

Typical Online Agreements and Associated Legal Challenges Confronting Consumers: A South African Perspective

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Abstract: *The emergence of the internet coupled with the rapid development in digital technology has revolutionised the way things are done, including the economic activities of businesses and consumers. The ease and convenience offered via the electronic commerce platform has become a major motivation for its increasing use rather than visits to physical stores or places of business. Amidst the comfort, wider array of products and time saving benefits available to consumers in the digital marketplace, consumers are confronted with complex problems and challenges that offline consumers who interact with sellers' face to face do not experience. Although there is subsisting legislation that regulates online transactions and agreement in South Africa, this seems to be inadequate to address the adverse situations consumers are exposed to while contracting electronically. This paper discusses the common forms of online contracts and the concomitant legal challenges affecting consumers while concluding contracts online in the South African context. Questions such as 'which country's law will apply on online contracts in cross-border contracts' are some of the pertinent issues without clear cut answers. Divided into four parts, the first part deals with the legal principles regulating online contracts, part two tackles the validity of online contracts, part three deals with the legal challenges consumers face in online contracts in South Africa and the last part is the conclusion. The authors hope that this contribution would help stimulate the debate about online contracts with hopes of bringing the much-needed contractual certainty in this area of the law.*

Key Words: *Contract Law; Online Contract; Legal Principles; Consumers; Transactions; Consumer Challenges; Technology; E-Commerce; South Africa.*

Introduction

The emergence of modern technologies, particularly, the internet for commercial transactions has not only given rise to new business oppor-

tunities but has had a tremendous influence on how contracts are concluded. The impact of technology and the internet is manifested in the way the traditional paper-based contracts are gradually being replaced by electronic form contracts. Consumers in the digital age are increasingly purchasing items online than they do face to face given the convenience and enabled accessibility in online transactions in comparison to a visit to a physical store. This paper concerns itself with the three most common forms of online contracts, the legal framework that regulates these electronic contracts and the challenges confronting online consumers when concluding online contracts in the South African setting.

General principles of the South African common law governing contracts

A contract is a legal arrangement that binds the parties based on their mutual assent. Thus, the basic premise is that a contract is the result of “consenting minds”, with each party free to accept or reject the other party’s terms and conditions.¹ The courts normally decide whether an agreement has been reached by asking whether one contracting party has made an offer that was accepted by the other party. Under common law, offer and acceptance are two of the most fundamental components of contract creation.² For most contracts, offers and acceptances may be made orally or in writing, or they may be assumed from the actions of the contracting parties. Firstly, there must be consensus, which forms the basis of a contract in South African law. The parties must be aware of each of their corresponding intentions to contract. Legally, this is referred to as the meeting of the minds (*consensus ad idem*). Secondly, there must be a serious intention to form binding legal relations. The parties to an agreement must intend to create legal relations for that agreement to be legally binding. There must be understanding between the parties that serious and binding legal relations will result from their agreement.³ Intention to establish legal relations between the parties is very central in establishing whether a contract has come into being when questions are raised around its existence. Based on the fundamentals of contract law,

¹ ABBOTT, K., N. PENDLEBURY and K. WARDMAN. *Business Law*. 6th ed. London: DP Publications, 1993, p. 97. ISBN 1-85805-050-2.

² ONG, J. P. The Enforceability of Digital Contract: A Comparative Analysis on Indonesia and New Zealand Law. *The Lawpreneurship Journal* [online]. 2021, vol. 1, no. 1, pp. 30-42 [cit. 2024-03-21]. ISSN 2807-7652. Available at: <https://doi.org/10.21632/tlj.1.1.30-42>.

³ KAHN, E. *Contract and Mercantile Law through the Cases*. 1st ed. Cape Town: Juta, 1971, p. 183.

consensus exists where parties are mutually aware of one another's intention. Regarding the terms and purpose of the transaction, consensus makes both parties obtain clarity and assurance.⁴ To determine if there was true agreement between the contracting parties, the court may examine how the intentions of the respective parties were displayed through their conduct. The phrase 'lack of *animus contrahendi*' (intention to be contractually bound) is used to describe cases in which, it ought to have been clear to the offeree that the offer was not intended to be taken seriously. To determine serious intention, the South African courts adopt the principle of *iusta causa*, which means that if it can be shown that the agreement is made seriously and deliberately with an intention to be bound, it will be enforceable.⁵ This approach differs from the English law which applies the doctrine of valuable consideration, where the contract is not considered valid unless the other party gives, promises or does something valuable in return. Thirdly, there must be reality of consent. If there is no genuine agreement, and the contract does not represent a true and free meeting of the minds, it may be rendered void at the election of the aggrieved party. Parties to the contract should have freely consented to enter the contract. In addition to the reality of consent requirement, the parties to the contract must have capacity to contract. Capacity to contract connotes the power to enter into legally binding agreement. It refers to competence in the eyes of the law to have rights and duties; perform juristic acts; incur civil or criminal liability for wrongdoing and be a party to litigation. Generally, any juristic or natural person has complete and unrestricted control over his or her affairs and has full contractual capacity. However, there are certain persons who either have limited capacity or no capacity to conclude contracts, mainly due to their age (level of maturity), their state of mind or their lifestyle. Practical examples are the following: minors, who are unmarried natural persons under the age of 18 years have to be assisted by either their par-

⁴ NWABUEZE, C. J. Reflections on Legal Uncertainties for E-Commerce Transactions in Cameroon. *The African Journal of Information and Communication* [online]. 2017, no. 20, pp. 171-180 [cit. 2024-03-21]. ISSN 2077-7213. Available at: <https://doi.org/10.23962/10539/23499>.

⁵ See *Case of Conradie v. Rossouw*. 1919 AD 279. The judgment in the Appeal Court showed that it is not the idea of consideration in the English law that it required but the serious intention to conclude a contract and that this serious intention is no other than a reasonable cause as accepted in Roman-Dutch law.

ents or guardian;⁶ married women,⁷ although the Matrimonial Property Act⁸ now stipulates that married women have the same contractual capacities as married men; persons that are mentally ill; intoxicated persons; prodigals; an insolvent person; persons convicted of a crime involving dishonesty and an alien enemy.⁹ The contract must also contain certain and definite terms. It must not be vague with the effect that the court is unable to work out its meaning or what the intentions of the parties are. An agreement is void if its terms are so uncertain that the court cannot determine what a party must do. This uncertainty may be in the form of vague and indefinite language; failure to agree on material provisions; granting to a party unlimited choice whether to perform or not; agreement to agree; or indefinite duration. Furthermore, the contract must be lawful. Courts, however, recognise agreements reached between people as binding and enforceable, based on the principle of 'sanctity of contract'. Agreements that are contrary to law (statute or common law) or morality or against social or economic values will not be enforced. Only lawful agreements are binding as contracts. The contract must also be possible to perform. This means that a contract must be physically and legally capable of being executed or carried out. There can be no contract if the contract is not physically capable of being when the contract is first made as the law does not enforce impossibilities. It is important to note that the impossibility must not be the fault of either party to the contract, otherwise the party will be liable on the contract. Another requirement for a valid contract is the aspect of formalities. The general rule is that no special formalities are needed for making an enforceable contract. Valid contracts can be made orally or in writing. It could also be implied from the conduct of the parties or a combination of both. However, there are a few exceptions to this rule, particularly where statutes have prescribed various formalities for different categories of agreements. Some of these types of agreements include: an agreement to sell land must be in writ-

⁶ HAVENGA, P., M. HAVENGA, E. HURTER, R. KELBRICK, E. MANAMELA, T. MANAMELA, H. SCHULZE and Ph. STOOP. *General Principles of Commercial Law*. 7th ed. Claremont: Juta, 2010, p. 69. ISBN 978-0-7021-8514-4.

⁷ Marriage has certain patrimonial consequences which are linked to a chosen marital regime, which could be in or out of community of property. The patrimonial consequences that emanate from the chosen marital regime can have an effect on the capacity to act by a married woman.

⁸ *Matrimonial Property Act No. 88* [1984].

⁹ SCOTT, J. and S. CORNELIUS, eds. *The Law of Commerce in South Africa*. 3rd ed. Cape Town: Oxford University Press, 2020, pp. 68-69. ISBN 978-0-19-075348-1.

ing;¹⁰ the sale or lease of land for a period of more than three years must be in writing;¹¹ an oral antenuptial contract is valid between the parties but must be signed in front of a notary, and registered within three months to be valid against a third party; donations, learnership contracts and leases of rights to minerals require written formalities.¹²

Validity of online contracts under South African law

The steady increase in the use of the internet and information communication technology for commercial activities, brought to the fore a worldwide uncertainty as to how and whether contracts concluded electronically can be accepted as valid and enforceable.¹³ Governments of several nations, as well as the United Nations Commission on International Trade Law (UNCITRAL), demanded that globally recognized universal electronic transactions laws be drafted to close this legal loophole. In keeping with its central and coordinating role within the United Nation's (UN) system in addressing legal issues related to the digital economy, UNCITRAL prepared a suite of legislative texts to enable and facilitate the use of electronic means to engage in commercial activities.¹⁴

Akin to the situation in other advanced nations, prior to the enactment of the statute regulating online transactions and communications in South Africa, there were a lot of legal uncertainty on the validity of electronic contracts and the treatment of equivalent of aspects that are necessary in traditional contracts, such as 'writing' and 'signature' that signifies consent. To alleviate the difficulties and ambiguity around electronic transactions and address the legal concerns raised by electronic agree-

¹⁰ As provided for in *Alienation of Land Act No. 68* [1981].

¹¹ *Property Time-sharing Control Act No. 75* [1983].

¹² PAPADOPOULOS, S. and S. SNAIL ka MTUZE. *Cyberlaw@SA: The Law of the Internet in South Africa*. 4th ed. Pretoria: Van Schaik, 2022, p. 90. ISBN 978-0-627-03795-5.

¹³ SNAIL, S. Electronic Contracts in South Africa – A Comparative Analysis. *Journal of Information, Law & Technology* [online]. 2008, no. 2, pp. 1-24 [cit. 2024-03-21]. ISSN 1361-4169. Available at: https://warwick.ac.uk/fac/soc/law/elj/jilt/2008_2/snail; and SADU-AL, M. K. Electronic Contracts: Legal Issues and Challenges. *International Journal of Research and Analytical Reviews* [online]. 2021, vol. 8, no. 3, pp. 793-798 [cit. 2024-03-21]. ISSN 2348-1269. Available at: <https://ijrar.org/papers/IJRAR21C2209.pdf>.

¹⁴ *UNCITRAL Model Law on Electronic Commerce* [1996], which is based on the fundamental principles of non-discrimination against the use of electronic means, functional equivalency, and technology neutrality, is the most widely enacted text. It establishes rules for the equal treatment of electronic and paper-based information as well as the legal recognition of electronic transactions and processes. Further guidelines for the usage of electronic signatures may be found in *UNCITRAL Model Law on Electronic Signatures* [2001].

ments in South Africa, the legislature enacted the Electronic Communications and Transactions Act 2002 (ECT Act). The ECT Act which is mainly based upon both UNICITRAL Model Laws on E-Commerce¹⁵ was promulgated to facilitate and regulate electronic communications and transactions that are in the interest of the public. The Act thus governs online and electronic contracts. Unless explicitly prohibited, it applies to electronic transactions (commercial and non-commercial) and data transmissions.

According to South African law, there are no special prerequisites for the establishment of online contracts. As it is with traditional contracts, contracts formed electronically are binding and enforceable provided all the requirements recognised by law for a valid contract are present. Digital agreements made over the internet or via electronic communications, such as email, SMS or other forms of data messages, have similar legal validity as the traditional paper-based and oral contracts and must comply with the essential requirements. Thus, the same substantive legal criteria, such as an offer, acceptance, consensus, lawfulness, serious intention, and capacity to contract, that apply to the physical world contracts also apply to digital contracts, notwithstanding the exclusion of physical contact between the parties. In the context of online agreements for example, a contract will be formed where a consumer makes an offer online by placing an order and the website supplier (seller) accepts the offer. In practical terms, when a consumer places a product in the virtual “basket” or “shopping cart” for payment, he is making an offer under an electronic contract. Acceptance on the other hand occurs when the seller agrees to sell the product in accordance with the offer made by the customer who added the item to his shopping cart.

Although these modalities align with the general legal principles that underpin the formation of contracts, there are problematic issues that are peculiar to the electronic environment that may cast doubts on the validity of online contracts. One of such is the aspect of consent. Based on South African law, the electronic environment makes provision for various ways to signify consent, either by way of clicking on icons or continued browsing a webpage. Literature however suggests that the that reali-

¹⁵ SNAIL, S. L. South African E-Consumer Law in the Context of the ECT Act (Part 1). *Juta's Business Law* [online]. 2007, vol. 15, no. 1, pp. 40-46 [cit. 2024-03-21]. ISSN 1996-210X. Available at: <https://doi.org/10520/ejc52577>.

ty of consent requirement is difficult to ascertain.¹⁶ Given the ‘take it or leave it’ nature of the e-commerce contracts, the consumer, as the weaker party, would not have the opportunity to bargain, instead, the consumer would usually have to decide whether to accept the unjust and unreasonable terms or to permanently forgo the product or service. Another peculiarity in contracting online is the aspect of capacity to contract. In the e-commerce environment, determining the capacity of individuals to contract is challenging due to the absence of a face-to-face engagement. This makes it nearly impossible for the seller to determine the legitimacy of the person who clicked on the agreement terms and conditions of the online contract. There is therefore the possibility of unassisted minors or other consumers with legal disability entering online contracts by simply clicking the ‘I agree’ button or certain images signifying acceptance to the terms.

Notwithstanding that similar contractual principles governing conventional contracts apply to online contracts, the Act imposes obligations on the operators (suppliers) to provide consumers with an opportunity to evaluate the full electronic transaction, make any necessary corrections, and withdraw from the transaction before placing any order. If the supplier does not give the consumer this chance to assess the contents of a transaction, the Act allows the consumer to terminate the transaction within 14 days after obtaining the products or services covered by the transaction.¹⁷ This particular provision aim to protect online consumers who are in a more precarious situation compared to their offline counterparts given the absence of physical interaction with the supplier. The virtual nature of online contracts do not afford consumers the opportunity to inspect the goods physically or visit the business premises of the supplier as would have been the case in a brick-and-mortar or physical stores environment. Thus, the risk factor in the e-commerce environment is comparatively high with regards to matters revolving around product quality, defective orders, payment security, data security, e-contract enforceability, insufficient information disclosure and rights enforcement of

¹⁶ Van DEVENTER, S. Problems Relating to the Formation of Online Contracts: A Comparative Perspective. *The South African Law Journal* [online]. 2022, vol. 139, no. 1, p. 33 [cit. 2024-03-21]. ISSN 1996-2177. Available at: <https://doi.org/10.47348/salj/v139/i1a2>; and PAPADOPOULOS, S. Are We about To Cure the Scourge of Spam? A Commentary on Current and Proposed South African Legislative Intervention. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* [online]. 2012, vol. 75, no. 2, pp. 223-240 [cit. 2024-03-21]. ISSN 1682-4490. Available at: <https://doi.org/2263/20824>.

¹⁷ *Electronic Communications and Transactions Act No. 25* [2002], Section 43(3).

individual rights. All the obligations in this provision are expected to be fulfilled by the supplier to ensure the consumer is well informed and not prejudiced by virtue of concluding the contract. In addition there are other requirements imposed on suppliers selling products or services available for purchase, rental, or exchange to natural people under the Act include providing end users or consumers with specific information about the operator and the goods or services.¹⁸ As provided for in the ECT Act, electronic contracts are legally equivalent to paper-based contracts, and one type of contract is not given advantage over the other.¹⁹ Notwithstanding the fact that South African law gives legal backing to electronic offer and acceptance between two parties, there exists some uncertainty regarding the legal significance of the offer and acceptance in a digitised form created between two parties, for example, whether the information on a website may be considered to be a legitimate offer as opposed to a mere invitation to do business; or the act of continued browsing on a webpage can be construed as acceptance. More importantly, there is also a recognition of unique challenges and risks consumers are confronted with, given that consumers are generally considered the weaker party in contract arrangements, particularly in the virtual environment where electronic agreements are involved.

Legal challenges consumers' face in online contracts in South Africa

Notwithstanding the progress made in developing rules to facilitate online contracts and the existing case law, the South African legal framework that governs electronic agreements is still at a budding stage compared to other advanced countries like Australia, Germany, the United Kingdom (UK) and the United States. Although South Africa has produced a couple of groundbreaking litigations as well as a body of case law on electronic communications and transactions,²⁰ these resources are not as widespread as the legal process demands.²¹ This therefore necessitates

¹⁸ *Electronic Communications and Transactions Act No. 25* [2002], Section 43(1).

¹⁹ *Electronic Communications and Transactions Act No. 25* [2002], Section 22.

²⁰ *Case of Jafta v. Ezemvelo KZN Wildlife* [2008-07-01]. Judgement of the Labour Court of South Africa, 2008, D204/07; *Case of Spring Forest Trading 599 CC v. Wilberry (Pty) Ltd t/a Ecowash and Another* [2014-11-21]. Judgement of the Supreme Court of Appeal of South Africa, 2014, 725/13; and *Case of Global & Local Investments Advisors (Pty) Ltd v. Fouche* [2020-03-18]. Judgement of the Supreme Court of Appeal of South Africa, 2020, 71/2019.

²¹ SNAIL, S. L. South African E-Consumer Law in the Context of the ECT Act (Part 1). *Juta's Business Law* [online]. 2007, vol. 15, no. 1, p. 40 [cit. 2024-03-21]. ISSN 1996-210X. Available at: <https://doi.org/10520/ejc52577>.

consulting foreign law and case law studies for guidance. Some of the issues and potential challenges related to online consumer issues in the South African context are discussed in the section below.

1 Jurisdictional issues and choice of applicable law for cross border transactions

One of the major challenges that consumers face while concluding online contracts relates to issues around jurisdiction over cross border transactions. Due to the global nature of online agreements, with no physical territorial borders, consumers can contract with suppliers in another country or territory. South African consumers, like their counterparts in other countries, engage in transactions on international websites. Given the cross-border nature of these transactions, different laws are applicable to consumers trading activities in their physical location. Problems therefore may arise in the event of a dispute arising between the parties and ascertaining which court and law will govern the contract in addition to where and how judgment will be enforced.²² A South African consumer for example, who enters into an online contract with a supplier in another country whose server is located outside that country will be confronted with uncertainty on where the contract can be said to have been concluded and the court's jurisdiction to hear and settle any conflict that may arise from the contract. Unwitting consumers may find themselves in a situation where they may have to file a lawsuit in a foreign jurisdiction and are then subject to foreign law. Determining the court jurisdiction and the legal systems that will be applicable to settle disputes that may arise from the purchase of goods or use of the services across geographical borders is a potential challenging issue. Although several efforts and initiatives have been made *via* national and international bodies and instruments, questions still arise on the effectiveness of these online dispute resolution mechanisms. In the context of South Africa, there has been expression of doubts as to whether any substantial cross-border complaint would ever be pursued against such overseas online suppliers who do not have a physical presence in South Africa.²³ To tackle this exigent issue, website merchants have been advised to include

²² De VILLERS, M. R. H. *Consumer Protection under the Electronic Communications and Transactions Act 25 of 2002*. 1st ed. Johannesburg, SA: University of Johannesburg, Department of Mercantile Law, 2004, p. 157.

²³ PAPADOPOULOS, S. and S. SNAIL ka MTUZE. *Cyberlaw@SA: The Law of the Internet in South Africa*. 4th ed. Pretoria: Van Schaik, 2022, p. 90. ISBN 978-0-627-03795-5.

a ‘choice of jurisdiction’ clause²⁴ or forum selection clauses in the online contract where both parties are allowed to choose the geographical location of the court that will preside over the matter in the event of a disagreement. Likewise, other advanced countries have devised ways to tackle consumers dispute issues arising from cross border online transactions approaches. As an example, The US Courts developed “effects test” to assist to establish jurisdiction in e-commerce consumer disputes.²⁵ Here, if a defendant wilfully causes injury to forum members, states may exercise their jurisdiction. In the United Kingdom, preference is given to the residence or domicile of consumers over the dwelling place of suppliers. Consumers are given preference with regards to the choice of a convenient court location, with the rationale that the supplier who is already operating in his place of business, is better empowered to travel to the forum of the consumer.²⁶ This is considered fair and an effective mechanism in protecting the rights of the consumer. In the same vein, there is the Brussels I Recast²⁷ that offers guidelines that courts in Member States of the European Union employ to decide whether they have jurisdiction over disputes involving several European Union nations. In the South African setting, jurisdiction remains a thorny issue with no clear-cut solutions on matters revolving around consumer disputes in online international transactions. There is still lack of clarity with regards to the specific place of jurisdiction for settlement of disputes in cross border contracts in South Africa. Similarly, there is no South African court judgment

²⁴ Van DEVENTER, S. Regulating Substantively Unfair Terms in Online Contracts. *Stellenbosch Law Review* [online]. 2021, vol. 32, no. 3, p. 518 [cit. 2024-03-21]. ISSN 1996-2193. Available at: <https://doi.org/10.47348/slr/2021/i3a8>.

²⁵ *Case of Calder v. Jones* [1984-03-20]. Opinion of the Supreme Court of the United States, 1984, 465 U.S. 783 serves as the foundation for this. States may use their jurisdiction when the offender wilfully causes injury to forum members. In this case, a citizen of California filed a lawsuit in California Superior Court against a resident of Florida, alleging that the latter authored defamatory remarks about her in a well-known national newspaper. The Court determined that California bore most of the damages in terms of the respondent’s personal anguish and the damage to her professional image in order to establish that jurisdiction was appropriate.

²⁶ OAKLEY, R. L. Fairness in Electronic Contracting: Minimum Standards for Non-negotiated Contracts. *Houston Law Review* [online]. 2005, vol. 42, no. 4, pp. 1041-1105 [cit. 2024-03-21]. ISSN 0018-6694. Available at: <https://houstonlawreview.org/article/4789-fairness-in-electronic-contracting-minimum-standards-for-non-negotiated-contracts>.

²⁷ Regulation (EU) No. 1215/2012 (often referred to as “Brussels I Recast”) will take effect. It repeals and substitutes Regulation No. 44/2001 (also referred to as “Brussels I”) regarding jurisdiction and the recognition and enforcement of decisions in Civil and commercial cases.

that specifically deals with the jurisdictional issues of online contracts although courts are allowed to consider foreign law where such legal disputes arise.²⁸ Due to this legal gap, suggestions have been made to review the existing legislation, particularly the ECT Act, to align with the United Kingdom's approach in granting jurisdiction to the place of residence of the consumer with regards to international agreement disputes.

2 Contract formation

Although the ECT Act has brought about validity to e-contracts in South Africa, it is devoid on how the fundamental principles governing formation of online contracts should be applied to this class of contracts. Flowing from this is the difficulty in confirming whether the prerequisites for a valid or legally enforceable contract has been met in practice. Despite the recognition of electronic transactions and measures taken to address the validity of electronic data message and transactions, the Act neither provides a definition of electronic contract (e-contract) nor provides explanation on how it is formed. Due to this omission and vagueness, e-contracts may be viewed differently, and in some instances, may even be incorrectly construed.

With regards to the common 'wrap' agreements, namely, shrink wrap, click wrap (web-wrap) and browse wrap agreements that are concluded over the internet, critical issues persist in relation to the procedure for conclusion of contract particularly regarding the forms of expression of assent in online contract formation. Shrink wrap contracts are a form of licensing arrangement where the contract's terms and conditions, typically present on the plastic or documentation of the goods bought by the consumer, are enforced.²⁹ A click-wrap agreement is concluded by means of a party to the contract clicking on words or an image stating "I agree" or "I agree to be bound by the terms and conditions", indicating agreement or consent to the particular terms and conditions. A browse wrap on the other hand is an agreement where the user is not

²⁸ Section 2 of the South African Constitution contains the Supremacy clause and adds that when interpreting South African law, foreign law may be taken into account as well as international law.

²⁹ GAUR, A. E-Contracts, Legal Issues and Challenges Involved: An Overview. *Journal of Emerging Technologies and Innovative Research* [online]. 2021, vol. 8, no. 1, pp. 404-410 [cit. 2024-03-21]. ISSN 2349-5162. Available at: <https://www.jetir.org/papers/JETIR2101054.pdf>; and SAINI, N. and A. P. BHANU. Conflict of Laws in E-Contracts. *Multicultural Education* [online]. 2021, vol. 7, no. 10, pp. 761-763 [cit. 2024-03-21]. ISSN 1068-3844. Available at: <https://doi.org/10.5281/zenodo.5610164>.

required to click on words or image, but the mere use of the website constitutes assent to the terms and conditions associated with the contract. Usually, web operators add a hyperlink at the bottom of individual webpages, and the contract conditions are only revealed when the hyperlink is activated. A consumer's act of going past the home page of the website or continued browsing is construed as resulting in a contractual relationship. Thus, browse wrap have elicited concerns about its enforceability because of the absence of clarity on whether a user has positively agreed to the terms of the contract. These situations consequently raise questions on the enforceability of these forms of online contracts. In addition, these forms of agreement leave little or no room for consumers to negotiate or make an input to the terms and conditions of the website owner or supplier as would have been the case in the physical world, leaving prospective consumers with no option than to accept or decline the contract. This uncertainty, amplified by little case law in South Africa and even less legislation addressing the legitimacy of these forms of contracts has a potential of disadvantaging the consumers. The various forms of expressing one's intent to be contractually bound by electronic means and when they become enforceable is also not accommodated in the ECT Act. Thus, there is still uncertainty as to whether an act of clicking an icon on a vendor's website or mere viewing or scrolling a webpage would qualify as legally recognizable acts signifying one's intent to be contractually bound, particularly where terms were unilaterally imposed by the supplier. These highlighted gaps are detrimental to the interest of the consumers while purchasing goods and services online as they are not afforded the opportunity to make an input or modify the terms of the contract.

3 Lack of consistency in the enforceability of online contracts

Another area of concern for consumers relates to the gaps and legal uncertainties on enforceability of online agreements. As online contracts take on the characteristics of the typical standard form or adhesion contracts where the terms are unilaterally imposed by the vendor, there is lack of clarity on whether clicking an icon or agreement button for standard form online contract constitutes an intention to be legally bound or an invitation to do business. There are no specific provisions in the ECT Act that address the enforceability of click-wrap, browse-wrap, and shrink-wrap contracts. To bridge the lacuna, South African courts apply the contract formation rules which require the contractual party to have

actual or constructive knowledge of the contract's terms and conditions prior to utilising the website or other product.³⁰ The effect of this is that all reasonable measures must have been taken to bring the terms and conditions to the contracting party's attention before acceptance is made by the other contracting party.³¹

In the practical sense, it means that each dispute brought before the court will be treated on the facts of the individual cases, by considering different factors such as whether the consumer was given notice of the terms before clicking on the 'I agree' button, whether the terms were visible on the web page, the location or position of the terms amongst others. This could result in different outcomes for similar online consumer situations. The lack of consistency could be detrimental to the consumer who may not intend to be bound.

4 Unfair and deceptive practices

Unfair and deceptive practices by online merchants or suppliers are part of the concerns identified in literature that negatively affect consumers.³² These inequitable practices by online vendors range from misleading and unfair advertising, unfair contract terms, informational requirements and rights of withdrawal, product safety and liability, warranties to fraudulent or unethical trade practices.³³ A typical unfair situation is where an online supplier indicates as part of the terms and conditions, that it 'reserves the right to modify the displayed online terms at any time without giving notice to the consumer'³⁴ Consumers are consequently directed to

³⁰ PISTORIUS, T. Formation of Internet Contracts: An Analysis of the Contractual and Security Issues. *SA Mercantile Law Journal*. 1999, vol. 11, no. 2, pp. 282-299. ISSN 1015-0099; and PISTORIUS, T. Contract Formation: A Comparative Perspective on the Model Law on Electronic Commerce. *Comparative and International Law Journal of Southern Africa* [online]. 2002, vol. 35, no. 2, pp. 129-156 [cit. 2024-03-21]. ISSN 2522-3062. Available at: https://doi.org/10520/aja00104051_178.

³¹ Based on *Case of Kempston Hire (Pty) Ltd v. Snyman*. 1988 (4) SA 465 (T) at 468 H.

³² FRANCO, C. E. and S. B. REGI. Advantages and Challenges of E-Commerce Customers and Businesses: In Indian Perspective. *International Journal of Research – Granthaalayah* [online]. 2016, vol. 4, no. 3, pp. 7-13 [cit. 2024-03-21]. ISSN 2350-0530. Available at: <https://doi.org/10.29121/granthaalayah.v4.i3se.2016.2771>.

³³ PAPADOPOULOS, S. and S. SNAIL ka MTUZE. *Cyberlaw@SA: The Law of the Internet in South Africa*. 4th ed. Pretoria: Van Schaik, 2022, p. 77. ISBN 978-0-627-03795-5.

³⁴ MORINGIELLO, J. M. and J. E. OTTAVIANI. Online Contracts: We May Modify These Terms at Any Time, Right?. In: *American Bar Association* [online]. 2016-05-20 [cit. 2024-03-21]. Available at: https://www.americanbar.org/groups/business_law/resources/business-law-today/2016-may/online-contracts/.

the new terms without any explanation for the changes. Given that online suppliers utilise standard form (adhesion) where the website owner unilaterally imposes the terms of the contract on consumers, any change in the terms is tantamount to a unilateral modification which may be prejudicial to the consumer.

Another aspect that could be detrimental to the consumer relates to clauses limiting liability inserted by suppliers. A limitation of liability clause limits the amount and forms of compensation that one party can seek from the other where harm results from the contract.³⁵ In essence, a limitation of liability clause is used to mitigate risks in a contract. It limits one party's responsibility and minimizes the chance of the other side filing a claim, otherwise the financial claim by the other party that suffers a loss arising from the contract will be limitless. In contract law in general, clauses limiting either party's liability are usually contentious. In the online marketplace, this becomes more vexatious since the supplier is the sole drafter of the terms, due to the standard form nature of online agreements. There is a tendency by the supplier to avoid or limit liability significantly which may be detrimental to the consumer. Hence, in most jurisdictions, there is a greater restriction on limitation of liability clauses for online agreements to ensure fairness. Where the court finds the limitation of liability to be unreasonable, it will not be binding on the consumer.

These challenges associated with online contracting can result in consumers losing trust in e-commerce which would ultimately hamper the development and growth in e-commerce. It is submitted that this can only be addressed by developing comprehensive rules that tackle the risks and challenges to which consumers are exposed.³⁶

³⁵ SCOTT, J. and S. CORNELIUS, eds. *The Law of Commerce in South Africa*. 3rd ed. Cape Town: Oxford University Press, 2020, p. 105. ISBN 978-0-19-075348-1.

³⁶ ROHENDI, A. Perlindungan Konsumen dalam Transaksi E-Commerce Perspektif Hukum Nasional dan Internasional [Consumer Protection in the E-Commerce: Indonesian Law and International Law Perspective]. *Ecodemica* [online]. 2015, vol. 3, no. 2, p. 476 [cit. 2024-03-21]. ISSN 2528-2255. Available at: <https://doi.org/10.31294/jeco.v3i2.34>. For example, *United Nations Guidelines for Consumer Protection* [2016] has been identified as the most recent global measure which addresses the consumer protection issues in broad terms.

5 Lack of data protection

One of the frequent challenges experienced by consumers, identified in literature, in recent times, is lack of data protection. Since most transactions require exchange of information between the parties, such as contact details, banking information and identity numbers, these personal data of consumers can be exploited for criminal activities such as fraudulent schemes, identity theft, credit card piracy, illegal funds transfer and other similar criminal practices. It is worthy of note that despite the creation of international instruments that facilitate the recognition and validation of electronic transactions such as the UNCITRAL Model Law and Electronic Communication Convention, it is only of recent that there have been global attempts to tackle online consumer protection issues.³⁷

Thus, the risk factor in the e-commerce environment is comparatively high with regards to matters revolving around product quality, payment security, data security, e-contract enforceability, insufficient information disclosure and individual rights enforcement.

6 Unfair contract terms

Generally, contract terms are provisions in a contract that set out the parties' respective rights and duties. Terms inform the parties on what they are required to do under the contract. Online contracts are usually in the form of standard form agreements which are usually prone to abuse from the drafting party. Unlike the traditional way most contracts are concluded, there are no opportunities for negotiations or input from the consumer in arriving at the terms of the contract. In addition, the terms are often hidden or difficult to locate on the webpage, written in a language that is too technical for an average consumer to decipher and also extraordinarily lengthy. As a result, online contracts can operate unfairly on consumers given the one-sided input of the drafting party and the other peculiar characteristics. Some of the common attributes of online contracts that present as obstacles to consumers are those which include terms that limit the rights of consumers in order to mitigate the

³⁷ ROHENDI, A. Perlindungan Konsumen dalam Transaksi E-Commerce Perspektif Hukum Nasional dan Internasional [Consumer Protection in the E-Commerce: Indonesian Law and International Law Perspective]. *Ecodemica* [online]. 2015, vol. 3, no. 2, p. 476 [cit. 2024-03-21]. ISSN 2528-2255. Available at: <https://doi.org/10.31294/jeco.v3i2.34>.

business risk of suppliers.³⁸ For example, terms that prevent a consumer from claiming damages or obtaining remedies in court. These terms, referred to as ‘shield terms’ aim to prevent consumer action and protect the drafting party. Another category of online contracts is the one which includes terms that eliminate the rights of the consumer (referred to as ‘sword terms’) while some terms aim to draw additional information from consumers that has nothing to do with the transaction (referred to as ‘crook terms’).

7 Lack of security of online payments

Online and mobile payments include those made using an active personal account. Online payment systems now come in a variety of forms due to technological advancements, including credit cards, debit cards, contactless payment methods, mobile payments, smart cards, digital wallets, electronic cash, and check systems, and more. The usage of mobile devices by customers for e-commerce payment transactions has been growing along with technological advancements,³⁹ particularly with the larger user base of mobile phones.⁴⁰ Prior research indicates that mobile payment methods provide their clients a variety of benefits, including location-free access,⁴¹ a wide range of purchasing options, an easier alternative to cash payments, and rapid interaction with their financial resources. Notwithstanding these benefits, prior studies highlight security risks consumers are exposed to that revolve around privacy concerns.⁴² Consumer data

³⁸ Van DEVENTER, S. Regulating Substantively Unfair Terms in Online Contracts. *Stellenbosch Law Review* [online]. 2021, vol. 32, no. 3, p. 518 [cit. 2024-03-21]. ISSN 1996-2193. Available at: <https://doi.org/10.47348/slr/2021/i3a8>.

³⁹ UNCTAD *Annual Report 2017: So Much Done, So Much To Do* [online]. 1st ed. Geneva: United Nations Conference on Trade and Development, 2018. 113 p. [cit. 2024-03-21]. Available at: <https://unctad.org/publication/unctad-annual-report-2017>.

⁴⁰ BEZHOVSKI, Z. The Future of the Mobile Payment as Electronic Payment System. *European Journal of Business and Management* [online]. 2016, vol. 8, no. 8, p. 127 [cit. 2024-03-21]. ISSN 2222-2839. Available at: <https://iiste.org/Journals/index.php/EJBM/article/view/29473>.

⁴¹ LAUKKANEN, T. and J. LAURONEN. Consumer Value Creation in Mobile Banking Services. *International Journal of Mobile Communications* [online]. 2005, vol. 3, no. 4, p. 325 [cit. 2024-03-21]. ISSN 1741-5217. Available at: <https://doi.org/10.1504/ijmc.2005.007021>.

⁴² BEZHOVSKI, Z. The Future of the Mobile Payment as Electronic Payment System. *European Journal of Business and Management* [online]. 2016, vol. 8, no. 8, p. 127 [cit. 2024-03-21]. ISSN 2222-2839. Available at: <https://iiste.org/Journals/index.php/EJBM/article/view/29473>; and EDWARDS, L. Consumer Privacy, On-line Business and the Internet: Looking for Privacy in All the Wrong Places. *International Journal of Law and Information*

can be accessed and misused by unauthorised third parties without the consumer's knowledge or consent. Consequently, fraudulent commercial practices such as identity theft, data theft, hacking of suppliers' website, unlawful interception of the payment process and other security risks result from these prejudicial situations that consumers are confronted with while transacting online at the pre-purchase stage.⁴³

Conclusions

This paper has discussed the legal framework regulating online contracts in South Africa drawing from common law and legislative instruments. Three common ways in which contracts are concluded in the online environment were also identified, namely, shrink wrap, click-wrap, and browse-wrap contracts. Furthermore, legal issues centred on the challenges consumers are confronted with have been highlighted. As it is with the traditional contracts, the intention of the parties to form legal relations is critical in arriving at a conclusion that a contract has been formed in the online environment. Only mistakes relating to a substantial fact, legal rule, or concept will result in a lack of agreement. In determining the validity of online contracts, it has been established that those digital agreements made over the internet or through internet protocols, such as email, SMS, or other forms of data messages, possess the same legal standing as the traditional paper-based and oral contract and must comply with the essential requirement. To address the identified legal challenges confronting consumers in the e-commerce environment, there is a need for interventions that can strengthen and effectively safeguard the rights of online consumers. Government through the legislature should take appropriate steps to amend and regularly update the current legislation and regulatory actions to keep up with emerging technology and the accompanying problems they pose to online consumers. In addition, government should take steps to impose regulations on internet-based business operations, particularly regarding standard terms (adhesion) contracts so that some of the unconscionable provisions can be prescribed and standardized to prevent consumer exploitation. Finally,

Technology [online]. 2003, vol. 11, no. 3, pp. 226-250 [cit. 2024-03-21]. ISSN 1464-3693. Available at: <https://doi.org/10.1093/ijlit/11.3.226>.

⁴³ MALLAT, N. Exploring Consumer Adoption of Mobile Payments – A Qualitative Study. *The Journal of Strategic Information Systems* [online]. 2007, vol. 16, no. 4, p. 413 [cit. 2024-03-21]. ISSN 1873-1198. Available at: <https://doi.org/10.1016/j.jsis.2007.08.001>; and STAVROU, A. *Mission Impossible?: E-Security in South Africa's Commercial and Financial Sectors*. 1st ed. Pretoria: Institute for Security Studies, 2002. 115 p. ISBN 1-919913-10-6.

regulatory agencies and consumer organizations should take a more active role in implementing legal rules and methods, to prevent business providers from including unfair conditions in online contracts. Consumers interacting in the e-commerce sector will gain confidence from the implementation of these proposed measures to safeguard their rights in the online contracting environment.

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