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An overview of South African e-consumer law in the context of the Electronic Communications and Transactions Act (part 2)

e-Consumers' rights and e-vendors' duties, and cross-border e-consumer contracts

4 The principles of e-consumer law in ECTA

4.1 *The legal duties of e-vendors*

'One of the drawbacks of transacting via the Internet is that it is often difficult for the consumer to know whom he/she is dealing with. To address this problem, ECTA [that is, the Electronic Communications and Transactions Act 25 of 2002] now provides that whenever a business concludes electronic transactions with consumers, eighteen categories of information must be included on the webpages of the web site where these goods/services are offered' (see Werksmans Inc *Business guide to electronic commerce and the law* (2005) 58, accessed

at <http://www.werksmans.co.za> on 22 September 2006).

The Act also places certain obligations on the e-vendor with regard to non-disclosure of an e-consumer's private information.

4.1.1 Web site compliance: using the embedded-links approach

To make sure that an e-vendor complies with the information required by statute, as prescribed by section 43 of ECTA, it has

been suggested that ‘common embedded links should be identified and created to incorporate the information required by legislation or which is necessary to protect your organization in the way it interacts with consumers and surfers on its web site’ (B Rheeders ‘Managing e-business: A business approach to legal aspects’ paper presented at Melrose — Legal Ramifications in Information Technology & Cyberspace Workshop, 27–28 July 2007 in Johannesburg, at 2). ‘This information relates both to the identity of the business and nature of the transaction concluded with the consumer’ (Werksmans *op cit* at 58).

Besides the provisions of section 43 of ECTA, other applicable legislation places similar obligations on the e-vendor as regards specific disclosures. The statutes include the following:

- the Business Names Act 27 of 1960: section 3 provides that businesses may not issue or send any trade catalogue unless it contains certain details; and a web page is akin to a trade catalogue;
- the Promotion of Access to Information Act 2 of 2000: section 51 requires that a manual be made available by a private body, which must include the postal and street address, phone and fax number and, if available, the e-mail address of the head of the body;
- the Trade Marks Act 194 of 1993;
- the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (‘IPCRA’);
- the National Credit Act 34 of 2005 (this has now repealed the old Credit Agreements Act 75 of 1980 but only to the extent that it is not provided for in ECTA);
- the draft National Consumer Bill; and
- the Companies Act 61 of 1973: section 50 requires that a company must have its name and registration number mentioned in legible characters in all notices and other official publications of the company, including notices or other official publications in electronic format. For a web site offering goods and/or services to e-consumers to comply with ECTA, the

following information must be provided in the form of embedded links in terms of section 43 of ECTA (in this respect, compare article 4, on ‘Prior information’, of the European Union Commission Directive on the Protection of Consumers in Respect of Distance Contracts (Directive 97/7)):

- the name and legal status of the company (including its registration number and the names of the company office bearers (see s 43(1)(a) and (f) of ECTA);
- the full contact details of the company (its web site address, fax, e-mail, telephone numbers, mobile phone, and so on): see ss 43(1)(b) and (c)), including the physical address for place of service of legal documents (its *domicilium citandi et executandi*). It is suggested that this information should be bundled in an embedded link called ‘About Our Company’ (see Rheeders *op cit* at 2);
- the details of the membership of any self-regulatory or accreditation bodies to which that supplier belongs or to which it subscribes, and the contact details of that body (s 43(1)(d)). I suggest that this information should be bundled in an embedded link called ‘Regulatory or Accreditation Bodies Membership’ (Rheeders *op cit* at 6);
- the details of any code of conduct to which the e-vendor subscribes, and how that code can be accessed, together with information pertaining to an alternative dispute resolution code (ADRC) and on how to access that code (s 43(1)(e) and (o)). I suggest that this information should be combined in an embedded link called ‘Code of Conduct and Alternative Dispute Resolution (ADR)’;
- the terms of the e-consumer agreement must be disclosed, including any guarantees that will apply to the transaction and how those terms may be accessed, stored, and reproduced electronically by consumers (s 43(1)(k)). This information includes the time in which the goods and/or services will be dispatched and delivered; the manner and period in which an e-consumer can access a full record of the transaction concluded; and a policy on refund, return, and exchange (s 43(1)(l), (m) and (n))

respectively). I suggest that this information should be combined in an embedded link called 'Terms and Conditions'. Where appropriate, the minimum duration of the agreement (in the case of agreements for the supply of goods or services to be performed on an ongoing basis or recurrently) can be specified in the embedded link on terms and conditions; also included can be the cooling-off provisions of section 44 (see s 43(1)). Section 49, on complaints to the Consumer Affairs Committee, will apply if any of the said terms and conditions do not comply with the provisions of Chapter VII of ECTA on consumer protection: these terms and conditions will then be void from the outset;

- an e-vendor is required to give a sufficient description of the main characteristics of the goods or services offered by that supplier, to enable a consumer to make an informed decision on the proposed electronic transaction (s 43(1)(b)). The e-vendor must also state the full purchase price, including transport costs, taxes, and any other fees or costs (s 43(1)(i)), and also the manner of payment (s 43(1)(j)). I suggest that this information should be combined in an embedded link called 'Catalogue, Order & Payment Options'; and
- it is also essential that an embedded link called 'Security Procedures and Privacy Policy' be included. This link will contain security procedures and the policy on privacy, and provide and disclose to e-consumers the procedures, and technical and other necessary information of the e-vendor that are in place to ensure the privacy and the security of the payment mechanism (if any) and the payment information and personal information of the e-consumer (R Buys 'Online consumer protection and spam' in F Cronje & Reinhardt Buys (eds) *Cyberlaw @ SA II: The Law of the Internet in South Africa* (2004) 146). Section 14 of the Constitution of the Republic of South Africa 1996 aims at protecting the privacy of individuals' information to be used and/or accessed without their consent. If a web site e-vendor makes false representations in its privacy policy about how it treats personal

information received from the e-consumer, and if the e-consumer suffers damage and/or prejudice as a result of the e-vendor's negligent conduct and/or intentional disclosures to unauthorized third persons, the e-vendor may face a damages claim by the innocent e-consumer (see J Forder & P Quirk *Electronic Commerce and the Law* (2001) 251).

The failure to provide all the above information exposes the e-vendor to the legal risk that, regardless of the nature of the goods and/or services involved, any e-consumer is entitled to cancel the electronic transaction with the e-vendor within fourteen days of receiving the goods or services in question (s 43(3)). If the transaction is thus cancelled, the e-consumer must immediately return the goods to the e-vendor and/or stop using the services being rendered, and the e-vendor must refund all payments made by the consumer minus the direct cost of returning the goods (s 43(4)(a)-(b)). This requirement could have serious financial implications if the e-vendor fails or refuses to comply with the ECTA requirements on prior disclosures.

4.2 *The rights of the e-consumer*

To understand the protection of e-consumers, it is essential to examine the definition of a consumer (that is, an e-consumer) in ECTA. Section 1 defines a 'consumer' as 'any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier'. South African scholars generally agree that the definition of 'consumer' refers only to a natural person, and so does not apply to transactions between suppliers and companies and other juristic persons such as businesses and trusts (see Buys op cit at 142; Rheeders op cit at 2).

4.2.1 The e-consumer's right to review the transaction

For each electronic transaction to be legitimate, the e-vendor is required to set up his or her

web site in such a way that the e-consumer has the opportunity to review the entire electronic transaction, to correct any mistakes, and to withdraw from the transaction, before finally placing an order (s 43(2)(a), (b) and (c) respectively). Buys suggests that the e-consumer may put various items into a virtual shopping basket, where he or she will be able to change quantities and delete orders and then click 'Order Now' to finalize the transaction (op cit at 148). Section 43(3) again applies where no compliance with section 43(2) has been ensured: any consumer who has entered into an electronic transaction through the e-vendor's web site is entitled to cancel such a transaction, regardless of the nature of the goods and/or services rendered, within fourteen days of their receipt (Werksmans op cit at 60).

4.2.2 Performance by the supplier

The ECTA places the burden of ensuring that payment systems are used entirely securely on the e-vendor. The rationale is to promote e-consumer confidence in line with section 43(5) of ECTA, which provides that all businesses involved in electronic commerce must use payment systems that are 'sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned'. Consequently, the e-vendor may also become liable for damages suffered by an e-consumer should the latter's confidential banking information be intentionally stolen and/or be leaked negligently to third parties because the e-vendor's cybershopping environment is not secure (compare s 43(6)).

To establish which current technological standards apply, an e-vendor should consider using security technology and consult leaders in the field of e-commerce such as Maestro, MasterCard, and American Express.

4.2.3 The cooling-off period

As the quality of the goods or services cannot be evaluated online, and in certain instances

they are delivered defective or are unfit, an e-consumer is entitled to cancel without reason and without penalty any (electronic) transaction and any related credit agreement for the supply of goods within seven days after the date of the receipt of the goods (s 44(1)(a)) or, in the case of services being rendered, within seven days after the date of the conclusion of the agreement (s 44(1)(b)). The only charge that may be levied on the consumer would be the direct cost of returning the goods (s 44(2)). If the e-consumer exercises this right but has already paid for the goods or services, then he or she is entitled to a full refund that must be made within 30 days of the cancellation (s 44(3)).

It is important to note that, generally, the ECTA's cooling-off provisions apply to all electronic transactions of a commercial type entered into by consumers and e-vendors. However, the Act specifically excludes protection for certain electronic transactions (s 42(2)), including–

- financial services;
- auctions;
- the supply of foodstuffs and beverages intended for everyday consumption supplied to the home, residence, or workplace of the consumer;
- services which began with the consumer's consent before the end of the cooling-off period;
- where the price for the supply of goods or services depends on fluctuations in the financial markets;
- where the goods are custom made;
- where audio or video recordings or computer software were unsealed by the consumer;
- for the sale of newspapers, periodicals, magazines, and books;
- for the provision of gaming and lottery services; or
- for the provision of accommodation, transport, catering, or leisure services and where the supplier undertakes, when the transaction is concluded, to provide these services on a specific date or within a specific period.

One must, however, note that section 44 does not prejudice the e-consumer as regards

reliance on any other right provided for in any other law (s 44(4)). This is also consistent with the European Union Distance Selling Directive (see HJ Vogel 'e-Commerce: Directives of the European Union and implementation in German Law' in D Campbell & S Woodley (eds) *e-Commerce: Law and Jurisdiction* (2003) 53).

4.2.4 Unsolicited goods, services, and communications

Anyone sending unsolicited commercial communications (also known as spam) to a customer must allow the latter the option to cancel his or her subscription to the mailing list, and with the identifying particulars of the sources from which that person obtained the consumer's personal information, at the consumer's request (s 45(1)(a)–(b)). No agreement can be entered into where the consumer has failed to respond to unsolicited mail (s 45(2)). Put differently, where an e-vendor's e-mail contains a unilateral term that non-response to it will result in the acceptance of its terms, it cannot hold the e-consumer contractually liable.

Anyone who fails to comply with section 45(1) of ECTA commits an offence and is liable, on conviction, to the penalties prescribed by section 89(1) — a fine or imprisonment of not more than twelve months (s 45(3)). These penalties also await anyone who sends unsolicited commercial communications after being informed by the recipient that those communications are no longer welcome (s 45(4)). e-Vendors might even be interdicted from sending spam to e-consumers, as in the American case of *Cyber Promotions, Inc v American Online, Inc* 948 F Supp 436 (ED Pa 1996), where the court granted an injunction against Cyber Promotions, which had sent 'e-mail bombs' to millions of customers over the AOL network.

5 Cross-border e-consumer contracts

5.1 Introduction to cross-border contracts

Electronic commerce does not acknowledge borders. This leaves the court in a predicament

as to which laws to apply to certain disputes and in which forum. Although electronic data messages and electronic signatures have been internationally recognized as functional equivalents and much international uniformity does exist, '[o]ne of the most vexed legal problems in the regulation of international electronic commerce relates to the issue of jurisdiction' (Werksmans op cit at 15).

5.2 Jurisdiction

It has been explained (ibid) that

'[j]urisdiction is the legal term used to describe the power or competency of a court to hear and decide disputes. Generally speaking, the public international law principle of territorial sovereignty provides that the courts of any given country only have jurisdiction over the individuals/corporates who reside within that country, or over the activities (including transactions) that occur within the borders of that country'.

The place in which a contract is entered into is mainly of interest in international transactions if the parties have not agreed to a specific jurisdiction or if there is no applicable international convention that determines jurisdiction (Buys op cit at 164). The general rule is that a contract must be determined according to the *lex loci contractus* of the last legally relevant act (*Kergeulen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487). This means that the contract is concluded at the place where the last act necessary to constitute the agreement was performed.

5.3 Legal principles of the 'conflict of laws'

Although there is no South African court judgment that specifically deals with the jurisdictional issues of Internet-based contracts, the court would probably first ask 'whether an effective judgment is possible' (Werksmans op cit at 17). Put differently, the court would ask whether it could effectively grant relief to a South African business instituting a claim

against a foreign business entity within another court's jurisdiction, and whether the South African business can effectively sue and take steps in execution against the foreign business entity. It has been suggested that a claimant must satisfy the following three requirements in order to be heard, granted relief, and be able to take steps in execution in a South African court (ibid):

- the South African business entity must conduct business within the jurisdictional area of the specific court;
- at least one traditional basis for founding jurisdiction must exist (an example would be the rule on the *lex loci contractus*); and
- for the establishment of personal jurisdiction over the foreign contracting party, the latter must have consented (expressly or by implication) to jurisdiction or else that party's assets must be attached in order to confirm jurisdiction (see also *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 883 (A) at 894; Owen Dean 'Stalking the sleeping lion' July 2006 *De Rebus* 20).

It is also suggested that local companies allowing foreign access to their web site and engaging electronically with people in other countries should include, in their web site terms and conditions and all other cross-border agreements, a 'choice of law' clause, a 'submission to jurisdiction' clause, and a clause fixing the place where the contract is formed (Werksmans op cit at 17–18). Jurisdiction remains a legal chameleon, however, and a party cannot be completely sure which court will have or accept jurisdiction in the case of a dispute in respect of a transnational electronic transaction.

Since this problem was increasingly becoming a point of legal concern while transnational electronic contracts were booming in the mid-1990s, the Hague Conference on Private International Law responded with the signing of its Convention on Choice of Court Agreements, the final act at the twentieth session of the Hague Conference on Private International Law

(accessible at http://hccb.e-vision.nl/index_en.php?act=conventions.text&cid=98); see also Christian Schulze 'The 2005 Hague Convention on Choice of Court Agreements' (2007) 19 *SA Merc LJ* 140). Article 1 of the Convention limits the scope of the Convention in international cases to 'exclusive choice of court agreements concluded in civil or commercial matters'. A matter is 'international' 'if the parties are not resident in the same contracting state, or if other elements relevant to the dispute have a connection with another contracting state, regardless of the location of the chosen court' (Schulze op cit at 141, summarising art 1(2) of the Convention). But the Convention expressly does not apply to exclusive choice of court agreements 'to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party' (art 2(1)(a)), and so e-consumer agreements would not fall within the scope of the Convention.

5.4 *The application of foreign law in terms of the ECTA*

An e-consumer will be afforded the protection of all the rights contained in Chapter VII of ECTA, even when contracting with an e-vendor in a foreign jurisdiction with a different legal system (compare s 47 of the ECTA). The effect of this provision on international law is interesting, as there is uncertainty on the enforcement of this provision in other jurisdictions (Rheeders op cit at 16). Buys considers that this provision might either be ignored by a foreign e-vendor because of the uncertainty that exists, or that it might even result in the e-vendor's not doing business with South African e-consumers (op cit at 158).

6 Conclusions and recommendations

The ECTA guarantees the validity of agreements concluded either partly or wholly by a data message (s 22(1)). In a nutshell, this new statute has entrenched in law the recognition of data messages as a functional equivalent to paper. A 'consumer' is defined as 'any natural person who enters into or intends entering into an electronic transaction with a supplier as the

end user of goods or services offered by that supplier' (s 1). So the provisions of Chapter VII of ECTA on consumer protection do not apply to transactions between suppliers and companies and other juristic person such as businesses and trusts. The provisions of Chapter VII do apply to all 'electronic transactions' (s 42). The Act also places eighteen obligations on the e-vendor with which he or she must comply in order to be ECTA web site compliant. The failure to abide by these obligations might result in the e-vendor's being either civilly liable towards the e-consumer, or the latter's summarily terminating any electronic agreement reached.

The Act specifically confers various consumer protection rights on consumers in order to give effect to the objectives of the Act, with specific reference to consumer protection designed to 'promote legal certainty and confidence in respect of electronic communications and transactions' and to 'develop a safe, secure and effective environment for the consumer, business and the Government to conduct and use electronic transactions' (s 2(1)(e) and (j)). An e-vendor must create his or her web site in such a manner that the e-consumer has the opportunity to review the entire electronic transaction, to correct any mistakes, and to withdraw from the transaction, before finally placing an order (s 43(2)). All businesses involved in electronic commerce must use payment systems that are 'sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned' (s 43(5)).

Unless an e-vendor has agreed otherwise with e-consumers, any order must be executed within 30 days of receipt (s 46(1)). An e-consumer is entitled to cancel without reason and without penalty any (electronic) transaction and any related credit agreement for the supply of goods within seven days after the date of the receipt of the goods (s 44(1)).

ECTA has managed to encompass all the internationally accepted general principles on e-consumer law

Anyone sending spam is prohibited from doing so without providing the e-consumer with the ability to unsubscribe to that service (s 45(1)). Criminal sanctions and an interdict may be sought if no co-operation is received from an e-vendor who persistently sends out unsolicited e-mail (s 45(4)). An e-consumer will be given the protection of all the rights contained in Chapter VII of ECTA even when contracting with an e-vendor in a foreign jurisdiction with a different legal system (s 47). This provision does not survive scrutiny in an international law, however, and it must be revised to avoid legal uncertainty.

In summary: ECTA has managed to encompass all the internationally accepted general principles on e-consumer law, and only time will tell whether these will be suitable and enforceable in the South African legal environment.

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