

Consumer protection in international electronic contracts

by

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Abstract

Consumer Protection in International Electronic Contracts

Since the Internet became available for commercial use in the early 90s, the way of doing business was changed forever. The Internet and electronic commerce have allowed people to carry out business by means of electronic communications, which makes it possible for them to do business and to conclude contracts with people situated within foreign jurisdictions. The need for consumer protection in electronic commerce has become necessary because of the misuse of aspects peculiar to electronic-commerce. Consumers have been cautious to make use of electronic-commerce, as they are uncertain about the consequences that their actions might have. Consumers will only utilise e-commerce if they have confidence in the legal system regulating it; therefore, legislation was needed to regulate their e-commerce activities. In 2002, the *Electronic Communications and Transactions Act, 2002* was introduced into South African law as the first piece of legislation that would deal exclusively with electronic communications. Chapter VII of this particular act deals exclusively with consumer protection and seeks to remove certain uncertainties imposed by e-commerce. This is done by providing the South African consumer with statutory rights and obligations when engaging in electronic communications. The *Consumer Protection Act, 68 of 2008* is the most recent piece of legislation that aims to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements. South African legislation dealing with electronic commerce is relatively recent, and it is uncertain whether consumers are offered sufficient protection when they conclude contracts with suppliers or sellers from a foreign jurisdiction, that is, one that is situated outside South Africa.

After looking at the protection mechanisms in place for South African consumers engaging in e-commerce, we have seen that there are certain problems that one might experience when trying to determine the applicability of some of the consumer protection measures to international electronic contracts. Most of the problems that we have identified are practical of nature. Consumers may, for instance, find it hard to execute their rights against foreign suppliers in a South African court, even if the court has jurisdiction to adjudicate the matter. Another problem that we identified is that some of the important terms in our legislation are too vaguely defined. Vague

terms and definitions can lead to legal uncertainty, as consumers might find it hard to understand the ambit of the acts, and to determine the applicability thereof on their transactions. In order to look for possible solutions for South Africa, the author referred to the legal position with regards to consumer protections in the United Kingdom, and saw the important role that European Union legislation plays when determining the legal position regarding consumer protection in the UK. The legislation in the UK dealing with consumer protection is far more specific than the South African legislation dealing with same. There is definitely consumer protection legislation in place in South Africa but the ongoing technological changes in the electronic commerce milieu make it necessary for our legislators to review consumer protection legislation on a regular basis to ensure that it offers sufficient protection for South African consumers engaging in international electronic contracts.

Keywords: Electronic commerce, electronic contracting, international contracts, consumer contracts, consumer protection, cross-border contracts, Chapter VII of the *Electronic Communication and Transactions Act 2002*, *Consumer Protection Act 68 of 2008*, legal issues involved in electronic contracting.

Opsomming

Verbruikersbeskerming by Internasionale Elektroniese Kontrakte

Sedert die Internet vir kommersiële gebruik beskikbaar gestel is in die vroeë 90's, is die wyse waarop besigheid gedoen word vir altyd verander. Die Internet en elektroniese handel het dit vir persone moontlik gemaak om besigheid te dryf deur middel van elektroniese kommunikasie, en om sodoende ook met persone in buitelandse jurisdiksies te kan kontrakteer. 'n Behoefte aan verbruikersbeskerming by elektroniese handel het ontstaan as gevolg van die misbruik van sekere aspekte van elektroniese handel. Dit het tot gevolg gehad dat verbruikers versigtig was om van elektroniese-handel gebruik te maak, omdat hul onsekerheid gehad het oor die regsgevolge wat hul bedrywighede kon inhou. Verbruikers sal slegs van elektroniese handel gebruik maak indien hul vertrou het in die regsstelsel wat elektroniese handel reguleer, en daarom was dit nodig om wetgewing daar te stel wat elektroniese handel en gepaardgaande aktiwiteite reguleer. In 2002 het die *Elektroniese Kommunikasie en Transaksies Wet, 2002*, deel gevorm van die Suid-Afrikaanse reg, en was dit as te wone die eerste wetgewing wat eksklusief handel met elektroniese kommunikasie. Hoofstuk VII van die betrokke Wet het eksklusief handel oor verbruikersbeskerming, en het gepoog om onsekerhede rondom elektroniese-handel uit die weg te ruim, deur Suid-Afrikaanse verbruikers van statutêre regte en verpligtinge te voorsien wanneer hul gebruik maak van elektroniese kommunikasies. Die *Verbruikersbeskermingswet, 68 van 2008* is die mees onlangse wetgewing wat verbruikersbeskerming aan betref, en poog om 'n konsekwente wetgewende raamwerk met betrekking tot verbruikers-ooreenkomste en transaksies daar te stel. Die Suid-Afrikaanse wetgewing wat handel oor elektroniese handel is relatief onlangs, en daar bestaan onsekerheid of daar genoegsame beskerming gebied word aan verbruikers wat internasionale kontrakte aangaan met verskaffers wat in jurisdiksies buite die grense van Suid-Afrika gevestig is .

Nadat daar na die verskeie beskermingsmeganismes gekyk is wat in Suid-Afrika in plek is, is daar gevind dat sekere probleme ondervind kan word wanneer die toepaslikheid van die verskeie verbruikersbeskermings-maatreëls op internasionale elektroniese kontrakte vasgestel probeer word. Die meeste van hierdie probleme wat

geïdentifiseer is, is prakties van aard. Verbruikers kan dit byvoorbeeld moeilik vind om hul regte in 'n Suid-Afrikaanse hof af te dwing teen 'n buitelandse verskaffer, al het die hof wel jurisdiksie om die saak aan te hoor. Daar is ook verder gevind dat belangrike terme in van die wetgewing soms te vaag en verwarrend omskryf word. Vae terme en definisies kan lei tot regsonsekerheid, omrede verbruikers dit moeilik kan vind om die toepassing van die wette op hul transaksies vas te stel, en of hul transaksies wel in die bestek van die betrokke wet val. Op soek na moontlike oplossings vir hierdie probleme, het die skrywer na die regsposisie met betrekking tot verbruikersbeskerming in die Verenigde Koninkryk gekyk, en die belangrike rol wat wetgewing van die Europese Unie speel, wanneer die regsposisie rondom verbruikersbeskerming in die Verenigde Koninkryk vasgestel moet word. Die wetgewing in die Verenigde Koninkryk wat handel oor verbruikersbeskerming is baie meer spesifiek gerig as die wetgewing in Suid-Afrika.

Daar is defenitief verbruikersbeskermingswetgewing in plek in Suid-Afrika, maar die groeiende veranderinge in tegnologie en elektroniese handel sal van wetgewers vereis om verbruikersbeskermingswetgewing op 'n gereelde basis te hersien, om sodoende te verseker dat genoegsame beskerming vir Suid-Afrikaanse verbruikers wat betrokke is by internasionale elektroniese kontrakte gebied word.

Sleutelwoorde: Elektroniese handel, elektroniese kontraksluiting, internasionale kontrakte, verbruikersbeskerming, oorgrenskontrakte, Hoofstuk VII van die *Wet op Elektroniese Kommunikasie en Transaksies, 2002*, *Wet op Verbruikersbeskerming, 68 van 2008*, *Probleme ondervind met elektroniese kontrakte*.

1. Introduction

1.1 *The Birth of Electronic-Commerce*

Since 1991, when the Internet became available for commercial use for the first time, the *WWW (World Wide Web)* has had an effect on electronic-commerce (e-commerce) that has forever changed the way of doing business.

The *WWW* enabled the ordinary person to compete with bigger enterprises and businesses, with advantages such as low entry costs when starting a business, and the possibility of fast returns on investments made.¹ The value of purchases by businesses through computer networks in the United Kingdom reached a new high in 2009, with purchases valued at £466.3billion. This suggests a growth in relation to online purchasing from 33.3 per cent in 2008 to 51.9 per cent in 2009.²

1.2 *E-commerce and the Nature Thereof*

Neither the *EC Directive on Electronic Commerce* nor the *UNCITRAL Model Law on Electronic Commerce* gives a definition of the term “electronic commerce”. In the context of private international law, e-commerce has been defined as “commercial activities which are carried on by means of computers interconnected by telecommunications lines”, or even more simply, as “business transactions conducted over the Internet”.³

E-commerce and, more specifically, electronic contracting, provide consumers with an opportunity to have access to vast amounts of information regarding goods or services, anywhere in the world, at any desired time.⁴

With regards to methods of electronic contracting, one can distinguish between four methods. The first method of contracting is known as an e-mail contract, that is,

1 De Klerk S “Networks and Electronic Commerce” 72.

2 See www.statistics.gov.uk.- accessed 23 July 2010.

3 Schulze C “Electronic Commerce and Civil Jurisdiction” 2006 *SA Merc LJ* 32.

4 Akomodi TI “Contemporary legal issues in electronic Commerce in Nigeria” 2008 *Potchefstroom Elec L J* 3.

basically the exchange of documents (*i.e.* the contract) via electronic mail. The second method is contracting via the WWW. This method is similar to a mail order, but differs due to the fact that one party maintains the website on which the goods or services are advertised. Prospective buyers complete an electronic form provided on the website through which they order goods or services from the seller. The seller can also be referred to as the “e-merchant”. The third manner in which a contract can be concluded is when the parties trade under the framework of an Electronic Data Interchange Agreement (EDI). An EDI can be defined as a “paperless” trading system, and involves the electronic transfer of structured data from one computer application to another.⁵ The final method of electronic contracting can be when natural persons make legally relevant agreements that are valid and binding.⁶ In order to give an idea of the process and the roles that the buyer and the seller play during an electronic contract, one can look at the illustration based on that provided by Perry and Schreider:⁷

Buyer	Seller
Identify a need	Identify customer needs
	Create a product/service that will meet the customer needs
Search for products/services to satisfy a specific need.	Advertise and promote the product or the service
Negotiate a purchase agreement	Negotiate a sale transaction
Arrange for delivery	Arrange for delivery
Inspection, testing and acceptance of goods	Invoice and bill customer
Make payment.	Receive and process customer payments
Warranty claims and regular maintenance	Provide after-sales support, maintenance and warranty services

5 See www.sars.gov.za - accessed 23 July 2010.

6 Snail *South African E-Consumer Law* 41.

7 Perry & Schreider *New Perspectives* 8.

1.3 *Legal Issues in Electronic Contracting*

The above illustration of the process of electronic contracting implies that both purchasing and concluding contracts online is far more complex than one would imagine, and that the rights and obligations attached thereto could have serious legal consequences for the parties concerned. A shopping survey was carried out between November 1998 and February 1999 by researchers in 11 different countries⁸, in order to identify problems that consumers have with regards to electronic contracts concluded online (by making use of the Internet or other electronic mediums).

Some of the problems related to e-commerce identified by consumers included the quality of information given by sellers on their web sites and the reliability of their services. With regards to the reliability of services, in many cases, the goods arrived very late, if at all. Consumers were, furthermore, not provided with essential information concerning the complaint procedure. In some cases, the matter was worse, for the identity of the company was unclear and physical information, such as the place of business and contact details, were not provided at all.⁹ Other problems include those regarding to the formation of the contract (for example, the duration of the offer), delivery, risks and insurance, price, currency and geographical limitations (goods are sometimes only available in certain countries).¹⁰ The reality is that consumers do not realise that they are exposed to fraudulent and deceptive commercial practices when they are a party to an e-commerce-orientated transaction.¹¹

Other problems that can be associated with online contracting include the extent to which the communication between the parties is protected (i.e. data protection).¹² As in any agreement, certain information is exchanged between the parties to the contract, such as addresses, banking details and ID numbers, which can be

8 Australia, Belgium, Germany, Greece, Hong Kong, Japan, Norway, Spain, Sweden, United Kingdom, and the United States of America. See www.consumersinternational.org.

9 See www.consumerinternational.org *Comparativeconsumers@shopping International comparative study* 6.

10 Buys *Cyberlaw@SA* 158.

11 Akomolede 2008 *Potchefstroom Elec LJ* 18.

12 Van der Merwe et al *Information and Communications Technology Law* 313.

misused.¹³ Another issue is that of jurisdiction, as the lack of a uniform legal framework with regard to Internet transactions creates unpredictability of jurisdiction.¹⁴ Questions arise, for instance, over which court will have jurisdiction in the event of a dispute between parties to an Internet contract: will it be the law of the seller or that of the buyer (or consumer) that will govern the transactions, and where and how should a judgment be enforced?¹⁵

1.4 The Need for Consumer Protection

These are merely a few of the problems associated with online contracting. Factors like these can result in consumers losing faith and trust in e-commerce. One of these problems is the fact that consumers do not trust e-commerce. Consumers will only utilise e-commerce to its full potential if they have confidence in the system and its benefits such as convenience, which will, in turn, outweigh the potential risks associated with e-commerce.¹⁶ Confidence and trust can be gained by offering protection to the consumer against risks like the interception of personal data.¹⁷

Consumer protection is necessary to enhance the trust that consumers have in e-commerce. Increased trust will, in turn, lead to benefits such as increased competitiveness and an increase in the volume of electronic transactions. Seen in the light of rapidly developing e-commerce internationally, this can have a positive influence on the economy of the country, as the then President, Thabo Mbeki, stated in his State of the Nation address in 2002:

A critical and pervasive element in economic development in the current age is the optimum utilisation of information and communications technology.¹⁸

There are several pieces of legislation in South Africa dealing with the protection of consumers when contracting online. The *Constitution of the Republic of South Africa, 1996* is the supreme law of South Africa, and must always be borne in mind when

13 Own emphasis.

14 Schulze 2006 *SA Merc LJ* 31.

15 De Villiers MRH *Consumer Protection: The Electronic Communications and Transactions Act 25 of 2002* 157.

17 Van der Merwe et al *Information and Communications Technology Law* 314-315.

18 Pather S *E-Commerce Information Systems* 12.

establishing the applicability of other South African legislation. The reason, therefore, is that any law or conduct inconsistent with it will be invalid.¹⁹ In addition, the Constitution states that international law must be considered and foreign law may be considered in the interpretation of South African law. This implies that South Africa has the advantage of learning from other countries and their legislations, and to take that in consideration when drafting its own e-commerce legislation.²⁰ It is further important to bear in mind that fundamental rights are protected in the Constitution, such as the right to privacy²¹ and equality²², which can be affected when contracting online. Consumer protection rights (such as these contained in Chapter VII of the *Electronic Communications and Transactions Act*) are examples of statutory rights in favour of a party to an agreement (including electronic agreements) that operate automatically and without the need of specific consensus.²³ Some other relevant statutes affecting e-commerce and the protection of consumers (not necessarily in *international* contracts) are:

1. *The Promotion of Access to Information Act* 2 of 2002: deals with the right of privacy, access to information and the protection of data);
2. *The Electronic Communications and Transactions Act*, 25 of 2002: deals exclusively with electronic communications;
3. *The Consumer Protection Act*, 68 of 2008: the most recent, coming into force on 1 April 2011.

Although the South African legislation dealing with electronic commerce is relatively recent, it is not certain whether or enough protection is offered to people contracting online across the border²⁴, but one can think that authorities might face challenges, due to the global nature of the Internet, when they apply their laws in traditional ways.²⁵ The reason is that Internet communications go beyond territorial borders, and that legislation regulating Internet transactions

19 Section 2 of the *Constitution of the Republic of South Africa, 1996*.

20 Snail SA *E-Consumer Law* 40; See Murdoch W "Online Shopping within the Context of South African Law" available at www.ibls.com.

21 Section 14 of the *Constitution of the Republic of South Africa, 1996*.

22 Section 9 of the *Constitution of the Republic of South Africa, 1996*.

23 Johnson *The Legal Consequences of Internet Contracts* 91.

24 The Author's submission.

25 Nasir *Legal Issues* 1.

and communications could be insufficient when one applies them to transactions with legal consequences outside the South African border.²⁶

The aim of this dissertation is to determine whether South African legislation addresses the problems associated with e-commerce (with specific reference to consumer protection in international agreements) effectively. A comparison will be made between the South African legal position on e-commerce and the legal position as it is in the United Kingdom, due to the fact that the United Kingdom has a longer history than South Africa with regards to e-commerce and the regulation thereof. Therefore, in the next chapters, the legal positions of both South African and the United Kingdom with regard to consumer protection in international/cross-border transactions will be discussed, in order to consider the adequacy of consumer protection in South Africa. The author will evaluate the legal positions in both countries, in order to see if we might learn from the United Kingdom and the way that they deal with the protection of their consumers when contracting online. This dissertation will only focus on agreements/contracts concluded between consumers (natural persons) and businesses (e-merchants).

26 Schulze 2006 SA *Merc LJ* 31.

2 The South African legal position

2.1 Introduction

A former judge of the United States of America, Oliver Wendell Holmes, once said, “We must study the history in order to understand the path of the law”.

The Internet became commercially part of society in South Africa in 1993, when businesses realised the advantages that the Internet has, such as the ability to conclude contracts online. As we know, this was in a time when South Africa was involved in a process of political and constitutional transformation. South Africa was urged not to regulate the use and access of the Internet, as there was a fear that the excessive control or regulation of it would have a negative influence on the use thereof, and that regulation of it would then be conducted with fear and prejudice.

The non-regulation of the Internet in South Africa resulted in legal uncertainty in e-commerce. Consumers were uncertain whether they could conclude a valid contract online, and what the legal consequences thereof would be. Eventually, the government realised the great advantages and benefits that the development of e-commerce have. These benefits include the potential that e-commerce has to level the playing field for small and large entities, geographic barriers or boundaries can be removed, consumers can easily locate hard-to-find goods and services, and also have a wide choice from which to make a purchase anytime and anywhere. Increased competition forces organisations to produce better quality products at reduced cost, and information can be shared more quickly through the use of an electronic medium.

In 2002, the *Electronic Communications and Transactions Act* (hereafter referred to as the “ECTA”) was implemented in order to put a legal framework in place that would deal exclusively with communication and transactions by electronic means. South African legislation dealing with consumer protection had been lagging behind Europe and the United States before the enactment of the ECTA, and there were no legislative instruments dealing exclusively with problems regarding electronic

contracting. Before the *Consumer Protection Act* 68 of 2006 commenced at the end of March 2011, there was no legislation, save the common law, protecting consumers against unfair contractual terms and conditions and problems that they might experience with distance selling (in other words, agreements with legal consequences outside the South African border).

South African legislation dealing with consumer protection and international electronic contracts will be discussed in this chapter, with reference to the Constitution of the Republic of South Africa and the common law position. This discussion will be followed by one on the consumer protection provisions found in the ECTA and the fairly new Consumer Protection Act. The author will discuss possible solutions and problems that these pieces of legislation entail for the South African consumer contracting online.

South African legislation and consumer protection with regard to International Electronic Contracts:

2.2 *The Constitution of the Republic of South Africa, 1996*

With regards to consumer protection and electronic commerce, there are two relevant and valuable rights that are mentioned in the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as “the Constitution”). On the one hand, Section 14 guarantees the right to privacy, and on the other hand, Section 32 guarantees the right to access of information. According to Eiselen, the right of access to information can seem to be almost *prima facie* in conflict with the right to privacy. The constitutional right to “informational privacy” has been interpreted by the Constitutional Court in the matter of *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors*²⁷, as coming into play in cases where a person has the ability to decide what information he wishes to disclose to the public, and that the expectation that he has such a decision will be respected, is reasonable: in other words, instances where it will be seen as

27 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 1 SA 545 (CC) 557.

reasonable for the supplier to withhold certain information from a consumer. The fact that the right of privacy is protected as a fundamental right, means that the government will be obliged to adopt legislation in such a manner that adequate protection is offered. In the light of the interpretation of information privacy by the Constitutional Court, one must bear in mind the ECTA. Section 43(1) of this particular act places an obligation on suppliers to make certain information available on their websites (which is a lengthy list of information). Will the supplier be able to reasonably withhold certain information from consumers, even if the act expects from him to disclose same, based on his constitutional right to decide what information he wishes to make available? The answer lies in the question. It will be expected from the supplier to give reasonable grounds on which he refuses to provide the information expected from him.²⁸

For the purposes of this study, we must also refer to Section 14 of the Constitution, which uses the term “communication”. It will be necessary to see whether an electronic contract falls in the ambit thereof.²⁹ The reason, therefore, is that a person’s communications are also protected under Section 14 of the Constitution that deals with the right to privacy. One should further refer to Section 233 of the Constitution, which gives a clear instruction to interpret legislation in such a manner that it is consistent with international law, whereas Section 39 provides for consideration of foreign law, which would include foreign case law. These principles can be useful when the courts interpret legislation dealing with consumer protection and cross-border electronic contracts. The reason, therefore, is because South African courts can seek guidelines in foreign case law that have dealt with problems regarding cross-border contracts, in order to see how they dealt with problems similar to those before the current forum.

This principle was confirmed in the *Jafta* case³⁰ before the Labour Court of South Africa. In this matter, Judge Pillay mentioned the importance of international and foreign law when dealing with matters concerning electronic communications. The main issue in this matter was whether an acceptance of an offer of employment sent

28 Roos 2008 *Potchefstroom Elec LJ* 93.

29 Van der Merwe et al *Information and Communications Technology Law* 23.

30 *S. B. Jafta v Ezemvelo KZN Wildlife* D204/07.

by e-mail or short message service (SMS) results in a valid contract. Although the dispute in *Jafta* was not trans-national, and neither of the parties referred to international or foreign law in their Heads of Argument, the court emphasised that electronic communications must be regulated by universal principles and that electronic communications' law should, therefore, be internationalised in order to be effective.

The court was concerned that if it ignored international and foreign law, that "it might take a *parochial approach*³¹ to solve a local dispute, thereby losing sight of the broader objectives of the ECTA". The court further explained the risk of comparisons and incorrect application when comparing foreign law. These risks can somehow be minimised when the law regulating electronic communication is freely available electronically. The court further mentioned its duty to ascertain the international and foreign law applicable to the Internet and other electronic communication systems, in order to determine whether the international instruments are binding on South Africa, what the best practice is and how the court should interpret and apply provisions of ECTA in disputes. In the end, the court requested further Heads of Argument from both the parties on international and foreign law to interpret and apply the ECTA.³²

It is clear that the Constitution recognises the importance of protecting the South African citizens' rights not to have the privacy of their communications infringed. The courts also seem to understand the importance of international and foreign laws when dealing with a dispute relating to electronic contracting; therefore, the decision in *Jafta*, emphasising that electronic communications must be regulated by universal principles and that electronic communications law should, therefore, be internationalised in order to be effective, has been warmly welcomed in the e-commerce milieu. The question can be asked: what is the importance and relevance of this decision and the mentioned constitutional rights for consumer protection? In the end, consumers need to have confidence in the legislation that regulates the

31 In *K v Minister of Safety and Security* 2005 (9) BLLR 835 (CC) para 345, Justice O' Regan warned against parochialism and urged practitioners to seek guidance, positive or negative, from other legal systems struggling with similar issues. By inviting the parties to address it on international and foreign law, the court hoped to broaden its mind, to acquire "a new optic" on whether the problem in this case is common and how it is solved by other judges.

32 *S. B. Jafta v Ezemvelo KZN Wildlife* D204/07 para 56 – 61.

legal aspects of their transactions and those offering protection to them. Further on in this chapter, we will see that the legislation designed for the regulation of electronic communications incorporates these fundamental rights in its consumer protection provisions. With regards to the cross-border element that will be discussed in this study, it is good to see that the courts realise the international nature of the Internet, and that they might need to look further than local legislation when searching for answers to problems relating to international contracts. Hopefully, cases like the *Jafta* case will urge legislators to find inspiration and solutions to problems regarding cross-border electronic contracting when developing new legislation.

2.3 The Common Law

The general common law principles of the South African law of contract are very important when one deals with South African e-consumer law.³³ The precise time of when a contract comes into being is of utmost importance. The reason for this is because an agreement (or the intention to conclude an agreement) must exist between the buyer and the seller, before the buyer (or the seller) can enjoy protection “as a consumer” under the various pieces legislation that will be discussed later on in this chapter.³⁴

A contract, in terms of the common law, is an agreement arising from either true or quasi-mutual assent, which is enforceable at law.³⁵ The capacity to act, consensus, lawfulness, and physical possibility are required elements before there can be a legally binding contract present between parties. Freedom of contract forms the basis of the South African Law of Contract. A contract is thus valid, purely on the basis that parties have come to an agreement, and that the law will enforce their agreement. This absolute principle was later influenced by the common law, in terms of which, a contract will not be enforced if it is contrary to public policy (in other words, *contra bonis mores*). The author is of the opinion that this can be one of the ways to protect a consumer that is a party to a contract. One can say that any

33 Snail *SA E-Consumer Law* 40.

34 De Villiers *Consumer Protection* 89.

35 Christie *The Law of Contract in SA* 2.

electronic contract between two or more parties complies with the formal requirements of a contract; therefore, it could be inferred, without any reference to the ECTA, that a valid contract has been concluded.³⁶ The South African common law with regard to the Law of Contract is based on freedom of contract. In cases like *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 - 612(A), the court held that there had to be strict adherence to the terms of a contract. It is interesting to see that acts like the CPA also refer to common law principles. Section 4(2)(a) of the CPA states that the courts must develop the common law as necessary to improve the realisation and enjoyment of consumer rights. An example where the CPA acknowledge a common law principle is Section 56(4) (a), which states that the implied warranty imposed by Sub-section 56(1) of the CPA, and the right to return goods, in terms of Sub-section 56(2) of the CPA, are each, in addition to any other implied warranty or condition imposed by the common law, this CPA itself, or any other public regulation. It is important to develop the common law in such a manner that it keeps up with the rapidly developing technological changes, and the effect that it has on electronic contracting.

2.4 The Electronic Communications and Transactions Act, 25 of 2002

2.4.1 Background and application

The *Electronic Communications and Transactions Act*, which came into force on 30 August 2002, made it possible for data messages to be a legally recognized form of conducting legally relevant acts, such as concluding electronic contracts. Before the ECTA, there was no exclusive Internet legislation that defined legal terms such as “writing”, “signature” and “originals” for the purpose of e-commerce.

The legal uncertainty, before the ECTA came into force, included whether a data message was a valid form of concluding a contract, and whether the performance of juristic acts, via electronic means, could impose legal obligations on the person using the data message.³⁷ Chapter VII of the ECTA deals exclusively with consumer

36 Snail SA E-Consumer Law 42.

37 Snail SA E-Consumer Law 43.

protection. This particular chapter is largely based on the European Union's *Distance Selling Directive*.³⁸ The ECTA seeks to remove legal barriers existing in e-commerce in South Africa by providing functional equivalent rules for electronic contracting.³⁹

2.4.2 Key definitions in the ECTA

A "consumer" is defined 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.⁴⁰

The ECTA offers protection only to natural persons. This narrow definition of a consumer has been criticised by writers such as Van Wyk and Van Zyl, based on the ground that the definition should not have been restricted to only cover natural persons, as small and medium-sized enterprises will also benefit from the protection provided by the ECTA.⁴¹ Very often, these small enterprises are in the same bargaining and practical position as that of the natural consumer and buy goods or services as end users. A strong case can be made out to include these smaller enterprises in the definition of "consumer", in order to benefit from the protection of the ECTA.⁴²

2.4.3 Applicability of Chapter VII on international electronic transactions

In addition to rights flowing from an agreement itself, there may be statutory rights in favour of a party to an agreement that will operate automatically and without the need for specific consensus between the parties. The rights provided for in this chapter of the ECTA are examples of such rights.⁴³ Chapter VII contains a number of

38 Pistorius T "The Legal Effect of Input Errors in Automated Transactions: The South African Matrix" 2008 *JILT* 4.

39 Pistorius T "Click-Wrap and Web Wrap Agreements" 2004 SA Merc LJ 569.

40 Section 1 of the ECTA.

41 Pistorius 2008 *JILT* 4.

42 De Villiers *Consumer Protection* 91.

43 Van der Merwe et al *Information and Communications Technology Law* 181.

consumer protection provisions, which might have devastating consequences for any transaction online, such as criminal liability, should they not be complied with.⁴⁴

When we take a look at Section 47, we can see that it will be applicable to international agreements. Section 47 reads as follows:

“Section 47 - The protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question.”

We can derive from this section that the ECTA foresees that an agreement/contract might be concluded between people from different jurisdictions or countries. Further, the section informs us that the consumer protection provisions in the Act (which are contained in Chapter VII), will be applicable to the international agreement, irrespective of the legal system applicable to the agreement. For example, if A (a South African) concludes a contract with B (a German), and the law governing the contract are the German law (the legal system applicable), then the provisions regarding consumer protection in the Act, will still be applicable to the agreement.⁴⁵ The question can be asked: what will the consequences of this section be on contracts concluded in South Africa which have cross-border effects (*i.e.* contracts where delivery must take place in a country outside South Africa or contracts where either the supplier or the buyer is situated outside South Africa)? This section is of utmost importance, as it is the only section in the ECTA that mentions the applicability of the consumer protection provisions on agreements that might contain a foreign element (a foreign legal system). The author is of the opinion that this section somehow aims to establish jurisdiction for a South African court over consumer protection disputes. Is this practically possible? This section imposes certain problems that can have far reaching consequences. The consequences and problems experienced with this section will be discussed next.

44 Huffmann *Consumer Protection in E-commerce* 55.

45 Own emphasis.

2.4.3.1 Problems with Section 47

This section of the ECTA might seem straight-forward, but only until one starts thinking of the practical implications that this section will have on disputes surrounding cross-border contracts. Section 47 has been criticised on the basis that its attempt at extra-territoriality will have a negative impact on the South African consumer's ability to conclude agreements with foreign suppliers. The concern is that this section may lead thereto that foreign suppliers may choose not to do business with a South African consumer. This section may further prejudice the growth of e-commerce, which is contrary to the effect of what the Government had in mind. It can be difficult, in practice, for suppliers to comply with all consumer protection measures world-wide that may apply to them when they contract with consumers from foreign jurisdictions.⁴⁶ Even if they do choose to contract with them, it may be difficult to enforce Section 47, because a South African court may not have jurisdiction to adjudicate, and judgement may need to be enforced in another jurisdiction.⁴⁷ This gets us to the important issue of jurisdiction.

2.4.4 *Jurisdiction of South African courts over consumer protection disputes and international electronic contracts*

Electronic commerce does not acknowledge geographical borders because Internet transactions are conducted over a network, ignoring all traditional geographic boundaries. Although some international uniformity exists around e-commerce, issues relating to jurisdiction are still some of the biggest legal problems in the regulation of international electronic commerce.⁴⁸

It is a fact that the advent of the Internet poses interesting challenges to the law of jurisdiction, and that conventional elements of jurisdiction, choice of law and enforcement of foreign judgments in respect of online contracts could be hard to execute when dealing with Internet transactions and disputes that could arise there

46 Jacobs 2004 *SA Merc LJ* 563.

47 De Villiers *Consumer Protection* 166.

48 Snail *Electronic Contracts in South Africa* 18.

from. It is, therefore, not strange that bodies like the United Nations and national governments are confronted by these jurisdictional issues on an international level.⁴⁹

A court will not exercise jurisdiction when it is not in the position to give an effective judgement.⁵⁰ In most of cases, parties to a contract agree in their agreement on a certain court to have jurisdiction, or provide for a certain country's law to govern their contract, should disputes arise there from. This is done in terms of the principle of party autonomy, and is similar to the principle of freedom to contract.⁵¹ This is usually done by inserting a choice-of-law clause into the contract. In practice, this means that parties can choose any law to govern their contract, simply by stating it in therein. Parties can thus also contract out of legislation (in other words, they can choose that, for instance, the law of X will govern the contract, and, therefore, the law of Y will not be applicable). This is not general, as there might be provisions contained in legislation stating that parties are not allowed to exclude the applicability of certain legislation. Parties will have to determine the nature of their contract, as well as all the pieces of legislation that might be applicable to their agreement, before making decisions regarding the legal system that they wish to apply to their contract. An example of such a provision is Section 48 of the ECTA, which will be discussed further on in this chapter, where it will be seen that when a South African is a party to an electronic contract, certain legislation's applicability cannot be excluded by the contract.

The author currently dealing with international contracts and it is, therefore, necessary to look at some of the problems that they might impose when one is trying to determine the courts that will have jurisdiction. Due to the fact that many online contracts involve some sort of foreign element (for example, the supplier is from a place situated outside the South African border), Conflict of Law rules will also apply to the contract in circumstances where it is uncertain what court will have jurisdiction. Conflict of Law rules can be defined as those rules that each country applies in order

49 Jobodwana *Conflict of Laws in Cyberspace* 3.

50 Van der Merwe *Electronic Communications Technology Law* 170-171.

The court in *Ewing McDonald & Co. v M & M Products Co. 1991 (1) SA 252 (A)*, defined jurisdiction as the "power vested in a court to adjudicate upon, determine and dispose of a matter".

51 Johnson *The Legal Consequences of Internet Contracts* 98.

to determine which system of law will govern a dispute in the event of there being two or more possible systems that can be applicable to the contract. One of the problems experienced with Conflict of Law rules is that each country has its own set of rules and that different legal systems might be pointed out, depending on the country's set of rules being used. This means that it could be either the law of the supplier or the law of the consumer that could be applicable to the contract.

When the contract does not make provision for an express jurisdiction clause that will govern the contract, the proper law governing the contract shall be determined by the presumed intention of the parties. The intention of the parties may be derived from the place where the performance in terms of the contract will take place (*lex loci solutionis*), the place where the contract was concluded (*lex loci contractus*) or other *induciae* contained in the contract.

Factors that may be relevant in the case of online contracting, when determining the applicable legal system, can include any wording or terminology from which it can be derived that a particular system of law should apply to the agreement. For example, if a contract states that payment must be made in US Dollars, there will be a strong indication that the party had intended the foreign law to apply, and the location of the parties at the time that the contract was concluded.

When there is no way in which the intention of the parties can be determined, the law will assign a system of law to the agreement. Writers like Forsyth argue that the proper law of such a contract will be the *lex loci contractus*, unless performance in terms of the contract is to take place somewhere else, in which case, the law of that place shall apply (the *lex loci solutionis*).⁵² We should further look at the South African legislation dealing with consumer protection and international electronic contracts in order to see how it regulates jurisdiction.

The ECTA contains a section that exclusively deals with jurisdiction and mentions the instances where a South African court will have jurisdiction when a dispute arises, and protection that is offered under the ECTA. Section 90 of the ECTA deals with jurisdiction and states that a South African court will have jurisdiction when:

52 Johnson *The Legal Consequences of Internet Contracts* 93-97.

- (a) the offence was committed in the Republic;
- (b) any act of preparation towards the offence or any part of the offence was committed in the Republic, or where any result of the offence has had an effect in the Republic;
- (c) the offence was committed by a South African citizen or a person with permanent residence in the Republic or by a person carrying on business in the Republic; or
- (d) the offence was committed on board any ship or aircraft registered in the Republic or on a voyage or flight to or from the Republic at the time that the offence was committed.

This provision of the ECTA only refers to criminal jurisdiction of the act, and not to civil jurisdiction. The question arises: how one will determine whether or not a court will have jurisdiction over a civil dispute that might arise from a contract, for example, instances where there is a breach of contract on the supplier's side, which does not constitute a criminal offence?

Usually, in practice, an Internet contract will include a choice of law clause, indicating the country which laws would govern the contract, should a dispute regarding the contract arise. The simple reason for this, therefore, is that foreign suppliers attempt to secure "home jurisdiction" for themselves. This can have bad consequences for the South African consumer, who will have no choice but to be subjected to the foreign court's jurisdiction. This can be very costly, to say the least.⁵³ The South African would have to travel to the foreign court, appoint a correspondent in that country and, most likely, appoint an advocate who would also have to attend the foreign court, etc. Other costs include accommodation (which could be high when one is dealing with a lengthy trial) and translating services.

A South African consumer will be protected by the ECTA when entering into electronic agreements authorised by the ECTA. The mentioned protection will be available to the consumer (irrespective of the law governing the contract) as a result of either a jurisdiction clause or the law governing the contract because of existing International Private Law principles in the event that the contract does not contain a choice of law clause.

It is clear from the preceding paragraphs that determining jurisdiction can be a difficult task when one is dealing with cross-border transactions, especially in instances where the parties have failed to agree on jurisdiction, or where it is difficult to determine what exactly the intention of the parties was. It is also clear that

53 Schulze 2006 SA Merc LJ 44.

uncertainty can somehow be limited, simply by agreeing on a certain court to have jurisdiction, or a certain legal system to apply to the agreement, by including a clause in the agreement itself. According to Section 48 of the ECTA, an agreement attempting to exclude the consumer protection provisions of the ECTA will be null and void. It is clear from this provision that parties cannot contract out of the ECTA in order to keep the ECTA from being applicable to their agreement.

2.4.5 Consumer protection provisions in the ECTA

As mentioned above, Chapter VII contains the consumer protection provisions that might have devastating consequences for any online agreement should they not be complied with. These provisions will be discussed in the next couple of paragraphs, as well as the implications that they have for electronic contracting, especially in international electronic transactions.

2.4.5.1 Information to be provided and the right to review the agreement

In terms of Section 43(1) of the ECTA, a supplier offering goods or services for sale, for hire or for exchange by way of an electronic transaction must make certain information available to consumers on the website where such goods or services are offered. Section 43(1) (a)-(r) provides a list of 18 pieces of the information mentioned above, that must be disclosed on the website where the supplier offers its goods or services. This information includes the full name and legal status of the supplier, as well as the physical address and contact details of the company. The usage of the term “on the website” is indicative thereof that this section will only affect suppliers that have an Internet website. The question arises: will foreign suppliers also have to comply with this section? For obvious reasons, this section will only be practicably applicable on South African website hosts, because how can one expect a foreign supplier to apply with the provisions of an act, if he has never heard of it? The author is of the opinion that one can, at the very least, expect from the supplier to disclose basic information such as addresses and telephone numbers, enabling the consumer to make contact with the supplier or to track them down. With regard to the usage of the term “offering”, and the meaning thereof, one has to take a look at

the purpose of the ECTA (consumer protection) in order to see that all service providers that sell goods and services via electronic transactions shall fall under the scope of Section 43.

The obligation that Section 43 imposes on the supplier to make certain information available on its website, will give the consumer or prospective buyer the opportunity to know exactly with whom they are dealing. Problems that consumers may experience when the prescribed information is not provided can have serious legal consequences. Possible consequences will be explained by this example:

A, who always wanted to have an antique clock, decides to browse the Internet, and comes across “Antique Times”, situated in the United Kingdom, where she finds the perfect clock and decides to buy it. The supplier agrees to send the clock to her after she has made payment into his bank account. Excited A immediately pays the R40 000, and provides the supplier with a physical address to where he must send the clock. The clock never arrives. After nine weeks, A goes onto the website in order to contact the supplier, only to find out that there is no telephone number, e-mail address or physical address. She sends him a message on his website, but he never replies. At first, this seemed like an uncomplicated transaction, and it might have been one if the supplier delivered the clock to the given address. This simple example explains the importance of the information that should have been supplied. If she had had the contact details, physical address and legal status of the supplier, she would have been able to issue a summons against him, demanding delivery or her money back. This dilemma would not have happened if the supplier had provided A with sufficient information. The question now arises: when is the information provided deemed to be sufficient?

The test that the court applies in order to determine whether the information that is provided is sufficient is the test of reasonableness, which was applied in a case that will shortly be discussed. The document itself should be sufficient to gain the attention of a reasonable customer, and the terms and condition provided for should be visible and readily available to the consumer. These principles were applied in the matter of *Durban’s Water Wonderland (Pty) Ltd v Botha & another* before the

Supreme Court of Appeal.⁵⁴ The court had to deal with the question of whether the disclaimer sign of the Appellant (Durban's Water Wonderland) at the entrance of its amusement park was prominently displayed, and if the terms thereon formed a part of the contract (the buying of a ticket) concluded by Botha (the Respondent). The court found that any reasonable person approaching the ticket- office in order to purchase a ticket hardly would have failed to observe the notices with their bold, white-painted borders on either side of the cashier's window. Having regard to the nature of the contract and the circumstances in which it would ordinarily be entered into, the existence of a notice containing terms relating thereto would not be unexpected by a reasonable patron. The court was thus satisfied that the steps taken by the appellant to bring the disclaimer to the attention of patrons were reasonable and that, accordingly, the contract concluded by Mrs Botha was subject to its terms.

It must be noted that incorporation by reference enjoys explicit recognition in terms of South African law, and that it is not necessary for the consumer to perform any action, such as clicking on an icon, to regard information as part of the data message itself.⁵⁵ The exact meaning of "making available", as used in the ECTA, is also not very clear; therefore, writers like Buys suggest that suppliers include this information in the "terms of use" on their website to allow a consumer to click on "I agree to the terms of use" before being allowed to finalise any transaction. This suggestion clearly states the importance of the acceptance of the terms by the consumer prior to making the intended transaction.⁵⁶

Before the contract is finally concluded, Sub-section 43(2) obliges the supplier to provide the consumer with an opportunity to review the entire electronic transaction, to correct any mistakes or to withdraw from the transaction, before finally placing any order. Should the supplier fail to give the consumer the opportunity to review the agreement, the consumer may cancel the transaction within 14 days of receiving the goods or services under the transaction, and must return the goods to the supplier or, where applicable, cease using the services performed by the supplier. The idea behind Section 43, is to give the consumer enough information to enable him or her

54 1999 (1) SA 982 (SCA).

55 Pistorius 2004 SA Merc LJ 574.

56 Buys, "How Will The Consumer Protection Provisions Of The New ECT Act Affect Your Web Site?" available at www.buys.co.za.

to make an informed choice. The problem that this section can cause is that it will not be applicable to suppliers situated overseas, not because of the wording of the section, or the exclusion thereof somehow, but simply because one cannot expect a foreign supplier to adhere to the consumer legislation of every single country with which it contracts.

2.4.5.2 The cooling-off period

Section 44 of the ECTA provides for a cooling-off period.⁵⁷ A cooling-off period can be seen as a compensating technique of consumer protection. Cooling-off periods can take two different forms. Firstly, they can force people (in the context of this chapter, it will be the parties to the contract) to delay action against one another until the cooling-off period has lapsed, and secondly, they offer the consumer the chance to consider the advantages and disadvantages of the agreement. The consumer will then be entitled to cancel the contract within this given time period. In this part of the chapter, the author will discuss the second form of cooling off, with regards to the relevant sections of the ECTA dealing therewith.⁵⁸

It is important to know that in some forms of agreements, the use a cooling-off period will not available to the consumer. The reason for this is due to the nature of the services or the goods, for example, a contract concluded for the importation of fresh fruit. In terms of Section 44, a consumer will be entitled to cancel any transaction and any related credit agreement for the supply of goods or services within seven days after the receipt of the goods, or within seven days after the conclusion of the contract, in the case of services provided. This right to cancel will be without penalty, and the consumer does not have to give a reason for the said cancellation. If the consumer decides to cancel the agreement in terms of the aforesaid section, he or

57 Section 44. (1) A consumer is entitled to cancel without reason and without penalty any transaction and any related credit agreement for the supply:
(a) of goods within seven days after the date of the receipt of the goods; or
(b) of services within seven days after the date of the conclusion of the agreement.
(2) The only charge that may be levied on the consumer is the direct cost of returning the goods.
(3) If payment for the goods or services has been effected prior to a consumer exercising a right referred to in Sub-section (1), the consumer is entitled to a full refund of such payment, which refund must be made within 30 days of the date of cancellation.
(4) This section must not be construed as prejudicing the rights of a consumer provided for in any other law.

58 Sourun *The Efficiency of a Cooling-off Period* .

she might be charged for the direct cost of returning the goods, but will be entitled to a full refund from the supplier, which must be made within 30 days from the date of cancellation. There arise several uncertainties and concerns with regard to this section of the ECTA. Firstly, the ECTA has no regulation dealing with instances where the supplier has already begun to provide services to the consumer. Secondly, it is unclear whether the consumer may exercise the right to withdraw according to Section 43(3) and Section 44(1) before receiving the goods or services. These two provisions state “within 14 days of receiving the goods or services” and “within 7 days after the date of receipt of the goods”. This uncertainty allows for the interpretation that the consumer must have received the goods before he can exercise this right. Thirdly, the sections do not prescribe the manner in which the consumer is supposed to cancel the transaction, whereas Section 46(2), on the other hand, states that the consumer may cancel by means of “written notice”.⁵⁹ It might be suggested that a supplier describes the manner in which the agreement may be cancelled in its “terms and conditions”. In this way, both the consumer and supplier will have more legal certainty with regard to the cancellation procedure.⁶⁰

Although the cooling-off period provision seems straight forward, one could find it hard to enforce this remedy against a foreign supplier. For example, it could be difficult and costly to proceed with legal action against a supplier who refuses to return the purchase price for the goods returned.

2.4.5.3 Performance of the contract

The performance of the contract is dealt with in Section 46 of the ECTA. In terms thereof, the supplier must execute the order within 30 days after the day on which the supplier received the order, unless the parties have agreed otherwise. Should the supplier fail to *execute* the order within the said time, the consumer has the option to cancel the agreement with seven days’ written notice. In circumstances where the goods or services are unavailable, the supplier must immediately notify the consumer thereof and must further refund any payments within 30 days after the date of such notification.⁶¹ When dealing with the unavailability of goods, Buys

59 Huffmann *Consumer Protection in E-commerce* 58.

60 Own emphasis.

61 Section 46 (1)-(3) of the ECTA.

suggests that one applies an objective test when looking into the reasons for the unavailability. If it seems like the supplier, in some way, has directly contributed to the fact that the goods are not available, he further suggests that the consumer has the option to cancel the transaction in terms of Section 46(3).⁶²

Although this section seems to be straightforward, it imposes some practical uncertainties that can lead to confusion. It is not sure what meaning will be attached to the term “execute”. Would it be sufficient for the supplier to send the goods to the consumer on day thirty or must the customer have received the order by the thirtieth day? This can be crucial in order to determine whether the consumer can exercise the right to cancel the agreement if the supplier has failed to execute the order within 30 days.⁶³ Buys argues that the supplier’s duty to execute the order within 30 days implies that the supplier should complete all its contractual duties, in terms of the contract, within 30 days.⁶⁴ The duties referred to may include receiving the goods from the retailer or factory, the packaging of the goods for shipping and delivering them to the Post Office or company that will do the actual delivery in the end. These duties do not include the delivery of the goods to the consumer.⁶⁵ This time-limit of 30 days seem to be reasonable in the instances where both the supplier and the consumer reside in South Africa, but in cases where the supplier resides in another country, it might be difficult to “execute” the order within 30 days. In the end, one will have to wait and see how South African will courts interpret the term “execute”, when dealing with a cross-border transaction.

2.5 The influence of the UNCITRAL Model Law on e-commerce legislation in South Africa

The United Nations also recognized potential problems that might occur when one is dealing with international electronic agreements. The *United Nations Commission on International Trade Law* (hereafter referred to as “UNCITRAL”) drafted the *Model*

62 Buys *Cyberlaw@SA* 157.

63 De Villiers *Consumer Protection* 123.

64 Buys *Cyberlaw@SA* 157.

65 Buys *Cyberlaw@SA* 157.

Law on E-Commerce in 1996 in order to assist countries in drafting and enacting laws that will enable them to contract electronically. This provided extended definitions of legal terms like “writing”, “signature” and “originals”. In 2005, the same body drafted the *United Nation Convention on the Use of Electronic Communications in International Contracts*, which aims to harmonize the provisions of the Model Law, in order to form an international law instrument that could give countries guidance on electronic cross-border contracts. Although South Africa is not legally bound by this instrument, it was influential in its drafting, and this formed the basis for the ECTA as it is known today.

However, although the ECTA is based on the Model Law, there are certain differences between them, for example, the Model Law defines an “intermediary” as “a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message”. The ECTA, on the other hand, defines an “intermediary” as “a person who, on behalf of another person, *whether as an agent or not*, sends, receives or stores that data message or provides other services with respect to that data message”. The difference between these two definitions implies that when an impostor claims to be representing “another person” and an innocent third party is lured into conducting e-business transactions with that impostor to the third party’s own detriment, such an impostor, in terms of the ECTA, will be held liable as an intermediary to a particular data message. This is just one example of a difference between the ECTA and the Model Law, but it is also true to say that all of the provisions covered in the Model Law are also covered in the ECTA, with the exception of provisions in the Model Law concerning contracts with regard to the carriage of goods.⁶⁶ The importance of international instruments such as these when dealing with electronic contracting and the interpretation of one’s local legislation was demonstrated in *Jafta*, as discussed above.

66 Gereda SL *The ECT Act* 290-291.

2.6 Consumer Protection Act, 68 of 2008

2.6.1 Introduction

The *Consumer Protection Act, 68 of 2002* (hereafter referred to as “the CPA”) came into force at the end of March 2011. In the preamble of the CPA, it is stated that emerging technological changes, trading methods, patterns and agreements bring new benefits, opportunities and challenges to the market for consumer goods and services within South Africa, and that it is necessary to promote an economic environment that supports and strengthens a culture of consumer rights in order to protect consumers from hazards to their well-being and safety. The emerging technological changes have had the effect that our existing consumer protection measures have become outdated. The South African consumer protection framework has had to be reviewed in order to provide a framework of legislation, policies and government authorities to regulate consumer-supplier interaction. The CPA now provides an extensive framework for consumer protection that aims to protect the consumer against unfair business practices that were previously unregulated.

The CPA places a big amount of obligations on suppliers and authorities, and it remains to be seen whether the CPA will achieve its purposes.⁶⁷ In this part of the chapter, the author will focus on the working of the CPA and the changes that it might bring in the e-commerce milieu. The author will discuss the application of the act, some of the important remedies available under the act, as well as the practical implications or problems that they might have or impose on cross-border electronic transactions.

67 Jacobs W, Stoop PN, Van Niekerk R “Fundamental Consumer Rights under the Consumer Protection Act 2002: a Critical overview and analysis” 2010 *Potchefstroom Elec LJ* 303.

2.6.2 Important definitions in the CPA

In Section 1 of the CPA, an “agreement” is defined as an arrangement or understanding between or among two or more parties, establishing a relationship in law between them. An “importer” is defined as any person⁶⁸ who brings goods, or causes them to be brought, from outside the Republic into the Republic, with the intention of making them available for supply in the ordinary course of business. “Commission” means the National Consumer Commission (hereafter referred to as “the Commission”) that is established by Section 85, which states that the Commission is an organ of state within the public administration, but functions as an institution outside the public service. According to Section 85(2), the Commission will have jurisdiction, in the form of a juristic person, throughout the Republic. The section further provides that the Commission must exercise the functions assigned to it in terms of the act (or any other law, or by the Minister) in the most cost-efficient and effective manner and in accordance with the values, principles and guidelines for public administrative bodies, as mentioned in Section 195 of the Constitution.

2.6.3 Application of the CPA

With regard to the application of the CPA, it is necessary to look at the definitions of the words used in Section 5 dealing with the application of the act. In terms of Section 5(1) the CPA will apply to every transaction *occurring* within the Republic, unless it is exempted by Sub-section (2), or in terms of Sub-sections (3) and (4).⁶⁹

68 Section 1 of the CPA.

69 (2) This Act does not apply to any transaction:

(a) in terms of which goods or services are promoted or supplied to the State;

(b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of Section 6;

(c) if the transaction falls within an exemption granted by the Minister in terms of Sub-sections (3) and (4);

(d) that constitutes a credit agreement under the National Credit Act, but the goods or services that are the subject of the credit agreement are not excluded from the ambit of this Act;

(e) pertaining to services to be supplied under an employment contract;

(f) giving effect to a collective bargaining agreement within the meaning of Section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995); or

(g) giving effect to a collective agreement as defined in Section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995).

The term “occur” is used throughout the CPA, but unfortunately the CPA does not tell us what exactly is meant by the term. This term is important because, as we have seen above, the CPA will only apply to transactions “occurring within the Republic”. The author is of the opinion that it might be that the contract must be concluded in South Africa, or that the goods or services must be delivered within South Africa. The uncertainty surrounding this term will cause problems when one is dealing with an international electronic contract, as it could be difficult for a South African consumer to prove that the transaction indeed occurred within the Republic. The moment and place of the conclusion of electronic contracts are regulated by Section 22(2) of the ECTA, which states: “An agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offerer.” The provisions of Section 22(2) will only be applicable in circumstances where the parties have not, by express agreement, varied the rules stated by the ECTA by means of contractual determination (Section 21 of the ECTA). The place where a contract is formed is thus very important in a case of a contract concluded between parties who are situated in different jurisdictions, or international contracts in which one may suffer prejudice due to conflicting legal rules, as we have discussed above.⁷⁰

When one is dealing with the application of the CPA, two important questions arise in relation to cross-border transactions. Firstly, can a consumer contract out of the CPA by means of a choice of law clause, making the transaction governable by a foreign law? Secondly, will the CPA apply in the case of a transaction occurring outside of South Africa, but with a governing law clause making the transaction subject to

(3) A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of:

(a) any other national legislation; or

(b) any treaty, international law, convention or protocol.

(4) The Minister, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in Sub-section (3):

(a) only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and

(b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.

70 Snail *South African E-consumer Law* 45.

South African law? In order to deal with these questions, one will have to take a look at Section 5 of the CPA, dealing with the application of the CPA.

Section 5(8) states that the CPA will apply to a matter irrespective of whether the supplier resides or has its principal office within the Republic or not.

The CPA will thus be applicable to a transaction if the transaction is not exempted in terms of Sub-sections (2) – (4), and clearly answers the first question. Exporters who supply offshore goods or services to South Africa, and who wish to exclude the application of the CPA to their agreement, can do so by simply ensuring that their transaction does not occur within South Africa. Exporters can conclude the contract outside of South Africa and further supply the goods or provide the services outside South Africa in order not to be subjected to the CPA. A way of doing that could be, for example, to sign the contract in Germany and to deliver the goods to a German address as fulfilment of supplying the goods. The transaction has then occurred outside South Africa, and the South African buyer will then arrange for further delivery into South Africa. This might sound strange at first, because, in the end, goods/services are still delivered in South Africa and the CPA will be applicable. The subsequent delivery into South Africa will be a new transaction, to which the original supplier is not a party. In this way, a supplier can prevent the CPA from being applicable to its transaction.⁷¹ Section 5(8) clearly has loopholes in it, as a supplier could use the above method to keep the CPA from being applicable to the transaction.

This section almost creates the same problems and might have the same practical implications as Section 47 of the ECTA⁷², because a foreign supplier would rather not contract with a South African consumer than be exposed to all the remedies that the consumer has at his disposal. This can have a negative influence on South African e-commerce, and South Africa might even end up known as “the country with potent/bizarre consumer protection”.

71 Laher I and Diinie D “The Consumer Protection Act and Cross-border Transactions” available at www.cover.co.za

72 See par 2.3.3.1 above.

2.6.4 Protection mechanisms in the Consumer Protection Act

The CPA provides for many rights and certain obligations for a consumer. The writer will only refer to the rights that will have a direct influence on *electronic* transactions, where the buyer and seller are from two different countries. One of them, of course, is situated in South Africa. It must at all times be kept in mind that the whole CPA (except for the exclusions provided for in the CPA itself) will be applicable to a transaction occurring within the Republic.

2.6.4.1 Right to privacy

The right to privacy in terms of the CPA emanates from Section 14 of the Constitution.⁷³ The CPA includes a comprehensive set of consumer rights relating to privacy, and careful consideration must be given to the nature of the interaction between suppliers and consumers in order to ensure a wide field of application.⁷⁴

Section 11 deals with unwanted direct marketing. It offers every person the right to pre-emptively block any approach or communication addressed to him or her if the communication is primarily for the purpose of indirect marketing. E-mails from businesses promoting their goods or services are examples of such unwanted direct marketing. The right to privacy, according to Section 11 of the act, will further include the right to refuse to accept any unwanted communication, and to demand the person responsible for initiating the communication to desist from initiating any further communication.

2.6.4.2 Right to choose

The consumer's right to choose is dealt with in Sections 13 to 21 of the CPA. The consumer has the right to choose the supplier with whom he or she wants to do business. As a prerequisite to offering to supply any goods or services to a consumer, a supplier must not require the consumer to purchase any particular goods or services or to enter into additional agreements or transactions to purchase

73 Jacobs et al 2010 *Potchefstroom Elec LJ* 320.

74 Kirby 2009 *Without Prejudice* 28.

any goods or services from a third party.⁷⁵ With regards to the cooling-off period, Section 16 will not apply when Section 44 of the ECTA (dealing with cooling off) is applicable to the transaction.

A consumer is entitled, in certain circumstances, to cancel advance reservations, bookings or orders of any goods or services to be supplied. This right is subject to the right of the supplier to require payment of a deposit in advance, and to impose a reasonable charge for the cancellation of the order or the reservation. In order to determine whether the charge for cancellation is reasonable, factors such as the nature of the goods or services and the length of notice of cancellation provided by the consumer must be borne in mind. In some instances, the supplier may not charge a cancellation fee, for example, if the consumer is unable to honour the reservation because of death or hospitalisation.⁷⁶

Section 18 gives the consumer the right to examine the goods before completing the transaction. Due to the nature of online agreements, it is sometimes impossible for consumers to examine the goods that they intend buying. Goods are described online on the sellers' websites, most of the time accompanied by a picture depicting the product. If a South African buyer purchases an item online from a foreign seller, he or she will probably only get to inspect the goods upon their arrival in South Africa.⁷⁷ Section 18 only deals with situations where the consumer has already had the chance to inspect the goods. Sub-section 18(2) reads that when a consumer has agreed to purchase the goods solely on description or sample thereof by the supplier, the goods delivered to the consumer must, in all material aspects and characteristics, correspond to those that an ordinary alert consumer would be entitled to expect, based on the description. It is clear that the test to be applied will be objective of nature, and that the consumer would have to prove that, based on the description given by the supplier⁷⁸, he or she is entitled to expect certain features, etc.

Section 19, dealing with the consumer's right with respect to delivery of goods or supply of services, will not apply to a transaction which is governed by Section 46 of the ECTA. Section 19 regulates the time, place and risks associated with delivery.

75 Section 13(1) of the CPA.

76 Section 17 (1)-(5) of the CPA.

77 Own emphasis.

78 Own emphasis.

This section is of utmost importance with regards to the passing of the risk from the supplier to the consumer (buyer). In terms of Section 19(2), the risk will only pass to the consumer upon acceptance of delivery by the latter, unless they have an agreement to the contrary. The consumer is regarded to have accepted delivery of goods in the circumstances as set out in Section 19(4). It is important for a supplier to have proof of acceptance from the consumer's side, in ordering him to prove that the risk has passed, should he have to. In the event of a supplier contravening Section 19, a consumer has different remedies at his or her disposal, depending on the circumstances of the case.

Section 20 deals with the circumstances where a consumer has the right to return the goods to the seller. This will be, for example, in instances where the goods have been found to be unsuitable for the particular purpose for which they have been purchased.⁷⁹

2.6.4.3 Right to information

The consumer has a right to information in plain and understandable language.⁸⁰ This right aims to give consumers the chance to make informed choices and to understand the terms of the agreement into which they are entering.⁸¹ The question can be asked: when will information deemed to be given in "plain and understandable" language? In terms of Section 22 (2), plain language is language that enables an ordinary consumer, with average literacy skills and minimal experience as a consumer, to understand the contents without undue effort. It is uncertain what the position will be in respect of foreigners living in South Africa who can only speak a foreign language. How will it then be determined whether the information is "plain and understandable"?⁸² It must further be kept in mind that a website (from South African origin or not) is accessible from anywhere in the world, and that South African consumers may find it hard to understand certain terms used by the suppliers on their websites.⁸³ Certain factors, as set out in Section 22, may

79 Section 20 (2) (d) of the CPA.

80 Section 22 of the CPA.

81 Jacobs et al 2010 *Potchefstroom Elec LJ* 329.

82 Jacobs et al 2010 *Potchefstroom Elec LJ* 330.

83 Own Emphasis.

be taken in account to determine whether a website and its contents are in “plain and understandable” language:

- (a) the context, comprehensiveness and consistency of the notice, document or visual representation;
- (b) the organisation, form and style of the notice, document or visual representation;
- (c) the vocabulary, usage and sentence structure of the notice, document or visual representation; and
- (d) the use of any illustrations, examples, headings or other aids to reading and understanding.⁸⁴

The CPA further provides for the Commission to publish guidelines for methods to determine whether information is provided in plain and understandable language.⁸⁵ This can ensure that the act will keep up, not only with the rapidly changing e-commerce in South Africa, but also with the inventing of new and globally used terms used in electronic contracting.

2.6.4.4 Catalogue marketing

Section 33 of the CPA is about the regulation of catalogue marketing. Catalogue marketing can be explained as being an agreement for the supply of goods or services concluded telephonically, or by postal order, or fax, or in any similar manner in which, with respect to goods, a consumer does not have the opportunity to inspect them prior to conclusion of an agreement. In terms of Sub-section 33(1)(b), this provision of the act will not apply to an electronic transaction if Chapter VII of the ECTA, dealing with consumer protection, applies to it. It will, furthermore, not be not applicable to franchise agreements.

Due to the fact that we are dealing with electronic contracts, one would have to make sure that the ECTA is not applicable to the transaction, because the ECTA deals exclusively with electronic communications, and the chances that an electronic transaction will fall within the ambit of the ECTA, and will enjoy protection under

84 Section 22 (2) (a)-(d) of the CPA.

85 Section 22 (3) of the CPA.

Chapter VII thereof, are good. In cases where the ECTA is not applicable, Section 33 plays a role by providing us with a list of information that the supplier must disclose to the consumer, prior to the conclusion of the agreement. This information includes the following:

- (a) the supplier's name and licence or registration number, if any;
- (b) the supplier's physical business address and contact details;
- (c) the written sales record of each transaction;
- (d) the currency in which money is payable under the agreement;
- (e) the supplier's delivery arrangements;
- (f) the cancellation, exchange and refund policies of the supplier, if any;
- (g) the manner and form in which complaints may be lodged; and
- (h) any other information.

This list reminds us of the list of information provided by Section 43(1)(a-r) of the ECTA, and that can be the reason why Section 33 of the CPA will not be applicable to a transaction that is governed by Chapter VII of the ECTA, because Section 43 forms a part of Chapter VII. The main purpose of Section 33 is, in the end, to provide the consumer with the opportunity to make wise decisions with regard to the agreement, by supplying him/her with sufficient information, not only about the supplier, but also about the physical characteristics, etc, of the goods or services.⁸⁶

2.7 End Remarks

The most important and relevant pieces of South African legislation with regards to consumer protection have been discussed in this chapter. We have seen that various consumer protection rights are based on some of the fundamental rights provided for in the Constitution. The *Jafta* case has emphasised both the importance of foreign law when interpreting matters concerning electronic communications, and that universal principles regarding electronic communications law should be internationalised in order to be effective.⁸⁷ Section 47 of the ECTA that the ECTA foresees that agreements could be concluded between persons from different jurisdiction, and that protection should be offered to a South African consumer by binding suppliers from other jurisdictions. Section 47 of the ECTA could have a

86 Jacobs et al 2010 *Potchefstroom Elec LJ* 339- 340.

87 See par 2.2 above.

negative impact on a South African consumer's ability to conclude agreements with foreign suppliers, as it would be difficult for foreign suppliers to comply with all the protection mechanisms contained in a act like the ECTA, so much so, that they could choose rather not to do business with a South African consumer.⁸⁸ It became very clear from the discussion of jurisdiction that the issues regarding the jurisdiction of South African courts in an e-commerce dispute are enormous, and that it might be a difficult and complex task to determine which courts will have jurisdiction over a dispute. This is mainly due to the fact that e-commerce ignores geographical borders, that a single transaction can have legal effects in more than one country and that there might be more than one legal system applicable to an agreement. Despite the fact that consumers seem to be well protected, problems regarding jurisdiction can deprive them of the protection offered. Section 90 of the ECTA only deals with criminal jurisdiction. This creates a lot of uncertainties as to the question of which court will have jurisdiction over a civil dispute.⁸⁹ Chapter VII of the ECTA revealed a list of consumer protection provisions, amongst which, the right to information, which plays a big role and is important in order for a consumer to make an informed choice regarding the nature of the agreement and, especially, the identity of the supplier. Section 43 which deals with the right to information, can, in practice, not be applicable to a foreign supplier, as one cannot expect a foreign supplier to adhere to the consumer protection legislation of a country that is foreign to him.⁹⁰

The cooling-off period seemed quite straight forward at first, but after discussing the practical implications thereof on cross-border contract, it was discovered that consumers might find it difficult to enforce this remedy against a foreign supplier. It will be costly for a consumer to proceed with legal action against a supplier who does not offer a consumer the chance to make use of this remedy, especially in cross-border contracts where different (and sometimes foreign) courts might have jurisdiction to hear the matter.⁹¹ The provision in the ECTA, dealing with the performance of the contract, also imposed certain practical difficulties that could lead to legal uncertainty, especially regarding the time period within which performance

88 See par 2.4.3 above.

89 See par 2.4.4 above.

90 See par 2.4.5.1 above.

91 See par 2.4.5.2 above.

must take place, as the ECTA does not specify exactly what the term “execute” means. Terms like these are very important when one wants to determine whether the consumer may exercise their right to cancel the agreement.⁹²

The CPA is the most recent legislation that deals with consumer protection, and aims to protect the consumer against unfair business practices that were previously unregulated. Section 5(8) of the CPA states that the CPA will be applicable to a matter, irrespective of where the supplier resides or has its principal place of business. This section’s attempt at extra-territoriality can surely have a negative impact on cross-border e-commerce, as suppliers could choose rather not to do business with a South African consumer. I have also seen that there are ways of preventing that the CPA will be applicable to a contract, as a foreign supplier can manipulate the terms of a contract in such a way that the transaction would occur outside South Africa, and that the CPA will not be applicable to the contract. The CPA does not contain a provision similar to Section 48 of the ECTA, which forbids parties from excluding the applicability of the ECTA to their contract.⁹³ Most of the problems that I have identified are practical in nature. This is due to the fact that the discussed legislation does not deal separately with cross-border electronic contracts. I have also seen that the lack of clarity on certain definitions contained in the various pieces of legislation may unduly limit the rights afforded under the various legislations. The absence of case law regarding these definitions definitely further hinders legal certainty, especially about the meaning of new terms that are, for example, used in the CPA.

92 See par 2.4.5.3 above.

93 See par 2.2.6 and par 2.2.4 (dealing with Section 48 of the ECTA) above.

3 The legal position in the United Kingdom

3.1 Introduction

Since the first “.co.uk” was registered in the United Kingdom (the UK) about a quarter of a century ago, as of 2009, the Internet and Internet-related operations had contributed an estimated £100 billion to the UK economy.⁹⁴

A report compiled by the Law Commission⁹⁵ emphasised the importance of electronic commerce (such as electronic contracts) for the UK economy, and identified the need for legislation regulating it to be reviewed, if the UK is to enjoy the full benefits offered by it and if UK businesses are to play a major role in the global electronic commerce markets. They realised that if legislation regulating e-commerce was not reviewed, UK companies could face a competitive disadvantage that would make the UK a less attractive place to do business. Furthermore, English law could lose its status as the law of choice governing many international commercial contracts or agreements. With regards to the global nature of electronic commerce, and the UK's position in Europe, as a member of the European Union (EU), the committee realised that the UK must implement the *Electronic Commerce Directive* by January 2002.⁹⁶

In July 2009, the UK government identified the need for a more coherent approach to the protection of consumers when transacting online, and asked the Office of Fair Trading to develop a longer-term national strategy for this.

There are three items of regulation that are particularly relevant to UK businesses trading online:

1. The *Data Protection Act 1998*;

94 Protecting Consumers Online: A Strategy for the UK 2010 available at www.offt.gov.uk .

95 The Law Commission was set up by the *Law Commissions Act 1965 (UK)*, in order to promote the reform of the law. The terms of this specific report was agreed upon on the 3rd of December 2001 under the title: “*Electronic Commerce: Formal Requirements in Commercial Transactions*”.

96 Report by the Law Commission *Electronic Commerce: Formal Requirements in Commercial Transactions* 2001 1.

2. The *Consumer Protection (Distance Selling) Regulations 2000* (as amended by the *Consumer Protection (Distance Selling) (Amendment) Regulations 2005*; and the
3. The *Electronic Commerce (EC Directive) Regulations of 2002*.⁹⁷

The author will begin this chapter with a brief explanation of the UK's legal position as a member of the European Union, with special reference to the stance of EU law as a source of the UK legislative framework. Thereafter, the author will continue with a discussion of the relevant UK legislation and EU instruments dealing with e-commerce. The author will also refer to *Council Regulation (EC) no 44/2001* dealing with jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, in order to see how EU member states deal with the jurisdictional rules applicable to electronic consumer contracts.

3.2 European Law as a Source of UK Law

The UK became a member of the EU⁹⁸ on 1 January 1973 after signing the *Treaty of Rome*⁹⁹ in 1972. European law was incorporated into UK law by virtue of the *European Communities Act 1972* (which is a UK act). EU law can be regarded as a direct source of English law, which became an increasingly important source of English domestic legal.¹⁰⁰ The UK has no written constitution, and the reigning monarch is seen as the head of state. The supreme authority of the crown is, in practice, carried by the government of the day. The constitutional law of the UK is regarded as consisting of statute law on the one hand, and on the other, case law, whereby judicial precedent is applied in the court by judges who interpret statute law.¹⁰¹ A third element in UK law consists of constitutional convention, which does not have statutory authority but, nevertheless, has binding force. A great part of the relationship between sovereign and parliament is conventional rather than

97 See www.website-law.co.uk.

98 The European Union was established in 1957, when the six initial member states (France, Germany, Italy, Belgium, Netherlands and Luxembourg) signed the Treaty of Rome.

99 The Treaty of Rome was a post-war mechanism that aimed at stability through European unity amongst the people of Europe by means of common action in the economic field. See Ward & Akhtar *English Legal System* 106.

100 Ward & Akhtar *English Legal System* 2; 106.
See www.leeds.ac.uk.

101 Carter S A *Guide to the UK Legal System* - available at www.nyulawglobal.org.

statutory.¹⁰² It is important to mention that any UK law that is inconsistent with European law on the same subject can be overridden, including Acts of Parliament. This creates the perception that the doctrine of parliamentary sovereignty is somehow compromised.¹⁰³ This was illustrated in the matter of *Factortame v Secretary of State for Transport*.¹⁰⁴ After the court established that UK law had breached European law, and that European law must prevail, the UK law was formally changed by statute. Another matter where the Court of Justice has developed the doctrine of supremacy of EU Law over national law was in the matter of *Van Gend en Loos v Nederlandse Administratie der Belastingen*,¹⁰⁵ where the court stated that “Member States had limited their sovereign rights”. With regards to the legal status of “Regulations” (such as *the Electronic Commerce (EC Directive) Regulations of 2002*), Article 228 of the EU Treaty provides that regulations are to be directly applicable and binding in their entirety. Regulations automatically form a part of UK law by virtue of Section 2(1) of the *European Communities Act 1972*.

“Directives” on the other hand, do not have the same immediate and direct effect as Regulations. They are left to each member state’s national authority to be incorporated in its legislations. In the UK, the implementation of directives is usually done by means of an “Order in Council” or statutory instrument under Section 2(2) of the *European Communities Act 1972*, which “provides a general power for further implementation of Community obligations by means of secondary legislation”.¹⁰⁶ We can find an example thereof when we look at the preamble of the *Electronic Commerce (EC Directive) Regulations of 2002*, and see how it was made part of UK law. The preamble reads as follows:

The Secretary of State, being a Minister designated for the purposes of **Section 2(2) of the European Communities Act** in relation to information society services, in exercise of the powers conferred on her by that section, hereby makes the following Regulations:

102 Carter S *A Guide to the UK Legal System* - available at www.nyulawglobal.org.
103 See www.leeds.ac.uk *European Union Law* [accessed on 28 September 2011].
104 [1989] 2 W.L.R 997 (HL)
105 Case 26/62 [1963] ECR 1.
106 Ward & Akhtar *English Legal System* 123.

We have now seen that EU laws¹⁰⁷ play an important role in the UK, simply due to the fact that the UK is a member of the European Union, and that it has chosen to make EU laws applicable to it by means of the *European Communities Act* of 1972. When we deal with the various legislation and EU instruments that are applicable to e-commerce, it is important to keep the position of the UK as a member of the EU in mind throughout the discussion, by, for example, whether one is dealing with a directive or a regulation.

In order for the UK to improve and support the growth of e-commerce, it had to adopt the various directives and regulations enacted by the EU, which had to establish a consistent, harmonised system that would build trust amongst businesses and consumers in order to allow e-commerce participants to enjoy the full benefits of the digitalised market. Only a uniform and harmonised legislative framework is able to support and improve the development of the electronic economy.¹⁰⁸

3.3 Data Protection in the United Kingdom

The Internet allows the quick and easy transmission of data across the national boundaries of the UK. The consequences thereof are that personal information of UK citizens is accessed and processed outside the country, sometimes without the consent or knowledge of the individual. The UK legislation that deals with data protection, when data is transferred across her majesty's border, is the *Data Protection Act* of 1998, and more specifically, Principle 8¹⁰⁹ thereof.

3.3.1 Principle 8 of the Data Protection Act

The eighth principle is derived from a requirement in the *European Communities Directive 95/46/EC*. In terms of article 25(1) of the directive:

“The Member States shall provide that the transfer to a third country of personal data, which are undergoing processing or are intended for processing after transfer may take place, only if the third country in question ensures an *adequate level of protection*.”

107 The European Union makes laws in the form of Treaties, Regulations and Directives.

108 Huffmann *Consumer Protection in E-Commerce* 14.

109 Principle 8 of Schedule 1 to the *Data Protection Act*.

In terms of this principle, personal data shall not be transferred to a country or territory outside the European Economic Area¹¹⁰ (the EEA) unless the country concerned ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data. The principle of this regulation is thus: if the country situated outside the EEA (for example, South Africa) offers adequate protection, then data transferring will be possible.

A result of the foregoing is that it might be necessary for the UK (as an EEA State) to take special precautions when it seems as if inadequate consumer protection is offered in a specific country.¹¹¹ Analyses of non-EU countries' protection laws were conducted to establish which countries¹¹² offer adequate protection.

The Information Commissioner's Office (ICO) published a guide that is concerned with the eighth principle. It is important to know that data controllers transferring personal data must comply with the principles and the Data Protection Act 1998 as a whole. The Commissioner furnishes us with a 4-step approach when determining the application of the eighth schedule. The first two steps thereof will be discussed.

3.3.2 *Transfer of personal data to a third country*

The first step is to establish whether there is a transfer of personal data to a non-EEA country. Unfortunately, the act does not give us a definition of the word "transfer". The ordinary meaning of the word, transfer, is the transmission from one place, person, etc, to another. The act requires that the transfer of information, which is not initially personal data but intended to be automatically processed or which forms part of a relevant filing system, should enjoy protection under the act.¹¹³

In a case¹¹⁴ before the European Court of Justice, it was held that no transfer of personal data took place to a third (non-EEA) country, where an individual loaded

110 The EEA States consist of all the European Union Member States together with Iceland, Liechtenstein, Norway, Switzerland and Turkey.

111 *Data Protection in the European Union* 12 available at ec.europa.eu.

112 Especially important trading partners of the EU.

113 www.ico.gov.uk - The eighth data protection principle and international data transfers 4

114 *Bodil Lindqvist v Kammaraklagaren* (2003) (Case C-101/01). Although this case was not heard before a UK court, the author refers to it due to the fact that Principle 8 derives from Article 25(1) of *Directive 95/46/EC*.

personal data onto an Internet page in a member state using a Internet hosting provider in that state, even though the page was accessible to people based in a third country. In practice, data are often loaded onto the Internet with the intention that it be accessed in a third country, and as this will usually lead to a transfer, the principle in the *Lindqvist* case will not apply in such circumstances. However, in situations where there is no intention to transfer the data to a third country, and no transfer is deemed to have taken place as the information has not been accessed in a third country, the eighth principle does not apply.

3.3.3 *Adequate level of protection*

The second step is to establish whether the third country and the circumstances of the transfer ensure an adequate level of protection. In order to see whether there are adequate levels of protection, an EU finding of adequacy or an assessment of adequacy made by the data controller itself may be taken into account.

Any question as to whether there is adequacy will be determined in accordance with the finding of the European Commission that a third country does, or does not, ensure adequacy.¹¹⁵ Where there are no Commission findings about the adequacy of a third country's data protection regime, it is for exporting controllers to assess adequacy with the help of the directive and the act. The basis of the assessment of adequacy is contained in Article 25(2)¹¹⁶, which states:

“The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.”

Certain factors to bear in mind when conducting the assessment are the nature of the personal data, the country or territory of origin of the information contained in the data, the final destination of that information, the purposes for which and period during which the data are intended to be processed, the law in force in the country or

115 See Article 25(6) of the Directive (and Schedule 1, Part II, Para 15 of the Act).

116 Article 25(2) has been implemented by the Act at Schedule 1, Part II paragraph 13.

territory in question, the international obligations of that country or territory, any relevant codes of conduct or other rules that are enforceable in that country or territory and any security measures taken in respect of the data in that country or territory. Some of this information is easy to get hold of (for instance, the nature of the data), but other information could be far more difficult to establish (for instance, the legislation that is in place in that country).¹¹⁷ The question can be asked: what is the importance of data protection for consumers? As we will see in the chapters to follow, information and the disclosing thereof plays a big role in the various regulations and directives, and a consumer must be protected from any harm that can be caused due to the fact that personal information (such as banking details and addresses) is, sometimes, made available to unauthorised persons when consumers take part in online activities.

One of the instruments in place in the UK in order to protect the British when shopping online or entering into other contracts, at a distance, from suppliers, is the *Consumer Protection (Distance Selling) Regulations*. These regulations, aiming to protect the consumer in the evolving e-commerce era, have been in force across the UK since the 31st of October 2000.

3.4 Consumer Protection (*Distance Selling*) Regulations

These regulations are the UK implementing Regulations for Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.¹¹⁸ It is said that this directive was established at a time when the Internet was in its infancy¹¹⁹, and is one of the most important pieces of legislation drafted by the EU concerning consumer protection. It is only applicable to transactions concluded between businesses and consumers (also known as B2C transactions).

117 The Eighth Data Protection Principle and International Data Transfers 8-14 available at www.ico.gov.uk.

118 See www.website-law.co.uk.

119 Howells and Weatherill *Consumer Protection Law* 383.

3.4.1 Application

In order to get a clear understanding of the application of the UK regulations, it is important to understand some the terms relevant to consumer protection, and more specifically, in the context of international/ distant contracts.

A consumer is interpreted as any natural person, who in contracts to which the regulations apply, is acting for purposes that are outside his or her business.¹²⁰ It is important that as a result of this definition, the regulations will not apply to transactions between businesses, as already mentioned above.¹²¹

The term “distance contract”, must be seen in the light that it is any contract concerning goods or services concluded between a supplier¹²² and consumer under a organised distance sales or service provision scheme run by the supplier, which for the purpose of the contract, makes exclusive use of one or more means of distance communication.¹²³ Distance selling covers Internet, mail order and telephone sales.¹²⁴ The question can arise: what exactly is meant by “distance communication”? An indicative list of such means is contained in Schedule 1 of the regulations.

As in any other act, there are certain exclusions to its scope and applicability. In terms of Regulation 4, the regulations will apply to distance contracts, other than the excepted contracts as listed in Regulation 5. Some of the excepted contracts are business-to-business contracts, certain contracts for the sale of land, contracts for the construction of a building and where the contract also provides for a sale or other transfer of an interest in the contracts relating to financial services to consumers.

120 Definition of “*consumer*” in terms of Regulation 3 of the Regulations.

121 See par 3.4 above.

122 Supplier – “any person who, in contract to which these Regulations apply, is acting in his commercial or professional capacity”.

123 Definition of “*distance contract*” in terms of Regulation 3 of the Regulations.

124 E-consumer protection- available at www.Internetrights.org.uk [accessed 4 August 2010]

3.4.2 Consumer protection mechanisms in the consumer protection (distance selling) regulations

3.4.2.1 Supplier's obligation to provide information

With regards to consumer protection and the information to be provided in good time prior to the conclusion of the contract, Regulation 7 provides us with a list of information that the supplier must disclose/provide to the consumer. This information includes¹²⁵ information on the main characteristics of the goods, the price, any taxes and delivery costs, payment arrangements, guarantees and information as to where complaints about the goods must be addressed.¹²⁶ In terms of Regulation 7(2), the supplier must ensure that the given information is provided in a clear and comprehensible manner that is appropriate to the means of distance communication used. Regulation 8 further expects the supplier to provide the consumer with the information in writing, as set out in Regulation 7(1)(a)(i-vi), and information regarding the right to cancel the agreement under Regulation 10. This written information should be supplied either prior to the conclusion of the contract¹²⁷, or thereafter, in good time, in any event during the performance of the contract (when a service is supplied), or, at the latest, at the time of delivery (in the event of goods been supplied).¹²⁸ One can thus distinguish between pre-contractual disclosure of information and written disclosure at, or soon after, the conclusion of the contract. It must be noted that Regulation 8 will not apply to a contract for the supply of services supplied on only one occasion and which are invoiced by the operator of the means of distance communication.¹²⁹ In such instances, the supplier should, at least, take all necessary steps to ensure that a consumer is able to obtain the supplier's geographical address and the place of business to which the consumer may address any complaints.¹³⁰

125 Explanatory Note to the *Consumer Protection (Distance Selling) Regulations 2000* 1.

126 Regulation 7 of the *Consumer Protection (Distance Selling) Regulations 2000*.

127 Regulation 8(1)(a) of the *Consumer Protection (Distance Selling) Regulations 2000*.

128 Regulation 8(1)(b) (i)-(ii) of the *Consumer Protection (Distance Selling) Regulations 2000*.

129 Regulation 9(1) of the *Consumer Protection (Distance Selling) Regulations 2000*.

130 Regulation 9(2) of the *Consumer Protection (Distance Selling) Regulations 2000*.

One of the main ideas behind “information disclosure” is to provide the consumer with the chance to participate fairly and effectively as a duly informed party to a contract.

3.4.2.2 The right to cancel the contract

3.4.2.2.1 General

A consumer’s right to cancel a contract can be seen as giving the consumer the chance to assure themselves of the quality and characteristics of the goods. It can, in essence, be seen as an extension of the policy of ensuring that the consumer has the opportunity to make a fully informed choice.¹³¹

Regulations 10 to 18 deal with the right to cancel. The right to cancel with regards to goods and the right to cancel with regards to services are dealt with separately in Regulations 11 and 12 respectively. These two regulations give us the time period within which the consumer can exercise the right to cancel the agreement. In terms of Regulation 10(1), the consumer can give a *notice of cancellation* to the supplier, or any other person previously notified by the supplier to the consumer as a person to whom the notice of cancellation can be addressed. This notice will then cancel the contract between the supplier and the consumer/buyer, and will have the effect of treating the contract as if it had not been made. The question arises: how will one determine whether the consumer has properly informed the supplier of his intention to cancel the contract? The consumer is assisted by the fact that the notice is treated as being properly given, if it is addressed to the last known address of the supplier, or faxed, posted or e-mailed to the last known address, and is taken to be given on the day that the notice was sent. (This is important to determine whether the right to cancel was exercised within the given time period as contemplated in Regulations 11 and 12).

131 Howells and Weatherill *Consumer Protection Law* 376.

3.4.2.2.2 Right to cancellation in the case of goods

In terms of Regulation 11, the cancellation period for a contract for the supply of goods begins with the day on which the contract is concluded¹³² and ends as provided in paragraphs 2 to 5. These paragraphs distinguish between instances where the supplier complied with Regulation 8 and instances where the supplier did not. If the supplier complied with Regulation 8, the cancellation period will end on the expiry of the period of seven working days, beginning with the day after the day on which the consumer receives the goods.¹³³

Where a supplier, which has not complied with Regulation 8, provides to the consumer the information referred to Regulation 8(2), and does not so in writing or in another durable medium available and accessible to the consumer, within the period of *three months*, beginning with the day after the day on which the consumer receives the goods, the right to cancel the agreement will end after the day on which the consumer received the information, as contemplated in Regulation 8. If neither Regulations 8(2) nor 8(3) apply to an agreement, the cancellation period ends on the expiry of the period of three months and seven working days, beginning with the day after the day on which the consumer receives the goods.¹³⁴

3.4.2.2.3 Right to cancellation in the case of services

The cancellation period in the case of contracts for the supply of services is determined on the same basis as for the supply of goods, and is dealt with by Regulation 12. The only difference is that the cancellation period ends on the expiry of the period of seven working days, beginning with the day after the day on which *the contract was concluded*. The three-month period will also be applicable in instances where the supplier did not provide the consumer with the information, as contemplated in Regulation 8.

There is a list of exclusions to the right to cancel, where the consumer will not be able to exercise his right, listed in Regulation 13(a-f). This includes, for example, instances where the consumer has been informed that the contract may cancelled,

132 Regulation 11(1) of the *Consumer Protection (Distance Selling) Regulations 2000*.

133 Regulation 11(2) of the *Consumer Protection (Distance Selling) Regulations 2000*.

134 Regulation 11(4) of the *Consumer Protection (Distance Selling) Regulations 2000*.

and performance has begun, goods made to the specifications of the consumer (custom-made goods), audio or video recordings that have been unsealed, newspapers, periodical magazines or lottery services.

3.4.2.3 Performance of the contract

Regulation 19 deals with the performance of the contract. The general rule according to this regulation is that unless otherwise agreed, the supplier shall perform the contract within a maximum of 30 days, beginning with the day after the day that the consumer has sent the order to the supplier.¹³⁵ There can, actually, be certain technical and logistic problems that can make it difficult to execute this right. The order can, for example, get lost in the post, or there can be a heavy delay in the e-mail system, or the server sending the e-mail etc.¹³⁶ Regulation 19(2) regulates the instance where the goods or services ordered are not available within the period for performance referred to in Regulation 19(1). In such instances, the supplier should inform the consumer of the fact that it will be unable to perform the contract, and should reimburse any sums paid by or on behalf of the consumer. The money should be reimbursed within 30 days from the day following the expiration of the period for performance.¹³⁷ Regulation 19(5) states that the contract shall be treated as if it has never been made should the supplier fail to perform within the period for performance as contemplated in Regulation 19(1). The supplier may supply the consumer with goods or services, equivalent to the ordered goods, for the same price, provided that this possibility was provided for in the agreement, and that the consumer was informed that the supplier will bear the costs for returning the substitute goods.¹³⁸ It might, for some reasons, be difficult for the supplier to execute the order within the said 30 days, and it would, therefore, be wise to provide for alternative arrangements in the contract. The author is also of the opinion that the time used to determine the start of the 30-day period can be problematic in some cases, especially when one is dealing with electronic contracts with cross-border effects. It might, for example, be difficult to determine when exactly the consumer

135 Regulation 19(1) of the *Consumer Protection (Distance Selling) Regulations 2000*.

136 Howells and Weatherill *Consumer Protection Law* 379.

137 Regulation 19 (2-4) of the *Consumer Protection (Distance Selling) Regulations 2000*.

138 Regulation 19 (7) of the *Consumer Protection (Distance Selling) Regulations 2000*.

placed the order. This problem could easily be resolved by, for example, making it the time when the supplier *receives* the order and notifies the consumer thereof.

3.5 The Electronic Commerce (EC Directive) Regulations 2002

The *Electronic Commerce (EC Directive) Regulations 2002* (hereafter referred to as “the 2002 Regulations”) are the UK’s implementing regulations for the *Directive 2000/31/EC* (hereafter referred to as the “E-Directive”) of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, and in particular, electronic commerce, in the internal market, and govern the conduct of electronic commerce in the UK.¹³⁹ The 2002 Regulations are thus the way that the UK implements some parts of the e-directive. This is important to keep in mind, because directives and regulations have different stances in law. The UK did, in fact, not implement the whole E-Directive, based on the assumption that, according to them, a great majority of relevant statutory references are already capable of being fulfilled by electronic communications. An example of such a failure is the UK’s failure to fully implement Article 9 of the E-Directive, which will be discussed further on in this chapter.¹⁴⁰

3.5.1 Objective and scope

The purpose of the E-Directive is to clarify the rights and obligations of businesses and consumers that make use of e-commerce, and further, to promote the single market in Europe by ensuring the free movement of digital information across the EEA.¹⁴¹ The 2002 Regulations seek to liberalise the provision of online services, firstly by requiring UK-established service providers to comply with UK laws even when providing those services in another EEA member state, and secondly to prevent the UK from restricting the provision of information society services from another member state. The 2002 Regulations do not deal with jurisdiction of the courts (i.e. which court will have jurisdiction to hear a cross-border dispute.) The

139 See www.website-law.co.uk.

140 Murray *Contracting Electronically in the Shadow of the E-Commerce Directive* 25-26.

141 Beginners guide to the e-commerce regulations of 2002 2.

regulations permit UK enforcement authorities¹⁴² and, in some instances, courts to take proportionate measures against given services on a case-by-case basis in limited circumstances, for instance, if it is necessary to protect public policy or consumers.¹⁴³

3.5.2 *Rights and obligations provided by the 2002 Regulations*

3.5.2.1 Information to be provided

Regulation 6 (which is Article 5 of the E-Directive) provides us with a list of information to be provided by a person providing an information society service¹⁴⁴. Notwithstanding the information requirements established by instruments such as Directive 97/7/EC, this regulation (implementing the E-Directive) establishes further additional information obligations, which must not only be met by service providers¹⁴⁵ selling goods or providing services, but also by those service providers that simply supply recipients (including consumers)¹⁴⁶ with information. Regulation 9 demands service providers to provide recipients with, amongst other information, their name, geographic address, trade register number, VAT identification number (if appropriate) and e-mail addresses. One of the problems experienced with Regulation 9 is that it does not incorporate Article 9(1) of the E-Directive, which requires member states to ensure that their law allows contracts to be concluded by electronic means. The reason, therefore, as is mentioned above, is that the UK government believes that the great majority of relevant statutory references, for example, the requirements for writing or signatures, are already capable of being fulfilled by electronic communications, where the context in which they appear does

142 Examples of such authorities include Trading Standards Departments, the Office of Fair Trading and the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS).- *Beginners Guide to the E-commerce Regulations of 2002* 4.

143 *Beginners Guide to the E-commerce Regulations of 2002* 5.

144 Defined as “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing and storage of data, and at the individual request of a recipient of a service”- recital 17 of the Directive

145 In terms of Regulation 2, a “service provider” is defined as “any person providing an information society service”.

146 The definition “recipient” includes all types of usage of information society services, by those who provide information on open networks such as the Internet and by those who seek information on the Internet for private or professional reasons. It includes both natural persons and legal persons. *A Guide for Business to the EC Directive* 11.

not indicate the contrary.¹⁴⁷ This view of the UK government has been criticised by writers such as Murray, who argue that the failure to fully implement Article 9 means that many contracts of form, not least contracts under the *Consumer Credit Act 1974*, will remain without legal effectiveness in the UK, due to the fact that they have been concluded by electronic means.¹⁴⁸ In terms of Regulation 6(2), service providers must also indicate prices “clearly and unambiguously”, and must, in particular, indicate whether the prices include tax and delivery costs.

Regulation 9 (Article 10 of the E- Directive) sets out the information that must be provided, where contracts are concluded by electronic means, by the service provider. These information requirements include the different technical steps to follow in order to conclude the contract, whether or not the concluded contract will be filed by the service provider, whether it will be accessible, the technical means for identifying and correcting input errors prior to the final placing of the order and the languages offered for the conclusion of the contract. The service provider must also make the terms and conditions available to the recipient in such a manner that allows him or her to store and reproduce them.¹⁴⁹ Should the service provider fail to comply with this regulation, the recipient may seek an order from any court having jurisdiction in relation to the contract requiring that the service provider complies with the regulation.¹⁵⁰

The latter-mentioned pieces of information to be provided can give the consumer more legal certainty, especially when he or she will be able to conclude the agreement in their own language and be able to conclude a contract on a step-by-step basis, which will prevent input errors, etc. Regulation 9 (Article 10 of the EC Directive) is not a formation of contract provision at all but, rather, a consumer protection provision embedded into the contract formation rules.¹⁵¹ Unfortunately, the regulations do not say how the information should be provided in order to be “in a clear, comprehensible and unambiguous manner”. Article 10 of the EC Directive have been criticised by writers such as Murray, based on the fact that its provisions are not flexible enough to meet the demands of the variety of contractual relationships in e-commerce, and that it could add a degree of resistance to the

147 *A Guide for Business to the EC Directive 20.*

148 *Murray Contracting Electronically in the Shadow of the E-Commerce Directive 26.*

149 Regulation 9 (3) of the 2002 Regulations.

150 Regulation 14 of the 2002 Regulations.

151 *Murray Contracting Electronically in the Shadow of the E-Commerce Directive 4.*

“frictionless economy”. It is further said that Article 10 does not solve any practical problems, and that there are enough incentives in national general Contract Law for businesses to provide the information requested by the E-Directive. According to him, the implementation of Article 10 will only create confusion in the national laws of member states.¹⁵²

3.5.2.2 Commercial communications and unsolicited communications

Commercial communications, for example, advertisements and direct marketing are important for the well-being of any company. The electronic world has made it a lot easier and cheaper for companies to reach almost any person worldwide with their online adverts. The bad thing about this is that consumers might receive a lot of “unwanted” e-mails (also known as unsolicited communications or “SPAM”) and other forms of electronic messages that will cost them money to download. The regulations provided for some form of protection against such forms of communications by laying some obligations on the supplier.¹⁵³ The question can be asked: what is the importance of this regulation for electronic contracting? It might happen that consumers consent to the terms and conditions in such e-mails, and that before they know it, they could become a party to some form of agreement. An example of this can be e-mails advertising “free music downloads”. Consumers might find such e-mails attractive, and agree to the terms and the conditions of the website. They enter their contact details, etc, in order to “start downloading for free”, but later on, surprisingly, receive a bill for all their downloads. In terms of Regulation 7 (incorporating Article 6 of the E-Directive), the service provider must clearly identify commercial communications that are part of their information society service, and must, further, identify on whose behalf they are making the communication (if applicable). Regulation 8 (incorporating Article 7 of the E-Directive) obligates the service provider to ensure that any unsolicited commercial communications sent by them via electronic mail are *clearly and unambiguously* identifiable as soon as they are received.

152 Murray *Contracting Electronically in the Shadow of the E-Commerce Directive* 18.

153 Huffmann *Consumer Protection in E-commerce* 25.

3.5.2.3 The right to rescind the contract

In terms of Regulation 15, a person shall be entitled to rescind a contract in the event that he or she has entered into a contract to which the 2002 Regulations apply, and the service provider has failed to make available means of allowing the person to identify and correct input errors in compliance with Regulation 11(1)(b). In terms of Regulation 11(1)(b), a service provider must provide the recipient of the service with appropriate, effective and accessible technical means allowing the identification and correction of any input errors prior to placing the order. This will ensure that the consumer will have the opportunity to go through the contractual terms and to identify any errors that might have made in the contract. The regulation does not state the manner in which this technical means must be made available. The process regarding the correction of input errors should be dealt with in the terms and the conditions on the website. In this way, the recipient can know, from the start that input errors and mistakes can occur, and that they must make sure that the details and information they provide to the supplier are correct.

3.5.3 Liability of the service provider

Regulations 13 to 15 deal the consequences of failure to comply with Regulations 6 to 9 and 11. In terms of Regulation 13, the duties imposed by the latter regulations shall be enforceable against the service provider in an action for damages for breach of statutory duty. The recipient has the right to rescind the contract, as discussed above. Regulations 17 to 19 create a defence for intermediary service providers, and mention cases where the service provider will not be liable.

3.6 Jurisdiction regarding Electronic Contracts

3.6.1 The English common law

Prior to the Rome Convention,¹⁵⁴ parties had the freedom to choose the law that will apply to their contract. The only prerequisite was that the choice-of-law clause should not be *mala fide* or illegal. This prerequisite was established in the matter of *Vita Food Products Inc. v Unus Shipping Co.*¹⁵⁵, which was concerned with a commercial contract containing a choice-of-law clause that would make the English law applicable to a contract.

In terms of Article 3(1) of the Rome Convention, a contract shall be governed by the law chosen by the parties. The convention does not contain any provisions that would make a choice-of-law clause void. Article 3(3) provides that the choice does not prejudice the application of the mandatory rules of the country with which the contract has its only connection. A choice-of-law clause can, however, be held void in terms of the law of contract of the legal system, which governs the material validity of the clause. A court that wishes to apply the Rome Convention must first test the validity of the clause under the law of contract of the legal system chosen by the parties, and only, thereafter, move on to the convention's provisions. In the event that the chosen law is the English law, the court will further have to apply the *bona fide* test established in the *Vita Food* matter.¹⁵⁶

3.6.2 Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters

3.6.2.1 Background

The *Council Regulation (EC) no 44/2001* on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (also referred to as "Brussels I"), lays down rules governing the jurisdiction of courts and the

154 Convention 80/934/ECC on the law applicable to contractual obligations was opened for signature in Rome on 19 June 1980, and entered into force on 1 April 1991.

155 *Vita Food Products Inc. v Unus Shipping Co.*[1939] AC.

156 Schu *The Applicable Law to Consumer Contract Made over the Internet* 202-203.

enforcement of judgements in civil and commercial matters in EU countries. This regulation will be applicable in the UK due to the fact that it automatically forms a part of UK law by virtue of Section 2(1) of the *European Communities Act of 1972*.¹⁵⁷ The author will refer to the scope and application of the regulation.

3.6.2.2 Scope, application and general principles

Article 1 deal with the scope and application of the Council Regulations. In terms of Article 1(1), the regulations shall apply in civil and commercial matters, whatever the nature of the court or tribunal. Article 1(2)(a-d) mentions the instances where the regulations will not apply. These exclusions include matters regarding the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession.¹⁵⁸ The regulations will, furthermore, not be applicable to matters regarding bankruptcy,¹⁵⁹ social security¹⁶⁰ or arbitration.¹⁶¹

Article 2 states that persons domiciled in a member state shall be sued in the courts of that state, whatever their nationality. This rule is subject to the regulations themselves.¹⁶² The first step, when suing someone, is thus to determine the domicile of that person (in other words, the domicile of the defendant). In terms of Article 2(2), a person that is not a national of the member state in which he or she is domiciled shall be governed by the rules of jurisdiction that are applicable to a national of that state. The nationality of a person is thus irrelevant when determining jurisdiction, and one will only have to look at their domicile. The domicile of a person will be determined by referring to the domestic laws of the EU country where the court that might hear the matter is situated.¹⁶³ Apart from the basic principle of jurisdiction, Article 5 mentions certain instances where a defendant may be sued in the court of a EU country where he is not domiciled.¹⁶⁴

For the purposes of this study, it is important to mentioned Article 5(1)(a & b), that distinguishes between the jurisdiction of a member state court in the event of a

157 See paragraph 3.2 above.

158 Article 1 (2) (a) of the Council Regulations.

159 Art. 1 (2)(b) of the Council Regulations.

160 Art. 1 (2)(c) of the Council Regulations.

161 Art. 1 (2)(d) of the Council Regulations.

162 Art. 2(1) of the Council Regulations.

163 See www.europa.eu

164 Art. 5. of the Council Regulations

contract for the sale of goods on the one hand, and for the provision of services on the other. In the case of goods, the place in a member state where the goods have been or should have been delivered in terms of the contract, will be the place where the person could be sued. In the case for the provision of services, the place where the service was or should have been provided will be the place where the defendant can be sued.

We have canvassed the basic principle of jurisdiction in commercial matters as contemplated in Articles 1 and 2 and have seen that domicile is the main factor to be considered when determining a court's jurisdiction over a defendant. We also learned from Article 5 that there are certain circumstances, for example, contracts for the sale of goods or services, where so-called "special jurisdiction rules", as discussed above, will be applicable. Article 5 uses the words "in another member state", which means that the regulations will only be applicable between member states. These jurisdictional rules seem to be fairly sufficient and straightforward when one applies them between member states. The problem will come when one of the parties is situated outside the EU (for example the buyer is situated in the United States of America, and the seller in the UK). It is here that international private-law rules will play an important role in determining jurisdiction.

The Internet has changed the traditional view of consumer trade and some of the traditional connecting factors used in private international law to determine the applicable law can be fortuitous in the online environment. The private international law on consumer contracts is not very well developed and is unlikely to deal with the unique problems caused by online consumer trade.¹⁶⁵ One of the most prominent difficulties is to find solutions for the question of which law will be applicable in agreements concluded on the world-wide web. It will be necessary to look at the current consumer rules provided for in private international law, and to establish whether they can be transplanted into the Internet environment. The problem that one is facing is that there will be at least two different sets of private international rules applicable to a matter concerning a cross-border contract involving parties from different countries, as every country has its own set of private international law rules.¹⁶⁶ The courts of both countries will first determine whether they have

165 Schu *The Applicable Law to Consumer Contract Made over the Internet* 194.

166 Schu *The Applicable Law to Consumer Contract Made over the Internet* 197- 200.

jurisdiction, whereafter they will apply their own set of rules, which may lead to different results.¹⁶⁷

The problem with cross-border electronic contracts is that the contract could conclude virtually anywhere on the world, and that more than one legal system could be applicable to the contract.

3.6 End Remarks

I have seen that the laws of the European Union plays an important role in the UK, as the UK is a member of the EU, and that it has chosen to make EU laws part of its legislative framework by means of the *European Communities Act* of 1972.¹⁶⁸ We have seen that the *Data Protection Act* 1998, the *Consumer Protection (Distance Selling) Regulations 2000* (as amended by the *Consumer Protection (Distance Selling) (Amendment) Regulations 2005* and the *Electronic Commerce (EC Directive) Regulations of 2002* are the most relevant pieces of legislation in the UK concerned with the protection of businesses and consumer trading online.¹⁶⁹ After studying Principle 8 of its *Data Protection Act*, I have learned that information and the disclosing thereof plays a big role in the protection of consumers, and that consumers must be protected from any harm that can be caused due to the fact that their personal information is sometimes made available to unauthorised persons when taking part in online activities. This is done by following the four-step approach to determine whether the country to which the information is sent offers “sufficient and adequate” consumer protection. One of the biggest problems with Principle 8 is that it might be difficult to understand the laws of the country in question. When I looked at the *Consumer Protection (Distance Selling) Regulations* I saw the importance of the supplier’s obligation to provide the consumer with certain information in terms of Regulation 8. Regulation 8 distinguishes between pre-contractual disclosure of information, and the disclosure of information that has to be provided in writing at, or soon after, the conclusion of the contract.¹⁷⁰

167 Schu *The Applicable Law to Consumer Contract Made over the Internet* 196.

168 See par 3.2 above.

169 See par 3.1 above.

170 See par 3.2.1 above.

Regulations 10-18 deal with the right of the consumer to cancel the agreement and provides the procedure that a consumer must follow when a supplier fails to perform the contract within the given time period (These rights are similar to the “cooling-off” period provision in the ECTA.) Regulation 8 might also impose certain legal uncertainties, as it might be difficult to determine the start of the 30-day period within which the supplier must “perform” the contract. This also seems to be the problem under the ECTA, where it is uncertain what exactly the term “execute” means.¹⁷¹ The *Electronic Commerce (EC Directive) Regulations 2002* were enacted in the UK in order to regulate electronic commerce in that country. These regulations also emphasise the importance of information, but it not clear as to how exactly it must be provided in order to be “in a clear, comprehensible and ambiguous manner”.¹⁷² With regards to jurisdiction, I have seen that under the common law, the UK applies a *bona fide* test when determining the validity of choice-of-law clauses. The Council Regulation (EC) no 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters lays down helpful, clear rules that will be applicable when parties situated in EU member states are involved in e-commerce disputes. It is safe to say that these rules seem to be fairly sufficient and straightforward when one applies them between member states, but the problem will come when one of the parties is situated outside the EU. One will then have to refer to international private-law rules, and that will consequently go hand-in-hand with the problems associated with these due to the fact that more than one set of rules could be applicable to the contract.¹⁷³

The legislation in the UK dealing with consumer protection is far more specific than the South African legislation dealing with same. Most of the UK legislation (if not almost all), is based on legislation enacted by the EU, which automatically forms a part of UK law, or is made statute in terms of its *European Communities Act of 1972*. UK and South African consumers seem to experience the same problems. These problems include that legislation is sometimes vague, in the sense that important terms are not properly defined. Consumers might be subjected to the jurisdiction of foreign courts, and that could prevent them from fully benefiting from the rights that they have in terms of the various legislations.

171 See 2.4.5.3 above.

172 See par 4.3.1 above.

173 See paras 5.1 - 5.2.2 above.

4. Conclusion

I have seen that the non-regulation of the Internet and Internet-related transactions in South Africa resulted in legal uncertainty, not only for consumers, but also for suppliers engaging in e-commerce. The Constitution, as the supreme law of South Africa, acknowledges the importance of the right to privacy and other important rights relevant for consumer protection, by providing for them in the Bill of Rights. The oldest South African legislation dealing with the Internet, or more specifically, electronic communications, is the ECTA, which was only enacted in 2002. The legislation dealing with e-commerce is thus fairly new, and has some flaws and loopholes when one applies them to cross-border transactions. The fact that electronic communications are regulated by this one piece of legislation has its pros and cons: on the one hand, it will be easier for suppliers to see if their websites are in line with the ECTA. The UK has more than one piece of legislation that it must adhere to. On the other hand, this uniform approach has the disadvantage that some areas of e-commerce are insufficiently regulated.

The CPA was written in favour of the consumer, and suppliers are facing an onerous task to comply with all the consumer-protection provisions therein. Reviewing current business practices and replacing them with mechanisms that will be in line with the CPA will have huge cost implications for suppliers. These costs will include training staff members and more extensive liability insurance. The consumer, on the other hand, welcomes the CPA, on the consumer-protection front, as an attempt to eradicate many exploitive practices in the marketplace.¹⁷⁴ The CPA does not have provisions that deal exclusively with cross-border contract, and one will, therefore, have to see how the courts interpret provisions like Section 5(8). The ECTA gives us a more detailed framework than the CPA as it exclusively deals with electronic communications, which makes it easier to determine the applicability of an electronic agreement.

The purpose of this dissertation is to determine whether South African legislation addresses the problems associated with e-commerce effectively, and whether South

174 Jacobs et al 2010 *Potchefstroom Elec LJ* 398.

Africa might learn from the United Kingdom and the way that it deals with the protection of its consumers when contracting online. It is clear that there are, indeed, protection mechanisms in place for consumers engaging in e-commerce in South Africa. There are certain problems that one might experience when trying to determine the applicability of the various acts of international electronic agreement. As I walked through the legislative hallways of the UK, I have seen the importance of EU legislation when determining the legal position regarding consumer protection in the UK. Legislation dealing with consumer protection in the UK is relatively wide spread and various pieces of legislation dealing with consumer protection have evolved. The UK sometimes fails to implement regulations and directives in their entirety, which could have far-reaching consequences by creating a sense of legal uncertainty amongst consumers. But UK legislation is definitely moving in the right direction, mostly thanks to the development of EU legislation. The UK and EU also sit with the problem surrounding the harmonisation of jurisdiction rules, and that the need for a global jurisdictional framework in the near future will become more relevant. I have also seen that it might be difficult to apply private international law rules to a dispute in order to seek solutions for problems experienced with jurisdiction. This is mainly due to the international character of e-commerce worldwide.

It is not strange that the UK experiences the same problems as South Africa with regards to certain consumer protection provisions, as Chapter VII of the ECTA is largely based on the European Union's *Distance Selling Directive*.

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