

ELECTRONIC TRANSACTIONS – ARE YOU PROTECTED?

Introduction

Many businesspersons are uncertain when it comes to transactions that occur on the internet or electronically. This is as a result of the increasingly complex manner in which the transactions are regulated, such as 'offer and acceptance', 'automated contracts', 'the time and place of conclusion of contracts', and the 'incorporation of standard terms and conditions by reference'.

Automated contracts and agency

The Common Law and the Electronic Communications Transactions Act No 25 of 2002 (hereafter referred to as "the ECT Act") provide for concluding binding contracts when an electronic agent is used. The reliance theory approach is contained in both Common Law and the ECT Act, which deems that liability may only be escaped where a material mistake is reasonable, and which sets out the requirements that must be met in order for an electronic transaction to be deemed void.

An automated transaction / contract is defined as a transaction which is '*conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment*'. Simply put, this means that either the entire transaction or a part thereof takes place electronically - such as by the click of a button to purchase an item. An electronic agent is defined as an automated means '*to initiate an action or respond to data messages*'.

Thus, a company may utilize a computer programme that allows it to act automatically when entering into an agreement, for example, when an online customer purchases an item electronically and the programme informs the customer of a successful purchase. The computer programme may also automatically process payment and thus the amount paid for the item is transferred into the company's bank account. However, the binding effect of an automated transaction is subject to a natural person having the opportunity to actually review the terms of the agreement prior to the conclusion thereof.

The Time and Place of conclusion of contracts

In terms of section 22(2) of the ECT Act, an agreement is concluded between parties at the time and place where the acceptance of the offer was received by the offeror. In the instance where the offeror has not determined the time and place, the information theory is used for telephonic communication whilst the reception theory is used for indirect communications such as via email i.e. electronic communications. Thus, if the offeror concluded a contract via telephonic communication, the contract is deemed to be concluded where the offeror is located as well as when he/she came to know of the offer/sale being accepted/purchased. If it is via indirect communication, then it would still be where the offeror is located but at the time when it was actually received in the mailbox as opposed to the time it was sent.

Section 23 of the ECT Act deals with when and where the contract came into existence. Where a data message has been used to conclude the contract between persons within the same information system, it is deemed to be sent at the time that it is retrieved by the recipient. Where the parties do not operate within the same information system, it is deemed to have been sent at the time that it enters an information system outside the control of the sender.

Jafta v Ezemvelo KZN Wildlife 2008 10 BLLR 954 (LC) (Jafta case)

In this case, the Court used Comparative Foreign Law in addition to the ECT Act in determining disputes arising from parties that do not operate within the same information system i.e. Gmail and a private company server.

The Court held that the time the data message is received by the recipient is deemed to be when it enters the recipients designated information system i.e. the private company server in the case of Jaftha, and when it is capable of being received by the recipient. Furthermore, the place that the data message is sent and received is deemed to be from the parties' respective usual place of business or residence. These provisions therefore provide clarity in terms of the time and place of contracts being concluded.

Offer and Acceptance

This is one of the cornerstones of a valid contract. The ECT Act deals with the formation and validity of agreements stating that *'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*

offeror'. This means that offer and acceptance is important re the validity of electronic contracts, however it is still difficult to determine when and where it took place as a result of the parties not needing to be in the immediate presence of one another.

It is important to determine which type of communication was used to conclude the contract. Telephone communication is classified as direct communication for the purposes of the ECT Act. However, it does not fall within the scope of the ECT Act as it is not included in the definition of data messages. We therefore look to Common Law for direct communications not dealt with in the ECT Act, in particular, the information theory.

Indirect Communications make use of the dispatch theory. This determines an offer taking place when the offeree has taken subjective notice thereof, and the acceptance taking place at the time and place where the acceptance was dispatched from. The ECT Act follows the reception theory in terms of indirect communications. Thus electronic communications in this regard is seen to be at the risk of the sender as the contract is only concluded once the acceptance is actually received by the offeror who need not provide subjective notice of the receipt of the acceptance. As a result of the indirect nature of communications such as emails, it is significantly difficult to determine when acceptance of an offer is received by the other party.

Incorporation of Standard terms and conditions by reference

The Common Law is states that it must have come to the attention of all parties to the contract prior to the conclusion of the said contract. The general rule is thus that, when concluding contractual agreements, the documents in each instance must contain reference to the applicable standard terms and conditions. As a result of the size of documents, standard terms and conditions are not always readily available and may therefore be done by means of reference.

The ECT Act has thus incorporated the Common Law position. As electronic transactions are paperless, websites make use of a technique that is known as click-wrap to make the standard terms and conditions readily available for online customers. This technique refers to the use of hyperlinks or buttons referring to the standard terms and conditions, as well as a button to click that you have accepted these conditions. This technique is compliant with the law and regulates the conclusion of contracts. 1. Gabriella Keeble

Conclusion

Keeping up with the digitalisation of the industry, consumers should be more certain that they are covered and comfortable to contract electronically. SchoemanLaw Inc is doing its part and has created Contracts4Biz where you can download contracts at the click of a button.

Need a contract drawn up within minutes? Try Contracts4Biz. Alternatively, let us take the lead and ensure your rights are protected in your contracts. Call SchoemanLaw today!

