

ual Obligations, 1998.¹⁸⁹ The of departure, that is that the 1) states that, when there is governed by the law of the (2) contains a presumption ntry in which the party who ly resident or, in the case of acteristic performance of a ot payment for them. The hich the seller resides.

commercial parties. If one onvention determines that ice apply in addition to the ore valid and governs the e protective law applicable ible legislation that over-

of-law clause in their stan- ding in South African law : European Rome Conven-¹⁹³ In terms of those pro- ean country in question e proper law.¹⁹⁵ It remains ly the mandatory foreign frica. Normally courts will

ourt exercises jurisdiction court is asked to enforce submitted that the South ent in the absence of the jurisdiction of the Euro- acked international com- nternational competence namely the residence or

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nternational competence, see

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 selling²⁰² 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).

Europe apart, the attitude to consumer law in most jurisdictions is perhaps best summarised by the American writer Whaley in a way all too familiar in our own context:²⁰⁴

Consumer Law is not quite respectable. Embarrassingly, it deals not with the great issues of our day, but with the petty ones – issues so small as to be mostly ignored by traditional law. Were consumers duped about the terms of the deal? *Caveat emptor*. Was the contract filled with unfair terms? *Laissez faire*. (Doesn't someone who signs a contract have a duty to read?) Did the car fall apart? The interest rate proved deceptive? The credit report wrong? *De minimis non curat lex*. The courts should not bother with such trifles. Our system cannot bear litigating the annoyances of day-to-day life. The floodgates would open and horrors wash ashore.

In South Africa the tide seems to be turning, with more and more consumer-protection measures being discussed or introduced. If it is accepted, the Consumer Protection Bill 2006 is set to make important inroads into the traditional approach to contract and contract terms in consumer contracts. The ECT Act²⁰⁵ has introduced important protective measures to protect consumers transacting online.²⁰⁶ These measures, largely adopted from the European Distance Selling Directive,²⁰⁷ have important implications for the manner in which South African webtraders have to construct their websites, the information contained on such websites and the manner of transacting.

Consumers in the online environment are in much the same position as consumers who buy from mail-order companies (companies engaged in "distance selling"). Unlike the consumer who buys something from a shop, the online or distance consumer has no opportunity to handle and check the goods, to try on the clothes or taste the food. Often the wonderfully good-looking product on the web page or in the brochure turns out to be flimsier or shabbier than expected. No legislative consumer-protection measures in respect of distance selling are yet in force in South Africa, although Chapter VII of the ECT Act provides a measure of protection to on-line customers.

6.4.2 Chapter VII of the Electronic Communications and Transactions Act

6.4.2.1 Introduction

With the consumer-protection measures contained in Chapter VII the legislature has departed from the underlying principles of technological neutrality and functional equivalence in terms of which the ECT Act is aimed at facilitating trade and ensuring

204 Whaley *Problems and Materials on Consumer Law* xxi.

205 Act 25 of 2002.

206 In Chapter VII. See Jacobs "The Electronic Communications and Transactions Act; consumer protection and Internet contracts" 2004 *SA Merc LJ* 556–557; Coetzee "The Electronic Communications and Transactions Act 25 of 2002" 2004 *Stell LR* 508–509.

207 Directive (EC) 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19. This Directive is now supported by the EU Consumer Protection Co-operation Regulation which seeks to co-ordinate consumer-protection policy in the EU. For a discussion of the implementation of the Directive in Britain see Reed and Angel (eds) *Computer Law* 89–96 and Lloyd *Legal Aspects of the Information Society* 269–270.

legal certainty without distinguishing between transactions in the virtual and the real worlds. In terms of these principles the provisions in respect of electronic transactions should provide equal treatment to customers who transact online and those who transact "offline". However, the legislature in this instance recognised that online customers are subject to risks which ordinary offline customers do not face, and thus need additional protection. However, although customers of distance selling companies are in a position similar to that of online customers, they are not given the same degree or type of protection.²⁰⁸

The ECT Act provides a number of protective measures in addition to those consumer-protection measures that already exist in terms of other legislation or the common law. The following consumer rights will be discussed in more detail below:

- ☐ The right to information about the webtrader, its goods or services, prices, the terms of the trader's sales agreement (including standard terms and conditions), and the trader's returns policy, privacy policy and security measures (section 43(1)).
- ☐ The right to review, correct and withdraw from the transaction before finalisation (section 43(2)).
- ☐ The right to a secure payment system, including the right to claim damages in the case of an infringement of this right (section 43(5)).
- ☐ The right to withdraw from the agreement without having to give a reason, in the cooling-off period (section 44).
- ☐ The right to protection against spam (section 45).
- ☐ The right to prompt performance (section 46).
- ☐ Rights against avoidance (sections 47 and 48).

6.4.2.2 The scope of Chapter VII

Section 42 deals with the scope of the consumer-protection provisions contained in Chapter VII. Although section 42(1) states that this chapter only deals with electronic transactions, it is clear from the rest of the chapter that only electronic transactions in which one of the parties is a consumer are treated.

A Consumers – natural persons

Section 1 of the ECT Act defines "consumer" as "any natural person who enters or intends entering into an electronic transaction with a supplier as the end-user of the goods or services offered by that supplier".

It is one of the perennial problems of consumer law to find a workable definition of and limitation on who should be regarded as consumers in order to qualify for the protective measures provided by consumer law. Very often small businesses, corporations or trusts are in the same unenviable bargaining and practical position as that of consumers and buy goods or services as end-users; a strong case can be made for the inclusion of such bodies in the definition of consumer.²⁰⁹ The difficulty in

²⁰⁸ Buys "Online consumer protection and spam" 140 raises the issue of the constitutionality of this unequal treatment, but does not clearly traverse the constitutional basis for such an attack.

²⁰⁹ See, for instance, the criticisms of Buys "Online consumer protection and spam" 142.

defining consumer transactions is overcome by drawing an arbitrary distinction on policy grounds between natural persons, who comprise the biggest group of genuine consumers, and legal persons, who are used mostly for commercial purposes.

The definition adopted in the ECT Act is in line with that used in other jurisdictions, such as the European Union. For instance, the Distance Selling Directive²¹⁰ defines a consumer as "any natural person acting for purposes outside his trade, business, craft, or profession".²¹¹

In terms of the definition of "consumer" in the ECT Act the following transactions do not qualify for the protection afforded by Chapter VII:

- ☐ Transactions between legal or artificial persons. The position of a trust is problematic in this context. The trustee, who is a natural person, acts in her or his capacity as trustee. If the goods or services are for the benefit of the trust as end-user, the transaction would seem to fall within the scope of Chapter VII.
- ☐ Transactions between a webtrader and a natural person who is not procuring the goods or services as an end-user but for business purposes, such as on-selling. Even when the goods are to be used in the individual's business, he or she is regarded as an end-user. For example, sole proprietors who buy software to be used in their businesses should be regarded as end-users; but, if they buy the software to re-sell, they should not be regarded as consumers. It is submitted that the onus of proving that a party is a consumer should be on that party.

B Electronic transactions

The term "electronic transaction" is not defined in the ECT Act, but the term "transaction" is: "'transaction' means a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services".²¹²

The scope of this definition is not immediately apparent. The definition seems to widen the scope of the normal legal meaning of a transaction by including transactions of a non-commercial nature. In the *Compact Oxford English Dictionary*²¹³ a transaction is defined as "1 an instance of buying or selling. 2 the action of conducting business. 3 an exchange or interaction between people". From this definition it is clear that "transaction" can have a restricted meaning or a wide meaning. The fact that the ECT Act includes non-commercial transactions in its definition indicates that the wider meaning should be used.

An "electronic transaction" for the purposes of Chapter VII therefore includes the exchange of all data messages between the webtrader and the consumer, whether they are of a contractual nature or not. For obvious reasons, the consumer-protection provisions only become relevant when the consumer is in the process of concluding a contract, or has already done so and wants to escape its negative consequences or rely on the rights provided by it.

210 Directive (EC) 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

211 See the discussion of Reed and Angel (eds) *Computer Law* 57-59.

212 S 1 of Act 25 of 2002.

213 Simpson and Weiner (eds) *Compact Oxford English Dictionary* 862.

The application of the provisions in Chapter VII is limited to electronic consumer transactions and does not apply to consumer transactions generally. The protective measures contained in that Chapter will therefore not apply when, for instance, the consumer has bought goods from a distance selling company and the transaction was not concluded electronically.

Buyers correctly points out that a problem may arise when part of the transaction is concluded electronically and part of it by other means.²¹⁴ The solution proposed by Buyers, namely that the provisions of Chapter VII apply in all instances in which part of the transaction is concluded electronically,²¹⁵ seems correct. Requiring all elements of the transaction to be electronically concluded before the consumer may rely on these protective measures will give rise to unacceptable anomalies and results.

C Exclusions

Section 42(3) provides that Chapter VII does not apply to a regulatory authority established in terms of a law if that law prescribes consumer-protection provisions in respect of electronic transactions. This section is poorly drafted and obscure. What it says is that the provisions of Chapter VII do not apply to transactions between a regulatory authority and consumers if the Act establishing the authority contains consumer-protection provisions in respect of electronic transactions. Section 42(3) is probably intended to mean that when an Act subjects electronic consumer transactions to protective measures, transactions covered by that Act will not be subject to the provisions of the ECT Act. Whether this provision can be rescued by interpretative means is unlikely. It will probably remain a dead letter in the Act.²¹⁶

Section 42(2) contains a number of other transactions that are not subject to the cooling-off period provided for in section 44. These exclusions are dealt with in paragraph 6.4.2.5 below.

6.4.2.3 Informational duties of the webtrader

Section 43 prescribes the information a webtrader must supply on its website. The trader's failure to supply this information gives the consumer a right to cancel the agreement within 14 days of receiving the goods or services.²¹⁷ These obligations are aimed at ensuring the consumer is given full information about the identity of the webtrader, the nature of the goods and services, the agreement, and her or his rights in terms of Chapter VII of the ECT Act.

The webtrader's website must include the following information:

- ☐ The full name and legal status of the webtrader, and, if the trader is a legal person (that is, not a natural person), its registration number, the names of its office-bearers and its place of registration.
- ☐ The physical address, telephone number, website address and e-mail address of the webtrader and the physical address at which the trader will receive legal service of documents. This information allows the consumer to contact the webtrader

214 Buyers "Online consumer protection and spam" 140.

215 Ibid. 140–141.

216 See also the criticisms of Buyers "Online consumer protection and spam" 143.

217 S 44(3).

in the case of any difficulties or if he or she wants to terminate the agreement or give any other notice. In terms of section 23(c) the physical addresses given will be deemed to be the webtrader's usual place of business for the purposes of establishing jurisdiction, and a place for the conclusion of any contract and service of legal documents such as demands and summonses.

- ☐ The fact of the webtrader's membership of or subscription to any self-regulatory, accreditation or professional body, and the contact details of that body. Examples of such bodies are the Banking Council,²¹⁸ Advertising Standards Authority,²¹⁹ Direct Marketing Association,²²⁰ Internet Service Providers Association,²²¹ and the professional bodies of various professions such as those of attorneys,²²² financial advisors²²³ and estate agents.²²⁴
- ☐ Any code of conduct to which the webtrader subscribes and how that code may be accessed electronically by the consumer. Examples of such codes are the Banking Code of Practice,²²⁵ SA Insurance Association Code of Good Practice²²⁶ and the Direct Marketing Association's Code of Practice and Best Practice Guidelines for the Marketing of Goods and Services Through the Internet.²²⁷ The website address where the code can be accessed should be sufficient, although a hyperlink is more user-friendly and meets the requirements of the Act.
- ☐ An adequate description of the main characteristics of the goods or services offered, to enable a consumer to make an informed decision about the proposed electronic transaction. The detail in which the webtrader must describe the goods and their characteristics depends on the particular circumstances. The criterion against which the information will be measured is whether the information is sufficient to allow a reasonable consumer to make an informed choice. This information should include all the characteristics and specifications of the product or service a reasonable consumer will usually consider when procuring those goods or services.²²⁸
- ☐ The full price of the goods or services, including transport costs, taxes and any other fees or costs, and the manner of payment. At some stage during the transaction the consumer should be given a full summary of all costs and the total price payable. The trader's failure to provide the consumer with the total price payable entitles the consumer to cancel the agreement within 14 days of receiving the goods or services. There should also be clear indication of what methods

218 See the Council's Banking Code at www.banking.org.za (accessed 26 August 2007).

219 See the ASA's Code of Advertising Standards at www.asasa.org.za (accessed 26 August 2007).

220 See the DMA's Code of Practice and Best Practice Guidelines for the Marketing of Goods and Services Through the Internet at www.dmasa.org/articles.php (accessed 27 August 2007).

221 See www.ispa.org.za (accessed 26 August 2007).

222 See the website of the Law Society of South Africa at www.lssa.org.za (accessed 26 August 2007).

223 See the website of the Financial Services Board for regulatory information at www.fsb.co.za (accessed 26 August 2007).

224 See the website of the Estate Agency Affairs Board for regulatory information at www.eaab.org.za/page.php?p_id=1 (accessed 26 August 2007).

225 Available at www.banking.org.za (accessed 26 August 2007).

226 Available at www.saia.co.za (accessed 26 August 2007).

227 Available at www.dmasa.org/articles.php (accessed 26 August 2007).

228 See the examples mentioned by Buys "Online consumer protection and spam" 144.

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of payment are required or acceptable and when and how payment will be exacted.

- ☐ Any terms of agreement, including guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers. The contractual reference to or inclusion of these terms must comply with at least the general requirements for the incorporation of such terms otherwise they will not be deemed part of the contract. In addition the website must offer consumers assistance in downloading and storing such terms. Webtraders should ensure that the version of the terms downloaded is identifiable.
- ☐ The time within which the goods will be dispatched or delivered or within which the services will be rendered. This gives the consumer an indication of when to expect the goods and whether there will unacceptable delays. Many webtraders offer a package-tracking service which informs the consumer of where the goods are in the dispatch or delivery process. Usually webtraders will provide the date of dispatch with an *estimated* date of delivery as delivery may be subject to risks outside the control of the webtrader.
- ☐ The manner in and period within which consumers can access and maintain a full record of the transaction. Access can take one of three forms: (a) the consumer must download or print the actual transaction details upon completion of the transaction; (b) the details are e-mailed to the consumer; or (c) the transaction details are stored by the webtrader and may be accessed by the consumer, in which case the website must indicate how long the transaction will be accessible in this manner.
- ☐ The return, exchange and refund policy of the webtrader. This information can be maintained as a separate policy or as part of the standard terms and conditions of the trader. If the trader's policy is not to accept returns or exchanges or make refunds, this must be clearly stated.
- ☐ Any alternative dispute-resolution code to which the webtrader subscribes and how the wording of that code may be accessed electronically by the consumer. This method of dispute resolution should not be confused with an arbitration clause in the standard terms and conditions of the webtrader. Many webtraders are members of trade organisations, such as the Banking Council or the Insurance Association, which have dispute-resolution mechanisms that may be used by consumers in the event of a dispute. Approaching these bodies is usually much quicker and cheaper for the consumer than ordinary dispute resolution as the consumer need only lay a complaint which is then investigated by the organisation concerned, the banking ombudsman, for example. The decision of the body or person responsible is usually binding on the webtrader but not on the consumer, allowing the latter to resort to litigation or arbitration. If the agreement is subject to arbitration, however, the consumer is limited to initiating arbitration proceedings in terms of the agreement and may not resort to normal judicial proceedings.
- ☐ The webtrader's security procedures and privacy policy in respect of payment, payment information and personal information. These policies and procedures are usually contained on the website and can be accessed by a hyperlink. The webtrader is obliged to maintain a payment system that is sufficiently secure in

the light of existing technology,²²⁹ and its privacy policy must indicate the manner in which the consumer's personal information will be stored and used and whether it will be made available to third parties.

- When appropriate, the minimum duration of the agreement in the case of agreements for the supply of products or services to be performed on an ongoing basis or recurrently. In addition the website should provide for the termination of the ongoing service after the minimum period, should the consumer wish to terminate the agreement.
- Consumers' rights in terms of section 44, when applicable. Buys suggests that the webtrader need only refer to the scope and provisions of section 44 without actually indicating whether it is applicable to the transaction in question.²³⁰ It is submitted that this provision – section 43(1)(r) – requires the webtrader to indicate that section 44 is applicable whenever it is applicable and that the trader be bound by such indication. Should the webtrader fail to provide the necessary reference when it should have done so, the consumer will be entitled to terminate the agreement up to 14 days after receipt of the goods or services.

Should the supplier fail to comply with these informational duties the consumer is entitled to terminate the agreement within 14 days of receiving the goods or services.²³¹ If the consumer elects to terminate the agreement, the goods must be returned to the webtrader at the expense of the consumer. The webtrader must refund all payments made by the consumer,²³² but is entitled to subtract the costs of returning the goods if the consumer has not paid those costs.

6.4.2.4 Transactional duties of the webtrader

A *Transaction summary*

During the electronic negotiation of the electronic transaction, the webtrader must give the consumer the opportunity to review the entire electronic transaction, to correct any mistakes and to withdraw from the transaction if he or she wish to do so. Failure to give consumers this opportunity has consequences in terms of sections 43(2) and 20, the latter of which deals with automated transactions.

In terms of section 43(2) of the ECT Act the consumer is entitled to withdraw from the transaction within 14 days of receiving the goods or services if the webtrader failed to give her or him the prescribed opportunity to review, correct and withdraw.

In terms of section 20 of the Act the agreement may be cancelled with retrospective effect by the consumer if the webtrader fails to give the consumer the opportunity to prevent or correct a mistake at the time of the consumer's interaction with the electronic agent, provided that the consumer made a material error, notifies the webtrader of the mistake as soon as possible after becoming aware of it, takes reasonable steps to return or destroy the goods (as instructed by the webtrader) and receives

²²⁹ S 43(5) – see para. 6.2.4.2B below.

²³⁰ Buys "Online consumer protection and spam" 147.

²³¹ S 43(3).

²³² S 43(4).

no material benefit from the goods. When the consumer (successfully) relies on section 20, he or she is under no duty to pay for "re-transporting" of the goods.

Webtraders can easily avoid the negative consequences of sections 20 and 43(3) simply by ensuring that the transactions process makes adequate provision for consumers to review the transaction, notice any mistakes and correct them, or withdraw from the transaction. Webtraders can, for example, provide on their websites a final review screen displaying a summary of all the essential details of the transaction for the consumer's inspection before he or she finalises the transaction. Any mistake such as inadvertently ordering too many items or the wrong items should be immediately apparent to the consumer on such a review screen.

B *Payment procedures*

Section 43(5) requires that the webtrader use a "payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned". The security of the payment system relates not only to the transfer of information between the webtrader and consumers, and the webtrader and payment institution, but also to the safe storage of such information after completion of the transaction. If the information is retained for later use or evidential purposes, the database in which it is kept should also be secure against unauthorised access from within and outside the company.²³³

Buys suggests that, with current technology and techniques, the following procedures will ensure compliance with section 43(5):²³⁴

- ☐ A digital certificate from a recognised security provider to authenticate the website. The presence of a digital certificate is usually indicated by a small padlock icon appearing in the status bar of the browser and by the fact that the URL in the address bar changes from http:// to https://.
- ☐ Encryption technology that encrypts all data messages between webtraders and consumers on the one hand and webtraders and payment institutions on the other.
- ☐ The use of usernames and passwords by consumers to gain access to the same webtrader after the initial transaction.
- ☐ A time-out function in login or transaction pages which automatically logs the user off when there is no activity on the page for a certain period of time.
- ☐ Offline or off-site storage of payment information where possible. This may not be possible when the information is stored for subsequent easy use by consumers.

Webtraders must review their payment-security procedures from time to time to ensure that it is up to date and complies with the requirements of section 43(5). The provisions of section 43(5) take cognizance of the fact that more sophisticated and advanced security measures are being developed continuously as web criminals develop new methods to bypass or crack security measures. Failure to maintain security that is sufficient and up to date renders the webtrader liable for any damages its customers may suffer as a result of the abuse of the payment information.

²³³ See Buys "Online consumer protection and spam" 146.

²³⁴ Ibid. 146-147.

C Performance

The webtrader must comply with its normal contractual obligations as required by the applicable legal system. However, section 46 of the ECT Act stipulates additional obligations for the webtrader and concomitant rights for consumers.

In terms of section 46 the webtrader must execute the consumer's order within 30 days of receiving the order, unless their contract expressly provides otherwise. By implication, then, this is one of the obligations in Chapter VII that can be changed contractually despite the provisions of section 48 prohibiting the exclusion of rights contained in that chapter.

In terms of section 46(2), if the trader fails to execute the order within 30 days, the consumer may cancel the agreement with seven days' written notice to the webtrader. By implication this means that the webtrader is entitled to those seven days to rectify its failure to dispatch the order and thereby keep the contract intact.

When the webtrader becomes aware that the goods or services ordered are unavailable, section 46(3) requires it to notify the consumer forthwith of that fact and refund within 30 days of the notification any payment received. It would seem that this section gives the webtrader a right to terminate lawfully the agreement if the trader is unable to perform because the goods or services are unavailable. This is a serious inroad into the rights of the consumer and presumably the term "unavailable" should be strictly interpreted – the goods must be objectively unavailable, not merely unavailable to the webtrader. In addition the ECT Act provides no sanction for the webtrader's failure to comply with these provisions. Affected consumers are left to resort to normal claims for damages due to the trader's breach of contract.

6.4.2.5 Cooling-off period

Cooling-off periods are a feature of most distance selling provisions and consumer-protection measures. The requirements and exclusions contained in section 44 of the ECT Act²³⁵ are based on the EU's Distance Selling Directive.²³⁶ The cooling-off provision of section 44 gives the consumer the opportunity to terminate the agreement lawfully when "buyer's regret" sets in a reasonably short time after the transaction, or when the consumer has had an opportunity to reflect on the consequences of the transaction or to obtain independent advice.

Although the inclusion of the cooling-off period during the drafting of the ECT Act caused much heated debate, the practical consequences of its inclusion have been minimal for a variety of reasons. The existence of the cooling-off period is not well known to consumers even though it must be contained in the online contract. Most consumers do not bother to read the standard terms and conditions²³⁷ – their only interest is in the main features of the transaction: What goods or services will I be receiving? What is it going to cost me? When will it be delivered? It is usually only when they are unhappy with the goods or services delivered that they will delve into

²³⁵ Act 25 of 2002.

²³⁶ Directive (EC) 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

²³⁷ Eiselen "Die beheer oor standaardbedinge: 'n Regsvergelykende ondersoek" (LLD thesis, Potchefstroom University, 1988) 103–106; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras [135]–[136].

the agreement itself, and in most cases the cooling-off period will have lapsed by this stage.

Section 44 provides that a consumer may without reason and without penalty – that is, lawfully – terminate the contract within seven days of receiving the goods or within seven days of concluding a contract for services. The only cost implication for the consumer is that he or she is responsible for the cost of returning the goods to the trader.

The ECT Act contains a list of transactions not subject to the cooling-off period.²³⁸ The list includes a mixture of transactions in respect of which a cooling-off period would be totally impractical or other forms of protection exist. The following transactions are excluded from the cooling-off provisions of section 44:

- ☐ Transactions for financial services – in other words, all banking services, investment services, insurance and reinsurance operations, and operations relating to dealings in securities.
- ☐ Online auctions.
- ☐ Transactions for the supply of consumables such as foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer.
- ☐ Transactions for services which began with the consumer's consent before the end of the cooling-off period.
- ☐ Transactions in which the price for the supply of goods or services depends on fluctuations in financial markets and cannot be controlled by the supplier.
- ☐ Transactions in which the goods are made to order, are personalised, cannot be returned because of their nature or are subject to rapid deterioration.
- ☐ Transactions in which audio or video goods or computer software was unsealed by the consumer.
- ☐ Transactions for the sale of newspapers, periodicals, magazines and books.
- ☐ Transactions for the provision of gaming and lottery services.
- ☐ Transactions for the provision of accommodation, transport, catering or leisure services, in which the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.

6.4.2.6 Preservation of rights

The ECT Act²³⁹ contains two provisions dealing with the direct and indirect exclusion of the consumer rights contained in Chapter VII. Section 47 stipulates that, despite the fact that foreign law may be applicable to the transaction, as will be the case in most transactions in which South African consumers contract with foreign web-traders, the protective measures of Chapter VII nevertheless also apply to that transaction. As discussed above,²⁴⁰ this type of directly applicable private-international-law provision will only be effective when any litigation ensues in South Africa.

²³⁸ S 42(2) of Act 25 of 2002.

²³⁹ Act 25 of 2002.

²⁴⁰ Para. 6.3.

Section 48 provides that any provision in a contract which purports to exclude any of the protective measures in Chapter VII is null and void. It seems, however, that parties can within reason modify any of those provisions as long as the modification does not effectively amount to an exclusion. The right of the parties to vary the period within which performance must take place is implied by section 46(2).

6.4.2.7 Spam and unsolicited goods

One of the scourges of the Internet and, more particularly, email is the phenomenon of spam or unsolicited e-mail.²⁴¹ Spam messages vary from mildly irritating advertising and chain mail, to those with objectionable content and those which are downright dangerous, carrying with them all kinds of harmful viruses that can damage or destroy information and information systems.²⁴²

The ECT Act²⁴³ only deals with part of the problem in that it refers only to the unsolicited sending of commercial communications. Buys quite correctly concludes that it does not deal with "non-commercial communications such as newsletters, opinion surveys, religious messages, political contents, virus warnings and hoaxes, urban legends, news chain letters and hate-mail".²⁴⁴

The Act takes a low-key approach to spam. It requires that anyone sending unsolicited commercial communications to consumers must give the consumers an option to cancel their "subscription" to such communications. If requested by a consumer to do so, the spammer must inform the consumer of the source from which the personal information of the consumer was obtained. Failure to comply with these provisions constitutes an offence punishable in terms of section 89(1) of the ECT Act.

Section 45(2) provides that a consumer's failure to respond to an unsolicited communication cannot lead to any contractual obligation. This prevents webtraders from sending communication informing consumers that if they do not respond to the message that they will be deemed to have assented to the conclusion of a contract for goods or services.

These legal techniques for combating spam have had little effect in practice as the proliferation of spam clearly proves. Practical methods of filtering out spam are a much more effective way of dealing with it, although spammers continually devise new methods to evade electronic blocking or filtering devices.²⁴⁵

Although there are a number of different legislative responses to spam worldwide, ranging from prohibition and self-regulation to opt-out procedures, these measures are largely ineffective because of the difficulty of their enforcement – tracing and locating spammers are often very difficult – and because of the further complication of jurisdictional problems.²⁴⁶

241 See generally Lloyd *Legal Aspects of the Information Society* 270–275 and Ebersöhn "The unfair business practice of spamming and spoofing" 2003 (July) *De Rebus* 25–26.

242 See Chapter 4 above for a more detailed discussion of the law dealing with computer viruses.

243 Act 25 of 2002.

244 Buys "Online consumer protection and spam" 160.

245 Ibid.

246 See the detailed discussion in Buys "Online consumer protection and spam" 161–164.

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 radically 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 cell-phone 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.