

3. ELECTRONIC CONTRACTS

ESSENTIALIA OF A VALID CONTRACT

Electronic contracts are only valid if they meet the requirements (essentialia) of contracts. The essentialia for a valid contract under South African law are that there must be a valid offer and acceptance, and consequently a meeting of minds or consensus between the contracting parties. Where only one party has contractual capacity, a 'limping contract' which can only be enforced against the party with capacity will be formed. The contract must be legal or lawful and be capable of performance; otherwise it will not be enforceable. Generally, there are no prescribed formalities for the conclusion of a contract. However formalities are prescribed for certain contracts such as the sale of land.

The validity of a contract may be affected by misrepresentation, mistake or duress.

The time and place of conclusion of contracts are important because they relate to jurisdiction and applicable Law. Section 22 ECTA provides that the reception theory applies to electronic transactions. ECTA also provides for when data messages are to be considered as sent and received, as follows:

Sending: s23(a) : 'a data message, must be regarded as having been **sent** by the originator, when it **enters** an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is **capable of being retrieved** by the addressee'.

Reception: s23(b): 'a data message must be regarded as having been **received** by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is **capable of being retrieved and processed** by the addressee'.

These two concepts were in issue *Jafta v Ezemvelo KZN Wildlife* [2008] JOL 22096 (LC).

ECTA also provides for where a data message is taken to be sent from and received. Section 23(c) provides that a data message must be regarded as having been sent from the originator's usual place of residence or business and as having been received by the addressee, at the addressee's usual place of residence or business.

Section 25 provides for the attribution of data messages. A data message is considered to have been sent by the originator if he sent it himself or it was sent by his authorised agent or an automated system programmed by the originator himself or his authorised agent (unless it can be shown that the automated system did not function properly.)

Section 26(1) provides that the agreement is valid upon receipt of the acceptance and it is not necessary for the addressee to acknowledge receipt.



ONLINE AGREEMENTS

There are numerous categories of online agreements which include contracts for sale of tangible goods, the supply of digitised products and the supply of services/facilities. The principles of contract law apply to online agreements and to be valid, they must comply with the essentialia of a contract as outlined above.

Online contracts may be concluded in various ways. These ways are categorised by the manner in which the purchaser is presented with, and assents to, the terms and conditions of the sale. So, we speak of shrink wrap, click-wrap and browse-wrap contracts. These categories refer to the way in which the contracts are concluded and not the content thereof.

Shrink wrap contracts are those where the terms and conditions are printed on paper and placed within the shrink-wrap packaging of the goods sold (for example a CD containing a software package). The purchaser signals his assent to the terms and conditions by opening the package. Browse wrap contracts bind the user of a website to a contract created by the user's mere browsing of the website. With regard to click-wrap contracts, the purchaser or user of a website is required to indicate their assent to the contract by clicking on an icon. Whilst each of these types of concluding a contract are valid and can create binding contracts, some contracts may be voidable if the buyer's attention not drawn to terms and conditions. The seller or provider is required to take reasonable measures to bring the content thereof to the attention of the consumer and to highlight unusual or unexpected terms. The consumer must also be given an opportunity to accept or decline the proffered terms and conditions (*Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 1 SA 982 A).

When it comes to enforcement of online contracts, a traditional contract law approach is taken and a party seeking recourse has to consider the same factors as considered by a person suing on a contract concluded in the bricks and mortar world. Applicable consumer protection provisions are discussed in the next lecture.

AUTOMATED TRANSACTIONS

Automated transactions are defined by s1 ECTA as electronic transactions 'conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment'. The principles of contract law, as briefly



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outlined above apply to these contracts. However, due to their unique nature, protection for the parties needs to be expressly provided for where an error has occurred.

Accordingly, s 20 ECTA provides that an agreement will not be formed where a natural person (X) interacts directly with the electronic agent of another person (Y) and has made a material error during the creation of a data message and—

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

Recommended Reading

Debbie Collier 'e-Mail and SMS contracts' (2008) 16(1) *Juta's Business Law* 20-22

Elizabeth Macdonald 'When is a contract formed by the browse-wrap process?' (2011) 19(4) *International Journal of Law & Information Technology* 285-305

Tana Pistorius 'Click-wrap and web-wrap agreements' (2004) 16 *SA Merc LJ* 568

S Snail 'Electronic contracting in South Africa (e-contracts)' *Cyberlaw@SA* III pp 41 – 59

