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## **Electronic Contracts in South Africa - A Comparative Analysis** <sup>1</sup>

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## **Abstract**

The paper is a broad overview of the South African law on Electronic Contracts (e-contracts). It has a brief introduction to the South African Lex Informatica which covers historical evolution of Internet law on an international platform and how it has impacted on South African Law on negotiation of commercial contracts. Section 2 deals with the South African Common law and how it applied to electronic transaction prior to the enactment of the Electronic Communication Transactions Act (ECT), Act 25 2002 . Section 3 then deals with statutory regime as it relates to writing and signature requirements, time and place where contract enters into effect as well as the legal recognition of Shrink Wrap, Click-Wrap and Web Wrap Agreements as regulated by the ECT. Section 4 discusses cross-border contracts, issues of jurisdiction as well as the legal principle of ‘conflict of laws’ and what role it plays in electronic cross boarder transactions.

## **Keywords**

e-contracts, conflict of laws, South African law on electronic contracts, Electronic Communication Transaction Act 25, 2005

## **1. Introduction**

### **1.1. South African Lex Informatica**

The Lex Informatica or as otherwise referred to as Cyber law is not a traditional source of law but rather a new hybrid-law encompassing various pieces of old and new telecommunications legislation as well as the Common law. One must also note the supremacy of the Constitution. The Constitution of the Republic of South Africa as entrenched in the supremacy clause in section 2 states that, The Constitution is the Supreme Law of the Republic. Law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled (De Waal & Currie, 1998, p 7). It furthermore states that international law must be considered and foreign law may be considered in the interpretation of South African Law.

The general principles of the South African Common Law are of importance and are binding – specifically the Law of contract. Since the South African Lex Informatica has emerged as a new discipline in the legal field, one must take cognizance of the fact that interesting and groundbreaking litigation has taken place in South Africa and that a body of South African case law has also been developed (Snail, 2007, p 40). That being said the said body of jurisprudence is not yet as extensive as the legal process requires and therefore one still refers to foreign law and case law studies for guidance, as it is most persuasive.

The formation of electronic contracts in this new age of technology and era of globalization, initially caused a world-wide legal uncertainty as to how and whether electronic contracts concluded by electronic means can be recognized as valid and enforceable agreements. In response to this legal gap the United Nations Commission on International Trade Law (UNCITRAL) and governments of various countries called for the drafting of internationally recognized uniform electronic transactions legislation. In 1985 UNCITRAL drafted the Recommendation on the Legal Value of Computer Records which amongst other principles advices that :

‘Considering ..... that there is no need for a unification of the rules of evidence regarding the use of computer record in international trade, in view of the experience showing that substantial differences in the rules of evidence as they apply to the paper-based system of documentation have caused so far noticeable harm to the development of international trade ....’

1. *Recommends* to Governments:

(a) to review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission, to be assured that the rules are consistent with developments in technology, and to provide appropriate means for a Court to evaluate the credibility of the data contained in those records;

(b) to review legal requirements that certain trade transactions or trade related documents be in writing whether the written form is a condition to the enforceability or to the validity of the transaction or document, with a view to permitting, where appropriate, the use of electronic authentication;

(c) to review legal requirements of handwritten signature or other paper-based method of authentication on trade related documents with view to permitting, where appropriate, the use of electronic means authentication;’

In 1996, UNICITRAL drafted the UNICITRAL Model Law on E-Commerce in order to assist countries in drafting and enacting laws to enable electronic contracting. The UNICITRAL Model Law on E-Commerce extends the scope of the legal definitions of terms like ‘writing’, ‘signature’ and ‘originals’ to cover electronic records. This was followed by the UNICITRAL Model Law on Electronic Signatures (which was created to deal with various inconsistencies in the creation and acceptance of electronic signatures). In 2005 the same body drafted The United Nation Convention on the use of Electronic Communications in International Contracts which sought to harmonize the provisions of the two model law to form an international law instrument that could give guidance on electronic cross border contracts. One must note the interesting fact that while both the UNICITRAL Model Law on E-Commerce and the UNICITRAL Model Law on Electronic Signatures are not legally binding upon South Africa, they were influential in the drafting and formed the basis for the ECT. Scholars noted the remarkable consistencies with what is proposed in the UNICITRAL Convention of 2005. It has served both to educate lawmakers about the legal ramifications of electronic transactions and as a framework for any country wishing to draft electronic transaction legislation.

The Electronic Transactions and Communications Act of 2002 (ECTA), generally governs all data communication, online transactions on web-based shopping and cell phone Value Added Services (VAS). Other applicable legislation includes the Interception and Monitoring Act 127 of 1992, Regulation of Interception of Communications and Provisions of Communication Related Act (ICPCRA) 70 of 2002, the National Credit Act 34 of 2005 (which has now repealed the old Credit Agreements Act, Act 75 of 1980), Business Names Act of 1960, the draft National Consumer Bill, and the Companies Act. 61 of 1973

South African courts are not bound to the provisions of UNICITRAL Model Laws by virtue of the Constitution. Section 233 of the Constitution however gives a clear instruction to interpret legislation in a manner that is consistent with international law. It is also interesting to note that the constitution further provides for consideration of foreign law, which would include foreign case lawS (s 39).

## **1.2 Negotiating Different Types of E-contracts**

There are four different ways of e-contracting: The first and most important method of contracting on the Internet, is similar to a negotiation of one or more infrequent transactions by exchange of letters and documents – this is known as e-mail contract. In this method the parties can exchange e-mails and even attachments setting out the terms and conditions of their contract in detail. This is quite similar to offer and acceptance between the parties (Lotz & du Plessis, 2005, p 4).

The second method is known as contracting on the World Wide Web (www), this way is similar to a mail order. In this method, one party maintains the website at which he advertises his goods and services. The prospective buyer access the website and then completes an electronic form, whereby he orders goods or services from the seller (Pistorius, 1999, p 286).

The third manner is where the parties trade under the framework of an Electronic Data Interchange Agreement (EDI). EDI can be defined as ‘computer-to-computer transmission of data in a standardized format’. EDI enables businesses to exchange documents over either the internet or their private networks (Shim, et al., 2000, p 141 ). Private networks EDI is used by large businesses when buying goods but smaller businesses and individuals prefer to use EDI as it reduces costs (Nagalingam, 2000, p 6.) This is the primary electronic commerce medium; it is only applicable and valid between the contracting businesses that have assented to it.

Natural persons whilst chatting online in a virtual chat-room can make legally relevant agreements that are valid and binding. This is the final and the fourth method of contracting electronically (Loetz & Plesses, 2004, p 4 ).

## **1.3 Overview of ECT Act 2002**

The use of electronic data messages both in the business and personal environment has been on the steady increase over the years through the invention and evolution of various data communication devices. Electronic commerce is no longer a predication; it is an economically significant reality. The Internet is the world’s fastest growing commercial marketplace (Loetz & Plesses, 2004, p 1 ).

The question may be raised whether an E-mail, which is a form of data message, could be sufficient to signify the intent to contractually bound? The ECTA has now entrenched the position that digitally negotiated and electronically signed contracts are fully valid and enforceable in its Sections 12 and 13. The contractual condition of reducing a contract to written form and signing by the parties concerned is now also met if the parties do so by way of an electronic data message in terms of Section 11(1) of the ECTA . Rules regarding the time and place where the contract is concluded are now also provided by Section 22(2) of the ECTA.

Despite the recognition of different forms of expressing one’s intent to be contractually bound by electronic means, uncertainty still exists as to whether a click on an icon on the website of a vendor would constitute a legally recognizable act signifying one’s intent to be contractually bound as such where terms were unilaterally imposed (Pistorius, 1999, p 293 ). The absence of face-to-face negotiations in a number of significant electronic transactions

including click-wrap and web agreement for sale/licensing of software and other goods and website terms and conditions (the electronic agreement between website owners and users of a website necessarily means the terms of the transaction are unilaterally imposed by the owner of the website in question and will not be signed nor negotiated with the other party (Werkmans Inc., 2005 <<http://www.werksman.co.za>>). It may be argued that clicking 'I agree' or 'Buy' etc amounts to 'signing' or at least assent to the terms. Similarly, the absence of regulatory provisions on jurisdiction in the case of internationally concluded contracts makes the legal problem surrounding regulation and jurisdiction a vexed legal issue (Werkmans Inc., 2005 <<http://www.werksman.co.za>>).

## **2. The Validity and Enforceability of Electronic Contracts**

### **2.1 Overview of Common Law Position**

A contract has been defined as, 'an agreement (arising from either true or quasi-mutual assent) which is, or intended to be enforceable at law' (Nagel, 2000, p 66 ). The South African Law of Contract requires that the following elements of a contract must be present to be a legally binding agreement between any parties: capacity to act, (Ibid). The law presumes that every living person and/or juristic person has contractual capacity. This may however be limited or excluded due to age. Only person over 18 have full contractual capacity. Minors have to be assisted by one or both parents and/or guardian. In the case of an infant<sup>2</sup> and intoxicated person capacity to act is fully excluded. Consensus requires in order for a contract to be concluded that an offer created by one party must be unequivocally accepted by another resulting in the creation of consensus amongst the parties. The wills (intentions) of the parties and their intentions with the contract is the basis on which consensus is reached (*Saambou-Nasionale bouvereining v. Friedman* 1979 (3) SA 978 (A)). Lawfulness (Snail, 2007, p 40) and physical possibility as well as formalities may be included but are not mandatory (Ibid).

Accordingly, if any electronic communication between two or more parties (e.g. E-Mail or SMS) can be interpreted as having complied with the formal constitutive requirements of a contract, as stated above, it could be inferred without any reference to the ECT that a valid contract has been concluded. (Snail, 2007, p 40). If any of the said requirements is not present or doubt exists as to the genuineness thereof it may be declared void or voidable by a court of law.

### **2.2 Common Law Position on Electronic Contracts (Prior to Enactment of ECTA)**

There are no specific reported cases that specifically deal with the formation of a contract via the interchange of electronic mail. However, the case of *Council for Scientific and Industrial Research v. Fijen*<sup>3</sup> gave an indication of how our courts view this relatively new technology by stating that an E-mail sent to a superior indicating ones intent to resign constituted a valid letter of resignation in the context of a written and signed document.

The Interpretation Act 33 of 1957 states that 'In every law expression relating to writing shall, unless the contrary intention appears, be construed as including also references to

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<sup>2</sup> South African term derived from Latin for Infant (1-6 years)

<sup>3</sup> 1996 (2) S.A (A)

typewriting, lithography, photography and all other modes of representing or reproducing words in visible form.’ It goes further to state that a signature amongst other description thereof could be by ‘...a mark...’. It is submitted that this would also include an electronic mark and therefore an electronic signature as well.

It could be deduced from the wordings ‘all other modes of representing or reproducing words in visible form’ would also include the reproduction of E-Mail be it in reduced material form (printed) or electronically visible on an electronic display device as there is no *numerus clausus* (closed number of possibilities) on the various methods anticipated by this particular wordings of the provision. Our courts, have in the past, followed a similar approach to that suggested by the Interpretation Act in the case of agreements that were supposed to be reduced in writing where the parties used the antiquated method of sending a telegram. In the case of *Balzan v. O’Hara and Others*<sup>4</sup>, Coleman J. held that a telegram could constitute written and signed authority within the meaning of written and signed, as contemplated in the Land Alienation Act, Act 68 of 1957. The learned judge went on to say that,

‘... the fact that the telegram was not personally written nor signed by the sender, was not sufficient to disqualify the document as being non-compliant with the provision. The sender had obviously written the telegram in his own words by hand and signed the form which authorized the post office to send the telegram himself.’

Therefore, the court could only come to the logical conclusion that compliance had been rendered sufficiently. More than a century back the New Hampshire’s highest court in *Howley v. Whipple*<sup>5</sup> held that an offer and subsequent acceptance by telegraph satisfied the Statue of Frauds that places minimum requirements for written agreements in the USA. The majority of the court stated that,

‘It makes no difference whether the operator writes the offer or the acceptance ... with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long. In either case, the thought is communicated to the paper by the use of the finger resting upon the pen; nor does it make any difference that in one case common red ink is used, while in the other case a more subtle fluid, known as electricity, performs the same office.’

On a purposive interpretation of the Interpretation Act, electronic data may be brought within the definition of writing in line with the reasoning provided in the *Howley* decision as data messages are transmitted over long telephone lines and satellite links where the user enters a data message by pressing his fingers on the keys of the keyboard. Furthermore such messages can be reduced to tangible form by means of a compact disc, floppy disc or other reliable forms such as USB memory sticks and they can be viewed on video display or printout (Edelstein, 1996, p 16). However a more strict and technical interpretation of electronic data may fall outside the scope of that Act.

### 2.3 The Valid Offer

The first question that one needs to ask when examining the validity of an electronic contract is whether the contents of a website can constitute a valid offer (Pistorius, 1999, p 286). The offer must embody or contain sufficient information to enable the person to whom it is addressed to form a clear idea of exactly what the offeror has in mind (*Humphreys v. Casells*

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<sup>4</sup> 1964 (3) SA (T)

<sup>5</sup> 48 N.H.487, 488 (1869)

1923 TPD 280; Nagel, 2000, p 18 ). In other words the offer must therefore set out the exact essential and material terms of the proposed agreement in order to be unequivocally acceptable by the offeree. Our courts have been extremely reluctant in declaring agreements that are either vague or incomplete as a valid enforceable agreements (*Kantor v. Kantor* 1962 (3) SA 207; *Murray v. Murray* 1959 (3) SA 84 (W)).

The offer must be a firm offer; a tentative statement with possible agreement in mind is not sufficient (*Efroiken v. Simon* 1927 CPD 367) . It should also be noted that an advertisement does not generally constitute an offer; it merely amounts to an invitation to do business (*Crawley v. Rex* 1909 TS 1105). Note however that an advertisement may depending on its wording qualify as an offer (*Carlill v. Carbolic Smoke Ball Company* [1893] 1 QB 256 (CA); Pistorius, 1999, p 286). This might be a grey area especially when dealing with website based advertisements and advertisements by electronic mail. In *Bloom v. American Swiss*<sup>6</sup>, the court stated and made it clear that an offeree can only accept an offer that he had knowledge of. A person cannot accept an offer made by an offeror if the said person does not understand the terms and/or the circumstances of the offer as this would lack the necessary *animus contrahendi* (intention to be contractually bound).

Offers once received by the offeree can only lapse in the following circumstances: Expiry or lapse of prescribed time, in the case of a contract where time is of essence, after a reasonable time, upon the death of either the parties (*Laws v. Rutherford* 1924 AD 261 – 262 ), upon being rejected and upon revocation.

## 2.4 The Acceptance

A binding contract is created when there is an acceptance of an offer (Pistorius, 1999, p 286). The acceptance must be manifested and indicated by some form of unequivocal act from which the inference of acceptance can logically be drawn (*Reid Bros v. Fischer Bearings Ltd* 1943 AD 232 at p 241; *Collen v. Rietfontein Engineering Works* 1948 (1) S 413 (A) at pp 429-430 ). It stands to reason that consent is possible only where the whole offer and nothing more or less is accepted. When the acceptance is coupled with reservation it is no acceptance but is in fact a counter-offer which the offeror may accept (Van Aswegen, 1999, p 27).

In a nutshell the requirements for valid acceptance are: the acceptance must be unconditional/unequivocal; the offer must be accepted by the person to whom it was addressed; acceptance must be in response to offer and acceptance must comply with formalities (*Brand v. Spies* 1960 (4) SA 14, where a contract of sale of land that failed to satisfy statutory requirements in terms of sec 2 (1) of Land Alienation Act was deemed invalid).

## 2.5 Time and Place of where the Contract Enters into Effect

Normally no difficulties arise when establishing the time and place that acceptance took place and the contract became effective as the offeree usually makes his acceptance known in the presence of the offeror (Snail, 2003, p 17). In accordance with the information theory, the expression of acceptance and its communication to the offeror occur simultaneously and the

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<sup>6</sup> 1915 AD 100

agreement is accordingly concluded at time and place. According to the information theory (which applies to all contracts concluded in the presence of both parties) contractual duties begin when both parties consciously agree upon the terms of contract (Van Aswegen, 1999, p 28).

Although the information theory rests on the principle that the primary basis for contractual liability is actual and conscious agreement between the contractants, there are exceptions. The general rule though is that an agreement is formed only when the acceptance is communicated to the offeror (*Rex v. Nel* 1921 AD 339). The implication of this legal rule is that a legal bond will only be created when the offeror is informed of the acceptance in order for there to be *consensus ad idem*.

Difficulties do however arise when one is confronted with the case where there is an interval between the expression of the acceptance and its communication to the offeror as in the case of contracts concluded by post or other telecommunication method. Under these circumstances, the question always arises when and where the contract was actually concluded.

The court decided in the case of *Cape Explosives Works v. Lever Brothers SA (Ltd.)*<sup>7</sup>, to finally bring certainty to the matter and stated in its judgment that, ‘agreements entered into by letter arise at the place and at the moment when the letter of acceptance is mailed’. One must note that this will only apply in instances where the offer was also mailed, it will not apply where the offer was effected in another form but by post (*Smeiman v. Volkerz* 1954 (4) SA 170 (C)). This view was confirmed in the case of *Entores Ltd v. Miles for East Corpn*<sup>8</sup> where Jannet J held that a telephone conversation over the phone would be the same as 2 (two) people communicating *inter partes*<sup>9</sup> and therefore we apply the information theory. Accordingly, the contract is concluded at time and place where offeror is made aware of offeree’s acceptance. Therefore the ‘postal rule’ applies where an offer was also ‘mailed’ or where the parties express or contemplate or where it is reasonable that that the acceptance should be by post. This position was also confirmed in the decision of *Brinkibon Ltd v. Stahag Stahl und Stahlwarenhandels-gesellschaft*<sup>10</sup> where the court had to decide on the time and place of contract conclusion where a fax was sent from London to Vienna. The court held that the general rule on instantaneous communication was applicable and that the acceptance must come to the attention of the offeror or at least constructively come to his attention. The contract was formed where it was received namely, Vienna. (Pistorius, 2006, p 15)

## 2.6 Jurisdiction in Electronic Trans-border Contracts

The place a contract is formed is mainly of interest in international transaction where the parties have not agreed to a specific jurisdiction or where there is no applicable international convention that determines jurisdiction (Buys, 2000, p 164). Sibanda states that traditional common law and statutory *ratione jurisdictionis* or jurisdictional links may be applied to e-disputes (Sibanda, 2008, p 5 ). He goes on and states that worthy of consideration is the *rei sitae* principle (place where the property is situated if such property is the subject matter of

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<sup>7</sup> 1921 CPD 244

<sup>8</sup> [1955] 2 ALL ER at 479G

<sup>9</sup> The court held that a telex was an instantaneous method of communication

<sup>10</sup> GMBH 1983 2 AC 34

the suit); *ratione domicilii* (the place of domicile of the defendant); locality or residence of the defendant; and *ratione rei gestae* (the cause of action) (Theophilopoulos, et al., 2007, pp 17-18 cited in *ibid*). The generally accepted rule in South African law is that a contract must be determined according to the *lex loci contractus* of the last legally relevant act. (*Keregeulen Sealing & Whaling Co Ltd v Commissioner of Inland Revenue* 1939 D 487; Davel, 2000, p 29). This means that the contract is concluded at the place where the last act necessary to constitute the agreement was performed. Other jurisdictions such as the US have developed other tests to e-disputes that will be discussed further in section 4.

### **3. Statutory Regime: The Electronic Communications and Transactions Act**

#### **3.1 Legal Recognition of Data Messages**

After many years of legal uncertainty, on 2nd August 2002, the South African parliament assented to and brought into force the Electronic Communications and Transactions Act (ECT) Act 25 of 2002. Prior to the Electronic Communications and Transactions Act (ECTA), South Africa had not enacted any exclusive Internet legislation that comprehensively provided legal definitions of the terms 'writing', 'signature', and 'originals' in their application to electronic transacting (Stavrou, 2002, p 54).

The preamble of the ECTA clearly shows that this is a piece of pioneering legislation. It has managed to fill a lacuna that has been building up for many years due to new technological advances that the legislature had not catered for. The preamble of the ECTA reads as follows:

'To provide for the facilitation and regulation of electronic communications and transactions; to provide for the development of a national e-strategy for the republic; to promote universal access to electronic communications and transaction and the use of electronic transactions by SMMEs; to provide for human resource development in electronic transactions; to prevent abuse of information systems; to encourage the use of e-government services; and to provide for matters connected herewith.'

As one can note from the preamble, the ECTA has managed to cover extensive areas of the South African Internet law and hopefully bring much needed certainty in this specific area of law that has lacked any concrete authority.

Prior to the enactment of the ECTA, there was legal uncertainty whether a data message is a valid form of contract negotiation or performance of other juristic acts that could have legal obligations on the person using it. Prior to the enactment of ECTA, the South African Court in *Council for Scientific and Industrial Research v. Fijen*<sup>11</sup> expressed the view that this new type of means of negotiation, communication and correspondence was a valid means of expressing intent in an action for repudiation of an employment contract in terms of the Labour relations Act 28 of 1956. The Court further stated that the mode of repudiation by way of e-mail was regarded as a coherent form of communication of which a printout could form sufficient basis for the plaintiff's action. The recognition of data messages for the purposes of conducting legally relevant acts has now been entrenched into our law by virtue of section 11 of the ECTA (Snail, 2007, p 43). It similarly follows Article 4 and 11 of the United Nations Commission on International Trade Model Law on Electronic Commerce

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<sup>11</sup> 1996 (2) S.A (A)

(UNICITRAL Model Law on E-Commerce)<sup>12</sup> as well as Article 8 (1) of United Nations Convention on the use of Electronic Communications in International Contracts<sup>13</sup>.

Section 11 of the ECTA reads as follows:

- 1) Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.
- 2) Information is not without legal force and effect merely on the grounds that it is, not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in such data message.
- 3) Information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is:
  - a) referred to in a way which a reasonable person would have noticed the reference thereto and incorporation thereof and;
  - b) accessible in a form in which it may be read

If one closely scrutinize section 11(1) can immediately note that data messages are now a legally recognized form of conducting legally relevant acts and cannot be invalid due solely to their immaterial nature. Section 11(2) and Section 11(3) of the ECTA allows for incorporation by reference of terms that are not contained in the data message. An example of this, would be for instance in the case where an originator of an E-mail attaches or links an E-mail disclaimer (Snail, 2007, p 43; <[www.Sars.co.za](http://www.Sars.co.za)> for an example of this type of term).

Section 4 (2) (a) & (b) of the ECTA states that:

‘this Act must not be construed as requiring any person to generate, communicate, produce, process, send, receive, record, retain, store or display any information, document or signature by or in electronic form or prohibiting a person from establishing requirements in respect of the manner in which that person will accept data messages’.

This is clearly re-emphasized in Article 8 (2) of United Nations Convention on the use of Electronic Communications in International Contracts<sup>14</sup> which indicates that the use of electronic data messages is not mandatory but may be done by choice or tacit consent based on the conduct of the contracting parties.

### 3.2 Writing and Signature Requirements

Where data messages are used to communicate messages or documentation, the question arises as to whether such data messages have legal validity equal to messages written on paper. Is the employer effectively bound by the correspondences that are entered into by his bona fide employees? What is the status of electronic writing and electronic signatures (E.g.

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<sup>12</sup> Article 4(1) & (2) read together with Article 11(1) which reads ‘As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided ... the provisions of may be varied by agreement ... it does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.’ and ‘In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.’

<sup>13</sup> (1) A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.

<sup>14</sup> Nothing in this Convention requires a party to use or accept electronic communications, but a party’s agreement to do so may be inferred from the party’s conduct

E-mail, Blackberry etc.)? Section 12 of the ECTA recognizes data as the functional equivalent of writing or evidence in writing (Snail, 2007, p 44) and also similarly follows Article 6<sup>15</sup> of the UNCITRAL Model Law on E-Commerce as well as Article 9 (1) & (2)<sup>16</sup> of United Nations Convention on the use of Electronic Communications in International Contracts by guaranteeing data messages same legal validity equal to messages written on paper.

Section 12 of the ECTA reads as follows:

A requirement under law that a document or information be in writing is met if the document or information is, (a) in the form of a data message; and (b) accessible in a manner usable for subsequent reference.

It is noteworthy to comment that the United Nations Convention on the use of Electronic Communications in International Contracts not only reechoes the wording of the ECTA and the UNCITRAL Model Law on e-commerce but also adds an additional dimension by stating that no one is necessarily obliged to conclude an agreement or produce evidence in electronic form. The intention of the legislature is clear from the simple wording of the above provision. Furthermore, section 22 (1) of the ECTA guarantees the validity of agreements concluded either partly or wholly by a data message. In a nutshell the new ECTA has entrenched in our law the recognition of data messages a functional equivalent to paper (Snail, 2007, p 44). This would suggest that any correspondence in any electronic form from the Employers equipment would be deemed to be that of the Employer unless specifically used for private purpose.

In answering the question of whether a signature that was created by means of an electronic data message is valid, one should look at section 13 of the ECTA which also similarly follows Article 7 (1), (2) and (3)<sup>17</sup> of the UNCITRAL Model Law on E-Commerce as well as Article 9 (3)<sup>18</sup> of the United Nations Convention on the use of Electronic Communications

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<sup>15</sup> Article 6: Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.

<sup>16</sup> (1) Nothing in this convention requires a communication or a contract to be made or evidenced in any particular form.

(2) Where the law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

<sup>17</sup> (1) Where the law requires a signature of a person, that requirements met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) The provisions of this article do not apply to the following: [...].

<sup>18</sup> Where the law requires that a communication or a contract should be signed by a party, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication; and

(b) The method used is either: (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

in International Contracts, which ensure that data messages can satisfy the signature requirement.

Section 13 of the ECTA reads as follows:

- 1) Where the signature of a person is required by law, that requirement in relation to a data message is met only if an advanced electronic signature is used.
- 2) Subject to subsection (1) an electronic data message is not without legal force and effect merely on the grounds that it is in electronic form.
- 3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if:
  - a) a method is used to identify the person and indicate the person's approval of the information contained; and
  - b) having regard to all relevant circumstances at the time the method was used; the method was as reliable as was appropriate for the purposes for which the information was communicated.
- 4) Where an advanced electronic signature has been used, such signature is regarded as having created a valid electronic signature and to have been applied properly, unless the contrary is proved.
- 5) Subsection (4) does not preclude any person from –
  - a) establishing the validity of an advanced electronic signature in any other way; or
  - b) Adducing evidence of the non-validity of an advanced electronic signature.

In answering the question of whether a signature that was created by means of an electronic data message is valid, one should look at section 13 of the ECTA which ensures that data messages can satisfy the signature requirement. Section 13 (1) of the ECTA provides, "Where the signature of a person is required by law, that requirement in relation to a data message is met only if an advanced electronic signature is used." However, section 13 (2) states that an electronic signature shall not be without legal form merely because it is in electronic form and does not necessarily preclude signatures that are not electronic advanced signatures. What does this confusing and ambiguous wording by legislature mean? This means that three different contractual situations arise depending on the type of electronic signature. In the first instance as prescribed by section 13 (2) any electronic signature or a distinct electronic mark could be sufficient for the existence of a digital contract.

In the second instance as prescribed by section 13 (1) the electronic signature would have to be advanced electronic signature and would have to be provided by the South African Department of Communications (the identified accreditation authority as required by section 13 (4) of the ECTA). This requirement has not been incorporated in the UNCITRAL Model Law on e-commerce but a similar provision is visible in UNCITRAL Model Law on electronic signatures in Article 2(a)<sup>19</sup> read together with Article 6<sup>20</sup> in that it places more

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<sup>19</sup> (a) 'Electronic signature' means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message;

<sup>20</sup> (1) Where the law requires a signature of a person, that requirement is met in relation to a data message if an electronic signature is used that is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

(2) Paragraph 1 applies whether the requirement referred to therein is in the form of an obligation or whether the law simply provides consequences for the absence of a signature.

(3) An electronic signature is considered to be reliable for the purpose of satisfying the requirement referred to in paragraph 1 if:

stringent requirements in the recognition of electronic signatures. The third and last instance as provided for by section 13 (3) is in the instance where an electronic signature has not been used at all but the intent to be contractually bound has been expressed. This is akin to the popular click-wrap and shrink-wrap agreement which allow online users to express their intent to contract and allowing them to enter into valid purchase and sale agreements with vendors from the internet by clicking a mouse on a specific area of the screen.

Andrade suggests that the provisions of section 13 (1) and (4) read together which are not yet operative due to the establishment and development of the said accreditation authority, one must use an advanced electronic signature of any other country when being called upon to produce an advanced electronic signature to avoid any adverse legal consequences in the event of dispute about the validity of the said advanced electronic signature. There are various types of electronic signatures that vary according to the financial resources of the contracting parties. Some of the 'low-tech' solutions are electronic signatures with password protection, a picture scan of a handwritten signature, a light pen, etc. (Brazell, 2004, pp 37-39). Other more expensive solutions better known as 'biometrics'. These range from retinal scans, face recognition, finger print, hand print hand/finger geometry and voice recognition.

It is submitted that such an advanced electronic signature would carry no weight as it would be *void ab initio* as the wording of section 37 which governs the establishment and functions of the 'authorized accreditation authority' is mandatory and specifically refers to a South African accreditation authority. The Department of Telecommunications is the chosen accreditation authority. Once its rules and procedures are finalized it will be the sole body, which can issue 'advanced electronic signatures' that are valid in South Africa as to whether foreign signatures will be allowed to take part in the accreditation process is not clear. However it is my submission that if a foreign signature complies with what the accreditation requires it should not be excluded and may be valid. This however does not preclude parties from stating in a contract that an advanced electronic signature of certain country will be a valid 'advanced electronic signature' for the purposes of the said contract as per section 4(2) of the ECTA which echoes the principle of party autonomy. In principle the ECTA allows for both the use of electronic signatures without the signature being accredited by the South African accreditation authority if the agreement specifically states such or where a law requires an electronic signature an 'advanced electronic signature' would have to be used.

The ECTA specifically however excludes four different instances where an electronic signature or signature would not be valid. The four excluded acts are:

1. Concluding an agreement for the alienation (disposal) of immovable property as provided for in the Alienation of Land Act, Act 68 of 1981.

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(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

(4) Paragraph 3 does not limit the ability of any person:

(a) To establish in any other way, for the purpose of satisfying the requirement referred to in paragraph 1, the reliability of an electronic signature; or (b) To adduce evidence of the non-reliability of an electronic signature.

2. Concluding an agreement for a long-term of immovable property in excess of 20 years as provided for in the Alienation of Land Act 1981
3. The execution of a bill of exchange as defined in the Bills of Exchange Act, Act 7 of 1953.
4. The execution, retention and presentation of a will or codicil as defined in the Wills Act, Act 34 of 1964. However note the decision of *Mac Donald v. The Master*<sup>21</sup> where the court used its power to condone a document intended to be a will in terms of section 2 (3) of the Wills act to use a Computer print out as an indication of the testators last wishes (Snail, 2006, p 51).

Its main purpose is to provide equal treatment of the use of the various electronic signature techniques currently being used or still under development with the purpose of replacing the use of hand written signatures and other kinds of authentication mechanisms used in the traditional paper-based transaction (e.g. seals or stamps). South African Courts and commentators still have to explore the issue of an electronic signature as contained in the ECTA and the legislature may have to do away with the stringent requirements of an advanced electronic signature or in the alternative make provision of the use of internationally recognised electronic signatures that used advanced encryption mechanism in order to follow the international standard of technologically neutral electronic signatures. It is humbly submitted that the legislature ought to consider the law relating to the inclusion of the above stated excluded acts every five years similarly to German Law as to accommodate changing times (Vogel, 2003, p 53 ).

### **3.3 Time and Place of where the Contract Enters into Effect**

As mentioned previously in section 2 of this paper, South African Law makes provision for different methods of contract acceptance which could vary and affect the time and place of contract conclusion. It is important to look at both the information theory and expedition theory as explained in the case of a contract concluded by letter and/or telephone or fax as these are akin to e-mail. The place where a contract is formed is very important in case of a contract between parties who are in different jurisdictions or international contracts in which one may suffer prejudice due to conflicting legal rules (Snail, 2007, p 45). The moment and place of conclusion of electronic contracts are now being regulated by section 22 (2) of the ECTA which states:

Section 22 (2) of the ECTA states the following:

‘An agreement concluded between parties by means of data messages is concluded at the time and place where the acceptance of the offer was received by the offeror’.

As one can see, section 22 (2) of the ECTA places the time and place of conclusion at the place and time where the originator receives the addressee’s message. One must also note that the provision of section 22 (2) are only applicable where the parties have not by express agreement varied the rules stated by Section 22 of ECTA by means of contractual determination. Since the transmission of data messages usually occurs in the manner of the sender’s computer sending small data packets that eventually arrive at the recipients

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<sup>21</sup> 2002 5 (SA) O 697

computer in order to form the original message, it could become quite technical in certain instances when trying to establish the exact time when the messages is deemed to have been received.

Article 15 (1)(2)<sup>22</sup> of the UNICITRAL Model Law on E-Commerce defines the time of dispatch of a data message as the time when the data message enters an information system placed outside the control of the originator (Par. 101, UNICITRAL Model Law on Electronic Commerce with Guide to Enactment 55). Information system must be interpreted broadly and would therefore include the communication link between sender and for instance his service provider (Pistorius, 2006, p 19). With regard to the concept of having dispatched a message, a message should not be deemed dispatched if it merely reaches the information system of the addressee but fails to enter it (Par. 104, UNICITRAL Model Law on Electronic Commerce with Guide to Enactment 56). It is submitted that Article 15 is embodied in section 22 of the ECTA. Article 10 of the United Nations Convention on the use of Electronic Communications in International Contracts lays down slightly different principles regarding the time and place of sending and receipt. Article 10 of the UNECIC deals with the time and place of communications and is important for a number of reasons, including the time and formation of the agreement of the lapsing of an offer or some other time limit such as performance (Eiselen, 2007, pp 29-49). Article 10 (1) states that:

‘1. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.’

In terms of Article 10 (1) a message is deemed to have been sent if it leaves the information system used by the originator, that is, when the message is beyond the control of the originator. ‘Dispatch’ is defined as the time when an electronic communication left an information system under the control of the originator (Coetzee, 2006, p 254). In the instance where the message is sent on the same ISP, the message is deemed to have been sent when it is received by the addressee (Eiselen, 2007, pp 29 & 49). With regard to ‘receipt’, it is linked to time when the electronic communication become capable of being retrieved, which is presumed the time when it has reached the addressee’s electronic mail box (Coetzee, 2006, p 254). Eiselen adds that a message should be deemed to have been received when the addressee becomes aware of the fact that the message has been sent to the address (Eiselen, 2007, pp 30 & 49). Article 10(2) states that :

‘2. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee at that address and the addressee becomes aware that the electronic communication

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<sup>22</sup> (1) Unless otherwise agreed between the originator and the addressee, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

(i) at the time when the data message enters the designated information system; or (ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee; (b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's electronic address.'

The convention therefore applies an objective test and this is also re-emphasized in Article 10 (3) and Article 10 (4). The purpose of paragraphs 3 and 4 of Article 10 is to deal with the place of receipt of electronic communications. The principal reason for including these rules is to address a characteristic of electronic commerce that may not be treated adequately under existing law in that the information system of the addressee where the electronic communication is received, or from which the electronic communication is retrieved, is located in a jurisdiction other than that in which the addressee itself is located (Par.194, UNCITRAL United Nations Conventions on the Use of Electronic Communications in International Contracts with explanatory note 64).

Section 23 (a) & (b) of the ECTA states the following:

A data message –

(a) Used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee

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

Section 23 (c) of the ECTA states the following:

(c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence

This again is similar to Article 15 (3) & (4)<sup>23</sup> of the UNICITRAL Model Law on E-Commerce as well as Article 10 (3) & (4) of the United Nations Convention on the use of Electronic Communications in International Contracts.<sup>24</sup>

Section 23 suggests two different scenarios by virtue of sec 23 (a), which deals with the status of electronic data messages that are sent with specific attention to the receipt of messages by people on a local intranet via a server or Ethernet network connection

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<sup>23</sup> (3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).

(4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.

(5) The provisions of this article do not apply to the following: [...].

<sup>24</sup> (3) An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.

(4) Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is deemed to be received under paragraph 3 of this article.

(computers connected locally together) and sec 23 (b), which deals with electronic data messages that are sent by people who are either sending them via the Internet or other long-distance communication platform. In the former, the letter is deemed to be accessible by the recipient on sending the intra-mail. The ECTA is clearly a deviation from our two traditional common law theories of information and acceptance with regard to the use of electronic data messages and appears to be a modified version of the reception theory (Jacobs, 2005, p 251).

### **3.4 Shrink Wrap, Click-Wrap and Web Wrap Agreements**

Traders and consumers have through the years exploited the possibilities of e-commerce. Prior to the ECTA there was a lot of uncertainty as to the validity and the enforceability of shrink wrap; click wrap and web wrap agreements. These uncertainties are mainly due to the shift from paper based trading to the practical, paperless conclusion of contracts. The law has evolved certain principles concerning the so called ticket cases to dispense with the requirement of obtaining signatures to signify consent (Pistorius, 2004, p 568).

These contracts are by nature defined as contracts of adhesion- contract negotiation is excluded as one simply and unilaterally declares his/her acceptance or goes without (Ibid ). A shrink wrap agreement is one form of contract of adhesion. Other terms used for this type of agreement are 'box top', 'tear me open' or 'blister pack' agreements. The terms of the agreement become valid and enforceable when the plastic shrink wrap is broken and/or the software package is installed. However a retailers' failure to draw the buyers attention, specifically to the conditions and terms contained in the shrink wrap agreement may amount to a misrepresentation by silence (Pistorius, 1999, p 292), rendering the contract voidable (*Kempstone Hire v. Snyman* (1988) (4) SA 465 (T) at 468 H).

Akin to the concept of shrink wrap agreements are the 'click wrap', which are also known as 'web wrap' agreements that have been developed in e-commerce (Ibid). If the on-line consumer wishes to purchase products offered through an e-shop he/she will be instructed to 'click' on certain icons indicating his/her acceptance to the terms. Despite the fact that no common law exists confirming the validity and enforceability of such agreements section 22 (1) of the ECTA states that, '... an agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages'. Section 24 of the Act provides for the valid expression of intent to make an offer or acceptance by means of a data message and is not without legal force merely because it is in data form without an electronic signature. This section strengthens the provisions of sections 11 and 22 and solidifies the legal effectiveness of data messages used in transactional communication (Ibid). Section 24 (1) of the ECTA also states that validity is also provided for unilateral 'statements' by means of data messages.

Courts in the United States have ruled on the enforceability of shrink-wrap and web-wrap agreement on the basis of the facts of each case (Pistorius, 2004, p 571). In *Hotmail Corporation v. Van Money Pie Inc.*<sup>25</sup> the court hinted at the probability of such contracts being valid and enforceable. James Ware J of the U.S. District Court for the Northern District of California granted the plaintiff's motion for an injunction in trademark infringement and breach of contract suit involving a click-wrap agreement on the basis that the defendant had breached one of the 'Terms of Service' namely, 'not to use the Hotmail e-mail account to

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<sup>25</sup> C 98-20064 (N.D. Cal , April, 20 1998); also, *Canadian Position in the case of North American System Shops* 68 ALR 145 (Can QB 1989 )

facilitate the transmission of unsolicited commercial email, otherwise known as spam' (Nagalingam, 2000, p 20).

One must however note that the courts approach towards these forms of agreement is extremely cautious. The defendants usually raises the 'did not know' or 'did not see' the online agreement defense (*Ticket Masters Corporation v. Tickets Inc* No Cv 99-7654, 2000 WL 525390 (CD Cal 27 March 2000); *Spreht Netscape Communications Corporation* 150 F supp 2d 585 (SDNY 2001); *Ibid* at 572). However, the US court has refused to recognize the validity of similar shrink-wrap agreements in the case of *Vault Cortp.v. Quid Software Ltd*<sup>26</sup> and *Systems Inc. v. Wyse Tech*<sup>27</sup>. Although these 'click-warp' agreements have not yet been tested in our South African Courts, Pistorius states, 'there would appear to be no reason as to why they should not be enforceable. Compared to shrink-wrap agreements, where the contract terms are unread until the purchaser has unwrapped the software, with click-warp agreement the customer is aware of the contractual terms before a commitment is made to acquire the good or services' (Pistorius, 1999, p 292).

#### **4. International Cross-border Contracts**

Cyberspace holds many opportunities for internet commuter unfortunately cyberspace is 'No Eden'. Instead the internet is frequented by people and wherever you find people you are bound to find disputes (Nagalingam, 2000, p 35). Electronic commerce however, does not acknowledge geographical borders. While the recognition of electronic data messages and electronic signatures as functional equivalent have been internationally recognized and much international uniformity exists, one of the most vexed legal problems in the regulation of international electronic commerce however relates to the issue of jurisdiction (Werkmans Inc., 2005, p 15 <<http://www.werksman.co.za>>).

##### **4.1 Jurisdiction**

Jurisdiction is the legal terms used to describe the power or competency of a court to hear a dispute and decide disputes (Ibid). The classic definition of the term 'jurisdiction', which has been incorporated into its traditional understanding, was given by the court in *Ewing McDonald &Co v. M & M Products Co*<sup>28</sup>. The Court defined 'jurisdiction' as the 'power vested in a court to adjudicate upon, determine and dispose of a matter.' Thus, in order for the court to exercise jurisdiction, such court must satisfy two requirements. Firstly, the court must have the authority to hear the matter and, secondly, it must have the power to enforce its judgment. The first requirement is satisfied when there is a jurisdictional connecting factor, which means that there is a link between the court and the parties to the action or the cause of action. The second requirement is derived from the principle of effectiveness in terms of which the court should not exercise jurisdiction unless compliance with its judgment can be expected (Sibanda, 2008, p 4).

Generally speaking, the public international law principle of territorial sovereignty provides that the courts of any given country only have jurisdiction over the individuals/corporates who reside within that country, or over the activities (including transmissions) that occur

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<sup>26</sup> 847 F. 2d 255(5th Cir.1988)

<sup>27</sup> 939 F 2d 91 (3rd Cir. 199)

<sup>28</sup> 1991 (1) SA 252 (A)

within the borders of that country (Werkmans Inc., 2005, p 15 <<http://www.werksman.co.za>>). As stated before, the place a contract is formed is mainly of interest in international transactions where the parties have not agreed to a specific jurisdiction or where there is no applicable international convention that determines jurisdiction (Buys, 2000, p 164). The general rule is that a contract must be determined according to the *lex loci contractus* of the last legally relevant act (*Keregeulen Sealing & Whaling Co Ltd v. Commissioner of Inland Revenue* 1939 D 487; Davel, 2000, p 29). This means that the contract is concluded at the place where the last act necessary to constitute the agreement was performed.

## 4.2 Legal Principle of Conflict of Laws

Notwithstanding the fact that there is no South African judgment that specifically deals with the jurisdictional issues of internet-based contract the court would probably first ask whether an effective judgment is possible. (Werkmans Inc., 2005, p 17 <<http://www.werksman.co.za>>). That is, whether the court can effectively grant relief to a South African business instituting a claim against a foreign business entity within another court jurisdiction and whether it can effectively sue and take execution steps against it. Leading South African IT Law Firm Werkmans Inc, suggests that a claimant must satisfy three requirements in order to be heard, granted relief and to be able to take execution steps in a South African court (Ibid) :

1. The South African business must conduct business within a specific Court's jurisdiction.
2. One or more of the traditional grounds for founding of jurisdiction must be present in said matter e.g. the *lex loci contractus* rule (*Keregeulen Sealing & Whaling Co Ltd v. Commissioner of Inland Revenue* 1939 D 487; also see, Davel 2000 29)
3. The foreign party must have consent to jurisdiction ( expressly/implicitly ) or the foreigners assets must be attached to confirm jurisdiction (*Veneta Mineraria Spa v. Carolina Collieries ( Pty ) Ltd ( In Liquidation )* 1987 ( 4 ) SA 883 ( A ) at 994 ); Dean, 2006, p 20)

It is suggested by Werkmans that South African Companies that provide international access to their websites and transact electronically with citizens from around the world ensure that all their website terms and conditions and all other cross-border agreements should include a 'Choice of law', 'Choice of Court' clause and a 'Submission to Jurisdiction clause'. Jurisdiction however still remains a legal chameleon and a party can never be 100% sure as to which court will have and/or accept jurisdiction in the case of a dispute in a trans-national electronic transaction.

The case of *Zippo Mfg. co, v. Zippo Dot*<sup>29</sup> expanded on the 'minimum contact test' by stating that personal jurisdiction for e-commerce companies should be dealt with on a sliding scale (Wang, 2008, p 120) to analyse the contacts necessary to establish jurisdiction. In determining the constitutionality of exercising jurisdiction, in *Zippo* the court focused on 'the nature and quality of commercial activity that an entity conducts over the internet'<sup>30</sup>. US courts in accordance with the jurisdictional development around the world have developed an alternative test that assists in establishing jurisdiction in e-commerce called the 'effects test'

<sup>29</sup> F.Supp 1119 (W.D.pa 1997 )

<sup>30</sup> *Zippo Mfg. cow, v. Zippo Dot* F.Supp 1119 (W.D.pa 1997 ) at 1124

based on the Supreme Court's decision in *Calder v. Jones*<sup>31</sup>. It permits states to exercise jurisdiction when defendant intentionally harm forum residents. In the said matter, a California resident brought suit in California Superior Court against a Florida resident who allegedly wrote libelous matters about her in a prominent national publication. In holding that jurisdiction was proper, the Court found the brunt of the harm, in terms of respondent's emotional distress and the injury to her professional reputation was suffered in California (Wang, 2008, p 121).

Lastly the Courts in applying the *Zippo* and effects tests have focused on whether there was 'something more' that was required to exercise jurisdiction and developed the 'targeting test'. The 'targeting test' states that a court will have jurisdiction if, 'the defendant specifically engaged in wrongful conduct targeted at a plaintiff with the knowledge that the defendant is a resident of a forum state' (*Bancroft & Master Inc v. Augusta Nat'l Inc.*, 223 F. 3d 1082, 1087 (9th Cir 2000); *World-Wide Volkswagen Corp v. Woodson*, 444 US 286, 297 (1980)). The 'targeting test' is argued to be a better test as it deals more with the intention of the parties in determining jurisdiction and is seen a fairer approach in establishing whether a defendant could foresee being hauled before a court outside his/her normal jurisdiction.

Since this problem was increasingly becoming a legal concern as transnational electronic contracts were booming in the mid 90's, the Hague Conference on Private International Law responded with the signing of its final act, namely the Convention on Choice of Court agreements (Shulze, 2006) at the Twelfth Session of the Hague Conference on Private International law. Article 1 of the Convention limits the scope of applications exclusive choice of court agreements in civil and commercial matters. International parties are defined as parties that are not resident in the same Contracting state, or if other elements relevant to the dispute have a connection with another Contracting state, regardless of the location of the chosen court (Ibid).

The central provision in the convention is Article 5, which states that the court of a Contracting State designated in an exclusive court agreement shall have jurisdiction to decide upon matter to which the agreement is applicable to (Ibid). Article 5(2) goes further and imposes jurisdiction upon a court even were it declines on the basis of the legal principle forum non convenienc. However Brand (2004, p 348) has the view that the doctrine of forum non convenienc is still a valid reason to decline jurisdiction as the Convention does not exclude the court inherent power to decide in its own discretion whether to hear or not to hear a said matter. I disagree with Brand and favour Shulze's interpretation which is straightforward.

## 5. Conclusion

In spite the fact that our South African Law of Contract has previously only dealt extensively with the physical aspect of the reduced contract, namely signature, what constitutes writing and compliance with additional *ex lege* or agreed formalities, it has come out clear in this paper that our South African Cyber Law caters for paperless agreements or better said, electronic contracts (e-contracts). The South African Contract Law allows contracts to be formed in any manner, i.e. oral, telephone, written documentation, fax or conduct of the parties. Thus the only logical conclusion that one can come up with, is that a contract can be

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<sup>31</sup> 465 US 783 (1984)

formed electronically via the internet, SMS or any other electronic data transmission. An offer and an acceptance can be made by website, email, EDI and in a chat-room. There might be only one ambiguous issue regarding whether an E-mail piece list or a website is an invitation to treat or valid offer. In this regard, businesses can avoid ambiguity by making clear in its e-mail pricelist or website catalogue that it is either an invitation to treat or offer. The ECTA is mainly based upon both UNICITRAL Model Laws on E- Commerce. One could practically say that their provisions were merely incorporated in South African Law by copying and changing the numbering of sections. In my opinion the ECTA should be amended maybe every second year in order to cater for new technological advances without having to copy or ape international rules regulating cyber law. Alignment with international law instruments will also ensure global legal compliance.

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