

1. INTRODUCTION TO ELECTRONIC TRANSACTIONS LAW

Electronic transactions law is known by several different terms including Cyber law, IT law or Digital Media Law. Its essence is that it is a body of law that regulates commercial and non-commercial transactions concluded wholly or partially through electronic communications, including e-government services.

There is no definition in the Electronic Communications and Transactions Act No. 25 of 2002 (ECTA) and the definition stated above is a working definition adopted for purposes of this module. This definition refers to electronic communications which are defined by section 1 of ECTA as “communication by means of data messages” which are defined as “data generated, sent, received or stored by electronic means and includes (a) voice, where the voice is used in an automated transaction; and (b) a stored record”. This broad definition encompasses information sent by a multiplicity of means including the internet (via computers, TVs and mobile phones) using online ‘tools’ such as websites, email, VOIP, social networks and other communication devices such as the telephone (both land and mobile).

This module is primarily concerned with e-commerce which comprises of the following forms:

- Business to business (B2B ecommerce)
- Business to consumer (B2C ecommerce)
- Consumer to consumer (C2C)
- Employer to employee (workplace communications)
- Government to business (e-procurement)

Various branches of law are relevant to electronic transactions including contract law, law of privacy, law of delict, tax law, intellectual property law, criminal law, consumer law, private international law and administrative. This module canvasses some of these branches of law. Where appropriate, it also discusses relevant national policies.

SOUTH AFRICA’S E-COMMERCE POLICY

South Africa’s e-commerce policy has been developed in the 1999 Discussion Paper and the 2000 Green Paper (A Green Paper on Electronic Commerce for South Africa). The Green Paper identified the following underlying principles as being key to the development of an e-commerce policy for South Africa (par 1.2):

1. Quality of life



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2. International Benchmarking
3. Consultative process
4. Flexibility
5. Technology neutrality
6. Supporting private-sector-led and technology-based solutions and initiatives
7. Public-Private partnership
8. Supporting small, medium and micro enterprises (SMMEs) and informal sector

The Green Paper identified the main focus areas as the need-

1. for confidence in the security and privacy of transactions performed electronically;
2. to enhance the information infrastructure for electronic commerce;
3. to establish rules that will govern electronic commerce;
4. to bring the opportunities of e-commerce to the entire population.

Based on this, it suggested the following themes as being central to the policy:

1. Legal and regulatory issues
2. Building trust in the digital economy
3. Access, infrastructure and enabling
4. Technologies
5. Maximising the benefits: economic and social impacts

Paragraph 1.4 of the Green Paper envisaged the following process in the further development of policy and eventual legislation:

- Discussion Paper (July 1999),
- Green Paper (October 2000),
- White Paper (2nd quarter 2001) and
- Specific legislation (3rd or 4th Quarter 2001).

However, matters did not progress as planned and a white paper was not subsequently published. The Electronic Communications and Transactions Act, 2002 emerged as the legislation to regulate e-commerce and as such, is the main source of law relied upon in this module.

There are several other policy documents and developments that have a bearing on electronic transactions. These are:

1. The National Information Society and Development Plan, 2007 (e-strategy required by s5(1) ECTA)
2. The National Integrated ICT Policy Colloquium held on 19 April 2012 (e-commerce & digitising government commission) which sought to spearhead the development of



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a national ICT Policy (see overview at <http://kganyago.org/2012/04/24/the-beginning-of-a-beginning-integrated-ict-policy-for-south-africa/>)

3. The National Cyber Security Policy Framework for South Africa was approved by Cabinet, 2012

These policy documents and developments are critical to the understanding of applicable legislation and will inform any reform. It is thus important to consider whether or not the policy framework is comprehensive and meaningful and whether or not it has led to an appropriate regulatory framework.

SOURCES OF LAW

The common law continues to be an important source of law especially with respect to contract law, the law of defamation and privacy. However, there is a growing body of legislation that regulates electronic transactions, as listed below.

SOUTH AFRICAN LEGISLATION

1. The Constitution, 1996
2. The Promotion of Access to Information Act, 2000
3. Independent Communications Authority of South Africa Act, 2000
4. Electronic Communications and Transactions Act, 2002
5. The Regulation of Interception of Communications Act, 2002
6. The Electronic Communications Act, 2005
7. National Credit Act, 2005
8. Consumer Protection Act, 2008
9. Protection of Personal Information Bill, 2009

INTERNATIONAL LAW

International law impacts South African domestic law in 3 ways viz:

1. International agreements and model laws inform domestic legislation. They do not have direct application until they are incorporated into domestic legislation.
2. Customary international law is directly binding (s232 Constitution: 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.')
3. Domestic law is to be interpreted with recourse to international law (s233 Constitution: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.')



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Examples of relevant international law

United Nations Commission on International Trade Law (UNCITRAL)

1. Model Law on Electronic Commerce (1996, revised 1998)
2. Model Law on Electronic Signatures (2001)
3. United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (SA not a party)

Recommended Reading

C Cupido 'Electronic communications regulations' *Cyberlaw@SA III* pp 25 – 38

Department of Communications *A Green Paper on Electronic Commerce for South Africa*, 2000 available at <http://www.info.gov.za/view/DownloadFileAction?id=68917> (accessed 4 August 2012)

Frank H. Easterbrook 'Cyberspace and the Law of the Horse' (1996) *University of Chicago Legal Forum* 207

Steve Esselaar, Alison Gillwald, Mpho Moyo and Kammy Naidoo 'South African ICT Sector Performance Review 2009/2010' *Towards Evidence-based ICT Policy and Regulation Volume Two, Policy Paper 6, 2010*

Lawrence Lessig 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review* 501

S Papadopoulos 'An introduction to cyberlaw' *Cyberlaw@SA III* pp 1 – 8

D Taylor 'Legal informatics' *Cyberlaw@SA III* pp 9 – 24

SabinetLaw 'A guide to the law-making process in Parliament' available at <http://www.sabinetlaw.co.za/legislative/law-making-process> (accessed 4 August 2012)

SabinetLaw 'Cabinet has approved a national cyber security policy framework' available at <http://www.sabinetlaw.co.za/communications/articles/cabinet-approves-national-cyber-security-policy-framework> (accessed 4 August 2012)



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