

Short notes on

THE ROLE OF CONTRACT LAW IN DIGITISATION: ARE SMART CONTRACTS REGULATED IN SOUTH AFRICA?

Introduction

The growth of a global village, business enterprise and the need for instant gratification have allowed for the current generation of business makers to witness the evolution of agreements from letters of offer, to contracts, to online shopping and online banking. Regardless of its form, agreements and their relevant terms, remain the basic building blocks for doing business.

The use of smart contracts is but one of the many ways in which both the financial and legal sectors have capitalized on the global shift towards a more accessible and transparent future.

With due consideration to the above, attention must be drawn to the fact that despite hardship and challenge, those blessed with the gift of invention will always rise to the occasion.

The recent Covid-19 pandemic has been trying in many ways, but if nothing else; it has once again proven the strength of human resolve and tested our ability to adapt.

Businesses have been forced to leverage technology to reach efficiency and functionality, while individuals from all arenas of life are now interacting with new technologies far more frequently than ever before.

Be that as it may, it does not appear that legal regulation has been able to keep up with this current rate of advancement, especially within the South African context.

What are Smart Contracts?

In short, smart contracts involve little-to-no human intervention, and are created by algorithms which self-execute once certain conditions are met.¹ It is a more reliable, secure and highly cost-effective means of contracting that removes the potential human error associated with traditional contracting.²

There are however inadequacies of smart contracting which undermine their use. The uncontrollable and unregulatable nature as a result of removing human intervention; the rigidity of code: removing flexibility and discretion, and the immutability of contract stemming from decentralization are few of these inadequacies.³

¹ S Williams-Elegbe *Public Procurement, Corruption and Blockchain Technology: A Preliminary (Legal) Enquiry* (2018) unpublished paper presented as an Inaugural Lecture at Stellenbosch University, 25-10-2018 (available at https://www.sun.ac.za/english/Documents/newsclips/InauguralLecture_ProfSopeWilliamsElegbe_23Oct2018.pdf).

² C Herweijer, D Waughray & S Warren (eds) *The Fourth Industrial Revolution for the Earth Series: Building Block(chains) for a Better Planet* (e-book) (2018) 28
<http://www3.weforum.org/docs/WEF_Building-Blockchains.pdf> (accessed 10-03-2020).

³ Herweijer, Waughray & Warren *The Fourth Industrial Revolution for the Earth Series* 16.

Through legal regulation and provision, these shortcomings are mitigated, allowing for a more transparent means of governance, while enhancing legitimacy and ensuring accessibility. Be that as it may, the question arises whether such regulation exists in South Africa.

Legal and Regulatory Framework

The Protection of Private Information Act 4 of 2013 (“POPI”) -provides limited regulation in respect of regulating how personal information inputted onto online platforms are to be handles.

The Consumer Protection Act 68 of 2008 (“CPA”) -could regulate smart contracts pertaining to online shopping. The Consumer Goods and Services Ombud states that sections of the CPA do not apply to e-commerce transactions.⁴ For regulation of smart contracts for internet banking and online shopping, users should turn to the Electronic **Communications and Transactions Act 25 of 2002 (“ECTA”)**.

However, smart contracts are not specifically mentioned in ECTA and as such, a broad interpretation of Section 20 and 25 could be read to regulate smart contracts.

Section 20 governs automated transactions. Section 20(a) states that *“In an automated transaction; an agreement may be formed where all parties to a transaction or either one of them used an electronic agent”*. Section 1 defines an ‘electronic agent’ as *“a computer program or an electronic or other automated means used independently to initiate an action or respond to data messages...”*.

The reference to independence complements the interpretation that an electronic agent could be interpreted to include a smart contract, due to the element of autonomy and self-execution. Section 1 again refers to the notion of autonomy in its definition of an ‘automated transaction’, when it emphasises that the data message used in the electronic transaction is not to be reviewed by a natural person.

Section 25(c) reads: *“An information system programmed by or on behalf of the originator to operate automatically...”*. Section 1 defines ‘data message’ as *“any data generated, sent, received or stored by electronic means...”*, while ‘information system’ is defined as *“a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet.”* With this in mind, the code or algorithm used in the operation of smart contracts could be broadly interpreted to be a data message, while a ‘smart contract’ could be interpreted as an information system.

This wide interpretation could suffice to regulate smart contracts, but it could also result in stretching the provisions of ECTA perhaps a bit too far. While separate elements of the CPA, POPI and ECTA are the only current available means for regulation of smart contracts, there is still a clear need for further regulation and harmonization of the law due to the inadequate regulations provided.

⁴ Consumer Goods and Services Ombud, *“Advisory Note 10: E Commerce”*, www.cgso.org.za -accessed on 23 April 2020.

Conclusion

We are facing an ever-evolving world that is leveraging online platforms and services to become more technologically connected. Protection and legal regulation is needed to assist with accessibility and to accommodate these changes. We are encouraged to make use of the regulations available to us, but the demand for further regulation is growing amidst the changing global technological climate.

Contact an attorney at SchoemanLaw Inc for your online Consumer and Contractual needs.

