party may accidentally strike the 0 key once too often and order 1 000 items instead of 100, or type 19 instead of 10. In most cases it is almost impossible for the commercial website to detect such a mistake.

---

85 Christie *The Law of Contract* 21–29, 313–314; S van der Merwe et al. *Contract: General Principles* 25–27, 54–55. Regarding American law, see Daniel "Electronic contracting under the 2003 revision to article 2 of the Uniform Commercial Code" 2004 *Santa Clara Computer & High Technology LJ* 341–344. See also Phang "Contract formation and mistake in cyberspace" 2005 *Journal of Contract Law* 197–207.

86 1992 (3) SA 234 (A). See also S van der Merwe et al. *Contract: General Principles* 38–42; Christie *The Law of Contract* 21–29.

87 S van der Merwe et al. *Contract: General Principles* 38–42.

88 Ibid. 42–44.

6.2.3.2 Section 20(*e*) of the ECT Act

Section 20(*e*) of the ECT Act[89] deals with mistakes in automated transactions. It reads thus:

> (*e*) 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 and –
>
> (i) the electronic agent did not provide that person with an opportunity to prevent or correct the error;
>
> (ii) that person notifies the other person of the error as soon as practicable after that person has learned of it;
>
> (iii) that person takes reasonable steps, including steps that conform to the other person's instructions to return any performance received, or, if instructed to do so, to destroy that performance; and
>
> (iv) that person has not used or received any material benefit or value from any performance received from the other person.

It is clear that there is a close link between the provisions of section 20(*d*) and those of section 20(*e*). If the website fails to provide the customer with an opportunity to review the transaction as required by section 20(*d*), the contract may be void (not binding) or "limping" as discussed above.[90] Section 20(*e*) is more in accord with the common-law position regarding mistake, clearly providing that the agreement will be void owing to a mistake when the requirements of subsections (i) to (iv) are met. The legislature has in fact determined in section 20(*e*) when a mistake will be regarded as excusable or just (a *iustus error*) and under which circumstances the contract will nevertheless be held to be valid and binding, to wit when there is a reasonable reliance on the communication of the customer by the part of the website owner or when the customer who has taken advantage of the agreement is not allowed to rely on her or his own mistake.

The requirements of section 20(*e*) are cumulative and the onus is on the customer to prove all of these requirements in order to escape liability. When the contract is void because of a mistake, the ordinary contractual remedies are available to the parties in so far as any party has been prejudiced or enriched as a result of the mistake.[91] The prejudiced party is entitled to reclaim any performance with an enrichment action, more particularly the *condictio indebiti*, to the extent that the other party was enriched by that performance.[92]

Practically speaking section 20(*e*) has the following consequences when the customer has made a material error in the contracting process:

- ☐ If there was an opportunity for the customer to review the transaction, he or she will be bound despite the error. If, however, the error is so glaring that it should have been noticed by the website owner, the customer may still escape liability on the common-law grounds of mistake.

89 Act 25 of 2002.
90 See para. 6.2.2.3.
91 Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 106 ff.
92 Ibid. 106–108; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) 202A.

- If there was no opportunity for the customer to review the transaction, no opportunity to detect and correct the error, the contract will not be binding on her or him in terms of section 20(*d*) and may even be void in terms of common-law principles.

6.2.3.3 EDI and interchange agreements

Electronic data interchange usually takes place within a fairly rigorously regulated relationship between the parties. Most often this relationship is determined by the provisions of a so-called interchange agreement concluded between the parties at the outset.[93] An interchange agreement is a framework agreement regulating the rights and obligations of the parties on a continuous basis as long as their relationship persists. All individual transactions are concluded within the ambit and under the control of the interchange agreement.[94]

A model interchange agreement was developed for South Africa by the South African Bureau of Standards in 1996.[95] The United Nations Economic Commission for Europe Working Party on Facilitation of International Trade Procedures (WP.4) developed a similar standard interchange agreement for international use.[96] The Working Party describes an interchange agreement as follows:[97]

> An interchange agreement is made between trading partners setting out the rules they will adopt for using Electronic Data Interchange (EDI). Electronic Data Interchange is the electronic transfer from computer to computer of commercial or administrative transactions using an agreed standard to structure the transaction or message data. The agreement also details the individual roles and legal responsibilities of the trading partners for transmitting, receiving and storing electronic messages. Because of differences which are involved with the use of EDI in commerce, addressing these topics as they relate to a new electronic trading environment reduces the legal uncertainty that electronic trading might raise and enhances the confidence with which the technology is employed.

An interchange agreement should address at least the following issues:[98]

- selection of EDI messages, message standards and methods of communication;
- responsibilities for ensuring that the equipment, software and services are operated and maintained effectively;
- procedures for making any systems changes which may impair the ability of the trading partners to communicate;

---

93 Eiselen "The electronic data interchange agreement" 1995 *SA Merc LJ* 1; Walden *EDI and the Law* 73 ff; Thomsen and Wheble *Trading with EDI* 153–174; Coetzee "Incoterms, electronic interchange, and the Electronic Communications and Transactions Act" 2003 *SA Merc LJ* 1–19.

94 Eiselen "The electronic data interchange agreement" 1995 *SA Merc LJ* 7–8; Walden *EDI and the Law* 73–75.

95 Eiselen "The electronic data interchange agreement" 1995 *SA Merc LJ* 2–3; Boss and Ritter *Electronic Data Interchange Agreements: A Guide and Source Book* 8; Boss "Electronic data interchange agreements: Private contracting toward a global environment" 1992 *Northwestern J of Intl Law & Bus* 33; Van Esch and Prins *Recht en EDI* 2.

96 www.ebxml.org/project_teams/trade_partner/private/Rec26_InterchangeAgreement.doc (accessed 26 August 2007).

97 Ibid.

98 Eiselen "The electronic data interchange agreement" 1995 *SA Merc LJ* 8–18; Walden *EDI and the Law* 80–88; Thomsen and Wheble *Trading with EDI* 135–147; Baum and Perritt *Electronic Contracting, Publishing and EDI Law* 49 ff.

- security procedures and services;
- the point in time at which EDI messages will have legal effect;
- the roles and contracts of any third-party service providers;
- procedures for dealing with technical errors;
- the need (if any) for confidentiality;
- liability in the event of any delay or failure to meet agreed EDI communications requirements;
- the laws governing the exchanging of EDI messages;
- any other specific arrangements between the parties regulating their relationship; and
- methods for resolving any possible disputes.

If the parties have concluded a proper interchange agreement, most of the legal issues that could arise from the use of EDI or data messages should be easy to resolve without litigation.

6.2.4 *Time and place*

In the discussion of the offer and acceptance above,[99] brief mention was made of the determination of the time and place at which a contract is deemed to have come into existence.

Determining *where* the contract comes into being is important for the following reasons:

- To be valid the contract must comply with the provisions of the law of the place where it was concluded (*lex loci contractus*).[100] These may include formalities and other requirements such as consideration.
- The place of contracting may be a factor in determining the legal system applicable to the contract in terms of the provisions of private international law. The place of contracting is usually not determinative, but it is not unimportant. Another factor to be considered is where the performance is to take place (*lex loci solutionis*).[101]
- Overriding domestic-law provisions that apply at the place of contracting, such as consumer-protection measures, may also apply to the agreement.[102]
- The place of contracting may also be relevant in the determination of jurisdiction in a dispute between the parties.[103]

99 Para. 6.2.2 above.

100 Forsyth *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* 318–319.

101 Ibid. 307–313; *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171; *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 (2) SA 138 (C).

102 Forsyth *Private International Law* 8–9; North and Fawcett *Cheshire and North's Private International Law* 132.

103 Forsyth *Private International Law* 99–102; North and Fawcett *Cheshire and North's Private International Law* 179 ff; Lötz and Du Plessis "Elektroniese koopkontrakte" 2004 *De Jure* 13.

Determining *when* the contract comes into existence is important for the following reasons:

- Unless the offer is irrevocable, the offeror is entitled to retract the offer up to the moment there is a valid acceptance.
- Certain expiration periods start to run at the moment of acceptance. If a contract determines that performance is due, say, within three days of the conclusion of the agreement, the exact timing may be of great importance. When an option is granted prior to the conclusion of the agreement for a limited period, calculating that period is equally important.
- As far as liability for the payment of interest is concerned the timing can be critical, especially when large sums of money are involved.
- The coming into existence of the agreement changes the relationship between the offeror and offeree in that they are now bound to comply with their obligations in terms of that agreement.

In accordance with the common law an agreement comes into existence at the time and place determined by the parties. It is open to the offeror to determine where and when acceptance becomes final and binding.[104] In the absence of any stipulation by the offeror, the contract comes into existence at the following time and place:

- When the offeror is informed of the acceptance by the offeree, that is when the acceptance comes to the subjective notice of the offeror in accordance with the information theory. If an offeree situated in Cape Town communicates acceptance to the offeror situated in Johannesburg by telephone, the agreement comes into existence in Johannesburg at the time at which the offeror hears the acceptance.
- If the postal rule applies, the contract comes into existence at the time and place at which the acceptance is posted. Thus if the Cape Town offeree posts the acceptance in Cape Town, the contract will be deemed to have been concluded in Cape Town at the time of the posting of the letter.
- The ECT Act introduces a third approach, namely the reception theory. In terms of the provisions of section 22(2) a contract is concluded at the time and place at which the acceptance of the offer was received by the offeror.

The legislature has recognised the fact that time and place in the virtual world of the Internet are difficult to determine because the place where communications are received and stored may have very little connection with the physical location of the offeror or offeree.[105] For instance, if a South African business with warehouses in Durban runs a website which is hosted in India by an Indian Internet service provider, all automated communications on behalf of the offeror will physically originate

104 Christie *The Law of Contract* 64–65, 76–78; S van der Merwe et al. *Contract: General Principles* 68–70; *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A); *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 (4) SA 296 (T).

105 See, for instance, UNCITRAL Secretariat "Explanatory note" paras 76–79. For similar international solutions see the UN Convention for the International Sale of Goods, 1980 (Vienna) art. 18(2) of which provides that "An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror".

in India and all responses will be received and stored there. The location in India for business purposes, however, is totally incidental as the manufacture and dispatch of the goods take place in South Africa. Eventually payment will also be received in South Africa.

Section 23 of the ECT Act makes provision for these situations.[106] It reads thus:

> **23 Time and place of communications, dispatch and receipt.**—A data message –
>
> (*a*) used in the conclusion or performance of an agreement 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;
>
> (*b*) 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; and
>
> (*c*) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.

According to this provision a data message is deemed to have been sent at the time at which it goes beyond the control of the originator or sender. Therefore, for example, an e-mail is deemed to have been sent when the message leaves the information system of the originator. When the message has left the server and is "transported" through the Internet, it is deemed to have been sent. The only exception is when both parties use the same information system – for instance, they are both customers of the same service provider. In such a case, the message is deemed to have been sent as soon as it is capable of being retrieved by the addressee.[107]

6.2.5 *Formalities*

Where contracts are concerned, there are usually three formalities that may be required: writing, signature and some kind of third-party authentication or involvement (such as notarial execution).[108] These formalities are required for five reasons, namely legal certainty (provided by writing), identification, attribution, assent and authentication (provided by the signature). The formalities may be required either by statute or by the parties themselves.[109]

In many countries, such as the United States, Germany and Australia, an electronic message is regarded as "writing", but in others, such as the United Kingdom, Russia and South Africa, there has been uncertainty.[110] Authentication by signature is

106 S van der Merwe et al. *Contract: General Principles* 73–75.

107 See ECT Act s 23(*a*). See also Eiselen "Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980" 1999 (6) *EDI LR* 35–36; S van der Merwe et al. *Contract: General Principles* 152–153.

108 Eiselen "Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980" 1999 (6) *EDI LR* 35–36; S van der Merwe et al. *Contract: General Principles* 152–153.

109 Eiselen "E-commerce and the CISG: Formation, formalities and validity" 2002 *Vindobona Journal of Intl Commercial Law & Arbitration* 305; Coetzee "The Electronic Communications and Transactions Act 25 of 2002" 2004 *Stell LR* 511–513.

110 Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* paras 189–190; Baum and Perritt *Electronic Contracting, Publishing and EDI Law* 337–341; Wright *Electronic Commerce*

continued

a bigger problem, however. In most jurisdictions it seems that the requirement of a signature can only be met if a physical signature has been affixed to a paper document.[111]

The general rule in South African law is that no formalities are required for the conclusion of a valid and binding agreement.[112] Agreements therefore can be concluded by any means of communication which sufficiently indicates the intention of the parties concerned to be bound. Such communication can be express or implicit and can consist of the spoken word, writing and even conduct. There are, however, two broad exceptions to the freedom of form:

- **Formalities prescribed by law.** A few South African laws require formalities for certain types of agreement or communications. For instance the Alienation of Land Act[113] requires a contract for the alienation of land to be in writing and signed by the parties; the General Law Amendment Act[114] requires contracts of suretyship to be in writing and signed by the surety; the Matrimonial Property Act[115] requires the authorisation of a person married in community of property for certain transactions to be in writing and attested by two witnesses; and certain mining rights and leases need to be notarially executed in terms of the Mining Titles Registration Act.[116]
- **Formalities prescribed by the parties.** It is not uncommon for parties to require their agreements to be reduced to writing and signed before such agreements become valid and binding. Most written agreements are likely to contain a so-called Shifren clause[117] in terms of which no variation or consensual termination of the agreement is valid or binding on the parties unless it is reduced to writing and signed by both parties.

In line with the principle of functional equivalence,[118] the ECT Act makes provision for compliance with these formal requirements by electronic data messages and means. There can be little doubt that most data messages that can be displayed on a computer or cellphone screen will be considered "writing" in terms of the common law. Writing in this context merely refers to a depiction of the spoken word

---

§ 16.3.2; Fritzemeyer and Heun "Rechtsfragen des EDI" 1992 *Computerrecht* 131; Eiselen "The electronic data interchange agreement" 1995 *SA Merc LJ* 10–11; Eiselen "Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980" 1999 (6) *EDI LR* 21–46.

111 Wright *Electronic Commerce* §16.4–§16.5; Baum and Perritt *Electronic Contracting, Publishing and EDI Law* 337–341; Eiselen "Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980" 1999 (6) *EDI LR* 21–46.

112 S van der Merwe et al. *Contract: General Principles* 152–153; De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 75; Christie *The Law of Contract* 105–106; *Conradie v Rossouw* 1919 AD 279.

113 Act 68 of 1981.

114 Act 50 of 1986.

115 Act 88 of 1984.

116 Act 16 of 1967.

117 Named after *SA Sentrale Ko-op Graanmpy Bpk v Shifren* 1964 (4) SA 760 (A).

118 UNCITRAL Secretariat "Explanatory note" paras 15–18; Faria "e-Commerce and international legal harmonization" 2004 *SA Merc LJ* 529; Pistorius "Contract formation" 2002 *CILSA* 134–135.

which is capable of being read. The issue has in any case been put beyond doubt by section 12 of the ECT Act:

> **12 Writing.**—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.

These requirements are stricter than those under the common law in that the data message is required to be available for subsequent reference.[119] However, this requirement makes eminent sense in the context of formalities the object of which is to provide legal certainty. If a data message is so ephemeral that it cannot be saved for subsequent reference, it cannot provide that certainty.

This definition of writing also expands the common-law meaning of writing. The concept of a "data message" is widely defined in section 1 of the ECT Act and includes voice messages in which the voice is used in an automated transaction. Therefore telephonic communications between a natural person and an electronic agent, even when the electronic agent makes use of pre-recorded voice messages, constitute "writing" as set out here, provided that such communications are properly recorded, in other words are available for subsequent reference. In principle there can be no objection to this development; the means used provide as much legal certainty as any old-fashioned documentary evidence.

If a constitutive formal requirement for the validity of a document is that the document be signed by a party to it, it is probably not possible in terms of the common law for such signature to be effected by electronic means. In terms of the common law a signature is the handwritten symbol appended to a document by a person. An electronic signature does not meet these requirements.

A signature *identifies* the person assenting to or attesting the document; *attributes* the document to a specific person; indicates *assent* (by, for instance, a contract party) or *attestation* (by a witness); and *authenticates* the originality of the document.[120] Physical (or "wet") signatures have fulfilled these functions in law for centuries. However, they are not unproblematic or unfailing – after all, it is difficulty to prove that a signature is a forgery. Electronic signatures must perform all of these functions and provide at least as much legal certainty as traditional wet signatures, were they to provide an alternative method of signing.

Section 13 of the ECT Act makes provision for the use of electronic signatures:

> **13 Signature.**—(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

119 See the discussion on incorporation by reference at para. 6.2.6 below.

120 Eiselen "Electronic commerce and the UN Convention on Contracts for the International Sale of Goods (CISG) 1980" 1999 (6) *EDI LR* 35–36.

(*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.

Section 13 draws a distinction between two situations, namely when a signature is required by law and when it is merely required by the parties to an electronic transaction.[121] When the law requires a signature, that signature must meet the requirements of an advanced electronic signature.[122] When the signature is merely required by the parties themselves, any kind of data message that sufficiently identifies the person and indicates her or his approval should be adequate.[123] Section 13 adds that regard should be had to whether the method used was as reliable as was appropriate under the circumstances, taking into account the type of information communicated.

Section 13 strives to give functional equivalence to electronic signatures by requiring that they be adequate to link the message to a specific person (namely the author of the signature, thus ensuring identification and attribution) and to indicate reliably that person's approval of the document or text(thus establishing assent and authentication). Of course, as is the case with other formalities, the parties are free to agree on the kind of electronic signatures that will be regarded as sufficient by them.

The law sometimes requires authentication of documents by a trusted third party, such as a notary public. Section 18(1) makes provision for this kind of formality:

18 Notarisation, acknowledgement and certification.—(1) Where a law requires a signature, statement or document to be notarised, acknowledged, verified or made under oath, that requirement is met if the advanced electronic signature of the person authorised to perform those acts is attached to, incorporated in or logically associated with the electronic signature or data message.

Finally, some laws require formalities in respect of the sending of certain types of notice. The most common requirement is that a notice be sent by registered post. Section 19(4) creates a method whereby a party can comply with this statutory requirement by using the electronic communications system of the Post Office. To date, however, the Post Office has not put in place systems to make such communication and registration possible.

---

121 Coetzee "Incoterms, electronic data interchange, and the Electronic Communications and Transactions Act" 2003 *Stell LR* 5.

122 To date, the mechanisms to provide for advanced electronic signatures have not yet been put into operation. This requirement cannot therefore be complied with yet.

123 Coetzee "Incoterms, electronic data interchange, and the Electronic Communications and Transactions Act" 2003 *Stell LR* 5.

6.2.6 *Incorporation by reference ("click-wrap")*

The use of standard terms and conditions of agreement has become an important tool in modern business. It is widely recognised that the conduct of modern business without the aid of standard terms, despite their often oppressive nature, would be very difficult and costly.[121] A set or various sets of standard terms are usually drafted for a particular business and used by that business in all its transactions. In this way only a few terms need to be individually negotiated and reduced to writing.

Several techniques are used to incorporate these terms into agreements:

- The terms form part and parcel of the document that is filled in and signed by the parties. Suretyship documents used by banks are a good example.[125]
- There is a reference on the face of the document to the inclusion of the standard terms printed on the reverse side of the document. Sales dockets issued by retailers and signed by customers often use this technique. Applications for credit facilities likewise rely on this technique.[126]
- There is a reference in the document signed by the parties to the inclusion of standard terms that are available elsewhere. Public transporters often incorporate their terms by simply printing on the ticket issued to a customer a reference to the standard terms. These cases are commonly referred to as "ticket cases".[127]
- A sign or noticeboard at the place of contracting, usually the offeror's place of business, contains the terms or refers to their incorporation. Parking garages and amusement parks often use this method.[128]

On websites a similar technique, sometimes called click-wrap,[129] is used to incorporate standard terms. Many websites contain a hyperlink or button referring to the standard terms and conditions. The customer can then click on this hyperlink to access the standard terms. This method is akin to the sales-docket technique referred to above[130] and can be distinguished from the ticket cases by the fact that the text of the terms is readily available (one click away), whereas in most ticket cases the terms are contained in a document that needs to be accessed elsewhere, often not at the place of contracting.

The courts have developed a number of requirements for this incorporation by reference. Three questions are used to determine whether incorporation was successful:

---

124 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras [135]–[139]; Christie *The Law of Contract* 179.

125 See, for instance, *Roomer v Wedge Steel* 1998 (1) SA 538 (N).

126 See, for instance, *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA).

127 *Burger v Central SAR* 1903 TS 571; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A); Christie *The Law of Contract* 179.

128 *Durban's Water Wonderland v Botha* 1999 (1) SA 982 (SCA) 991G–H; *Steyn v LSA Motors* 1994 (1) SA 49 (A).

129 The distinction between click-wrap and web-wrap (see Pistorius "Click-wrap and web-wrap agreements" 2004 *SA Merc LJ* 569–570) is not legally significant as these methods are, in one way or another, examples of incorporation by reference. These two terms are, at best, shorthand references to this phenomenon in electronic trading. See also Mann and Winn *Electronic Commerce* 275.

130 Reed and Angel (eds) *Computer Law* 109–110; Todd *E-Commerce Law* 106–107; Mann and Winn *Electronic Commerce* 275–285.

- ☐ Did the customer read the document or notice of incorporation? If he or she did, the standard terms are successfully incorporated.[131]
- ☐ If the customer did not read the notice, did the supplier take reasonable steps to bring the notice to the attention of the customer? If the supplier did not, the notice is ineffectual and the terms are not included.[132]
- ☐ If reasonable steps were taken, would a reasonable customer have taken notice of the notice? If such a customer would have done so, the terms are included; otherwise they are excluded.[133]

Incorporation by reference in electronic transactions is governed by the provisions of section 11 which are similar to the common-law rules described above, but require something more. Section 11 reads thus:

> **11 Legal recognition of data messages.**—(1) Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.
>
> (2) 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.
>
> (3) 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 the other 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.

The common-law approach to incorporation does not usually require the terms being incorporated to be readily available for reference by the customer. It merely requires a clear reference to those terms. However, section 11(3) requires that the terms be accessible to the customer, either electronically or as a printout, in such a form that it can be read, stored and retrieved. This is one of the few occasions when the legislature has set higher standards for electronic transactions than it has for paper-based transactions. This higher standard is fully justifiable in the light of the fact that these terms can be made available easily and cheaply by the supplier.[134]

6.3 Transborder legal issues

6.3.1 *Introduction*

The advent of the Internet has given great impetus to the process of globalisation started in the early twentieth century by technological advances in transport and

---

131 Christie *The Law of Contract* 180–181; *Essa v Divaris* 1947 (1) SA 753 (A) 763.

132 *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* 1982 (2) SA 565 (C) 569E. See, for instance, *Africa Solar v Diwatt* 2002 (4) SA 681 (SCA); *Cape Group Construction v Govt of the United Kingdom* 2003 (5) SA 180 (SCA) in which the front page of the agreement, referring to additional terms on the reverse side, was faxed but not the reverse side!

133 *Durban's Water Wonderland v Botha* 1999 (1) SA 982 (SCA) 991G–H; *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) 643–644.

134 See similar requirements in German law: Schlechtriem and Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)* 199–202.

communications.[135] The movement of goods around the world became increasingly efficient with air transport and containerisation during the course of the twentieth century. Although communications technology also advanced steadily through the twentieth century, the Internet era (beginning in the last quarter of the twentieth century) represents such a quantum leap that distance and international borders have become almost meaningless in and no longer provide barriers to the exchange of information and communications. Whereas before the Internet era transborder business was largely limited to commercial parties, such business has now become a terrain where ordinary consumers regularly conduct transactions.[136]

From a legal point of view there are two main areas where international borders still play an important role, even though the parties concerned may not be actively aware of them: namely jurisdiction and applicable law. With the exception of public international law, which deals largely with the relationship between States, all law is territorial – it applies only within the political borders of a particular country. Accordingly, South African law for instance applies only within the borders of South Africa.

Any legal relationship between parties must therefore also have its foundation in the law of a particular country. A contract concluded between a South African business and a Nigerian business, for instance, must be governed by either South African or Nigerian law, or possibly even by a third legal system (if, for instance, the contract was concluded in Angola). There is no internationally applicable law, only the domestic contract law of the potentially applicable legal systems.[137]

There is a growing tendency in international trade to refer to an emerging international *lex mercatoria* but this concept is still very uncertain and without proper legal foundation,[138] being applied mostly only in arbitration proceedings. This putative international mercantile law seems to be based on instruments such as the Vienna Convention for the International Sale of Goods, 1980[139] or the UNIDROIT[140] Principles of International Commercial Contracts.[141] Despite these developments it is certain that in most instances the contractual relationship will have its foundation in a particular legal system to be determined by the rules of private international law.

---

135 Reed and Angel (eds) *Computer Law* 227–228; Hedley *The Law of Electronic Commerce and the Internet* 258; Todd *E-Commerce Law* 209; Pistorius "Formation of Internet contracts" 1999 *SA Merc LJ* 284–285; Lloyd *Legal Aspects of the Information Society* 268–269.

136 Reed and Angel (eds) *Computer Law* 226–227; Schneider *Electronic Commerce* 314–315.

137 Forsyth *Private International Law* 2–3, 294–295; North and Fawcett *Cheshire and North's Private International Law* 3–5, 533–534.

138 See, for instance, http://lawprofessors.typepad.com/contracts prof_blog/2005/12/theres_no_such_.html (accessed 26 August 2007) where Sachs argues against such a concept. See also Mazzacano "Canadian jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods" 2006 *Pace International LR* (also at www.cisg.law.pace.edu/cisg/biblio/mazzacano1.html) (accessed 26 August 2007).

139 For a discussion of and materials concerning the convention see Schlechtriem and Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)* and the website of the Pace Law School Institute of International Commercial Law, www.cisg.law.pace.edu (accessed 26 August 2007).

140 The shortened "name" – probably derived from the French for "one law" – adopted by the International Institute for the Unification of Private Law. See the Institute's website at www.unidroit.org.

141 The text of which is available, together with comments, at www.unidroit.org/english/home.htm (accessed 26 August 2007). See also Bonell *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts.*

A related but distinct problem arises when a dispute between the parties needs to be resolved by legal action, namely that of jurisdiction. The fact that the contract is governed by a specific legal system does not necessarily mean that the courts of that same legal system will have jurisdiction over the parties or the dispute.[142] Jurisdiction is determined by each country's principles and rules of jurisdiction, which have no connection with the rules of private international law that determine the applicable legal system.[143]

In a dispute the party lodging proceedings must first determine which courts have jurisdiction. If there is more than one such court, that party must choose one of those courts and lodge its action there. Only when the action has been lodged with a court will the rules of private international law of the *lex fori*[144] be applied to determine the applicable legal system. For instance, should a contractual dispute arise between the South African and Nigerian parties, the South African plaintiff may have no choice but to sue the Nigerian party in a Nigerian court if only the Nigerian court has jurisdiction. The Nigerian court will then apply either Nigerian contract law or South African contract law to the dispute, according to its rules of private international law.

6.3.2 *Jurisdiction*

In 1995 the Attorney-General of Minnesota stated that "Persons outside of [*sic*] Minnesota who transmit information via the internet knowing that the information will be disseminated in Minnesota will be subject to the jurisdiction of Minnesota Courts for the violations of state, criminal and civil law".[145]

Cameron correctly points out that, were this attitude adopted throughout the world, all States would in effect be imposing their jurisdiction over all persons using the Internet.[146] This is simply not realistic. Courts will have to apply their traditional grounds of jurisdiction to this specific field. Clearly, however, the advent of the Internet poses interesting challenges to the law of jurisdiction.[147]

The law that determines jurisdiction is the domestic national law of the court or courts where proceedings may potentially be initiated.[148] In contractual proceedings the plaintiff often has a choice of various courts where proceedings may be lodged because there may be a number of jurisdictional factors that apply to the particular facts. The choice made depends on a number of factors, including costs, location of witnesses and tactical advantages. In most cases it would be tactically advantageous to

142 Forsyth *Private International Law* 158–162; North and Fawcett *Cheshire and North's Private International Law* 179–182.

143 In some instances there may be harmonised law within a region such as Europe. See Øren "International jurisdiction over consumer contracts in e-Europe" 2003 *ICLQ* 667 for a discussion of the European Jurisdiction Regulation which contains specific provisions on consumer contracts.

144 The law of the court exercising jurisdiction.

145 As quoted in Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 1.

146 Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 1.

147 See, for instance, Osborne "Jurisdiction on the Internet – not such a barrel of laughs for the Euromarket!" 2000 *Computers and Law* 26–28.

148 Forsyth *Private International Law* 158–159. For a discussion of Australian and American rules of jurisdiction regarding the Internet see Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 1–17.

lodge proceedings in the courts of one's own jurisdiction for such purely practical reasons as convenience, easy access to lawyers familiar with the system, and reduced costs. However, there are also instances where a legal advantage may be gained because of the rules of private international law that will be applied or through the application of more liberal (or stricter) laws of procedure and evidence. All of these factors need to be considered before a choice of jurisdiction is exercised by the plaintiff.

The defendant on the other hand has no such choice because he or she is being dragged into court against her or his will. It is for this reason that in most countries the place of business or usual place of residence of the defendant is an important jurisdictional factor. The defendant can raise objections against the exercise of jurisdiction by the particular court, if such a defence is available. The scope of such a defence is usually fairly limited if the necessary jurisdictional factors exist.

In South African law jurisdiction, or "the power vested in a court by law to adjudicate upon, determine and dispose of matter",[149] is based first on the principles of the common law – Roman-Dutch law – and secondly on statute.[150] Although the South African High Court is a creature of the Constitution and statute, its jurisdictional limits are determined by the common law.[151] Section 19(1)(*a*) of the Supreme Court Act[152] states that "A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance". The jurisdiction of the magistrates' court, however, is determined solely by the provisions of the Magistrates' Courts Act.[153]

In South Africa the supreme courts, now the high courts, have interpreted section 19(1)(*a*) of the Supreme Court Act as meaning simply that their jurisdiction is based on common-law principles.[154] Two common-law principles underlie all issues relating to and rules of jurisdiction: (a) the power of the court to deal with the particular subject-matter, and (b) the effectiveness or the subordination of the defendant to the power of the court. In *Hugo v Wessels*[155] the court stated that whether a court has jurisdiction in a particular instance depends on a dual investigation. The first question is whether the court is entitled to take notice of the particular subject-matter. The answer to this depends on the existence of one or more recognised grounds of jurisdiction (*rationes jurisdictionis*). The second question is whether the defendant is subject to the court's powers. The answer to this depends on the doctrine of effectiveness. A court will not exercise jurisdiction when it cannot give an effective judgment.

---

149 See *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 256; *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) 484.

150 The Constitution of the Republic of South Africa, 1996, the Supreme Court Act 59 of 1959 and the Magistrates' Court Act 32 of 1944 are the primary pieces of legislation, but there are a number of others also conferring jurisdiction on the High Court in special instances, for instance the Income Tax Act 58 of 1962, the Patents Act 57 of 1978 and the Admiralty Jurisdiction Regulation Act 105 of 1983.

151 Forsyth *Private International Law* 164–165.

152 Act 59 of 1959.

153 Act 32 of 1944.

154 See, for instance, *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) 486. For a more comprehensive discussion see Forsyth *Private International Law* 164–168.

155 1987 (3) SA 837 (A) 849.

The following grounds establishing jurisdiction are recognised in South African law.

6.3.2.1 The domicile or residence of the defendant

A South African court will always exercise jurisdiction when the defendant is domiciled or resident within its area of jurisdiction at the time of the proceedings. A natural person is domiciled at the place where he or she has a lawful physical presence and the subjective intention of residing indefinitely or permanently,[156] or at the place assigned by law when he or she cannot exercise a domicile of choice.[157] According to the common law every person must have a domicile, but can have only one domicile at a time.

Courts also exercise jurisdiction over a person who is resident within its area of jurisdiction at the time of the proceedings. "Residence" in this context is not entirely clear but requires something more than the person's being in a place for a brief period of time. Thus, courts have regarded a person as being resident where he or she has a house and family, although shorter periods of periodic nature for recreational, business or family purposes may also amount to residence. Much depend on the particular circumstances.[158] A natural person can have more than one place of residence at the same time, but not more than one domicile.

A corporation is deemed to have its residence where its principal place of business is or where its registered office is situated.[159] A branch office does not qualify as a residence.[160] Foreign corporations are deemed to have their residence at their registered offices in the foreign jurisdiction, but if they conduct business in South Africa even a branch office will constitute residence here for the purposes of any legal disputes arising from the business conducted in South Africa.[161]

6.3.2.2 Where the cause of action arose

A court may have jurisdiction if the cause of action arose within its area of jurisdiction. Normally this condition refers to the place where a contract was entered into or to be performed. Where the breach of contract takes place, for some strange reason, is not generally accepted as grounds for jurisdiction. In *Leibowitz t/a Lee Finance v Mhlana*[162] the court stated that "'cause' means an action or legal proceeding (not a cause of action) and that 'a cause arising within its area of jurisdiction' means 'an action or legal proceeding which, according to the law, has duly originated within the Court's area of jurisdiction'". These grounds, however, are not sufficient on their own to found jurisdiction but must be combined with other grounds such as submission,

156 See s 1 of the Domicile Act 3 of 1992.
157 A domicile is assigned to minors or persons mentally incapable of making such a choice, in terms of s 2 of the Domicile Act 3 of 1992.
158 See Forsyth *Private International Law* 191–193.
159 *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) 486.
160 Forsyth *Private International Law* 195.
161 *ISM Inter Ltd v Maraldo* 1983 (4) SA 112 (T); Forsyth *Private International Law* 195–196. See, however, *Joseph v Air Tanzania Corporation* 1997 (3) SA 34 (W).
162 2006 (6) SA 180 (SCA) 183 para. [7].

arrest or attachment when the defendant is a so-called foreign *peregrinus*, a person with no South African domicile or residence.[163]

6.3.2.3 Submission

Until fairly recently mere submission to the court's jurisdiction by a foreign *peregrinus* was regarded as insufficient to establish jurisdiction in the absence of additional jurisdictional grounds such as the cause of action's arising in South Africa or the arrest of the *peregrinus* or attachment of goods or property. However, in *Jamieson v Sabingo*[164] this rule was authoritatively changed. The court stated that judgment against a defendant who has submitted to that court's jurisdiction voluntarily will not be without effect as it will be recognised and enforceable internationally; accordingly, mere submission without the aid of any other jurisdictional grounds is sufficient to found jurisdiction over the person of a foreign *peregrinus* when the other party is a South African *incola* (person resident or domiciled in South Africa).

Submission can take place at any time, even at the time of the lodging of proceedings. It can therefore be given at the time that a contract is concluded by the inclusion of a clause stipulating that a South African court will have jurisdiction over a dispute arising from that contract. A webtrader therefore can simply include such a jurisdictional clause in its standard terms and conditions. Submission can also take place expressly or tacitly prior to or during the course of the proceedings if the *peregrinus* does not object to the jurisdiction of the court. However, submission is ineffective if it takes place after the attachment of goods.[165]

6.3.2.4 Attachment or arrest

The goods of a foreign *peregrinus* may be attached, if they are within the borders of South Africa, to confirm jurisdiction (*ad confirmandam jurisdictionem*) when other grounds of jurisdiction exist, or to found jurisdiction (*ad fundandam jurisdictionem*) when other grounds of jurisdiction are absent. Attachment serves to provide the plaintiff with security and to ensure that any judgment in the plaintiff's favour will be effective.[166] However, when the defendant has submitted to the jurisdiction of the court, the plaintiff is not entitled to have the defendant's goods attached.[167] Attachment is also not permitted when the defendant is a South African *incola*. Previously the plaintiff was also entitled to have a foreign *peregrinus* arrested to confirm or found jurisdiction. However, arrest in these circumstances has been found to be unconstitutional and is therefore no longer allowed.[168]

---

163 *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) para. [3]; *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 258D–G; *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para. [20].

164 *Jamieson v Sabingo* 2002 (4) SA 49 (SCA). See also *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA) and *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) in which cases this principle was confirmed.

165 *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA).

166 *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA).

167 *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para. [30]; *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA).

168 See *Bid Industrial Holdings v Strang* [2007] SCA 144 (RSA).

6.3.2.5 Foreign examples and principles

Referring to Australian law, Cameron says that the following facts are regarded as sufficient jurisdictional grounds in most legal systems:[169]

- ☐ existence of a contract concluded within the jurisdiction
- ☐ breach of contract within the jurisdiction
- ☐ commission of a tort (delict) within the jurisdiction
- ☐ defendant's submission to the jurisdiction
- ☐ contract governed by the jurisdiction, in other words subject to its domestic law
- ☐ damages occurring within the jurisdiction
- ☐ defendant's owning land within the jurisdiction.

In Europe the Consumer Contracts Regulation of 1999[170] determines that when commercial activities aimed at consumers in a specific country or in several States including that country, the courts in that country will have jurisdiction over any dispute arising from contracts resulting from such activity even if the defendant is not resident in that country. Consumers in fact have a choice to pursue the matter in their own courts or those of the business party. Any advance choice-of-jurisdiction clause is normally invalid, but an agreement concluded after the dispute has arisen is valid and enforceable.[171]

In most legal systems the principle of freedom of contract allows parties to agree to the jurisdiction of courts to determine contractual disputes between them. The contract may make provision for the exclusive jurisdiction of a particular country's courts, or it may make provision for alternatives. When jurisdiction is not exclusive, the general rules of jurisdiction of a particular country may provide additional grounds of jurisdiction over and above the choice of the parties.

However, the fact that parties agree does not necessarily mean that their choice is effective or enforceable. It is particularly in the case of consumer contracts that choice-of-jurisdiction clauses may be invalid or unenforceable.[172] In certain countries with an English common-law background[173] the principle of *forum non conveniens* may persuade a particular court not to exercise jurisdiction over a matter, even though that court may, strictly speaking, have jurisdiction in terms of its own rules, when it seems that a court in another country is the more appropriate forum to decide the case.[174] A wide range of circumstances may influence the court's decision to decline to hear the case. The *forum non conveniens* doctrine does not apply in South Africa and there is no good reason to introduce it.[175]

---

169 Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 3. See also Reed and Angel (eds) *Computer Law* 227.

170 Art. 15 of the Unfair Terms in Consumer Contracts Regulation 1999, 1999/2093.

171 See Seaman "E-commerce, jurisdiction and choice of law" 2000 *Computers and Law* 28–37. See also Reed and Angel (eds) *Computer Law* 230.

172 See Reed and Angel (eds) *Computer Law* 229.

173 Such as England, Scotland, the United States and Canada.

174 See Forsyth *Private International Law* 173–176.

175 For a contrary argument, however, see Forsyth *Private International Law* 174–175. It is uncertain whether the court intended to introduce the doctrine in *Bid Industrial Holdings v Strang* [2007] SCA 144 (RSA). Certainly the doctrine was not adequately discussed before the court to warrant the deduction that the court intended doing so.

In the United States courts apply a "minimum contacts" doctrine to determine jurisdiction over non-resident defendants.[176] In *Cacioppo v Pool Mart Services, Inc.*[177] the court described the doctrine as follows:

> The threshold requirement for specific jurisdiction is the concept of "minimum contacts" where "there [is] some act by which the defendant purposefully avails [oneself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L. Ed.2d 1283, 1298 (1958) (citing *Int'l Shoe v. Wash.*, 326 U.S. 310, 319, 66 S.Ct. 154, 160, 90 L. Ed. 95, 104 (1945)); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323 (1989) (holding that the minimum contacts requirement is satisfied so long as the contacts resulted from a defendant's purposeful conduct and not the unilateral activities of a plaintiff).

In *Maritz, Inc. v Cybergold, Inc.*[178] the court distinguished between active and passive websites. When a website actively solicits business – that is, it interacts with the other party – the webtrader will be subject to the jurisdiction of the American courts. If the website merely provides information with no interactive solicitation of business the courts will not exercise a jurisdiction.[179] An active website satisfies the minimum-contacts doctrine, the passive website does not.[180] The court held as follows:

> CyberGold's posting of information about its new, up-coming service through a website seeks to develop a mailing list of internet users, as such users are essential to the success of its service. Clearly, CyberGold has obtained the website for the purpose of, and in anticipation that, internet users, searching the internet for websites, will access CyberGold's website and eventually sign up on CyberGold's mailing list. Although CyberGold characterizes its activity as merely maintaining a "passive website," its intent is to reach all internet users, regardless of geographic location. Defendant's characterization of its activity as passive is not completely accurate. By analogy, if a Missouri resident would mail a letter to CyberGold in California requesting information from CyberGold regarding its service, CyberGold would have the option as to whether to mail information to the Missouri resident and would have to take some active measures to respond to the mail. With CyberGold's website, CyberGold automatically and indiscriminately responds to each and every internet user who accesses its website. Through its website, CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally. Thus, CyberGold's contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over defendant.

6.3.2.6 Conclusion

Whether a court has jurisdiction depends on the rules of jurisdiction of that court. The general trend in most legal systems in respect of Internet transactions is to refer to the physical presence of parties rather than their virtual presence in a specific place.[181] This principle ought to apply also to the residence or domicile of parties or

---

176 First expounded in *International Shoe Co. v State of Wash., Office of Unemployment* 326 US 310, 66 SCt 154; US 1945.

177 A.2d, 2007 WL 2162427.

178 947 F Supp. 1328; ED Mo. 1996.

179 *Bensusan Restaurant Corp. v King* 126 F 3d 25; *Southern New England Tel. Co. v Global NAPS Inc.* 2007 WL 1089780 D Conn., 2007.

180 Reed and Angel (eds) *Computer Law* 230–231.

181 Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 1–17; Svantesson "Jurisdictional issues in cyberspace" 17 (2001) *Computer Law & Security Report* 318–326; Thatch "Personal jurisdiction

continued

to such jurisdictional factors as where performance is to take place or where the breach occurred.

For instance if a party situated in India develops software for a client in South Africa and delivers that software over the Internet, performance by that party takes place partly in India, where the product was developed and from where it was sent, but also partly in South Africa where it was delivered. Defects in the software must relate to a breach of contract that took place in India because that is where performance took place. However, if there is a choice-of-jurisdiction clause in the contract stipulating that South African courts will have jurisdiction over any dispute between the parties, the South African client is entitled to lodge proceedings in South Africa in the division where the contract is deemed to have been concluded or where delivery had to take place, in this case the place of business or residence of the South African party.

However, American courts have extended their jurisdictional rules with reference to the minimum-contracts doctrine potentially to all webtraders. A party who maintains an active website may potentially be liable to the jurisdiction of American courts, other than any other court that may also have jurisdiction, when the plaintiff is an American resident or accessed the website from America.

6.3.3 *Applicable law*

The law applicable to a cross-border contract has to be determined in terms of the rules of private international law. Like the rules of jurisdiction, the rules of private international law are part of domestic law and may differ from country to country. It is only when litigation has been initiated in a particular court that it will be definite which rules of private international law will be applied, namely those of the *lex fori*. Unlike the rules of jurisdiction, the contract can only be governed by one legal system, usually referred to as the "proper law" of the contract.

South African rules of private international law are premised on the principle of private autonomy in terms of which parties are free to choose the law that governs their agreement. Courts will generally uphold such a choice unless there is a mandatory law that applies regardless of the parties' choice or the choice is unlawful – for instance, when the choice is made in an attempt fraudulently to evade otherwise applicable mandatory rules.[182]

The proper law of the contract in South African law is determined in the following manner:

- ☐ When there is an express choice of law in the agreement, the legal system chosen is applied in accordance with the principle of party autonomy.[183]
- ☐ When there is a tacit choice of law – in other words, there is actual consensus but it is not expressly stated in the agreement – the law chosen by the parties applies.

---

and the worldwide web: Bits (and bytes) of minimum contact" 1997 *Rutgers Computer and Technology LJ* 143–178.

182 *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) 31. Generally see the discussion of Forsyth *Private International Law* 298–302; Pistorius "Formation of Internet contracts" 1999 *SA Merc LJ* 284–285.

183 Forsyth *Private International Law* 304.

A tacit choice is usually determined from the provisions of the contract itself and surrounding circumstances pointing to such an agreement. References to specific concepts or legislation from a particular country may be useful indications of the parties' choice.[184] Choice of jurisdiction is not in itself a conclusive indication of a tacit choice of law. The choice of jurisdiction may be influenced by factors that do not relate to the applicable law.

- When the parties make no choice of law, the court applies the presumptive intention of the parties. In the leading case *Standard Bank of South Africa Ltd v Efroiken and Newman*[185] the court stated that one must determine what ought to be presumed to have been the intention of the parties having regard to the subject-matter of the contract, its terms and the surrounding circumstances. Relying on the English case *Bonython v Commonwealth of Australia*[186] most courts now describe the proper law as being determined by an objective weighing of the factual links between the contractual relationship and the various legal systems that could possibly apply, although lip service is still paid to the *Efroiken* formula. The search is for the legal system with which the contract has the closest connection.[187]

  Where the contract was concluded or is to be performed is an important factor in determining the proper law, but courts must look at all the relevant factors to determine the closest relationship.

The autonomy of the parties and their choice of law may in certain circumstances be limited by directly applicable statutes, legislation that overrides the normally applicable rule of private international law with provisions that govern certain situations irrespective of the applicable law.[188] Usually such directly applicable laws are only effective in their own area of jurisdiction. For instance, a directly applicable South African law applies to a dispute adjudicated by a South African court despite the fact that the law applicable, according to the rules of private international law, is Dutch law. However, should a Dutch court be seized of the matter it will apply Dutch law without recourse to South African legislation, because the latter is territorially limited in its application.

The ECT Act contains one such directly applicable provision in respect of electronic trade, namely section 47. Section 47 is similar to provisions found in European consumer-protection legislation and is aimed at preserving the consumer-protection provisions of Chapter VII by stipulating that the "protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question".

The approach in South African law conforms broadly with that followed in many other countries. In Europe the applicable law in respect of contracts is governed by

---

184 See, for instance, *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 (2) SA 138 (C).

185 1924 AD 171.

186 [1951] AC 201 209.

187 See *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 (2) SA 138 (C) 146–147; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D); *Ex parte Spinazze* 1985 (3) SA 650 (A) 664; *Society of Lloyd's v Romahn and Two Other Cases* 2006 (4) SA 23 (C) para. [82].

188 Forsyth *Private International Law* 2–3. See Øren "International jurisdiction over consumer contracts in e-Europe" 2003 *ICLQ* 667 for a discussion of the European Jurisdiction Directive which has a directly applicable effect.

the Rome Convention on the Law Applicable to Contractual Obligations, 1998.[189] The Convention also recognises party autonomy as the point of departure, that is that the parties can freely choose the applicable law.[190] Article 4(1) states that, when there is no express or tacit choice of law, "the contract shall be governed by the law of the country with which it is most closely connected". Article 4(2) contains a presumption that the contract is most closely connected with the country in which the party who has to perform the characteristic performance is habitually resident or, in the case of a corporation, has its central administration. The characteristic performance of a sale, for instance, is the delivery of the goods, and not payment for them. The proper law therefore is the legal system of the country in which the seller resides.

These rules, however, only apply when the parties are commercial parties. If one of the parties is a consumer, article 5(2) of the Rome Convention determines that the mandatory rules of the consumer's country of residence apply in addition to the provisions of the chosen law. The law chosen is therefore valid and governs the agreement, but the commercial partner cannot evade the protective law applicable in the consumer's country. This is a form of directly applicable legislation that overrides the normal rules of private international law.[191]

In South African law webtraders may include a choice-of-law clause in their standard terms and conditions. Such a clause is valid and binding in South African law but may fall foul of directly applicable statutes, such as the European Rome Convention or Brussels Regulation,[192] which protect consumers.[193] In terms of those provisions[194] the mandatory protective provisions of the European country in question will still apply despite the fact that South African law is the proper law.[195] It remains an open question whether a South African court will apply the mandatory foreign provisions if the dispute should be adjudicated in South Africa. Normally courts will refuse to apply such foreign legislation.

The same interesting question arises when a European court exercises jurisdiction in terms of the Brussels Regulations and the South African court is asked to enforce the eventual judgment of the European court here. It is submitted that the South African court should refuse to enforce the foreign judgment in the absence of the submission of the South African commercial party to the jurisdiction of the European court, because the foreign court would then have lacked international competence.[196] In South African law only three grounds for international competence are recognised in respect of claims sounding in money, namely the residence or

189 See also North and Fawcett *Cheshire and North's Private International Law* 535 ff.

190 Art. 3. See also North and Fawcett *Cheshire and North's Private International Law* 552–553.

191 North and Fawcett *Cheshire and North's Private International Law* 575–577.

192 Council Regulation (EC) No. 44/2001 of 22 December 2000, "Jurisdiction, recognition and enforcement of judgments in civil and commercial matters" (the Brussels Regulation).

193 Reed and Angel (eds) *Computer Law* 226–231; Todd *E-Commerce Law* 197–207; Hedley *The Law of Electronic Commerce and the Internet* 261–265.

194 Art. 16 of the Brussels Regulation and art. 5(2) of the Rome Convention.

195 Reed and Angel (eds) *Computer Law* 226–231; Todd *E-Commerce Law* 197–207; Hedley *The Law of Electronic Commerce and the Internet* 261–265.

196 In respect of the issue of enforcement of foreign judgments and international competence, see Forsyth *Private International Law* 412–414.

physical presence of the defendant in the foreign court's area of jurisdiction,[197] or his or her submission.[198]

6.4 Consumer protection

6.4.1 *Introduction*

The growth of mass production, marketing and contracting during the twentieth century made consumer goods available more widely and more cheaply than ever before. At the same time these developments strained the traditional concepts of the law of contract and delict. The notion of an arm's-length deal negotiated between two equal contracting parties became largely a myth as far as consumer contracts were concerned. Consumers were rendered increasingly subordinate in these transactions, subjected to mass advertising which has often been misleading or deceptive, standard terms of agreement which became increasingly one-sided, and oppressive lending practices.

Throughout the world consumer-protection measures were adopted to counter these developments. The scope and comprehensiveness of these measures, however, vary dramatically from jurisdiction to jurisdiction. According to Reed and Angel the European Union has the most comprehensive consumer-protection policy and legislation of any region, covering every area of consumer activity.[199] In other jurisdictions, such as South Africa, consumer protection has been lagging behind developments in Europe and the United States with only a small number of consumer-protection instruments aimed at a few problem areas.

Legislative consumer-protection measures in South Africa are largely limited to consumer credit,[200] advertising and certain deceptive practices.[201] There are no provisions protecting consumers against unfair standard terms and conditions, although this may change soon with discussions on the Consumer Protection Bill 2006 nearing completion, and no provisions protecting consumers against problems related to distance selling[202] or aimed at product liability, outside normal common-law rights. Apart from legislative measures, however, several industry-specific self-regulating codes such as the Banking Code of Practice and the Code of Advertising Standards provide an effective measure of non-statutory protection.[203]

---

197 *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA).

198 Forsyth *Private International Law* 392–402.

199 See Reed and Angel (eds) *Computer Law* 53–55; Lloyd *Legal Aspects of the Information Society* 268–269.

200 Through such Acts as the erstwhile Hire Purchase Act 36 of 1942, Credit Agreements Act 75 of 1980, Usury Act 73 of 1968 and Price Control Act 25 of 1964 and now by the National Credit Act 34 of 2005.

201 Tackled by the largely ineffective Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

202 In respect of European legislation see the European Distance Selling Directive (EC) 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19; Lloyd *Legal Aspects of the Information Society* 233–234; Reed and Angel (eds) *Computer Law* 53–55. See also Geist *Internet Law in Canada* 646 ff; Øren "International jurisdiction over consumer contracts in e-Europe" 2003 *ICLQ* 666 ff.

203 Buys "Online consumer protection and spam" 138–139 refers to the Banking Code at www.banking.org.za (accessed 26 August 2007), the Code of Advertising Standards at www.asasa.org.za (accessed 26 August 2007) and the Direct Marketing Association's Code of Conduct and Best Practice Guidelines for the Marketing of Goods and Services Through the Internet at www.dmasa.org/articles.php (accessed 26 August 2007).

Article 7 of the EU's Directive on Electronic Commerce 2000/31/EC, for instance, contains an anti-spam provision requiring member States of the European Union which allow unsolicited commercial communication by electronic mail to ensure that such communications by a service provider established in their territory are identified clearly and unambiguously as unsolicited commercial communications. The intention is to give consumers an opportunity to identify such mail and to take action to eliminate or avoid it.[247] Article 7 further provides that member States must ensure that these service providers regularly check opt-out registers in which individuals have registered themselves. Most EU countries have such registers in which individuals can indicate that they do not wish to receive unsolicited commercial e-mails, but these registers have proved to be ineffective.[248]

6.5 Electronic payment

6.5.1 *Introduction*

Whereas there have been great strides in the development of law relating to electronic contracting, electronic payment systems for payments on the Internet have been slow to evolve.[249] Fear of fraud and abuse of payment information is probably the biggest single factor slowing down Internet trade today. According to Hedley,[250]

> Payment systems have yet to change as racially as have other market mechanisms involved with the Internet. The conservatism and apparent solidity of banking institutions militates against the rapid adoption of new technologies. In fact, ICT is increasingly used in banking institutions, but much of it is in proprietary systems rather than part of the Internet, and we are a very long way from a point where payment over the net is a simple and secure process. The risk of fraud is omnipresent.

This analysis may be a bit more pessimistic than reality justifies. Internet and cellphone banking and online credit-card payments are commonplace today, facilitating the transfer of funds from banking customer to banking customer through electronic funds transfers, although often this is limited to payment within a particular country and not across borders. Certainly that is the case within South Africa.

Although Internet banking has become an important part of domestic banking practice and continues growing in significance,[251] most payments on the Internet are credit-card transactions, even though such transactions are at risk of fraudulent interference by unscrupulous fraudulent websites or even employees of trusted above-board and honest websites.

---

247 Kuner "Directive 2000/31/EC – Directive on electronic commerce" 237–238.

248 Ibid. 238.

249 For a discussion of various new and innovative electronic payment methods and instruments see Schulze "Smart cards and e-money: New developments bring new problems" 2004 *SA Merc LJ* 703–715; Lawack-Davids "Internet cheques" 2001 *Obiter* 406–415; Pretorius "Elektroniese tjeks" 1999 *THRHR* 592–596.

250 Hedley *The Law of Electronic Commerce and the Internet* 248.

251 For an overview of the development of Internet and electronic banking see Kulundu-Bitonye "Electronic banking: An overview of systems and operations" 1998 *Lesotho LJ* 67–86 and Schulze "E-money and electronic funds transfers: A shortlist of some of the unresolved issues" 2004 *SA Merc LJ* 51–66.

The analysis below focuses on payment and payment systems in electronic trade and the consequences of payment, mistaken payment and fraud. A description of the development of electronic clearing and inter-bank relationships and transactions falls outside the scope of this work and readers are referred to more specialised works in this regard.[252]

6.5.2 *Internet banking*

The relationship between the bank and its customer is determined by the contract concluded between them. It can take the shape of a various traditional relationships such as loan and mandate, as well as specialised relationships founded on the agreement.[253] The most common relationships are the following:

- ☐ Bank as debtor and client as creditor, where the client has a savings or similar account or a current account which is in credit.
- ☐ Bank as creditor and client as debtor, where the client has a loan account or a current account which is in overdraft.
- ☐ Bank as mandatory and client as mandator, where the client has a cheque account or any other type of account from which the bank pays a third party according to the client's instructions. In terms of the contract of mandate, the mandatory undertakes to carry out instructions of the mandator.

Most banks have a specific agreement which covers the relationship between the client and the bank when the client uses Internet banking services.[254] These contracts vary from ones that are very user-friendly and easy to understand[255] to contracts which require of the client a level of education and sophistication most South Africans do not have.[256]

All of these contracts contain fairly wide-ranging limitation of the bank's liabilities and indemnities. Typical liability-limitation clauses in these standard agreements

---

252 For instance, Ellinger, Lomnicka and Hooley *Ellinger's Modern Banking Law*; Gkoutzinis *Internet Banking and the Law in Europe: Regulation, Financial Integration and Electronic Commerce*; Brindle *Law of Bank Payments*; Schudelaro *Electronic Payment Systems and Money Laundering: Risks and Measures in the Post-Internet Hype Era*; Lawack-Davids "The effect of electronic techniques on the payment process in cheques" 1997 *Obiter* 42–62, "Electronic payments and digital cash" 2001 *Obiter* 312–324 and "Internet cheques" 406–415; Vercuil "Electronic banking" 2002 (April) *De Rebus* 36–37; Schulze "Smart cards and e-money" 2004 *SA Merc LJ* 703–715; Pretorius "The truncation of cheques: Novel developments in. America" (2005) 13(1) *Juta's Business Law* 38–43.

253 See Malan and Pretorius *Malan Bills of Exchange, Cheques and Promissory Notes* 333–334; Stassen "Drie-party betalingsmeganismes in die moderne bankreg – Die regsaard van die verhouding tussen bank en kliënt" 1980 *MBL* 77; Petzer "Who should carry the Internet banking can?" 2003 (Nov) *De Rebus* 59–60; Lawack-Davids "Internet cheques" 2001 *Obiter* 406–415; Schulze "Smart cards and e-money" 2004 *SA Merc LJ* 703–715.

254 Schulze "Countermanding and electronic funds transfer: The Supreme Court of Appeal takes a second bite at the cherry" 2004 (16) *SA Merc LJ* 670.

255 See, for instance, the First National Bank site at www.fnb.co.za/legallinks/legal/ibTandC.html (accessed 26 August 2007). The agreement is couched in user-friendly language and easy-to-understand terms and layout. At the time of writing, it was one of the few agreements that was date-stamped, indicating when last it was changed.

256 See, for instance, the Nedbank contract at www.nedbank.co.za/terms/Nedbank_terms1.htm (accessed 26 August 2007) and the ABSA Bank contract at www.nedbank.co.za/terms/Nedbank_terms1.htm.

include clauses indicating that, although reasonable care has been taken to prevent harm or loss to its customers, the bank will not be liable for

- any harm or loss whatsoever arising as a result of the client's use of the online banking system, unless such loss or damage arises from the bank's gross negligence or intentional misconduct;
- any damages the client might suffer as a result of a compromise of his or her access codes;
- any interruption, malfunction, downtime or other failure of the bank's online banking system, third-party system, databases or any component part thereof for whatever reason;
- any loss or damage arising from the client's orders, investment decisions, purchases or disposal of goods and services, including financial instruments or currencies, from third parties based on the information provided on the bank's online banking system;
- any loss or damage with regard to the client's data directly or indirectly caused by malfunction of the bank's system, third-party systems, power failures, unlawful access to or theft of data, computer viruses or destructive code on the bank system or third-party systems, programming defects, or negligence on the bank's part;
- any interruption, malfunction, downtime or other failure of goods or services provided by third parties, including, without limitation, third-party systems such as the public switched telecommunication service providers, internet service providers, electricity suppliers, local authorities and certification authorities; or
- any event over which the bank has no direct control.

In terms of these agreements online customers of banks are issued with certain security data and procedures that they must follow when accessing and using Internet banking services. The usual security measures of user identity, coupled with a password for access and encryption, is bolstered by additional safety measures such as SMS or e-mail messages notifying customers of access to and transactions on their accounts. Most online banking sites also require an additional security code which is sent to the customer's cellphone when he or she wants to add new payment recipients to his or her account. In the few publicised instances where the security measures have been breached, the banks have been quick to allay consumers' fears about security and customer liability, taking full responsibility for protecting customers and not relying on the strict exclusion and indemnification clauses.

The relationship between the customer and bank, where a customer makes use of Internet banking services, is that of a debtor–creditor or mandator–mandatory, depending on the terms of their specific agreement.[257] Although the ECT Act[258] contains some provisions that may be relevant to Internet banking and electronic funds transfers (EFT), there is no specific legislation dealing with such transfers.[259] Apart

257 Kulundu-Bitonye "Electronic banking" 1998 *Lesotho LJ* 70; Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 56.

258 Act 25 of 2002.

259 See Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 57–58 and "Countermanding and electronic funds transfer" 2004 *SA Merc LJ* 670, who refers to the position in the USA where

continued

from providing customers with online and up-to-date information about their accounts, the bank undertakes to give effect to the following instructions received via the Internet:[260]

- ☐ Transfer of funds between various accounts that the client may have.
- ☐ Payment to third parties nominated by the client, in other words EFT payments.
- ☐ Other specialised services such as buying shares online and accessing credit reports.[261]

Schulze describes an EFT payment "as a method of payment, a medium through which a third party (the payer's bank) is given an instruction by the payer to effect payment through and electronic medium (a computer system) to the beneficiary's bank account".[262] An EFT payment instruction does not qualify as a negotiable instrument.[263] Its effect is to oblige the payer's bank to debit the payer's account and credit the payee's account, if the payee is a client of the same bank, or to request another bank to credit the payee's account with that other bank in terms of the inter-bank agreement.[264] In terms of this agreement, the payer is not entitled to countermand the electronic payment or require a reversal of the payment without the consent of the payee. However, if payment was made without an underlying cause – in other words, it was made by mistake – the payer can prevent the payee from using the funds, by notifying the payee of the mistaken payment and applying for an appropriate court order for the retransfer of the money.[265] The banks deal with mistaken payments much as they do with cheque payments:[266] when there is a seemingly valid payment instruction, they will carry it out and not reverse the payment. Should a dispute about the payment arise, the banks simply act as stakeholders while the parties resolve the dispute.[267]

The transfer of funds and payment of third parties take place by way of automated transactions, in that the consumer instructs the bank's computer which then carries out the instruction without human intervention. Consequently, all such transactions are subject to section 20 of the ECT Act, which section deals with automated transactions; in addition, all consumer transactions are subject to section 43(2), but such banking transactions are not subject to the cooling-off period in section 44.[268]

---

there has been legislation in place since 1978, and Meiring "Electronic funds transfers" 1998 *JBL* 36–41.

260 Meiring "Electronic funds transfers" 1998 *JBL* 37; Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 53–54.

261 See Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 667–668.

262 Ibid. 670–671. See also Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 53–54, 57–58; Kulundu-Bitonye "Electronic banking" 1998 *Lesotho LJ* 70 and Meiring "Electronic funds transfers" 1998 *JBL* 36.

263 See Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 670–673.

264 See *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA). See Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 675–678 for a critical analysis of this case.

265 *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)* [2006] 4 All SA 120 (SCA), 2005 (1) SA 441 (SCA).

266 See, for instance, *First National Bank of Southern Africa v Perry* 2001 (3) SA 960 (SCA) which dealt with the proceeds of a stolen cheque held by the bank.

267 Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 680.

268 See s 42(2)(*a*).

In terms of section 20(*d*) and (*e*), dealing with automated transactions, the customer is not bound to transactions if he or she is not able to review the transaction details before it is finalised. Customers are also protected against mistakes when they are not given an opportunity to review the transaction. Section 20, however, only governs this situation if the contract itself does not, and the parties are free to deviate from the section's provisions in their agreement. Practically speaking banks are able to dictate the terms in their standard agreements.

However, if the transaction is a consumer transaction, the application of section 43(2) is mandatory – it may not be excluded.[269] According to this provision, if the bank fails to give the customer an opportunity to review the transaction before it is finalised, the customer may cancel the transaction within 14 days of receiving the goods or service. All South African banks employ techniques requiring the consumer to review any payment instructions and correct mistakes or cancel the transaction, thus effectively complying with the protection requirements in sections 20 and 43. These measures effectively prevent the customer from relying on the additional rights afforded by those provisions.

The danger of EFT transactions is graphically illustrated by *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)*.[270] Nissan owed one of its creditors, TSW Manufacturing, an amount of approximately R12,7 million. Owing to an administrative mix-up at Nissan, its bank received instructions to pay TSW but was erroneously given the account number of Maple Freight, another of Nissan's creditors. However, no money was owed to Maple at that time. It was not generally known at the time that the automatic agents of the banks, their computers, did not perform a cross-check between the name of the account holder and the account number but simply effected transfer of funds to the account number provided in the EFT instruction.[271]

Stanley, the sole member of Maple, became aware of the unexpected windfall and, after obtaining legal advice, transferred the money from his Standard Bank account to Maple's current business account at First National Bank, where the funds were used in the day-to-day operations of Maple. The legal opinion obtained advised Stanley to put the money into an interest-bearing call account and further advised that the capital was repayable on demand to the person who made the payment in error, but that any interest earned would not be repayable.

Nissan brought an urgent interdict after Stanley failed to pay the amount of R12,7 million on demand. Stanley had also insisted on the payment of a rather large "administrative fee". Nissan thereupon obtained a court order freezing Maple's bank accounts, which were in credit in the amount of about R10,5 million. Stanley meanwhile caused Maple, which apparently was an ongoing concern, to go into liquidation.

After failing initially with its application in the Witwatersrand Local Division, Nissan was successful in obtaining an order for the payment of most of the money that was

---

269 See s 48.

270 [2006] 4 All SA 120 (SCA), 2005 (1) SA 441 (SCA). See Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 678–683 for a critical analysis of this case.

271 Some banks now clearly warn their clients that they (the banks) rely solely on the correctness of the account number for the transfer.

still in Maple's current account. The Supreme Court of Appeal made the following pertinent findings:

> [24] It is now necessary to consider to what extent, if any, the position of Maple as against FNB differed from Dambha's position as against Nedbank. Payment is a bilateral juristic act requiring the G meeting of two minds (*Burg Trailers SA (Pty) Ltd and Another v Absa Bank Ltd and Others* 2004 (1) SA 284 (SCA) at 289B). Where A hands over money to B, mistakenly believing that the money is due to B, B, if he is aware of the mistake, is not entitled to appropriate the money. Ownership of the money does not pass from A to B. Should B, in these circumstances, appropriate the money, such appropriation would constitute theft (*R v Oelsen* 1950 (2) PH H198; and *S v Graham* 1975 (3) SA 569 (A) at 573E–H). In *S v Graham*, it was held that, if A, mistakenly thinking that an amount is due to B, gives B a cheque in payment of that amount and B, knowing that the amount is not due, deposits the cheque, B commits theft of money although he has not appropriated money in the corporeal sense. It is B's claim to be entitled to be credited with the amount of the cheque that constitutes the theft. This Court was aware that its decision may not be strictly according to Roman-Dutch A law but stated that the Roman-Dutch law was a living system adaptable to modern conditions. As a result of the fact that ownership in specific coins no longer exists where resort is made to the modern system of banking and paying by cheque or kindred process, this Court came to regard money as being stolen even where it is not corporeal cash but is represented by a credit entry in books of B account. 18
>
> [25] The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank account. Should he appropriate the amount so transferred, ie should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft.
>
> [26] In this case, FNB, as agent of the appellant, intended to effect payment to TSW, and Standard Bank, as agent of Maple, intended to receive payment on behalf of Maple. There was no meeting of the minds. In these circumstances, Maple did not become entitled to the funds credited to its account. Any appropriation of the funds by Maple, with knowledge that it was not entitled to deal with the funds, would E have constituted theft. The transfer of the funds to the receipts account and thereafter to the payments account of Maple did not change Maple's position concerning those funds. Just like Standard Bank, FNB received funds to which Maple was not entitled. An appropriation of these funds by Maple, with knowledge that it was not entitled to the funds, would likewise have constituted theft thereof.

Following this decision two types of situation must be distinguished where mistaken EFT payments are concerned:

- When the party whose account is credited with the funds becomes aware of the mistaken payment and decides to use the funds for its own purposes. In such a case that party will be guilty of theft and liable for payment of the full amount received.
- When the party whose account is credited is unaware of the mistake and inadvertently uses the funds mistakenly paid. In these circumstances such a party has simply been enriched unjustifiably and is liable to repay the funds to the extent that it

> is deemed to have been enriched. The basis for the claim in these circumstances will be either the *condictio indebiti* or more likely the *condictio sine causa specialis*.[272]

Schulze quite correctly indicates that this area of South African law is still in its formative stage and that many vexing questions remain unanswered.[273]

6.5.3 *Credit-card payments*

Internationally credit-card payments are still the most important payment method on the Internet, despite the risk of fraud and misappropriation of payment information.[274] At the domestic level, EFT payments in business-to-business transactions are probably the most common form of payment, and credit-card payments in consumer transactions.[275] A 2006 report by the Organisation for Economic Co-operation and Development states:[276]

> By far the major international online payment means are credit cards, which are also dominant in many national transaction markets. Some estimates put their use at over 90% of all e-commerce transactions. In some countries debit cards and payments via online banking are widely used alternatives to credit cards. There is also a large diversity of other payment means such as mediating services, mobile payment systems and electronic currency which may be appropriate for different transactions. However, with the exception of the mediating service PayPal, the majority of alternative online payment means have not yet gained the necessary wide user base of both merchants and consumers. For micropayments, which are of increasing importance for digital content industries, one-off payments are not yet widely developed as alternatives and complements to subscription payment models or cumulative systems.
>
> The introduction of new payment systems faces significant barriers given infrastructure market characteristics, with high initial investment costs and positive network externalities favouring established incumbents with a wide user base. These characteristics strengthen the market position of traditional payment system providers – credit card institutions and banks – and associated lock-in to established and/or well-known systems and standards.

There have been a number of attempts to explain the legal nature of a credit-card transaction with reference to traditional legal concepts such as cession, subrogation, factoring, mandate, agency and delegation,[277] but it would seem that this transaction

---

272 The court did not specify which enrichment action was applied. See Lotz and Brand "Enrichment" paras 78–81 and 87–89 for the scope and requirements of the *condictio indebiti* and the *condictio sine causa specialis*. See also Eiselen and Pienaar *Unjustified Enrichment: A Casebook* 106–127 and 171–179, and *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).

273 Schulze "Countermanding and electronic funds transfer" 2004 (16) *SA Merc LJ* 683–684. See also OECD Working Party on the Information Economy Report DSTI/ICCP/IE(2004)18/FINAL of 18 April 2006, 5 www.oecd.org/dataoecd/37/19/36736056.pdf (accessed 26 August 2007).

274 See the OECD Working Party on the Information Economy Report DSTI/ICCP/IE(2004)18/FINAL of 18 April 2006, 5 at www.oecd.org/dataoecd/37/19/36736056.pdf (accessed 26 August 2007). For a general description of the use and working of credit cards in ATMs see *Diners Club SA (Pty) Ltd v Singh* 2004 (3) SA 630 (D) and Schulze "Of credit cards, unauthorised withdrawals and fraudulent credit card users" 2005 *SA Merc LJ* 202–213. See also Schulze "E-money and electronic funds transfers" 2004 *SA Merc LJ* 51–52 generally on the growth of credit-card payments.

275 Schulze "Smart cards and e-money" 2004 (16) *SA Merc LJ* 703.

276 www.oecd.org/dataoecd/37/19/36736056.pdf, 5 (accessed 26 August 2007).

277 See Cornelius "The legal nature of payment by credit card" 2003 *SA Merc LJ* 153–171; Schulze "Of credit cards, unauthorised withdrawals and fraudulent credit card users" 2005 *SA Merc LJ* 202–203;

continued

will not fit any of these straitjackets and should rather be regarded as an innominate transaction *sui generis* the underlying agreement of which determines the rights, duties and consequences of the parties. The only result of this conclusion is that the common law will not fill with implied terms any gaps that may arise in any of the relationships created. Because there are relatively few players in the banking field and the comprehensive standard terms of the card issuers dominate the relationships, there is no need to force credit-card contracts into a specific category.

At its basic level, a credit-card agreement involves the following rights and obligations:[278]

- The card issuer concludes an agreement with the card holder (consumer) in terms of which the card holder is entitled to present her or his card for payment of goods or services at accredited merchants or to draw money from banks, including automatic teller machines (ATMs), provided that the card holder meets certain minimum conditions such as presenting the card and signing a credit-card slip.
- The card issuer concludes an agreement with the merchant in terms of which the card issuer undertakes to pay the merchant for goods or services rendered to the card holder provided the merchant fulfils certain minimum requirements.
- The merchant supplies goods or services to the card holder against payment made with the credit card – the card holder presents the card and signs the slip or includes on it additional information, such as the number on the back of the card, as proof of authentication.
- The card issuer is obliged to pay the merchant upon presentation of the proof required by the issuer.
- The card holder must pay the periodic account issued by the card issuer within the stipulated time.

In traditional credit-card transactions the card holder presents the card and signs a slip in a face-to-face transaction. That traditional model no longer holds true, as card issuers allow certain merchants to receive credit-card payments in respect of which the credit card is not presented, such as when payment is made by telephone, fax or over the Internet. Whether a merchant is allowed to make such transactions depends on the underlying agreement with the credit-card issuer.

In some countries legislative protection exists for the users of credit cards,[279] but in South Africa credit-card payments are governed by the law of contract and the customs of credit-card issuers. Card issuers' standard terms of agreement are often very wide-ranging and do not include the procedures for dealing with payment disputes.[280] In the United Kingdom, for instance, when the authority of the card holder

---

Smith "Credit cards and the law" 1976 *THRHR* 1217–1219; *Diners Club SA (Pty) Ltd v Singh* 2004 (3) SA 630 (D).

278 Schulze "Of credit cards, unauthorised withdrawals and fraudulent credit card users" 2005 *SA Merc LJ* 204.

279 Hedley *The Law of Electronic Commerce and the Internet* 225–256; Todd *E-Commerce Law* 221.

280 See, for instance, the provisions of clauses 5 and 11 of Nedbank's credit-card agreement at www.nedbank.co.za/website/content/forms/formshome.asp?SubSubCatid=1333andsubsubcatname=Cards (accessed 26 August 2007). Clause 5.10, for instance, reads thus: "You will be liable for and must repay us all amounts we pay or have to pay if the Card, your Card number or PIN is used unless you have reported it as lost, stolen or being used wrongfully as set out in 5.9 above".

for a transaction is disputed, the onus of proving such authority is on the card issuer.[281] Consumers in the United Kingdom are also protected when goods are defective or substandard.[282]

Credit-card agreements of South African issuers do not as a rule seem to make provision for Internet transactions. For example, Nedbank's standard terms simply state:

> 5.11 Except where a transaction is made by means of your PIN or is requested by mail or telephone order, or is effected with the Personal Travel Card, you must sign a sales voucher, a cash advance voucher or a refund voucher, as the case may be, every time you use the Card or give the Card number to a merchant or supplier. By signing the voucher you confirm that the information on it is correct. You will be liable for and must repay us all amounts we pay or have to pay in respect of your Card transactions. If you do not sign the relevant voucher(s), you will still be liable to us.

The term "mail" is not defined in the definitions clause and could conceivably include e-mail transactions, but is definitely not be wide enough to cover Internet transactions.

6.5.4 *Development of new payment systems*

It would seem that the development of Internet banking and the ability of banking clients to make electronic funds transfers have been the most important new developments as far as electronic payments are concerned. Other more innovative attempts to create e-money, e-credits or e-cheques have not yet become generally available or acceptable.

To a large extent the boom in electronic commerce has been made possible by the willingness of credit-card companies to make payment by credit card over the Internet generally available despite the ever-present danger of fraud. Although South African law does not offer credit card holders any special legislative protection similar to that provided by English law, the practice of credit-card companies in dealing with fraudulent transactions seems to have allayed the fears of many consumers who make regular credit-card payments over the Internet, especially in respect of certain types of products and services or in transactions with webtraders who have built up a sound reputation.

6.6 Conclusion

Electronic commerce has become an important part of the way in which businesses and consumers do business today and all indications are that this type of business communication is set to grow exponentially in future. Despite fears that the law is unable to deal with the legal problems created by the use of electronic communications in the process of negotiating and concluding contracts and making payments, business has flourished even in the absence of special legal provisions. Legal uncertainty was nevertheless seen as a major stumbling block in the development of this type of trade.

---

281 See Hedley *The Law of Electronic Commerce and the Internet* 225–256; Todd *E-Commerce Law* 221.
282 See Hedley *The Law of Electronic Commerce and the Internet* 256.