Study unit 3
Contracting through the Internet

Overview

In this study unit we discuss various aspects of concluding contracts through the Internet. The general principles of the law of contract apply to these contracts, in the absence of any special legal rules adopted to deal specifically with these contracts. We will explain how the principles relating to consensus (agreement) apply to establish whether a contract has been concluded. If a contract has been concluded, one then has to determine where and when it has come into existence. We will also deal with the formalities that are, or may be, required to conclude a valid contract, and with the way in which a contract may be amended. Then we will discuss the various ways in which payment can be effected through the Internet, and the application of various European Directives to Internet contracts. Finally, we will discuss briefly which country's legal system governs a contract concluded through the Internet, and which court has jurisdiction to hear a contractual dispute.

Learning outcomes

After completing this study unit, you should be able —

- ❑ to apply the rules relating to offer and acceptance to contracts concluded through the Internet
- ❑ to explain why the rules relating to the so-called ticket cases may apply to Internet contracts
- ❑ to explain what is a click-wrap contract, and whether this type of contract is valid
- ❑ to determine when and where an Internet contract has been concluded
- ❑ to explain whether an Internet contract can comply with the formalities of writing and signature
- ❑ to explain how an Internet contract can be amended
- ❑ to determine whether the consumer protection laws of another apply to an Internet contract
- ❑ to determine which country's legal system governs an Internet contract
- ❑ to determine which court has jurisdiction to hear a dispute arising from an Internet contract
- ❑ to draft a standard Internet contract

Setting the scene

JTV (Pty) Ltd has now launched its Internet trading site. It offers the following products and services on its site:

- ❏ Thandi's artworks of which there are pictures on display and which may be bought online
- ❏ Thandi also offers to create artworks on commission, and invites interested parties to negotiate with her by e-mail
- ❏ John's short stories and novel, which may be ordered online
- ❏ Vusi's advice on technical matters, for which he charges R50 per request to which he has responded
- ❏ a mechanical device — called the 'Petrosaver' as it reduces fuel consumption — that Vusi has developed and manufactured

Tio, who has no legal training, has adapted a standard contract of sale and posted it on JTV's web site. He found this contract on an American commercial web site. John, Thandi, and Vusi are uncertain whether the contract terms will bind their potential customers.

Discussion

Introduction

The Internet has become a vehicle for tremendous economic growth through the development of e-commerce. Simple retail purchases made through cyber shopping malls are the most common Internet-based transactions. Participation in online auctions of goods and tickets for culture and sport events has become very popular. The banking and insurance industries increasingly use e-commerce. The use of e-mail in international trade transactions has increased rapidly and continues to expand. Presently, it seems unlikely, though, that major and complex transactions will be concluded online. But negotiating and sending draft agreements by e-mail can speed up concluding more complex transactions. Such online negotiations will usually be culminate in a written contract.

E-commerce on the Internet is only a part of e-commerce in a wider sense. In this sense the term includes also transactions concluded through electronic data interchange (EDI), telex, and

even fax. We will concentrate on Internet commerce. The international initiatives on e-commerce and foreign legislation cover all forms of electronic transactions.

The lure of Internet commerce has recently (in 2000) been tarnished by the sharp fall in information technology share prices on stock exchanges worldwide, and by the fact that few commercial web sites have been profitable. Still, the growth potential of Internet commerce remains enormous.

The use of technology does not substitute for sound business practices. So a commercial web site should be well-designed, the standard contract skilfully drafted, and customer service attentive. It is important carefully to draft the Internet contract that will regulate the relationship between the merchant and the consumer, and to set it up on the web site in such a way that a valid contract is concluded between the parties.

Internet commerce differs primarily from conventional commerce in that electronic transactions are largely impersonal and anonymous. The new way of trading creates the following problems:

- ❏ The traditional model of offer and acceptance is strained by the use of technology. The key issue is whether the new way of concluding contracts is different from, or similar to, existing ways of concluding contracts over a distance.

- ❏ The virtual world of e-commerce is paperless. Formalities such as writing and signature are sometimes required by law.

- ❏ Transnational transactions necessitate determining the applicable national legal system to regulate these transactions. The Internet has created a virtual world without borders, where cyber citizens conclude cyber contracts. But these contracts remain subject to different national laws.

- ❑ The identities of contracting parties are uncertain in a virtual world, and so have to be verified.

- ❑ Existing payment systems may be ill-suited to a virtual world.

- ❑ There is a lack of trust on the part of consumers about confidentiality, security, and payment information.

These problems contribute to a lack of consumer and business confidence in Internet commerce. Internet commerce requires an accessible, predictable, safe, and transparent trading environment, which operates worldwide across national borders and jurisdictions. Legal, procedural, and technical means have to be employed to ensure the existence of such an environment which will allow e-commerce to flourish.

Commercial law has traditionally lagged behind new commercial practices. Here, Internet commerce is no exception. Also, law always redefines contemporary developments in its own terms. Regardless of how revolutionary the Internet is, and how inappropriate the application of current legal processes and laws may be, existing legal rules may apply to this global networking of communities.

No special rules have yet been developed for Internet contracts in South Africa. Any changes to the common law by the courts or Parliament should consider emerging international trade practices, because of the international character of Internet commerce. At the same time, though, the established common-law principles have proved to be resilient and flexible, and hence able adequately to cater for modern developments.

Consensus (agreement)

An agreement is reached when two or more parties consent to be bound to each other by contractual obligations. The main components leading up to a valid contract are usually offer and acceptance.

An express contract may be concluded in writing or orally, or a mixture of the two — for example, the offer may be made in

writing but accepted orally. A tacit or inferred contract is concluded partly or wholly by the conduct of the parties — here the agreement is inferred from the actions of the parties.

Where the party through her actions accepts a written or oral offer, some commentators believe that a tacit agreement is concluded, whereas others argue that an express agreement is concluded. Such a contract is perhaps best described as partly express and partly tacit. The only difference of any consequence between these two types of contract lies in the manner in which the conclusion of the contract is proved (*Bremer Meulens (Edms) v Bpk v Floros* 1966 (1) PH A36 (A)).

Four ways of concluding an Internet contract have been identified:

- ❏ offer and acceptance by e-mail
- ❏ an offer made on a commercial web site which is accepted by clicking on a button or by doing a specified act (sometimes the owner of the commercial web site merely makes an invitation to do business and the consumer makes the offer by ordering some goods or a service, which offer, in turn, is accepted by the Internet trader)
- ❏ an electronic offer and acceptance displayed on the monitors of the offeror and offeree during an Internet relay chat
- ❏ a verbal offer and acceptance during a video conference, or Internet voice link

The offer and acceptance can, of course, be a mix of the above. The offer or acceptance can also be made by more traditional means: orally in each other's presence, by letter in the post, fax, telex, or telephone.

Offer

The requirements for a valid offer are:

- ❏ the offer must be definite and complete
- ❏ the offer must contemplate acceptance and a resultant obligation
- ❏ the offer must come to the attention of the offeree (adressee)
- ❏ an offer must, generally, be directed at a definite person or persons, although it may be also directed at an

undefined person or undefined persons

- ❏ the offer must comply with any formalities set by law

When one examines the validity of an Internet contract, the first question to be asked is whether the contents of a web site or electronic mail constitute an on-line 'offer' or merely 'an invitation to do business'. It is important to note that a true offer must be made with the intention to form a binding contract. So an advertisement is usually regarded as a mere invitation to do business and not as an offer (*Crawley v R* 1909 TS 1105). This also applies to the display of goods in a shop, or the placing of advertisements in the press or circulars. The prospective customer who comes forward is deemed to make an offer to buy; only upon acceptance of her offer by the advertiser does a contract come into existence. An advertisement may, depending on its wording, qualify as an offer where there is a clear indication that the advertiser intended it to be such (*Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256).

A commercial web site may serve both as 'shop displays' and 'shop sellers', and they may fuse advertising and selling. An advertisement or digital image of products for sale on a web site is, generally, directed 'to the world', and may, depending on its wording, constitute an offer. But it may also only be an invitation to the world at large to do business, in that the electronic order by a prospective client is regarded as an offer subject to acceptance by the Internet trader. The exact intention should be clearly stipulated in the standard terms of the Internet trader.

From the point of view of the Internet trader it is usually preferable to structure the Internet site in such a way that orders by consumers are regarded as offers rather than acceptances. It may happen, for example, that the interest in a specific product is oversubscribed by buyers worldwide to the extent that the Internet merchant is unable to fulfill its obligations, or that it receives orders from parts of the world where it does not want to ship or send its goods or services. In such cases unwanted orders can merely be rejected by the trader without further legal consequences.

If the Internet merchant wants to make an offer for the sale of goods to the general public, her offer should be made with an express term that the offer is subject to 'first come, first serve', or 'as long as stocks last', where stocks are limited. Such a

clause is, of course, not necessary where stocks are unlimited. She should also expressly limit the area of delivery in her offer.

Acceptance

The requirements for a valid acceptance are:

- ❏ The acceptance must be unconditional and unequivocal.
- ❏ The offer must be accepted by the person to whom it was addressed. Usually an offer on the Internet is made to the public generally, and hence any member of the public may accept it. But where the offer is made by e-mail it is usually directed at a specific person, and so only that person can validly accept the offer.
- ❏ The acceptance must be a reaction to the offer — a person cannot accept an offer of which she is not aware.
- ❏ The acceptance must comply with any formalities set by law or by the offeror.

A binding contract is created when the acceptance of an offer is made. The acceptance must be manifested by some unequivocal act from which the inference of acceptance can logically be drawn.

Also, the acceptance must be communicated to the offeror — it must come to the attention of the offeror. The offeror may expressly dispense with communication of the acceptance. The need to communicate the acceptance of the offer may also be waived impliedly, by requiring the offeree to signify her acceptance by some specified act. The offeror may thus prescribe that the offer could be accepted tacitly by the purchaser by performing a certain act. This act then evidences the purchaser's acceptance of the terms of the contract, and as such is equivalent in law to the signing of a contract.

Where the offeror indicates the mode of acceptance, the offeree should adhered to it (*Bloom v The American Swiss Watch Co* 1915 AD 100). But the offeror may not force the contract on the offeree by stating that the offeree's silence will be construed as acceptance, for example, by sending unsolicited goods through

the post (*Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A)).

Application to cyber contracts

In respect of Internet contracts, the traditional model of offer and acceptance is strained because of the use of technology. In most cases the Internet trader will set up its cyber trade site from which transactions will be conducted. Where the site constitutes an *offer* to be accepted by clients, the traditional model requires subjective knowledge of the acceptance by the offeror before the agreement will come into existence, unless such knowledge has been waived expressly or impliedly. In respect of most Internet contracts it will be difficult to tell whether knowledge of the acceptance ever reached the mind of the offeror or, if it is a company, came to the knowledge of a person authorized to contract on behalf of the company.

Conversely, if the site works with the model that it only invites business and that the order by the client constitutes an offer, the contract comes into existence only once the client receives subjective notice of the acceptance by the Internet trader. So the trading site will have to be able to confirm the order to the client. But there is the danger that the client may never receive notice of the confirmation, in which event no contract will have come into existence.

Acceptance of standard terms

Standard terms of agreement is a modern phenomenon in the law of contract. A party to a prospective contract may include or insist on including its standard terms of agreement as part of the eventual contract. Standard contracts are by nature contracts of adhesion, since the possibility of negotiations is excluded — one simply declares one's acceptance of the standard terms, or one goes without. These contracts are used extensively in almost all economic activities today, where they are reflected in documents such as insurance policies, bills of landing, and many banking and consumer financial instruments.

The set of rules devised for the ‘ticket cases’ may be applied to all cases where the supplier places before the consumer a

document (or ticket) which is not intended to be signed and which contains the terms on which the supplier is prepared to do business, or which refers the consumer to a document that contains the terms on which the supplier is prepared to do business. These principles were adopted to dispense with the need to obtain every consumer's signature, and hence they are used to prove that the consumer is bound to the contract.

In terms of these principles there is a three-pronged test to determine whether or not these standard terms have become part of the contract:

- ❏ Did the person who received the ticket know there was writing or printing on the ticket? This question serves no useful purpose and can be abandoned.

- ❏ Did she know that the writing or printing referred to terms of the contract?

  If both these questions can be answered in the affirmative, the terms referred to form part of the contract. But if either is answered in the negative, a further question is put:

- ❏ Did the party issuing the ticket take the steps which were reasonably necessary to bring the reference to the terms to the notice of the other party?

  If this was done the terms form part of the contract. If not, the other party is not bound by them.

Whether the necessary steps were taken for the purpose of this last question, is a question of fact. The nature of the document is material to the answer to this question as well. The more contractually obscure or incidental the document, the less likely it is to expect it to contain contractual terms, and the more specific and positive the steps must be to bring it to the attention of the consumer (*Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* 1982 (2) SA 565 (C)).

Of course, if it can be proved that the consumer has read the document, she is bound by its terms, and no enquiry as to her understanding of the document needs to be made. By reading the document and by going ahead with the contract, the

consumer accepts the offer (by her act), and so a valid contract is concluded.

The rules of the 'ticket cases' can apply to commercial websites. Websites that merely contain a notice that the use of the website or the placing of an order will be subject to their standard contract of use of the site or of sale. If, after applying the three-pronged test, it is found that the client is not bound by the standard contract, it does not follow that she is not bound by a contract. Through her acts she will have concluded a tacit contract, that will be regulated by the natural incidents of the specific type of contract that the parties have concluded. The terms of the standard contract will, however, not be binding.

'Click wrap' contracts have been specially developed for commercial web sites. Basically, they entail that a client who wants to register at a web site in order to make use of its services, or who wants to purchase goods offered through the 'electronic shop', will be instructed to a 'click' on a certain icon to indicate her acceptance of the terms of the contract. There will usually also be a link to the standard contract, that will be displayed when the client 'clicks' on that link.

Although the validity of these 'click wrap' agreements have not yet been tested in court, there appears to be no reason why they should not be enforceable. Compared to the ticket cases where the consumer is not necessarily aware of the existence of contract terms, the consumer is in the case of 'click wrap' agreements actually aware of the existence of contractual terms before a commitment is made to use the site or acquire the goods or services.

Activity 3.1

On 25 February 2001, Johnson, the managing director and major shareholder of MK Motors (Pty) Ltd, situated in Maputo, Mocambique, while surfing the net, came across JTV's web site. He is interested in the *Petrosaver* that Vuzi advertises for sale on this site. After perusing the site, he clicks on an icon that displays the following text: 'Order Petrosaver'. Johnson was then taken to page which stipulates that the JTV's standard terms of agreement apply to any transaction between JTV and a

customer ordering *Petrosavers* through the site. At the bottom of this page, Johnson came across two icons with the following wording on them: 'Display standard terms and conditions', and 'Order Petrosaver'. Johnson, who was in a hurry, clicked on the second icon without reading the standard terms. He was then taken to a page containing an order form. He ordered 300 *Petrosavers* at $10 each from JTV via this site. Ten seconds later he received a confirmation of his order, and he was requested to confirm his order. He clicked on the icon that confirmed the correctness of his order. On the same day, JTV dispatched the *Petrosavers* by freight container to MK Motors.

The standard terms of agreement included the following terms:

1. The agreement would become final and binding only upon receipt by JTV of the confirmation of the order by any client.

2. JTV was entitled to reject any order for any reason whatsoever.

3. The *Petrosavers* would be shipped within one week of the agreement.

4. The *Petrosavers* would carry a three-month guarantee against any defects, which guarantee would replace all other guarantees against latent defects.

5. The customer was not entitled to reject the *Petrosavers* for any reason whatsoever, whether or not they complied with international standards, and whether or not they were defective.
6. No variation of the contract or discharge from the contract would be valid and binding unless it had been confirmed in writing by JTV.

On the basis of the facts outlined, advise JTV on whether or not its standard terms of agreement had become part of the agreement, and whether or not all these terms were valid and enforceable.

After you have performed these activities, read the discussion in Tutorial Letter 201 for feedback.

Activity 3.2

Say Johnson made a mistake when he keyed in his order: instead of 300 he keyed in 800. When he was asked to confirm his order, he did not notice his mistake. A week later his mistake comes to his attention. He immediately informs JTV by e-mail of his mistake. Meanwhile, the goods had been dispatched by JTV.

Advise JTV as to whether there was consensus between it and MK Motors, and whether MK Motors was entitled to resile from the agreement in part or in total.

After you have performed these activities, read the discussion in Tutorial Letter 201 for feedback.

Discussion

When and where a contract is concluded

When and where a contract is concluded are determined simultaneously. The time of contracting is when the last step which is required for the completion of the contract is taken. The place where the last step is taken is the place of contracting.

By discussing the current legal position with regard to the time and place of contracting we will gain an understanding of the approach of the courts. This will enable us to discuss how the time and place of the formation of Internet contracts should be regulated.

There are four possible jurisprudential theories to determine if, when, and where a contract is concluded:

- ❏ the *declaration theory*, in terms of which the agreement is concluded once the offeree has expressed her acceptance
- ❏ the *expedition theory*, in terms of which the agreement is concluded as soon as the offeree has sent off her acceptance
- ❏ the *reception theory*, which holds that the agreement comes into being when the offeror receives the offeree's acceptance, or has access to it

- the *information theory*, in terms of which the agreement is concluded only when the offeror has been informed of the acceptance

The information theory as the general rule, and the exceptions to it

The general rule (information theory) is that a contract is formed only when and where the acceptance is communicated to the offeror (*R v Nel* 1921 AD 339; *Smeiman v Volkersz* 1954 (4) SA 170 (C); *Cecil Jacobs (Pty) Ltd v Mcleod & Sons* 1966 (4) SA 41 (N)). So the offeror should have been informed of the acceptance of her offer before actual consensus has been reached and a contract comes into existence. This will, for example, be the case when the parties conclude their contract by telephone.

The offeror may expressly waive or abandon her right to notification by indicating that the offeree may signify acceptance by performing a certain act (*Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A) at 597). The contract will then come into being at a stage prior to the communication of the acceptance to the offeror. But where the terms of the offer are obscure and lack clarity, the presumption that the contract is concluded when and where the offeror comes to hear of the offeree's acceptance should prevail (*Driftwood Properties (Pty) Ltd v McLean* (ibid)).

Sometimes it can be inferred from the circumstances under which the offer is made that the offeror has tacitly waived her right to notification, and that she has tacitly indicated that she will consider herself bound as soon as the offeree has complied with certain conditions. A tacit intention to prescribe a specific method of acceptance must be gathered from al the facts of a particular case. The following facts may be important: the geographical separation of the parties, the terms of the envisaged contract and the form and commercial nature of the envisaged contract (*Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 (4) SA 296 (T)).

We will now discuss some of the communication methods used by parties to enter into a contract where they are geographically separated from one another.

Placing an order

In *R v Nel* (supra), the appeal court held that where an order was sent to a person at a distance to supply certain goods at a certain price, the offer was accepted by the despatch of the goods and the offeror impliedly dispensed with the necessity of the acceptance being communicated to him. The reason was that if the general rule applied, the offeror might revoke her offer after the goods had been despatched. In this case, the order had been taken by an employee of the offeree.

Postal contracts

By making an offer by letter in the post, the offeror tacitly waives her right to notification and tacitly indicates that the contract will be concluded as soon as the letter of acceptance is posted (*Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd* 1921 CPD 244; *Kerguelen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487). No such tacit indication exists where the offer is made orally in the presence of each other and not by post, even if the parties stay a distance from each other (*Smeiman v Volkerz* (supra)). Neither does such a tacit indication exist where the offer is made by post, but the offeror has expressly indicated when the contract comes into being (*A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 468 (A) at 478). The express indication will then be decisive.

Why the courts chose the expedition theory for postal contracts is important. In *Cape Explosive Works Ltd v South African Oil and Fat Industries; Cape Explosive Works Ltd v Lever Brothers (South Africa) Ltd* (supra), the court reasoned that the communications (information) theory was best from a purely philosophical viewpoint and hence applies as the general principle of law. But with contracts concluded through the post, an exception was made in favour of the expedition theory, because, in practice, this theory was the most convenient and presented the least difficulty. Kotzé JP remarked (at 260):

> ‘As to practical inconveniences, in case of a letter arriving too late, or not at all, that is a contingency which seldom occurs, and in the vast majority of cases the regularity of the

> post can be depended on. At any rate human intercourse, founded on experience, is quite content to transact business through the post office.'

Searle J made the following remark with regard to the practicality of requiring the acceptance of the offer to reach the offeror before a contract was concluded:

> 'Indeed, if such a rule were enforced in contracts taking place by letter much confusion and complication would arise, for the acceptor would certainly be at a loss to know when his notification *reached* the offeror and his hands would be tied until he was assured on this point.'

Kotzé JP concluded (at 265–266):

> 'We should bear in mind that law in its development is apt to proceed on practical in preference to philosophical lines. The practice of law, as a living system, is based rather on human necessities and experience of the actual affairs of men, than on notions of a purely philosophical kind. Lord Bacon reminds us that the thoughts of the philosophers may be likened to the stars, they are lofty, but give very little light. I speak with every respect, and while I am conscious that we should at all times be logical in our reasoning, and as philosophic and systemic as we can in our laying down of legal principles, I hold it to be a sound notion that it is not a false inquiry to inquire what method serves the best practical purposes. When, then, it comes to the question of election between various legal theories, which each in turn has the support of eminent jurists — and we are at present placed in this position — it certainly is a matter of importance carefully to consider which of these different theories has the balance of practical convenience on its side, although we may not be prepared to accept some of the arguments put forth in support of it. These considerations have brought me to the conclusion that upon the whole the second theory is the one we should adopt.... This is the principle of the English, Scotch and American systems of jurisprudence, and appears to me also, apart from its practical convenience, to be in accordance with the leaning of our courts to be gathered from the remarks of the learned judges in the cases to which I have referred.'

The court in *Cape Explosive Works* chose the expedition theory on two grounds of commercial convenience:

- ❑ It is easier to prove posting than receipt of a letter. One can determine from the postmark on the envelope, if it is legible, when and where the letter has been posted.

- ❏ The offeree should be protected, because she would never be able to act safely on her reply.

In *Kerguelen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue* (supra) at 504–505, the appeal court considered the *Cape Explosives Works* decision and the reasons given for it. Stratford CJ specifically adopted the final summary of Kotzé JP in the *Cape Explosives Works* case (supra) and agreed with the court's conclusion. Stratford CJ advanced the additional reason of *legal* certainty:

> 'There is just one further reason for agreement with the decision. It was one of great importance not only to the legal but more particularly to the commercial community, which presumably has acted on the assumption of its correctness. Business men's assurance that the decision was a final pronouncement of the law on the subject must have become confirmed by the passage of time, for it has remained unchallenged for over twenty years. Therefore, if that judgment had less to recommend it than in law it has one would hesitate now to disturb it.'

The expedition theory does not apply where the postal service is disrupted by the conditions of war (*Bal v Van Staden* 1902 TS 128), or where the offeree has used a materially defective address (*Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd* 1959 (3) SA 208 (SR)).

The rule regarding postal contracts can be criticized on four grounds:

- ❏ Making an offer through the post is regarded as a tacit indication that the offer may be accepted by post. This construction of the intention of the offeror is based on a fiction.

- ❏ The rule was mainly devised for the protection of the offeree (*A to Z Bazaars (Pty) Ltd v Minister of Agriculture* (supra) at 476), but there is no valid reason in modern law why the offeree should be favoured above the offeror. The facility of proof argument depends on the efficiency of the parties in recording the despatch and receipt of mail. The uncertainty of the offeree is also not valid reason, because she cannot be certain in any case that there is a valid offer that she can accept. She would

not know if the offeror has died or lost contractual capacity in the mean time. Also, both parties should know whether a contract has come into being so that both can proceed to perform in confidence. The historical reason for favouring the offeree is that the post was an unreliable means of communication, when the rule was accepted in English law. The rule thus creates a kind of risk liability by operation of law. Risk liability may explain certain aspects of the rule — the restriction of the rule to where the offer is made by post and to the risks inherent in the post as a means of communication. But, on the one hand, this explanation is not so convincing if the reliability of the post in modern times is considered. On the other hand, the offeror has freely made a choice to use the post and so should bear the risk if the addressee also uses the post and the acceptance is, for example, lost in the post.

- ❏ Many countries apply the information or reception theory in some form.

- ❏ The offeror can expressly choose the information theory to apply.

Contracts concluded by telephone

Initially the courts were divided on whether the information theory or the expedition theory applied to contracts concluded by telephone. The Appellate Division settled the dispute in favour of the information theory. The reasons advanced by the courts are important.

In *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965 (4) SA 475 (E), Jennet JP refused to follow *Wolmer v Rees* 1935 TPD 319. He noted that, as a general rule, a contract was not concluded unless acceptance of the offer had been communicated to the offeror. However, the offeror could require, or authorize a particular method of acceptance. Compliance with such method, even though not brought to the knowledge of the offeror, would create a contract between the parties. An offer made through the post was the commonest illustration of implied authorization or indication by the offeror of a mode of acceptance. Jennet JP held that where an offer and

acceptance were made by telephone, the contract was concluded where the offeror heard of the acceptance of her offer (at 479–480):

> 'For the defendant it was argued that the decision in *Wolmer*'s case is wrong. Reliance was placed on the reasons for a contrary conclusion given in the case of *Entores Ltd v Miles Far East Corporation* [1955] 2 All ER 493. In that case it was said that communications by means of telephone or Telex are virtually instantaneous and that no good reason exists for a departure from the general rule that acceptance of an offer must reach the offeror — a departure which is recognized in the case of contracts made by post. The reasons given for that conclusion are clear and convincing. Parties in telephonic communication with each other are virtually in the same position as if they are inter praesentes. In order to speak to each other they make use of an instrument that enables them to do so. The very object of their using such instrument is to gain the direct communication that it affords.
>
> 'It follows that, when the telephone is used to make an offer, the offeror is not authorising a method of acceptance which will be binding on him whether or not he is made aware of the acceptance. The result of this conclusion is that I must, with great respect, differ from the decision in *Wolmer*'s case. In the present case the acceptance was conveyed to the appellant in Johannesburg and the contract was therefore concluded there.'

In *S v Henckert* 1981 (3) SA 445 (A) at 451, the Appellate Division briefly approved of the *Tel Peda* case without giving any reasons for its view. This decision is correct, as the telephone is the next best thing to face-to-face negotiations: the communication takes place directly in time between the parties without any real time lag. Any uncertainties, ambiguities, or even breaks in communication are immediately evident and can be cleared up immediately by the parties.

Contracts concluded by telegram

Apparently the courts will extend the rule with regard to postal contracts to contracts concluded by telegram. (The court assumed this to be so, in *Yeats v Dalton* 1938 EDL 177 at 179–180). This has been accepted as correct, but it has also been criticized. The fact that the sender of a telegram is interested in a speedy response can hardly be reconciled with

the possibility that the offeror must bear the risk of a delay or loss of the communication.

This concludes our discussion of the South African case law.

Summary of the approach of the South African courts

The approach of the South African courts can be summarized thus:

- ❏ The information theory is the general rule, whether the parties conclude their contract in each others presence or over a distance.

- ❏ The offeror is allowed expressly or impliedly to deviate from the general rule.

- ❏ The mere geographical separation of the parties is not a sufficient indication that the offeror has impliedly dispensed with the general rule. Such an indication may exist where other factors are also present. The courts have found one such other factor to be the extraordinary result of the application of the general rule (revocation possible after despatch but before delivery) where goods are ordered. In postal contracts, the commercial inconvenience caused by the general rule, the application of a different rule in other legal systems, and the generally observed trade usage have been regarded as sufficient indication.

- ❏ The courts have extended the application of rules to certain methods of communication to other similar methods of communication by means of analogy.

We may assume that the courts will follow a similar approach to contracts concluded by other means of communication where the parties are at a distance from one another.

In deciding which theory should be applied to a specific form of communication, the attention must not focus on the *type of machine* employed but rather on its *effect* (see further Tana Pistorius ‘Formation of Internet Contracts: An Analysis of the Contractual and Security Issues’ (1999) 11 *SA Mercantile LJ*

282 at 289).

Contracts entered into by telephone answering machines, telex, facsimile machines, and EDI

These methods of communication are all forms of electronic communication which occupy a functional position somewhere between the traditional letter and telephone communications. They are not similar to the telephone, as there is no direct and instantaneous communication between the parties. The rule of acceptance applying to these methods of communication should be similar, because they are similar devices

The telex was an instantaneous and direct method of communication when the English case of *Entores Ltd v Miles Far East Corporation* [1955] 2 All ER 493 (CA) was decided. Technological advances have changed the manner in which telex systems work and it is no longer an instantaneous method of communication (see Benjamin Wright *The Law of Electronic Commerce EDI, Fax and E-mail: Technology, Proof, and Liability* (1991) 47). The modern telex system may return an 'answer back' even though a paper record is not made at the receiving end. The terminal may write the message to a computer disk, or the message may be delivered to an electronic mailbox message. There is thus no guarantee that an operator will retrieve and print a message. All the data may be destroyed if a mailbox system should crash. A modern telex receiver is similar to other devices that *record* oral declarations. By contrast, the telephone is regarded as an instrument by means of which oral declarations are *communicated*.

The following views have been expressed on the applicable theory with regard to telephone answering machines:

- ❑ The general rule (the information theory) applies (AJ Kerr *The Principles of the Law of Contract* 5th ed (1998) 110): where an acceptance has been communicated to a telephone answering service, the contract is entered into when the offeror plays back the recording. If the offeror fails to play back, or delays playing back, the recording, and there is no other matter of higher priority requiring her attention, the contract comes into effect when she should have played it back.

- ❏ The expedition theory applies (MCJ Olmesdahl 'Unheralded Demise of *Wolmer v Rees*' (1984) 101 *South African LJ* 545 at 551): using telephone answering machines is analogous to using the post, as the parties are not in a conversational situation.

- ❏ The reception theory applies (RH Christie *The Law of Contract in South* Africa 3rd ed (1996) 85): the contract is deemed to have come into effect once the message of acceptance is recorded, even if the offeror does not play the message back. Some writers argue that the offeror is bound even if the machine should record it inaudibly, while others believe that she then should not be bound.

Similar views have been expressed with regard to the other forms of communication (telex, fax, and EDI). All these forms of communication are similar. The reception theory seems to be the most suitable in the form of access to the acceptance to be applied for the following reasons:

- ❏ Unlike with a posted letter, it is quite easy to determine when a party had access to a message, or when a message had been received. But it is just as difficult as with a posted letter to determine when a party had actually subjectively become informed of the existence or content of the message.

- ❏ Often an electronic order in EDI will be acknowledged by the supplier's system and executed by its plant without any person with executive powers actually taking notice of the communication. In these circumstances it is unrealistic to apply the information theory. This applies also to orders placed on a commercial web site.

- ❏ The information theory allows the receiver to deny that she has read the acceptance, and so places an impossible burden of proof on the sender.

Practically speaking, applying the reception theory will entail the following:

- ❏ In the case of a fax or telex, the acceptance is legally effective once it has been received by the recipient's fax

or telex machine.

- ❑ In the case of an EDI message, the offer, acceptance, order, or notice is legally effective once it has been received by the third-party network operator and placed in the recipient's electronic mailbox, when store-and-retrieve communication is used, or where it has been received by the recipient's computer system.

Internet contracts

Video conferencing, Internet relay chat, and Internet voice link

Internet relay chat, or Internet voice link, is a communication service that is 'full duplex' and in real time. Communication between the client and server on the World Wide Web, is instantly and places parties in a conversational situation. The information theory applies to both instances.

Video conferencing over the Internet is the method of communication which comes the closest to the parties' actually contracting in each other's presence. The information theory applies also to video conferencing.

Communication over the World Wide Web

Acceptances over the World Wide Web differ from acceptances by e-mail as the digital data is transmitted with a 'checksum' which allows the receiving computer to check that the correct information has been received. Moreover, communication between the client and server on the World Wide Web is simultaneous and has the quality of a telephone conversation, albeit between two computers, rather than two human beings. Either 'party' will immediately be aware if the other 'goes offline.' Many commentators argue that the reception theory should apply (for example, Clive Gringras *Nabarro Nathanson's The Laws of the Internet* (1997) 23).

When a message is sent by e-mail, the message first travels to the sender's server. This server acts as an central point for the collection and dispatch of messages from a number of computers. It then breaks the message into minute parcels of information, and sends the parcels, each addressed to the recipient, through the Internet. When the parcels reach the recipient's server the message is reassembled and placed in the recipients mailbox, where it awaits retrieval. If the e-mail does not reach the addressee, the sender receives a message from her service provider to inform her that the e-mail could not be delivered. E-mail is non-instantaneous and may even take longer to be delivered than the post (sometimes derisively called 'snail mail').

E-mail is unlike the post in two respects:

- ❏ Acceptance of e-mail is far more reliant on the recipient than the sender. Some e-mail users are permanently connected to their service provider, while some are notified when e-mail arrives for them. Some time will lapse if such person is not present, or if the service provider does not notify the user of new e-mail. Other users are not connected and have to login to their service provider on the off chance that there is e-mail for them.

- ❏ If the e-mail does not reach the addressee, the sender receives a message from her service provider to inform her that the e-mail could not be delivered. She will only know of this fact when she reads this message. The sender can also find out if her e-mail has been delivered, and when this has happened.

E-mail also differs from telephone communications in two respects:

- ❏ No 'direct line of communication' exists between the sender and receiver of e-mail, as the message is broken into parcels of information in the process of delivery. These parcels usually follow different routes through different computers in the Internet to the recipient. In the process, some of these parcels can be lost, with the result that the e-mail as received is garbled.

- With e-mail, it is impossible to check if an unequivocal acceptance was received. E-mail is sent using protocols (precise languages) which allow computers communicate information. Sometimes, when the protocols are used incorrectly, e-mail may arrive entirely garbled, and or missing some important characters such as zeros.

It should be remembered that mobile communications with the Internet is possible through a mobile phone, or 'notebook' computer. So it is naïve to assume that e-mail accepting an offer from 'company@plc.uk' was actually sent from the United Kingdom. Such e-mail could have been sent, for example, by mobile communications from a aeroplane crossing the Atlantic, or from the beach in Hawaii, or from an Internet café anywhere in the world.

Different views have been expressed as to which theory applies to e-mail:

- The information theory as the general rule should apply (Paula Bagraim 'Transacting in Cyberspace' (1998) 6 *Juta's Business Law* 50 at 51; Marco van der Merwe 'Cybercontracts' (1998) 6 *Juta's Business Law* 139 at 141).

- The expedition theory should apply, as e-mail is similar to ordinary mail (Gringras op cit at 23).

- The reception theory should apply (Pistorius op cit at 290). E-mail is very similar to the electronic communications discussed in the previous section, and the same arguments regarding the reception theory discussed there apply here.

Emerging international trade practices with regard to the time and place of contracting

The international developments are important for the following reasons:

- Internet commerce is potentially transnational. So the solution to the problem of determining the time and place

of the conclusion of Internet contracts adopted by the courts or Parliament adapting the common law, must be acceptable internationally.

- ❏ One of the factors which our courts take into account to determine whether the offeror impliedly has deviated from the information theory is trade usage. In this instance, then, international trade usage is important.

UNCITRAL Model Law

The Model Law offers two important solutions to the problems relating to Internet communication by e-mail and the World Wide Web:

- ❏ The Model Law fits in with the reception theory, expedition theory, or even the solution of the European Directive (see the discussion in the next section) by explaining when a message is dispatched and when it is received.

- ❏ The description of place of acceptance and dispatch of a message as the place of business or residence of the sender and receiver is a very realistic solution to the problem of determining the place of conclusion of the contract. A web site is sometimes hosted on a remote server, so that one needs to determine whether receipt of an acceptance is deemed to take place upon its arrival at the remote server, or upon arrival at the local server. Also, mobile communications through the Internet is possible by means of a mobile phone or portable computer, or by logging on from a remote terminal. In all these instances the place of dispatch and acceptance is the place of residence or business of the parties involved.

Article 15(1) of the Model Law states that, except where the originator and the addressee agree otherwise, the dispatch of a data message occurs when it enters an information system outside the control of the originator. Such system may be the information system of an intermediary, or an information system of the addressee. The term ‘information system’ has to be interpreted broadly, to connote any technical means. So it

includes the communication link between the sender and, for example, her service provider.

Article 15(2)(a) states that if the addressee has designated an information system for the purpose of receiving data messages, the time of receipt of a data message is determined as follows:

- ❑ when the data message enters the designated information system, or
- ❑ if the data message is sent to an information system of the addressee that is not the designated information system, when the data message is retrieved by the addressee.

(The term 'designated information system' connotes a system that has been specifically designated by a party, for example, where an offer expressly specifies the address to which acceptance should be sent.) A data message enters an information system when it becomes available for processing within that information system.

Article 15(2)(b) states that if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee's. It seems that the term 'information system' includes a mailbox stored on the service provider's computer (Glatt 59).

Article 15(4) provides that a data message is deemed to be dispatched from where the originator has its place of business, and that it is deemed to be received where the addressee has its place of business. Where the originator or the addressee has more than one place of business, the place of business for the purposes of this provision is that which has the closest relationship to the underlying transaction, or, in the absence of an underlying transaction, the principal place of business is. If the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.

European Directive

Article 11 of the European Directive contains express provisions relating to when an electronic contract is deemed to come into effect. It states that an order by a consumer made by technological means must be acknowledged by the service

provider without undue delay. The order or acknowledgement is deemed to be received when the party to whom it is addressed is to access it.

Conclusion

It is fairly certain that our courts will apply the information theory to contracts concluded with the conversational methods of communication on the Internet. But it is uncertain whether they will apply the information, expedition, or reception theory to contracts concluded by e-mail or through the World Wide Web. They could even decide that placing an order by a consumer on a commercial web site is similar to sending an order to a person at a distance to supply certain goods at a certain price, and that the offer expressed in the order is accepted by the despatch of the goods. The problem with this solution is that the consumer will not know whether her offer has been accepted. In this regard the solution of the European Directive has much to commend itself, as it clarifies that both parties know that a contract has been concluded.

The offeror may expressly indicate in her offer when the contract comes into being. By doing so she makes sure that a solution acceptable to her applies to the contract that is eventually concluded.

Activity 3.3

JTV's business is situated in Pretoria, and their Internet service provider, Netlink, in Cape Town. MK Motors (Pty) Ltd is situated in Maputo, Mocambique. JTV is not sure where the contract of sale with Johnson was concluded. Advise JTV.

After you have performed this activity, read the discussion in Tutorial Letter 201 for feedback.

General

In *Conradie v Rossouw* 1919 AD 279, the South African Appellate Division accepted the principle that a serious and deliberate agreement to create binding obligations was sufficient to bring a contract into existence, and hence that no special form was required for the conclusion of a binding agreement. So simple oral agreements are valid and enforceable, unless the law, or the parties themselves, prescribe formalities — such as writing and signature — as prerequisites for the agreement being enforceable.

Where contracts are concerned, there are usually three different types of formality that may be required:

- writing,
- signature, or
- some kind of third-party authentication or involvement (such as notarial execution).

In the context of international sales contracts for movables only the first two requirements are relevant. These formalities are required for two purposes — legal certainty (writing), and authentication (signature). They may be required by statute, or the parties themselves.

These two formalities may cause problems for electronic contracts. Many written contracts contain a standard clause which states that no amendments to the contract will be valid or binding unless they have been reduced to writing and have been signed by both parties. This makes complying with those formalities mandatory. It may also cause grave difficulties in regard to the use especially of e-mail and EDI, as it may be difficult or impossible to comply with the signature requirement.

Writing

Whether or not e-mail, fax, and EDI messages that have not been printed out constitute ‘writing’, especially in the context of statutory formality requirements, is handled differently in

different countries. In many countries electronic messages in whatever form are also regarded as writing, provided that they can be read in some form by a human being, even if only on a computer screen. In the United States, this progressive and realistic attitude seems to prevail. But in some countries doubt surrounds this issue.

In South Africa, for example, a statutory requirement of writing is probably not fulfilled if the 'document' is in electronic form only. For example, a fax must be printed out before it will constitute writing. Once it has been printed out, it is regarded as a document, usually a copy of the original that has been faxed.

Signature

The *Guide to the UNCITRAL Model Law* states that a signature can perform many functions, depending on the nature of the document (§ 55). For example, a signature may attest to the intent of a party to endorse authorship of a text, the intent of a person to associate herself with the content of a document written by someone else, or the fact that, and the time when, a person has been at a certain place.

Note that, in addition to the traditional hand-written signatures, there are various types of procedure (such as stamping, and perforation) that are sometimes also referred to as ‘signatures’. They exist alongside hand-written signatures and provide various levels of certainty (idem § 54).

Some jurisdictions require that contracts for the sale of goods above a certain amount should be ‘signed’ in order to be enforceable. However, the concept ‘signature’ adopted in this context is such that a stamp, perforation, or even a typewritten signature or printed letterhead may be regarded as sufficient to meet the signature requirement.

But there are also requirements that combine the traditional hand-written signature with additional security procedures, such as the confirmation of signatures by witnesses, or the certification of signatures by notaries.

An inherent problem of the dematerialized and intangible nature of electronic contracts has been the inability to affix signatures

to these agreements that perform the abovementioned functions (idem §§ 55 and 56). Although varying levels of 'security' or 'certainty' may be indicated by traditional 'signatures', the concept 'signature' is closely linked to the use of paper. Signature requirements currently present barriers to e-commerce.

Several international initiatives have been taken to secure e-commerce by means of some or other form of electronic authentication law. Technology that has been used to address and perform the authentication and identification functions is often impractical when applied to Internet contracts and other digital or electronic agreements.

Legal initiatives in this context include electronic signature laws, or digital signatures, or other public key-styled ('PKI') technologies. Some states in the United States have introduced legislation that address both digital and electronic signatures. These initiative may be divided into three categories:

- ❑ prescriptive (for example, legislation in Utah (107 52nd Leg 1st Reg Sess (Utah 1998), Minnesota (S 2068 80th Leg 1st Reg Sess (Min 1997), Washington (Wash Rev Code § 19.34 (1998), and Missouri (S 844 89th G A 2nd Reg Sess (Mo 1998));
- ❑ criteria based (for example, legislation in California (California Government Code § 22000-22005 (April 22 1997); and initiatives in Iowa (H F 2474 77th G A 1st Reg Sess (Iowa 1997); Kentucky (H R 708, 1998 Leg 1st Reg Sess (Ky 1998)); and
- ❑ signature enabling (for example, initiatives in Iowa (H F 2474 77th G A 1st Reg Sess (Iowa 1997); Kentucky (H R 708, 1998 Leg 1st Reg Sess (Ky 1998); and West Virginia (H R 4293 73rd Leg 2nd Sess (W Va 1998)).

Authentication by signature presents a more difficult problem. In most jurisdictions it seems that the requirement of signature is met only if a physical signature is affixed to a paper document. So-called electronic signatures do not suffice unless specific provision for electronic authentication has been made.

Public key systems may be used to assure the recipient that the person who sent the message or data is actually its author. These systems may also be used to ensure the integrity of the data transmission. So public key cryptography can be used to

generate digital signatures. For commercial actors, public key encryption assures, first, that their messages are secure, and, secondly, that other transacting parties are authenticated.

With this technology senders and receivers of electronic messages each has two keys — a public key and a private key — one is *never* shared with anybody, and one is shared with everybody. The two keys correspond, so that whatever is encoded with the one can be decoded with the other.

Reversing such public key cryptography creates digital signatures. The digital signature is an attachment to a set of data which is composed by taking the output of a hash function, or digest, of the original data that is encrypted with the sender's private key. The hash function puts the original data through an algorithm, which results in a data sequence unique to the particular message, but which is much shorter than the message itself. The digital signature can be decrypted only if the recipient has the correct public key. This allows the recipient to verify the identity of the sender.

The use of public key cryptography for digital signatures requires the assistance of a trusted third party (also known as a certifier) who establishes that the holders of public keys are whom they purport to be. So certifiers identify public key holders and publish and update public keys. This process is known as certificate issuance.

It has been argued that attempts to develop rules relating to standards and procedures to be used as substitutes for specific instances of ‘signatures’ are undesirable, as they would run the risk of tying the legal framework to a given state of technical development. Generally, then, technologically ‘neutral’ solutions should be sought.

Activity 3.4

JTV asks your opinion on the following questions:

- ❑ Does its Internet contract constitute 'writing'? If it does not, how this can be rectified?
- ❑ How can it be sure of the identity of the party with whom it deals when it concludes online contracts?

After you have answered these questions, read the discussion in Tutorial Letter 201 for feedback.

Discussion

Amendment

General

Once a final and binding contract has been concluded between the parties, both parties are bound to the terms as agreed. But it may happen that circumstances change between the time of conclusion of the contract and performance by the parties, or that the parties may have overlooked aspects which they wish to include in their contract. As the initial contract binds both parties through their consensus, the contract cannot be amended unilaterally by one of the parties. Generally, the contract can be amended by way of a new agreement or contract between the parties in terms of which they agree to amend the original, and the way in which it needs to be amended.

European Directive

Article 10 of the European Directive provides that the service providers must provide information on the technical means for identifying and correcting input errors prior to placing orders.

Article 11 then provides that service providers should make available to the recipients of their service appropriate, effective, and accessible technological means to allowing the recipients to

identify and correct input errors, prior to placing orders.

Restrictions

The freedom of the parties to amend their contract may be restricted if the contract is one for which formalities have been prescribed by legislation. In such case the parties need to comply with those formalities in respect of the amendment as well. The same applies where the contract contains a non-variation clause. Usually, a non-variation clause stipulates that the contract may not be amended unless such amendment is in writing and signed by both parties. With Internet contracts, of course, requiring a signature may be problematic. It should be sufficient that the amendment be in writing.

As amending the contract involves actual communication between the parties, this usually takes place by way of e-mail or other conventional forms of communication, such as fax or telephone. If the contract contains a non-variation clause (which is prudent from the perspective of the Internet trader), and any variation is agreed on orally (by telephone), the amendment should be confirmed in writing, either by fax or e-mail, to make it valid and binding.

Activity 3.5

After MK Motors (Pty) Ltd had ordered the *Petrosavers* from JTV on the web site as described above, Johnson sends an e-mail to JTV. He states that he would like to order *Petrosavers* on a regular basis, but that he would like to have a one-year replacement guarantee on all products, including those in the current order. After Vusi had considered Johnson's request, he phones Johnson to tell him that he is prepared to amend their contract as requested. However, he takes no further steps to do so. Johnson seeks your advice as to whether the amendment is valid and enforceable.

After you have performed this activity, read the discussion in Tutorial Letter 201 for feedback.

Introduction

By way of introduction note the following:

- Payment is a bilateral act.
- Payment must be in legal tender (money), unless the parties have agreed (expressly or impliedly) to another form of payment.
- The type of contract determines when performance has to take place if the parties fail to regulate the matter in their contract. For example, most Internet contracts are contracts of sale: it is a natural incident of the contract of sale that payment of the price and delivery of the thing sold has to take place at the same time. In cyber malls the price usually has to be paid first before the goods are despatched, which means that the parties have amended this natural incident of the contract of sale.

Electronic payment systems

The Green Paper states the following of importance regarding electronic payment systems:

> 'Payment systems in the e-commerce environment refer to methods or instruments of effecting payment through electronic means. E-commerce payments rely on the intermediary role of banks, credit card companies and other financial institutions.
>
> 'Challenges relate particularly to emerging payment mechanisms which can either be network-based or stored-value ("smart") cards some of which have the potential to exchange value (payment) without direct linking to bank accounts. Even if these mechanisms can be made secure and effective from the consumer's perspective, they may not always be the most efficient ways of transferring funds over the Internet. Other alternatives include "digital cash" (also referred to as "electronic money") and prepaid accounts.
>
> 'Some of these might serve customers who lack access to

full banking services.

'Smart cards or similar ideas might be especially useful for providing financial services and access as well as reducing the risk of theft and fraud. Other card-based instruments that have to be considered include:

1. Cellular phones, since they remove traditional restrictions of geographical location and high entry costs. With the rapid expansion of WAP-enabled phones, the Internet will be available to all. Even phones that are not WAP-enabled will be capable of being used as payment instruments.

2. Set-top boxes that enable owners of television sets to receive digital television signals. These boxes give users access to the Internet, e-mail and various other interactive channels and could be used to make payments.

'The legitimacy and security of electronic money payment systems may make or break e-commerce growth in South Africa: if payment systems are too complex or expose consumers to online fraud and theft, e-commerce may suffer a material blow. The South African financial sector is well positioned, especially with regard to large corporate businesses, to support widespread applications of e-commerce. Steps are also being taken by Government, banks and the private sector to find a common standard for smart cards that will be acceptable both nationally and internationally.'

In e-commerce the time factor is always important and payment has to be speedy. Initially, the only practical means of payment over the Internet was through using a credit or charge card.

These are the advantages of paying by credit card over the Internet:

- ❏ An institutional framework for payment by credit card already exists.
- ❏ Many of the larger card issuers are internationally recognized, which facilitate international payments.
- ❏ Payment by credit card has become internationally accepted in e-commerce.
- ❏ The development of new technology (Secure Electronic

Transactions protocol) promises to eliminate most of the risks involved in using credit cards for payments on the Internet.

The disadvantages of paying by credit card over the Internet are:

- There is currently a risk involved in sending sensitive credit card details over the Internet to an unknown merchant. The two methods used to combat this risk are encryption and central registries. Encryption does not protect against the misuse of information by the merchant. Where the two methods are used in conjunction, time lags in the completion of transfers are caused. The new technology (Secure Electronic Transactions protocol) is not yet in widespread use.

- Credit card payments require central processing of the payment instruction. This makes credit cards unsuitable for low value transactions, because of fixed transaction costs.

- An audit trial is created by each transaction which allows each payment to be traced.

- Only about 10 per cent of all consumers qualify for credit cards.

The disadvantages of paying by credit card has led to the development of new electronic payment systems. A detailed study of these new payment systems is beyond the scope of this module, as they are currently not used extensively.

Activity 3.6

The order form on JTV's web site provides for payment by the consumer with a credit card. The consumer has to fill in her credit card number before she submits her order. JTV has received a number of complaints from consumers who are afraid of revealing their credit card numbers over the Internet. The company seeks your advice in this matter:

- ❏ Thandi wants to know how the company can assure its customers that it is safe to reveal their credit card numbers on the order forms.
- ❏ Vusi does not understand why he has received so few requests for mechanical advice, when his *Petrosavers*. are selling like hot cakes.

After you have performed these activities, read the discussion in Tutorial Letter 201 for feedback.

Discussion

Consumer protection

Introduction

Consumer protection is still in its infancy in South African law and so hardly warrants special attention. However, as the Internet trade knows no national boundaries, Internet traders dealing with, for example, European consumers need to note the consumer protection measures that have been legislated in Europe, as these may affect their legal position.

There is an awareness, however, in South Africa, too, of the potential harm that may be inflicted upon unwary consumers participating in e-commerce on the Internet. In this regard, the Green Paper states:

> 'The electronic market place offers consumers unprecedented choice and twenty-four hours accessibility and convenience. It gives established marketers and new entrepreneurs low-cost access to a virtually unlimited customer base. With these benefits also comes the

challenge of ensuring that the virtual marketplace is a safe and secure one to purchase goods, services and access electronic information. Consumers must be confident that the goods and services offered online are fairly represented and that the merchants with whom they are dealing (many of whom may be located in another part of the world), will deliver their goods in a timely manner and are not engaged in illegal business practices such as fraud or deception. Consumers must be protected against the following dangers:

1. Unsolicited goods and communication;
2. Illegal or harmful goods, services and content (e.g. pornographic material);
3. Dangers resulting from the ease and convenience of buying on-line;
4. Insufficient information about goods or about their supplier; since, the buyer is not in a position to physically examine the goods offered;
5. The abundantly accessible nature of a web site;
6. The dangers of invasion of privacy...;
7. The risk of being deprived of protection through the unfamiliar, inadequate or conflicting law of a foreign country being applicable to the contract; and
8. Cyber fraud.

'On the other hand, suppliers are in some danger themselves, through exposing themselves to unknown liabilities, especially in view of the fact that the law on Internet commerce is as yet poorly defined, and differs from country to country. Consumer confidence also requires that consumers have access to fair and effective redresses if they are not satisfied with some aspects of the transaction. To ensure strong and effective consumer protection in an online environment and obviate the need for a long and arduous litigation process, alternative and easy-to-use mechanisms for consumer dispute resolution, redress and enforcement mechanisms are required. Again beyond enforcing current law and developing strong consumer protection policies, consumers must be made aware of the availability of instruments to help them use Internet safely.'

European Directive on the Protection of Consumers in Respect of Distance Contracts

The Directive on the Protection of Consumers in Respect of Distance Contracts (*OJ* C288/1) was adopted in 1997. The Directive is an important step towards harmonized consumer protection in the European Union. The Directive will have a significant impact on contracting through the Internet.

The Directive affects the practices of those who sell goods and

services to European consumers on the Internet. The notion of communication at a distance includes contracts made using e-mail or web sites. The Directive also covers the sale of goods or services over the Internet, or by a mixture of distance communication methods. Where an advertisement on a web site gives an European telephone number to be contacted to conclude a contract, the web site owner could fall under the Directive.

Article 4 prescribes certain information that must be provided to the consumer before the conclusion of any distance agreement. Such information includes the main characteristics of the goods and their prices. The information may be provided on any medium appropriate to the means of distance communication used (such as by e-mail or multimedia). Written confirmation must also be given to the consumer on another durable medium (see article 5(1)). Such 'durable medium' will probably not include e-mail.

Article 6 gives the consumer a right of withdrawal. The effect of this provision is to provide consumer parties to distance contracts with the right to withdraw from the contract at will, within seven working days of its conclusion. This exception ensures a 'cooling off' period, but it does not apply to unsealed video cassettes, records, or computer software. The consumer's right of withdrawal does not extend to digitally supplied goods.

European Directive on Electronic Commerce

Information to be made available

This Directive also requires in article 5 that the following information be made available to the consumer:

- ❑ name of service provider
- ❑ geographical address at which the service provider is established
- ❑ details about the service provider, such as its e-mail address
- ❑ the trade register where the service provider is registered and its registration number (where applicable)
- ❑ particulars of any authorisation scheme that may apply
- ❑ whether the service provider is registered with a

professional body, and the professional rules of such body may be accessed (this applies to regulated professions)

- ❏ where the service provider undertakes any activity which is subject to value-added tax (VAT), the applicable VAT identification numbers
- ❏ where applicable, the prices must be stated clearly and the service provider must indicate whether the price is inclusive of VAT and delivery costs

Commercial communications

Article 6 requires commercial communications be identified clearly as such, and that the following information be supplied:

- ❏ the natural or legal person on whose behalf the communication is made
- ❏ where promotional offers are made, they must be clearly identifiable as such and the conditions to be met in order to qualify must be easily accessible and presented clearly and unambiguously
- ❏ promotional competitions and games must be clearly identifiable as such, and the conditions for participation must be easily accessible and presented clearly and unambiguously

Unsolicited commercial communications

Article 7 of the Directive requires that unsolicited commercial communications clearly be identified as such. The Directive also provides that consumers who do not wish to obtain such communications may register themselves in opt-out registers. Service providers undertaking unsolicited commercial communications must regularly consult the opt-out registers to make sure that they do not send such communications to private persons registered in those registers.

European Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Movement of Such Data

The Directive on the Protection of Individuals with Regard to the

Processing of Personal Data and on the Movement of Such Data (Council Directive 95/46 of 24 October 1995, 1995 *OJ* (L 281) 31) ('the Privacy Directive') requires that the consent of an individual be obtained before the collection and use of personal data (art 7). Article 10 also requires that the purpose for which the data is being collected should be disclosed to the individual.

The transmission of personal data to other countries that lack 'adequate laws' for the protection of personal data is prohibited (art 25). Information on e-consumers — also called 'click data' — is fast becoming a commercial commodity. The Privacy Directive will have a profound influence on the emerging debate relating to the rights in respect of 'click data'.

Activity 3.7

Vusi has been receiving quite a few orders for his *Petrosaver* from individual buyers in Europe. He has heard that certain European Directives may apply to these transactions. JTV asks your opinion on the following questions:

- ❏ Which European Directives may apply to the *Petrosaver* orders?
- ❏ Should JTV make its web site compliant with these Directives?
- ❏ What steps must be taken to make the web site compliant with these Directives?

After you have answered these questions, read the discussion in Tutorial Letter 201 for feedback.

Discussion

Conflict of laws

Internet contracts almost invariably involve foreign elements. So conflict of laws plays an important role in determining which legal system regulates a particular contract. We will only briefly

discuss these rules.

Generally, the proper law of the contract governs most aspects of an international contract, but not aspects such as the preliminary determination whether a contract has been concluded, contractual capacity, and formalities.

The first step to establish the proper law of the contract is to determine whether the parties have expressly or tacitly decided which legal system should govern their contract. Many parties to international contracts fail to exercise an express choice. A number of considerations can indicate a tacit choice. For example, a particular place is chosen as the seat of arbitration, or the contract contains technical terms peculiar to a certain legal system, or refers to the legislation of a certain country.

Where the parties have not expressly nor tacitly exercised their choice, a choice of law is imputed by the court to the parties. The South African courts have in the past followed the approach of the lex loci contractus (the law of the place where the contract was concluded), or the lex loci solutionis (the law of the place where performance has to take place) as the applicable choice of law.

More recently the courts have followed a subjective approach (the presumed intention of the parties), and an objective approach (the closest and most real connection with the contract) in the absence of an express or tacit choice of law by the parties.

In terms of the subjective approach, the court tries to determine what the intention of the parties would have been had they applied their minds to the issue, in terms of the presumed intention theory. In *Standard Bank of SA Ltd v Efroiken & Newman* 1924 AD 171, it was held that various connecting factors will give rise to a presumption as to what the parties would have intended if they had applied their minds to a choice of law.

In terms of the objective approach, the proper law of the contract is determined with reference to that legal system which has the ‘closest and most real connection’ with the contract. The objective approach has not yet been endorsed by the highest court of appeal but many judges have expressed themselves in

favour of this approach.

Activity 3.8

Thandi's artwork has become very popular in contemporary art circles in Europe. Many interested buyers there send her e-mail and offer her commissions. From JTV's previous visit to you, she realizes that South African law may not apply to her contracts with these consumers. She wants to know what she can do, and how JTV should change its standard contract in this respect.

After you have performed this activity, read the discussion in Tutorial Letter 201 for feedback.

Discussion

Jurisdiction

We will briefly discuss which South African court will have jurisdiction in respect of Internet contracts. Note that the rules relating to jurisdiction may differ substantially from country to country.

Jurisdiction of the High Court

Where the defendant is an incola (either domiciled or resident) of a South African court, the following High Courts have jurisdiction:

- ❏ the High Court where a defendant is domiciled or resident, or in the case of a company, where its principal place of business or its registered office (if it is registered in South Africa) is
- ❏ the High Court where the cause of action (conclusion of the contract, breach of contract, or performance of the contract) arose, and, in the case of a company not registered in South Africa, the High Court where the cause of action arose if the company carries on business in South Africa

Where the defendant is a foreign peregrinus (neither domiciled nor resident) of all South African courts, the following High Courts will have jurisdiction:

- ❏ the High Court where the plaintiff is an incola, if the defendant has been arrested or some of her property has been attached somewhere in South Africa
- ❏ the High Court within whose area the cause of action arose, if the defendant has been arrested or some of her property has been attached somewhere in South Africa
- ❏ the High Court within whose area the cause of action arose, if the defendant has submitted by agreement to the jurisdiction of the court and the plaintiff is a local or foreign peregrinus

Jurisdiction of the magistrates' courts

The following magistrates' courts will have jurisdiction:

- ❏ the magistrate's court within whose area the defendant resides, carries on business, or is employed
- ❏ the magistrate's court within whose area the whole cause of action (both the conclusion of contract and breach of contract) arose
- ❏ the magistrate's court before whom the defendant appears and makes no objection to the jurisdiction of the court
- ❏ the magistrate's court within whose area the plaintiff is resident where the defendant is a foreign peregrinus of all South African magistrates', courts and if the defendant has been arrested or some of her property has been attached somewhere in South Africa
- ❏ the magistrate's court within whose area the whole cause of action arose, where the defendant is a foreign peregrinus of all South African magistrates' courts, and if the defendant has been arrested or some of her property has been attached somewhere in South Africa

The parties cannot submit to or choose a specific magistrate's court in their agreement.

Activity 3.9

Thandi has heard that the parties to an Internet contract can submit to the jurisdiction of a specific court. She wants to know what you think about inserting such a clause into JTV's standard Internet contract.

After you have performed this activity, read the discussion in Tutorial Letter 201 for feedback.

Discussion

Checklist for a standard Internet contract

The cyber trader can determine the terms and conditions upon which she is prepared to do business by drafting and including standard terms and conditions on her web site. The following checklist should be kept in mind to make sure that all the issues that were canvassed above are adequately provided for:

- ❑ When and where the contract will become final and binding, and all actions that are necessary to achieve this, such as confirmation and receipt of the confirmation. If there are any limitations to the duration of the offer they should also be stated.

- ❑ Any formalities such as writing, electronic authentication ('electronic signature'), or confirmation that need to be complied with to bring the contract into being.

- ❑ Payment terms and conditions, including the currency in which payment must be made, and the liability for any taxes or surcharges to be paid.

- ❑ A jurisdictional clause which determines which court (or courts) will have jurisdiction in the event of a dispute. For South African traders, this will usually be a Division of the High Court.

- ❑ A choice of law clause that stipulates which legal system will apply to the contract and the relationship between the parties. For South African traders, this will usually be

South African law.

- ❑ A clause relating to the admissibility of computer or electronic evidence in a court of law. In many jurisdictions the admissibility of computer generated evidence is problematic. In South Africa, the position is regulated by the Computer Evidence Act 57 of 1983 which is widely regarded as difficult to comply with. A simple clause stating that all computer generated evidence will be admissible in any proceedings between the parties will solve this problem and by-pass the stringent legislative requirements.

- ❑ Clauses relating to common-law guarantees or liability that you wish to vary or exclude, such as the liability for latent defects in contracts of sale. These clauses should also deal with guarantee periods, your policy in regard to returns and repairs of defective products, et cetera.

- ❑ Clauses stipulating when and where the transfer of ownership will take place.

- ❑ Clauses regulating the method and timing of delivery and transport of goods, and liability for payment for such delivery or transport.

- ❑ Clauses dealing with the availability of stock.

- ❑ Limitations in regard to the geographical area where deliveries will be made or services performed.

- ❑ A clause dealing with the risk of damage or loss to the goods and their insurance while being transported, and the liability for the cost of such insurance.

Conclusion	You should now appreciate the general principles of the law of contract that apply to these contracts concluded through the Internet, in the absence of any special legal rules adopted to deal specifically with these contracts. You should understand how the principles relating to consensus (agreement) apply to establish whether a contract has been concluded, and where and when it has come into existence. You should also appreciate the formalities that are, or may be, required to conclude a valid contract, and the way in which a contract may be amended. You should be able to explain the various ways in which payment can be effected through the Internet, and how and when certain European Directives apply to Internet contracts. Finally, you should appreciate which country's legal system governs a contract concluded through the Internet, and which court has jurisdiction to hear a contractual dispute.