

**LIABILITY FOR ECONOMIC LOSS SUSTAINED THROUGH THE
FAILURE OF AN ISP IN THE ELECTRONIC CONCLUSION OF
CONTRACTS.**

Submitted in partial fulfilment of the requirements for the degree

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To my family, Jean and my professional colleagues.

Without your unfailing support, encouragement and understanding, this work would never have seen completion.

I am because you are.

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Chapter 1

Introduction

“The people of South Africa recognise that recent and emerging technological changes, trading methods, patterns and agreements have brought, and will continue to bring, new benefits, opportunities and challenges to the market for consumer goods and services within South Africa.”¹

Thesis Statement

To recommend a theory for conclusion of contracts through electronic means; to determine which party is liable for economic losses sustained in a situation where such conclusion is prevented by failure on the part of an ISP; and lastly to determine if and how, a client or consumer is protected by consumer-orientated legislation.

Research Question

Who is liable for losses sustained due to defective electronic conclusion of contracts as a result of failure on the part of the ISP, what remedies are available to the injured party, and what protection/regulatory measures are in place to prevent such losses?

Assumptions Underlying Study

For the purposes of this study and to best recommend possible solutions for the complex problem at hand and to best highlight the various aspects relating to the situation under scrutiny, the following is to be assumed:

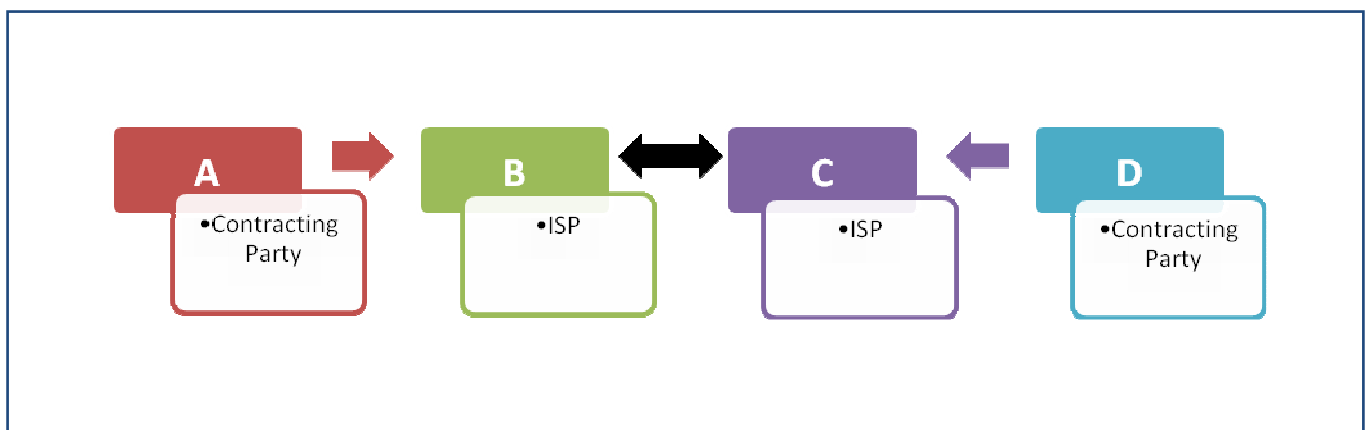
¹ Consumer Protection Act, 68 of 2008.

- that all aspects necessary for the valid conclusion of a contract have been fulfilled except that the so-called “offeror” has not been made aware of the acceptance of the offer and subsequent conclusion of a valid and binding contract between the two parties; and
- those aspects leading up to the conclusion, whilst not forming the crux of the discussion are discussed in relative detail for the purpose of forming a foundation in order to better understand both the unique intricacies of the problem at hand, as well as to form a “prism” through which to view possible solutions in a light that would most effectively bring legal certainty to this emerging economic transaction tool.

Abstract: Outlining the Specific Problem

Lötz and Du Plessis sum up the problem at hand most succinctly in their stating that “the relevant question is whether electronic contracts of sale can fulfil the general, legal requirements for the conclusion of a valid contract, and also where and when such contracts are (deemed to be) concluded”.²

In light of this statement, consider the following schematic representation of all the parties and their relationships, as typically occurring during the electronic contracting process:



This statement succinctly sums up a single aspect of this problem, the so-called “contracting phase”. Following the traditional thought pattern, all aspects leading up to the point of conclusion need to be assessed and critically discussed as a failing or miscommunication in any one of the traditional requirements for the conclusion of a valid contract may later in the contractual relationship affect

² Lötz and Du Plessis (2004) *De Jure* 1 at 2.

consensus and thus conclusion. This second phase “remedies and liability” refers to the situation where consensus is defective for one or other reason stemming from a failure in the internet/network services offered by the Internet Service Provider. A practical example of this may be:

A and D have concluded pre-contractual negotiations and stand on the brink of consensus. A has signed the agreement and has forwarded same to D by means of e-mail. As far as A is concerned, the contract is concluded and he/she makes arrangements to fulfil of his/her obligations. D does not receive the signed agreement from A due to a failure on the part of his/her Internet Service Provider (C) – the server crashed and as a result he/she has no knowledge of A’s acceptance. D therefore concludes a contract with a third party for the same goods that form the subject of the contract with A and performs in terms of same. In these circumstances A has suffered economic loss due to his/her preparation to perform alternatively, full performance in terms of a contract he/she believed to be concluded. It goes without saying that neither A nor D are responsible for the loss A has suffered. The obvious question is then who is responsible for A’s loss?

This work aims to assess firstly, the nature and the scope of possible remedies available to A to redress his/her loss, and secondly, the extent to which the Internet Service Provider can be held responsible for the failure of the communication medium. These issues will be discussed against the backdrop of the general principles of the law of contract and their application to this new and integral component in economic transactions.

Chapter 2

Reaching Consensus: Assessing Compliance with the General Principles of the Law of Contract and Exploring the Various Delivery Theories in the Context of Electronically Concluded Contracts

Introduction

The internet is undisputedly the world's largest and fastest growing market place. With the ever-increasing number and variety of fora and platforms through which everyday business transactions are conducted, electronic forms of commerce are rapidly becoming the standard norm and backbone of the global economy – a significant reality that will be and already is transforming the scope and applicability of contract law and its fundamental principles as we know them. Christie offers a different perspective in that “the law of contract is the fundamental importance in the modern world, because it is woven into and inseparable from every form of economic activity”.³ Perhaps the more correct position would be to view the law of contract as a tempering factor to control and formalise the tide of economic activity.

The Internet, or other electronic medium connecting contracting parties to one another, acts as a communication medium between the parties through which pre-contractual negotiations are conducted and finally, binding contractual ties are made. The scope and impact of such mediums are, however, not limited only to the contractual process – the Internet provides an accessible medium through which offers to contract are published and advertised as well as a “common playground” in which potential contractants can “meet and greet”. Whilst the accessibility and boundless freedom to contract have carried so-called e-commerce forward in leaps and bounds at an explosive rate, it must be remembered that in order to fully benefit from such technological advancements these e-contracts must comply with the requirements of enforceability and validity.

³ Christie (2011) 1

Throughout this chapter, reference will be made to the UNCITRAL Model Law on Electronic Commerce⁴ that was adopted in 1996 after a long and dedicated effort on the part of the United Nations Commission on International Trade Law⁵. This persuasive source of law whilst being both progressive and well-formulated, should form the subject, if not the basis, of further academic (and legislative) consideration in an effort to keep our current legal understanding of contract law abreast of international technological development.

The Model Law was developed in response to the ever-increasing number of commercial transactions concluded through electronic means – so-called electronic commerce or “e-commerce”, a form of commercial interaction that makes use of alternatives to paper-based methods of communication, recording and storage of information. The driving force behind the Model Law was to develop a model which could be adapted by different jurisdictions and legal systems in an effort to develop “harmonious international economic relations” and form a common “backbone” for legislation pertaining to these alternative commercial methods in the absence of such existing legislation in various jurisdictions.⁶

It is important to begin discussions on this topic by analysing the “electronic” component in “electronic contracts”. Generally it can be said that an electronic contract is a contract that is concluded, either wholly or in part, by means of communication of consensus, through a computer network.⁷ Christie offers a noteworthy explanation based on the *ratio* in *Conradie v Rossouw*⁸ which can be considered as the point at which the Roman-Dutch concept of a contract being a serious and deliberate agreement was accepted into our modern law of contract. Based on this Christie believes that it follow naturally as a general rule that the conclusion of an enforceable contract requires no special formalities.⁹ This position was developed and formally taken by Innes CJ in *Goldblatt v Fremantle* in his stating that “Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to

⁴ As adopted by the General Assembly on 17 December 1996, Resolution number 2205, hereafter referred to as “the Model Law”.

⁵ Hereinafter referred to as “the Commission”.

⁶ Preamble to the Model Law.

⁷ Lötze and Du Plessis (2004) *De Jure* 1 at 3.

⁸ 1919 AD 279.

⁹ Christie (2011) 109.

contract validity”.¹⁰ It is quite overwhelming to consider the repercussions that this viewpoint has had and the on-going effect it has on the development of contractual law. From a modern perspective it can be said that this ruling was the first to effectively bridge the gap between the traditional, more rigid theoretical views on the law of contracts and the practical realities of the open marketplace.

The Model Law refers to a “data message” as being “information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”.¹¹ Whilst it can be concluded that an electronic contract is made up of a series of data messages, the concept of a data message encompasses a far wider spectrum of communication than just that in pursuance of conclusion of a contract. The most important aspect that the Model Law introduces to our South African standpoint on the traditional general principles of the law of contract is the “functional equivalent approach”. This approach serves as a kind of bridging factor between the traditional views that are inevitably coupled to the paper-based approach, and the newly-emerging technological influences. This functional approach acts in many respects as a translation tool, converting the technical terminology and convenient capabilities of electronic-based commerce into the more rigid, traditional structures that we are accustomed to. Some of the terminology introduced by the Model Law will be used throughout the Chapter and thus it is important to understand the following terms that are central to this and further discussions: “originator” (meaning the party who, or on behalf of who, a data message was sent or generated), “addressee” (being that party who is the intended recipient of the data message) and “intermediary”¹² (that party who sends, receives and stores data messages on behalf of another party, or provides other services pertaining to data messages).¹³

Although essentially e-contracts do not necessitate an overhaul of the traditional principles of the law of contract, the focus of academic interest in such contracts should be shifted to specifically the time and place of conclusion of the contract; compliance with traditional common law requirements; and finally the liability of all parties to the agreement.

¹⁰ 1920 AD 123 at 128.

¹¹ Article 2 (a) of the Model Law.

¹² To be used interchangeably with “Internet Service Provider (ISP)” or “Service Provider” hereinafter.

¹³ Article 2 (b), (c) and (d) of the Model Law.

General Overview of the General Principles of the Law of Contract

General

Christie offers a brief summary of the theory of contract, which for the purposes of this work provides a proper platform from which to launch a detailed discussion of the problem at hand. In short, Christie draws the definition of a contract from a historical and theoretical perspective in putting forward three bases for the enforcement of contracts.¹⁴ Firstly, the Subjective Consensual Theory supports the maxim *consensus ad idem*, in so far as enforceability is founded in “the concurrence of the subjective wills of the contracting parties”.¹⁵ Secondly, the Objective Declaration Theory determines that enforceability is based on the declared intentions of the parties.¹⁶ And finally, the Reliance Theory offers the best of both worlds, in so far as it embodies the notion that enforceability is dependent on the “reasonable expectations conveyed to the mind of each party through the words or conduct of the other”.¹⁷ Whilst I personally am a strong proponent of the Objective Declaration Theory, our courts deemed the Subjective Consensual Theory to be the more acceptable in our law, as decided in the well criticised case of *Saambou Nasionale Bouvereniging v Friedman*¹⁸, with the Reliance Theory to be used in cases where true objective consensus cannot be determined.¹⁹ From this, and for convenience, Christie has provided us with a so-called “working definition” of a contract: An agreement (arising from either true or quasi-mutual assent) which is, or intended to be, enforceable at law.²⁰

Further and in light of Christie’s definition, I am of the opinion that it is worth considering Lotz and Du Plessis’ definition: In general a contract is an agreement, entered into between capable legal persons on the basis of consensus, with the aim to create legal ties (or binding obligations) between the parties.²¹ Whilst these definitions do bring a deeper understanding of the role that contracts play in the South African context, and to a limited extent, offer a glimpse at the general purpose of contracts, the well

¹⁴ Christie (2011) 1.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ 1979 3 SA 978 (A) at 993F.

¹⁹ Christie (2011) 1.

²⁰ *Id* at 2.

²¹ Lötz and Du Plessis (2004) *De Jure* 1 at 2.

known maxim: *pacta sunt servanda* hangs over all contracts, like the proverbial sword. *Pacta sunt servanda* commonly understood to mean that the courts are obliged to enforce agreements made between parties. It is the deeper meaning that can be found in the direct translation: “Agreements must be honoured”, that I believe lays the foundation for all discussion pertaining to the enforceability of contracts. Further, this foundation forms the basis of all policy considerations that may, and will, affect the development, in both the legislative sphere and judicial sphere, of the traditional general principles of the law of contract irrespective of how technology develops around it. It is my firm belief that the fundamental principles of the law of contract as we know them, will stand, in some form or another, unaltered but merely translated into the language of modern technology. In the South African context, it is clear that the legislature intended to maintain the fundamental principle of *pacta sunt servanda* through the development of the Constitution, with specific reference to the rights to dignity and autonomy. This position is clearly manifested in the written judgement of Ncobo J in the case of *Barkhuizen v Napier*,²² before the Constitutional Court: “What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable. In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, and at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.”²³ The learned Judge does expand on this view: “On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one’s own affairs, even to one’s detriment, is the very essence of freedom and a vital part of dignity. The other

²² 2007 5 SA 323 (CC).

²³ Christie (2011) 38 - 30.

consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract.”²⁴

In *Conradie v Rossouw*²⁵ the South African courts accepted the simpler Roman-Dutch concept of a contract as being: a serious and deliberate agreement. Christie believes that it should follow as a general rule that no special formalities are required for the making of an enforceable contract. With the above in mind, Lötzt and Du Plessis are of the opinion that there exists no legal reason why e-contracts cannot adhere to the general principles of the law of contract and thus create legally enforceable obligations between the contracting parties.²⁶ The Model Law takes a liberal approach in regard to recognition of electronic-based transactions in article 5 by providing that: “Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.” In hindsight, the general principles have had little opposition to being amended to find application for other technological advancements that have inevitably influenced the conclusion of contracts, for example: telephone-, telegram-, fax- and telex- contracts.²⁷

E-contracts are specifically incorporated and validated by the Model Law in terms of article 11, which provides that both offer and acceptance of a contract can be effectively and validly communicated in the form of data messages, and that in instances of data messages being used in formation or conclusion of a contract, the contract will not be invalidated or rendered unenforceable for the sole reason that such data messages played a role in its formation.²⁸ The Electronic Communications and Transactions Act echoes this position in Section 4(1) in that the formality requirements of writing and signature, imposed by statute or agreed between the parties to the transaction, can generally be satisfied in relation to electronic transactions. Lötzt and Du Plessis do, however, caution that given the specific characteristics of the internet, there will have to be renewed focus on the existing general principles of the law of contract and further highlight the fact that many new and technical terms have arisen from this form of contracting, most of which have not been defined in current legislation.²⁹ This current legislation, for

²⁴ *Id* at 57 and 58.

²⁵ 1919 AD 279.

²⁶ Lötzt and Du Plessis (2004) *De Jure* 1.

²⁷ *Id* at 3.

²⁸ Article 11 of the Model Law.

²⁹ Lötzt and Du Plessis (2004) *De Jure* 1 at 3.

purposes of this work, would be the Consumer Protection Act, Electronic Communications and Transactions Act, Electronic Communications Act as well as the Independent Communications Authority of South Africa Act that will be discussed in detail in the forthcoming chapters. This opinion forms a clear platform for further thinking and study on this topic and it goes without saying that a “renewed focus” is necessary, if not vital, given the convenience and boundless scope of e-commerce. One need only look around – at television, at the newspaper, at the many pamphlets stuffed into your post box to realise that e-commerce and more fundamentally, the internet, forms a critical part of the modern business’s function – it is the lifeblood of the free-market system. According to Papadopoulos we live in an information society which has arisen out of the industrial society of yesteryear. This information society is described as “a society in which information becomes a core economic, cultural and social resource. This debate stems from the fact that almost anything we do is intimately connected to information creation, retrieval, processing or management.”³⁰ It follows that it would be prudent to find a reliable and legally-acceptable manner of incorporation of this commercial-legal “love-child” into the greater legal contractual family, alternatively to stretch the boundaries and accepted definitions of the modern law of contract to include this commercial reality. Such extension and modification of what the already accepted principles will ensure legal certainty and provide fundamental remedies and recourse to contracting parties. Papadopoulos offers a very well-reasoned view of this particular position in stating “the law governing electronic contracts is a hybrid law that combines traditional common law principles, newer information and telecommunications legislation and the international Model Laws and Conventions.”³¹ The ultimate goal of the Model Law is to give clarity and harmony to this hybrid law. In further discussions based on article 11, the point is raised that the intention and purpose of the Model Law is not to interfere with the principles of the law of contract of any particular jurisdiction but rather to create and promote a harmonious increase in electronic-based commerce by providing a degree of legal certainty.³²

The introduction of e-contracts has not been met with complete confidence. Doubts regarding validity have been raised in many jurisdictions and stem from the fact that e-contracts lack human interaction, which brings to light concerns as to the true expression and communication of the contracting parties’ intention – thus calling into question whether true consensus can be reached in a situation where

³⁰ Papadopoulos et al (2012) 1.

³¹ *Id* at 41.

³² UNCITRAL Model Law on Electronic Commerce, Article-by-Article Remarks, para 76.

intention is communicated through data messages that are created by either contracting parties or automatically on their behalf.

Formalities

The UNCITRAL Model Law specially addresses the issues surrounding formalities of electronic contracts; in fact, the issue is so vast, integral and topical that the “writing” and “signature” formalities are afforded their own specific articles, among others. As far as the Model Law and Guide pertain to “writing”, a so-called “functional approach” was adopted, in terms of which the formalities are whittled down to their “bare bones” or “functions traditionally performed by various kinds of writings in a paper-based environment”.³³ In following this approach, the emphasis is on the function of the requirement that information be reduced to writing for legal purposes, and in so doing a “golden thread” is established and carried through to electronic contracts, so lending to-, developing and maintaining the integrity and legal certainty of - this form of contract. Article 6 establishes firmly that where the law requires information to be in writing, that requirement is met by a data message [...]³⁴ A proviso overrides this article and in so doing maintains the functional emphasis of the writing-formality in stating that “[...] if the information contained therein is accessible so as to be usable for subsequent reference”. It can logically be inferred and it is so submitted that the Commission involved in the formulation of the Model Law felt that at the core of the writing-formality lay the principles of accessibility and reference. Transposing this particular mode of thinking into the South African context we find that the opinion is shared in this matter. Van der Merwe *et al* are of the view that “the presumption is that parties who resort to writing of their own accord do so for evidential reasons rather than to impose formalities.”³⁵ This matter has been subject to much litigation; the most influential case pertaining to this particular issue is that of *Goldblatt v Fremantle* in which Innes J in the Appellate Division found the following: “Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that

³³ Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, Part I, Chapter 2, para 48.

³⁴ UNCITRAL Model Law on Electronic Commerce, article 6.

³⁵ Van der Merwe *et al* (2007)

the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract.”³⁶

Christie differs from van der Merwe and in his analysis states the possible advantages of written contracts believes that firstly, in preparing the contract the parties are given time to re-consider the agreement before committing themselves by means of signature. Secondly, should disputes arise, the burden of proof resting on the plaintiff is simplified in that he need only prove that the signature appearing on the document is that of the defendant. Finally, the possibility of disputes arising from such written agreements is diminished as the terms are clear and available for any party to peruse.³⁷

The Commission has gone a step further in their functional approach by assessing various functions that writing-requirement performs throughout many different jurisdictions, and whilst this list is non-exhaustive, it is interesting to note that the Commission makes particular reference to the following instances as reasons why various jurisdictions require the writing-element for conclusion of a valid contract:

- Evidentiary value: evidence of the existence and intention of the parties to create a binding obligation;
- Consumer Protection: to aid the parties in understanding the possible consequences of entering into a valid contract as well as ensuring that the contract and consequences are legible;
- Record-keeping: a written contract ensures that the document remains unaltered and thus provides a permanent record that can be referred back to at any stage, further reproductions and copies of the document can be made at any time should the need arise, at relatively little inconvenience. A further advantage of a written document would be the fact that the format of the document can be prescribed and thus be in a uniform format acceptable to public entities and authorities, including in this case the judicial system of a given jurisdiction. The Commission has made specific reference to the fact that documents in hard-copy make for easy storage of the represented data. This is a slightly archaic justification for a stubborn refusal to embrace new technology. It goes without saying that to store data in a digital format is far more convenient in that it takes up less space, is more easily accessed, reproduced and referenced.

³⁶ *Goldblatt v Fremantle* 1920 AD 123.

³⁷ Christie (2011) 109.

- Lastly, a written document bears a certain psychological weight in that the final intention and “word” of the contracting party is in “black and white”, once negotiation surrounding the specific terms and conditions of the contract have been finalized, the final and binding agreement is recorded and can thus be relied on, or in the worst case, be used as proof of an abandoned intention;

Pertaining to validity it appears that many years of practice have become a conveniently accepted norm in so far as authenticating such contracts goes, it has become the accepted norm that validating and authenticating of a document takes place by means of a mark or signature on the physical written document. The Commission is of the belief that in those jurisdictions where “writing” is a requirement for validity, rights and obligations arise once the intention is transferred to “black and white”. It is submitted that this reasoning is somewhat flawed in so far as there are many indications of a party’s intention, not least of all being the party’s conduct subsequent to conclusion of the contract. Should a contract not be rendered into writing and the parties conduct themselves as though the contract was validly concluded, it is my belief that the mere absence of “writing” does not mean that binding obligations and rights were not created.³⁸

In an explanatory note, the Model Law creates a pattern of understanding relating to the requirement of writing, which I believed to be a progressive and development-based approach worthy of further study, particularly in its possible application to the South African context. The Model Law refers to a “hierarchy of requirements” as far as the requirement of writing is concerned. “Writing” in itself should form the lowest requirement (or a “threshold requirement”) whilst requirements of “signature” and “original document” – which are dependent on the writing requirement follow further up the hierarchical ladder . The requirement of “signature” would form the next rung of the “functional approach ladder” and lastly the requirement of “original document” – the Model Law attributes this formation to the distinct yet increasing levels of reliability, traceability and inalterability of the hard-copy document. Emphasis is placed on the distinction with regard to the roles and functions of each rung – “signed writing” or “original writing” being more stringent requirements that as a result carry more evidentiary weight.³⁹

³⁸ UNCITRAL Model Law on Electronic Commerce, Article-by-Article Remarks, para 48.

³⁹ *Id* at para 49.

It is submitted that the UNCITRAL Model Law bridges the gap between those legal requirements for hard-copy documents and electronic documents, with special application in the sphere of electronically concluded contracts in article 7: the requirement that a document be signed: “Where the law requires a signature of a person, that requirement is 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.”⁴⁰ Obviously an electronic contract cannot be signed in the traditional sense of the word. Continuing according to the function-based approach, the Commission, in preparing the Model Law considered the most important functions of a signature to be (but not limited to) the following:

- Identifying a particular party and asserting their active participation in the (contracting) process as well as confirming their “association with the content of the document”.⁴¹
- Endorsing a certain document, particularly in the case where the document was drafted by another party. It is submitted that this would most frequently occur in instances where a special power of attorney has been granted to a party to engage in conclusion of a contract on behalf of another party.

The specific role of a signature in conclusion of a contract is discussed as well, once again bringing to the fore the important legal consequences of convenient modern technology. According to the discussions of article 7, a signature’s function is derived directly from the nature of the document signed, in the case of a contract to identify the contracting parties or those parties who will acquire rights and obligations in terms of the contract. *In sum*, article 7 paragraph (a) indicates that, in terms of an electronic contract, the basic function of a signature - being to identify parties to a contract, is duly upheld by the party who generated the electronic contract or “originator”, by using any method through which the originator can be identified. And secondly, that the originator confirms the content of the e-contract (or any data message in pursuance of conclusion of a contract) also by means of any method that can effectively and reliably communicate such confirmation. Paragraph (b) deals with the specific method used to identify the parties and communicate confirmation of the content of the electronic contract. In assessing the

⁴⁰ UNCITRAL Model Law on Electronic Commerce, article 7.

⁴¹ UNCITRAL Model Law on Electronic Commerce, Article-by-Article Remarks, para 53.

“reliability” or “appropriateness” of any method the Commission assessed a number of factors including (but not limited to) legal, commercial and technical factors.

Special note (for the purposes of this discussion of the liability of the ISP) is made of the compliance with authentication procedures as set forth by the intermediary or service provider, as well as the range of authentication procedures made available to the parties by the intermediary.⁴² The Model Law clearly broadens the scope of the concept of an “agreement” in its interpretation of the term, as being not only the agreement between contracting parties (whether bilateral or multilateral), but including also those agreements that may include a third party or so-called “intermediary” (for example networks or ISPs). These agreements usually take the form of service agreements and will be dealt with more fully hereunder.⁴³

Consensus

Van der Merwe *et al* highlight the underlying premise of a contract as being: “a contract entails the formation of a common intention by the contracting parties through an exchange of declarations which express their respective intentions”.⁴⁴ This perfectly describes the process of consensus – reaching a common intention. According to Lötz and Du Plessis this common intention revolves primarily around the *essentialia* of a purchase agreement.⁴⁵ Whilst this work aims to address electronically concluded contracts in general and not specifically purchase agreements, this statement should be interpreted in broader terms to mean that irrelevant of the nature of the contract concluded, consensus between contracting parties should be reached on the *essentialia* of that particular type of contract. Other types of contracts commonly concluded through electronic means include agency, lease and mandate amongst others. It goes without saying that forming of this common intention requires communication between the parties, this communication or negotiation commonly takes the form of an offer and acceptance of this offer. The internet is a convenient and cost-effective medium through which offer and acceptance can be accurately communicated. Such communications can take a number of electronic forms including

⁴² *Id* at para 58.

⁴³ *Id* at para 60.

⁴⁴ Van der Merwe *et al* (2007) 54.

⁴⁵ Lötz and Du Plessis (2004) *De Jure* 1 at 3.

e-mail, internet chat room, the world-wide web and electronic data interchange.⁴⁶ The latter form of communication is most commonly used between distributors and their clients and works in conjunction with both parties' computer systems. Due to this fixed connection between the parties, these contracts require little human intervention as the *essentialia* have been previously agreed on between the parties, and prior to setting up of the electronic data interchange system. In fact, the aim of this system is to exclude the need for human intervention completely.⁴⁷ An everyday example of these contracts is the automated ordering systems of large chain stores whereby once stock levels reach a certain point, an order is automatically placed with the supplier by means to the fixed link between the two parties. Given the limited human intervention in this type of contract, this type will not be further discussed herein.

It would be prudent at this point in this discussion to briefly point out the general principles and requirements for offer and acceptance of contracts:

- The offer must include all *essentialia* of the contract, specific to the nature of the proposed contract. In this respect Christie cautions against interpreting statements as “firm offers” and suggests that a step-by-step analysis of the negotiations that took place prior to the disputed statement is necessary. He distinguishes between offers and invitations to treat, offers to negotiate, requests for an offer, statements of information, statements of intention, proposals for partial agreement, agreements to contract and agreements to negotiate;⁴⁸
- The offer must be clear, specific and unambiguous. In this regard Levy J in the matter of *Wasmuth v Jacobs* described an offer in the following terms: “it is fundamental to the nature of any offer that it should be certain and definite in its terms”⁴⁹;
- The offer must be made with the intention to create binding legal ties between the parties (the so-called *Animus contrahendi*).

As a rule, the offer has no specific formalities to comply with, unless the parties have reached an agreement prescribing otherwise. Papadopoulos cites the cases of *Humphreys v Cassels*⁵⁰ and *Crawley v*

⁴⁶ *Id* at 4.

⁴⁷ *Id* at 7.

⁴⁸ Christie (2011) 34 – 41.

⁴⁹ 1987 3 SA 629 (SWA) 633D.

⁵⁰ 1923 TPD 280.

*Rex*⁵¹ in her summary that “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”.⁵²

Christie is of the view that an offer should be such that by its mere acceptance only, a contract will come into being.⁵³

Given the above requirements, it seems that making an offer by one or another electronic means as mentioned above will have little or no effect on the validity of the offer as the requirements are more concerned with the content of the offer rather than the manner or medium of the offer. Factors affecting the validity of the offer, for example vagueness, remain a question of fact dependant on an assessment of the content of the offer made.

No contract can come into being if the offer is not accepted.⁵⁴ The requirements for unqualified acceptance are briefly:

- A contractual offer made to a specific person can only be accepted by that person. This is a long-standing general principle that was initially introduced into the South African law in the matter of *Blew v Snoxell* in 1931.⁵⁵ This principle would follow the requirement of consensus in that the “meeting of minds” must involve two specific minds with a common intention.
- The offeree must have had knowledge of the offer. Christie submits that a party who accepts an offer, of which he was ignorant to the existence of at the time of the acceptance, is trying to place form before substance. Christie links this situation to one in which the offeree acted without *animus contrahendi* which must obviously fail to create a binding and enforceable contract between the parties;⁵⁶

⁵¹ 1909 TS 1105.

⁵² Papadopoulos *et al* (2012) 4.

⁵³ Christie (2011) 31.

⁵⁴ This general rule has arisen out of and been enforced through many cases from 1898 to the most recent being *Tel Pedra Investigation Bureau (Pty) Ltd v Van Zyl* 1965 4 SA 475 (E) 478G. As referenced in Christie (2011) 60.

⁵⁵ 1931 TPD 226.

⁵⁶ Christie (2011) 63.

- Acceptance must correspond with the offer. Christie is of the opinion that this forms part of the traditional requirement that the acceptance of an offer be clear, unequivocal and unambiguous.⁵⁷ In short, in accepting an offer, and offeree cannot introduce new terms, alterations, conditions or demands. This corresponds with the definition of an offer as described above – a simple, clear “yes” is all that is needed to conclude an enforceable contract based on the offer.
- The acceptance need not comply with any formalities unless such formalities are prescribed by statute or agreed between the parties. The leading case on this subject is that of *Driftwood Properties (Pty) Ltd v McLean* in which the Van Blerk J considered it “trite that an offeror can indicate the mode of acceptance whereby a *vinculum juris* will be created, and he can do so expressly or impliedly”.⁵⁸ It must however be borne in mind, that the mode, time and place of acceptance may very well be conditions on which the agreement to be formed is based, and as such the conclusion of the agreement would be dependent on these conditions. For example, should the offer be made and acceptance be required in writing, should the acceptance not be made in writing but be implied, the contract will not come into being;
- Acceptance is deemed to be completed once such acceptance is brought to the attention of the offeror. And whilst there is still much discussion on this topic, particularly as it pertains to offers that do not stipulate a mode of communication of the acceptance or merely require implied acceptance, Christie summarises this situation simply by saying that the offeree is required to make up his mind to accept the offer and in some way manifest this acceptance by the prescribed method and the contract is concluded;⁵⁹

Whilst not forming the crux of this discussion, it must be stated for interest sake, that security plays a unique role in electronic contracts that very seldom features in the more conventional methods of conclusion of contracts. It is obviously of utmost importance to confirm the integrity and true identity of the offeree during the acceptance process. Interestingly, this risk is an obvious derivative of the nature of electronic communication – whilst being convenient and striving, in many instances, to circumvent the “face-to-face” element synonymous with conclusion of contracts, the very same, often inconvenient, element creates unforeseen risks when not present. Many elaborate requirements and even specialised

⁵⁷*Id* at 65.

⁵⁸ 1971 3 SA 591 (A) 597 D.

⁵⁹ Christie (2011) 72.

instrumentation have evolved to compensate for this *lacuna*, in fact an entire field of business has mushroomed around this particular vulnerability, encompassing many smaller fields such as cryptography, cyber notarial services and encoding. This security risk could realistically lead to many forms of fraud and misrepresentation.⁶⁰

The basis for this discussion on consensus revolves around, specifically the time and place of conclusion of the contract between an ISP and its client. The emphasis on time and place of conclusion derives from the traditionally accepted view that the place of conclusion of the contract is the determining factor in ascertaining the particular legal system applicable and jurisdiction of the court, should disputes arise from the contract.⁶¹ This would, in the conventional manner of conclusion, not create a problem as the parties were in each other's presence during offer and acceptance. Failing this, it is commonly accepted practice – a practice that could well be applied to conclusion of contracts through electronic means that the parties would agree on a time and place of conclusion as part and parcel of the contract. This, again, is a problem that arises due to the global nature of electronic communication.

The Model Law addresses this issue in article 15 as it pertains to the time and place of dispatch and receipt of data messages. The analysis is rather simple in that a data message is deemed to be dispatched “when it enters an information system outside the control of the originator...”⁶² In this context “entry” means when the data message becomes available for processing within a given information system.⁶³ Receipt of a data message is a more complex issue, in that if the addressee has a specifically designated information system for the purpose of receiving data messages, the data message is deemed to be received when it enters that specific information system.⁶⁴ Alternatively, if the message is sent to an information system that is not the specific designated information system of the addressee, the message is deemed to be received when the addressee retrieves the message.⁶⁵

As for the place of dispatch and receipt of data messages, article 15(4) provides that a data message is deemed to be dispatched at the place where the originator has its place of business and is accordingly

⁶⁰ See further in this regard Bond & Whiteley (1998) 363.

⁶¹ Lötzt and Du Plessis (2004) *De Jure* 1 at 13.

⁶² UNCITRAL Model Law on Electronic Commerce, Article 15 (1).

⁶³ UNCITRAL Model Law on Electronic Commerce, Article-by-Article Remarks, para 103

⁶⁴ UNCITRAL Model Law on Electronic Commerce, Article 15 (2) (a) (i).

⁶⁵ *Id* at Article 15 (2) (a) (ii).

deemed to be received at the place where the addressee has its place of business.⁶⁶ An issue, however, arises in the case of larger businesses that may have more than one place of business, the Model Law accordingly provides that in such circumstances the message is deemed to be sent/received at that place of business that has the closest relationship to the underlying transaction, alternatively the principal place of business and if all else fails, at the habitual residence of the originator/addressee.⁶⁷ This provision may become problematic as the definition of a principal place of business may differ from jurisdiction to jurisdiction.

Interestingly for the purposes of this discussion the Article-by-Article Remarks of the Model Law expressly state that “the Model Law does not expressly address the question of possible malfunctioning of information systems as a basis for liability. It was felt during the preparation of the Model Law that the addressee should not be placed under the burdensome obligation to maintain its information system functioning at all times by way of a general provision”.⁶⁸ The Commission has neglected a fundamental principle in this article. Whilst it is understandable that a general provision with regard to liability may be a hard line to take, this would have been the perfect opportunity to establish a degree of care or minimum maintenance which is expected of both parties and their respective intermediaries in terms of their information systems. In order to find a basis for liability in this issue, we would have to set our sights closer to home and examine our own common law and various legislation.

The Electronic Communications and Transactions Act⁶⁹ clearly and succinctly states that “an agreement concluded between parties by means of data messages is concluded at the time when and at the place where the acceptance of the offer was received by the offeror”.⁷⁰ In addressing the time and place of dispatch and receipt of the data messages – the ECTA runs parallel, almost verbatim, with the Model Law in section 23. This effectively provides legal certainty as to the time and place of conclusion of electronic contracts.

⁶⁶ *Id* at Article 15 (4).

⁶⁷ *Id* at Article 15(4) (a) and (b).

⁶⁸ UNCITRAL Model Law on Electronic Commerce, Article-by-Article Remarks, para 104.

⁶⁹ Act 25 of 2002. Hereinafter “the ECTA”.

⁷⁰ Section 22(2) of the ECTA.

Following from this premise it is interesting to note that the Model Law follows a distinctive approach in that the content of data messages in pursuance of reaching consensus, i.e. those messages conveying a declaration of will or similar statement, is separately validated if in the form or style of a data message. Article 12 addresses this matter in providing that “a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message”. This article is repeated and finds local standing in terms of section 24 of ECTA, differing slightly in wording to make provision for “an expression of intent” rather than a “a declaration of will” as seen above. Whilst this article does follow the style and paradigm of the “functional equivalent approach” proposed by the Commission, it does take this approach a step further in that it involves itself with the specific content of a data message. This draws particular attention due to the fact that it is the only article referring not only to the message itself but the content of such a message, and the content referred to is most relevant in the sphere of electronic contracts. It gives the impression that, perhaps subconsciously, the Commission understands the importance of creating legal certainty in this area of contract law, alternatively, perhaps the Commission was of the understanding that consensus forms the pinnacle of contract-formation and as such, despite many provisions pertaining to recognition of e-contracts and formalities, this specific article was specially drafted to ensure that the parties could be certain that consensus would be reached despite the form of the contract. In further discussion pertaining to this article, it is brought to light that the Commission did shift its focus from the conclusion of contracts to the duty of performance in terms of the contractual obligations created.⁷¹ It is further submitted that this approach is of utmost significance to those jurisdictions hoping to model their national legislation towards inclusion and acceptance of electronic contracts and that this particular article forms the structural support of the “bridge” between the traditional views of the law of contract and varying, technologically-enhanced formats. It can thus justifiably be put forward that whilst the format of contracts may vary, the fundamental principles regarding their valid conclusion remain the solid foundation of any contractual transaction – effectively creating the harmonious universality envisioned.

⁷¹ UNCITRAL Model Law on Electronic Commerce, Article-by-Article Remarks, para 81.

Assessment of the Various Delivery Theories

Introduction

The general rule regarding consensus in South Africa is the information theory which is based on the principle that through actual agreement between the parties contractual liability is established, and in order for the parties to “actually agree” (I read here: the moment when the contract is concluded) the person who made the offer is informed that his/her offer has been accepted by the offeree.⁷² Christie draws his opinion from the following basis, which I believe is critical to consider in light of the discussions to follow: “the concept of agreement by consent, or true agreement, or a meeting of the minds, or a coincidence of the wills, or *consensus ad idem* (these phrases being interchangeable) is more of a philosophical than a legal concept. A lawyer needs proof before concluding that a particular state of affairs exists, and when the state of affairs in question is something so subjective as the states of mind of two or more parties on a particular occasion or occasions, the lawyer will find that, in truth, the search is not for agreement by consent but for evidence of such an agreement.”⁷³ This view is drawn from the judgement of Wessels J in *Jordaan v Trollip*⁷⁴: “Although the minds of the parties must come together, courts of law can only judge from external facts whether this has or has not occurred. In practise, therefore, it is the manifestation of their wills and not the unexpressed will which is of importance”. I fully support this mature approach. It brings a gravity to the situation and assesses the problem from a practical viewpoint where other sources prefer to argue the theoretical implications of consensus.

Declaration Theory

In terms of this theory, a contract is concluded at the place and time when the offeree declares or expresses his acceptance of the contract.⁷⁵ This remains very vague and undermines (or at the very least does not give effect to) the communication-element that forms the core of consensus. Take the following simple example: **A** receives an offer from **B** late in the evening at his home in Pretoria. Having perused the contract he mutters to himself, “this is exactly what I want, yes! I will let **B** know in the morning”. The most obvious question that arises is when does conclusion take place? When **A** mutters to himself, or

⁷² Van der Merwe *et al* (2007) 55.

⁷³ Christie (2011) 24.

⁷⁴ 1960 1 PH A25 (T).

⁷⁵ Lötze and Du Plessis (2004) *De Jure* 1 at 14.

when he formally responds in the affirmative to **B**? According to Lötz and Du Plessis, in such a scenario, the offer itself should be the determining factor in that, if the offer is writing the contract is deemed to be concluded once the acceptance is communicated to the offeror in writing.⁷⁶ Following this view, should an offer be made by one or another electronic form, it would appear that the process of typing or manifesting the acceptance in an electronic format would constitute the formulating of the acceptance-intention and thus at this time the contract would be concluded. This theory was however rejected in the South African law by the judgment in *Fern Gold Mining Co v Tobias*.⁷⁷ And further, the Electronic Communications and Transactions Act supports a different theory which will be discussed later.

Reception Theory / Information Theory

The reception theory builds on the declaration theory and depends on making the offeror aware of the acceptance by the offeree. Thus, in terms of this theory, the contract is concluded at the time and place where the offeror is made aware of the acceptance of the offer. This theory is not airtight either in that the offeree, having communicated his acceptance, can at no point determine when the offeror is actually made aware of his acceptance. An example of this would be the case where the offeree (**B**) sends his acceptance by e-mail. **A** only receives this e-mail three days later and only then becomes aware of the acceptance. **B** thus is in the dark as to the exact time and place of acceptance. It appears that in order to qualify when and where conclusion has taken place, this theory calls for further communication between the parties. This theory inevitably is open to various forms of fraud in terms of which an offeror can deny that he or she became aware of acceptance of the contract, further the offeror is given a longer period in which to recall his offer, to the detriment of the offeree.

Section 22(2) and 23 of ECTA, however, incorporates into legislation the so-called reception theory that has long been established in the common law. According to ECTA an agreement 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. Practically speaking, this would be the moment when and place where the originator receives the addressee's message of acceptance. Van der Merwe *et al* argue at length whether this theory is suitable for application to conclusion of electronic contracts and summarise that "the possibility of electronic declarations of will being truncated, lost or delayed by intermediaries, or simply

⁷⁶ *Ibid.*

⁷⁷ 1890 3 S.A.R. 134.

the failure of the addressee to retrieve an electronic message, nevertheless militate against the retention of the information theory in this context”.⁷⁸ They apply this theory further in allocating risk to the party who initiates communication in this regard, but only up until the point that the data message enters the sphere of control of the addressee. I understand this to mean that should the accepting party relay their acceptance by means of a data message to the offeror and that message becomes lost, they will remain liable. Thus having clicked “send” the accepting party is liable for their own losses should they make preparations to perform in terms of the contract that they deem to be concluded.

Papadopoulos *et al* delve deep into the information theory and confirm, which in turn clarifies those questions raised above, that expression of acceptance and its communication to the offeror occur simultaneously and that conclusion happens at that moment. Further, in citing Van Aswegen, she addresses the risk factor in light of contractual duties as beginning when both parties consciously agree to the terms of the contract.⁷⁹

It would appear that Christie is hesitant to support a specific theory, preferring to follow a generalistic overview. It is clear that both the Declaration and Reception Theories are inherently objective and it is this notion that Christie supports in his saying that “it is correct to say that in order to decide whether a contract exists one looks first for the true agreement of two or more parties, and because such agreement can only be revealed by external manifestations one’s approach must of necessity be generally objective”.⁸⁰

In summary, it can be said that generally the contract is made at the time and place where agreement is reached. In light of the discussions above, agreement is reached when each party to the agreement is aware of the other party’s agreement with them. And whilst it is impossible to know when this exact moment is, it is safest to deem this point of conclusion as being that moment when and place where the offeror is made aware of the offeree’s acceptance of his offer. It is equally as correct to say that “actions speak louder than words” in these circumstances where manifestation of conclusion of a contract forms the central point of determining liability.

⁷⁸ Van der Merwe *et al* (2007) 74.

⁷⁹ Papadopoulos *et al* (2012) 52.

⁸⁰ Christie (2011) 26.

Chapter 3

Understanding the Nature of the Contract between Client and ISP

Introduction

The aim of this Chapter is to provide some practical insight and understanding into the contractual relationship between the intermediary and party to the e-contract as discussed in the previous Chapter. With reference to the schematic representation of the various relationships present in any typical e-contract,⁸¹ this Chapter will deal with the relationship between **A** and **B**, or **C** and **D**, i.e. the relationship between a party and their own internet service provider. For purposes of this chapter the terms intermediary, ISP, service provider and internet service provider will be used interchangeably as will the terms consumer, client, subscriber and user.

The role of the ISP in electronic contracts has been described as being “that party which directly connects networks to each other to form the greater Internet”.⁸² The Electronic Communications and Transactions Act makes use of the term “intermediary” to describe “a person who, on behalf of another person, whether as agent or not, sends, receives or stores a particular data message or provides other services with respect to that data message”.⁸³ Whilst the definition in ECTA is far wider, and to an extent less technical than that described by Lotz and Du Plessis, both of these descriptions are important in their own right for purposes of more fully understanding the role and nature of any ISP. From a consumer-orientated standpoint, an ISP is also a supplier of a service and for this reason the Consumer Protection Act defines a supplier as “a person who markets any goods or services”. This definition takes on a more economic tone which is important to keep in mind for purposes of understanding the transaction at the heart of any agreement between ISP and subscriber. It is for this reason that these terms will be used interchangeably throughout this Chapter.

⁸¹ See page 7 above.

⁸² Lötz and Du Plessis (2004) 1 at 5.

⁸³ Section 1 of the ECTA.

Case Studies

Whilst we have many Internet Service Providers in South Africa, two popular ISPs have been selected for discussion – both of which are mobile/wireless network service providers and have been selected for the reason that these wireless service providers are the most popular and most accessible to all consumers, independent or business-related. The aim of these case studies is to give a general overview of the nature of the agreement between the ISP and consumer with emphasis on what the contracts have in common – this in order to establish the general standpoint or industry norm of a particular contractual principle.

Further, select individual clauses will be discussed as they relate to the study aims of this work.

Case Study 1: MTN

Introduction

In order to avoid lengthy, repetitive discussions of the general principles of the law of contract, the following case study will be limited to an assessment of only those clauses pertaining to liability; rights and duties of the contracting parties; and those clauses that in themselves are distinct or of particular interest. For purposes of providing a clearer picture, each of the case studies will be discussed based on the same criteria as follows:

Definitions

“Agreement” is defined as being the Application Form together with its standard terms and conditions.⁸⁴

“Internet Services” are defined as being “the MTN wireless internet service provided to the subscribers in terms of the Application Form”.⁸⁵ It is interesting to note that the entire contract between ISP and its client is not reduced to a single document. It is submitted that this must be for practical reasons depending on the scope and nature of the particular services or “package” forming the subject of the contract in question. With such a wide and frequently varying range of internet-related products and services, it would in all likelihood prove a laborious task to draft a separate contract for each – this

⁸⁴ MTN Terms & Conditions at Clause 1.1.

⁸⁵ *Id* at Clause 1.5.

method of a single set of “Terms & Conditions” that are applicable generally to all products and services retains the simplicity, certainty and consistency across the board, for all services offered by this ISP.

“Equipment” is deemed to be “the hardware, including but not limited to a modem, router or smartphone, which will be sold to the subscriber and as governed in terms of the Internet Hardware Terms and Conditions”.⁸⁶ This definition raises questions in that it begins to unduly complicate the contractual process between the ISP and its client. In the practical situation, the hardware and the internet services are inextricably linked, the one being quite useless without the other. An example of this would be contracting for internet services for your business without receiving a modem or router through which the network is accessed and internet services are delivered and used. Alternatively, should one’s internet services suddenly not be available for use one would first have to determine where the fault lies - either with the internet services or with the equipment, and then consult the respective contract in order to determine one’s right of recourse or correct process to have the problem attended to. In the latter situation, assessing where the problem lies is a rather technical process, requiring expert knowledge – it would be rather unreasonable to expect the average internet user to have the necessary know-how in this respect. Further, determining which contract – either that relating to the internet services or that encompassing the equipment part of the particular set-up, requires a degree of legal expertise that again cannot be expected of the average computer literate individual. This begins a “chain” of contractual documents – so far we have the Application Form, these Terms and Conditions as well as those Terms and Conditions specific to the Internet Hardware.

“MTN Subscriber Terms and Conditions” the definition of these particular “T’s and C’s” refers to another document entitled “Product Terms & Conditions”.⁸⁷ It appears from this that there is another, separate set of contractual terms and conditions, that whilst forming part of the relationship between ISP and consumer, pertain to the specific product or package in terms of which internet services are rendered. It is submitted that this even further complicates the contractual process and would perhaps have been more succinctly dealt with under the definition of the internet services.

⁸⁶ *Id* at Clause 1.7.

⁸⁷ *Id* at Clause 1.9.

“Network” is defined as “the mobile telecommunication network and/or wireless platform for the Internet Services that is owned and operated by MTN”.⁸⁸ Similarly, “Network Coverage” means “the geographical area within which the Internet Services can be accessed and used by the subscriber”.⁸⁹

Clauses of Special Interest

We are all familiar with clauses pertaining to interpretation that are usually found at the beginning of contracts, the clause dealing with this, Clause 2, is of special interest and may prove to play a rather significant role in the limitation of liability of the ISP, or even general litigation, should a dispute arise based on this particular contract. This contract deviates from the general principles of the law of contract in stating that, “the rule of construction, that in event of ambiguity, the contract shall be interpreted against the party responsible for the drafting thereof, shall not apply in the interpretation of this Agreement”.⁹⁰ The reason for venturing from the path of the general principles is in this case not easily ascertainable. One is left to wonder if this is because as the service provider in this agreement, it is logical to assume that MTN has expert knowledge in the specific field encompassing this contract and as such it would be reasonable to favour a more technical interpretation should any dispute arise – which may very well be based on one or more technical aspects of the services provided. Alternatively, should this clause be viewed as a safety-measure assuring the service provider that should argument arise, it will be on their terms – a kind of “home language” advantage?

Whilst the actual provisions of clause 4.2 are not particularly noteworthy for the purposes of this discussion, the particular wording does raise concern as it seems to be incomplete – “In the event that the subscriber elects to terminate the agreement prior to the expiry of the Initial Period, the subscriber shall be required to pay a penalty in this regard, calculated as follows...[sic].” While this appears to be a bona fide typing/drafting error, the repercussions of same could be particularly detrimental for the consumer who has no way of knowing the scope of the penalty for terminating the contract with the ISP. This is a case of negligent drafting, at best, that is freely accessible by the public. Any dispute arising from an agreement encompassing this clause should be dealt with in terms of the general principles of the law

⁸⁸ *Id* at Clause 1.11.

⁸⁹ *Id* at Clause 1.12.

⁹⁰ *Id* at Clause 2.5.

of contract, specifically the common law remedies pertaining to termination and apportionment of damages, as the contracting parties can clearly have no consensus as to this part of the contract.

Clause 6⁹¹ is the only clause throughout the “Terms and Conditions” that places any sort of duty on the ISP and from a practical viewpoint this clause is as short as it is vague. It provides that “MTN shall use its reasonable endeavours to ensure that the Internet Services are made available to the subscriber for the duration stipulated ...” And despite the brief description, this too is subject to the Disclaimer of Warranties⁹². No mention is made of the standard/quality/reliability of the services that will be provided – in other words, a user cannot hold their ISP to provide a reliable service, or even a service that guarantees a certain internet speed – both of these aspects being of vital concern to any user who conducts a business that relies on an Internet Service in its daily transactions. On the other hand, the ISP binds itself to “use reasonable endeavours” – this phrase is not defined. Determining a reasonable endeavour is a point that can only be clarified through litigation on this specific topic. Further, such litigation should focus on an extension of the “reasonable man test” to a reasonable internet service provider – the reasons for this extension are the fact that such an argument may tend to become very technical and thus, for the purposes of apportioning fault, negligence and accordingly damages, the limits of what is expected of a “reasonable” internet service provider in rendering its services to the consumer need to be defined and applied across the board – thus encouraging legal certainty and addressing the imbalance of power inherent in such contracts.

This clause throws into sharp distinction the unequal positions of the two contracting parties. This position of unequal bargaining power will be discussed below in clause 7 as it appears at first glance that the obligations of the subscriber are clearly defined and numerous, whilst the duties of the ISP are vague and subject to complex limitations of liability, disclaimers and no guarantees. Despite being on the back foot in these kinds of agreements from a technical know-how perspective, it appears that the average consumer in South Africa has little option but to accept the unbalanced, unprotected position created in terms of this contract given the fact that ISPs are few and far between and there appears to be no reasonable prospect of expansion in this market given the limitations of infrastructure to support much-needed, healthy competition.

It is common knowledge that expanding access to the internet has spurred an explosion of illegal activity ranging from fraud to infringement of copyrights and circulation of pornographic and illicit material -

⁹¹ *Id* at Clause 6.

⁹² See further discussion of clause 9 below.

this is partly due to the fact that the Internet, in its global nature, cannot be policed or governed. It is encouraging to note that per clause 7,⁹³ MTN attempts to govern its users and curb illegal activity. In terms of this clause subscribers agree not to use the Internet Services provided for unlawful or abusive purposes – a non-exhaustive list. Should such clauses become standard to all Service Providers, illegal activity may be curbed in that a contract of this nature gives jurisdiction to the courts to prosecute those who act unlawfully through such services, it also goes a long way in defining such illegal activity and lastly it provides a medium through which illegal activity can be monitored and investigated.

Included in this agreement are many practical obligations that rest on the subscriber with regard to the installation of equipment needed to use the Internet Services, as well as further ill-defined obligations. In terms of clause 7.1.2 any data that is unused at the end of a particular month will accrue to the next month and then, if still not used, will expire and the subscriber will not be entitled to any credit/refund in regard to this unused data.

Firstly, the obligation on the subscriber is unclear – is the subscriber hereby obliged to use all the data made available to them on a monthly basis, and as a penalty for not complying with this obligation they forfeit the unused data, which has been paid for by the subscriber, with no right of recourse? Secondly, this clause creates a dangerous precedent. Whilst the ISP may claim payment from the user for that data used in excess of the data allotted to that user per month – creating the impression that “you pay for what you use” applies in favour of the ISP but the corollary is not true as it applies to the subscriber – “you don’t pay for what you don’t use”. In essence this becomes a situation of “use it or lose it” which begs the question, why? Should the user not use all the data allotted to them in a particular month, the ISP is in no way disadvantaged – they still have that data, which can be allotted to another subscriber, the possibility exists that they may still benefit from it. In reality the ISP benefits twice, they receive payment for data not used by the user, and in all likelihood allocate that data to another user, who will also pay for it. This also amounts to an unfair practice; however, this can only be remedied through litigation. To make any meaningful contribution to remedying this situation, one would need to put oneself into the position of the subscriber – a position not too far outside the frame of reference of most South Africans. This in turn prompts a critical study of the Consumer Protection Act.⁹⁴ Whilst a more in-depth discussion of the respective rights and duties of the parties in terms of- as well as possible remedies afforded by- the

⁹³ MTN Terms & Conditions at Clause 7.

⁹⁴ Consumer Protection Act, 68 of 2008, hereinafter “the CPA”.

CPA will follow below⁹⁵, it would be amiss not to cast this particular clause and the situation it inevitably creates into some doubt in light of the CPA. A cursory glance of the purposes and policy of the CPA (as more eloquently put forth in the Preamble of the Act), particularly as manifested in section 3, being: “The purposes of this Act are to promote and advance the social and economic welfare of consumers in South Africa by- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;”. Subsections (d) and (h) go further in so far as it expressly protects consumers from “unconscionable, unfair, unreasonable, unjust or otherwise improper trade practises”⁹⁶ and further “deceptive, misleading, unfair or fraudulent conduct”⁹⁷ Most importantly; the CPA makes provision for “an accessible, consistent, harmonised, effective and efficient system for redress for consumers”.⁹⁸ The terminology used in these purposes and policies of the CPA, words such as “unfair” or “unreasonable”, have no certain meaning and due to the fact that the CPA is among the more recently promulgated legislation, there is a vast lack of precedent on which to rely for such meanings. But all is not lost, section 4(5) sets the policies and purposes in motion in placing a duty on a person not to engage in conduct that is contrary to the policy or purposes of the CPA or so designed to frustrate same. Van Eeden understand the phrase “purposes and policy of the Act” to mean both a collective expression of the purposes of the Act as well as embodying the whole of section 3 in broader terms.⁹⁹ This interpretation of the wording together with the policy-based approach to consumer rights is an echo sounding from the Constitution and much later the National Credit Act. This appears to be a trend in modern legislation that favours development and interpretation towards a “legal culture” rather than rigid hard-and-fast rules. This approach lends itself to an enduring application that will, in time, be able to keep up with the advancing technology as it is interpreted and applied to constantly-developing marketplaces and economic frameworks. Viewed against this backdrop, it would appear that any clause offered to a subscriber by an ISP that takes the hard-line as mentioned above, would fall short of this policy and would subject itself to the harshest criticism.

⁹⁵ See Chapter 5 and 6 below respectively.

⁹⁶ Section 3(d)(i) of the CPA.

⁹⁷ *Id* at section 3(d)(ii).

⁹⁸ *Id* at section 3(h).

⁹⁹ E van Eeden (2009) 39.

Clause 8¹⁰⁰ sets the tone, in a manner of speaking, for the liability issue which will be discussed in depth hereunder and in later chapters.¹⁰¹ The central theme of this discussion revolves around the fact that “MTN reserves the right at any time and from time to time to modify or disconnect, temporarily or permanently, the Internet Services with or without notice to the subscriber”.¹⁰² This clause, amongst others of a similar tone, highlights an unfair position between ISP and consumer, emphasised further by the conspicuous lack of any right of recourse available to the consumer. When assessing inequality in bargaining power between contracting parties, any discussion would be incomplete without reference to the well-known precedent in *Afrox Healthcare Bpk*¹⁰³. The Court held that, with reference to the infamous *Brisley* case,¹⁰⁴ that while the considerations of good faith, reasonableness, fairness and justice are foundational to our law of contract, they are not in themselves legal rules and when it comes to the enforcement of contractual provisions, the Court has no discretion and cannot act on the basis on abstract ideas but only on the basis of rules that have been crystallised and laid down. In this regard, the Court further held that unequal bargaining power was a factor which could play a role in consideration of public interest. Any difference in such bargaining power between the parties does not automatically infer that any contractual terms that benefit the stronger party will come into conflict with public interest.¹⁰⁵ It can only be assumed that as disposed public interest may be to protection of consumers’ rights and adjusting the bargaining power between parties, so too is there overwhelming support and reliance on the *pacta sunt servanda* doctrine which in itself supports the fact that the courts must enforce contracts and thereby create legal certainty. It is this security in the fact that contracts are binding and enforceable that forms the basis of economic stability and freedom. Whilst I respect the tenuous and precarious weighing of these rights and principles, the wording of the CPA cannot be overlooked. Section 3 effectively makes the policies and purposes of the CPA solid in law. It creates a position in which the courts are forced to weigh the policies of consumer protection and inter alia, the unequal bargaining positions, in favour of the consumer. Section 4(3) of the CPA clearly states that “if any provision of the Act, read in its context, can reasonably be construed as having more than one meaning, the Tribunal or

¹⁰⁰ MTN Terms & Conditions at Clause 8: Suspension and disconnection of the internet service.

¹⁰¹ See further MTN Terms & Conditions at Clause 10, Clause 9 and Chapter 4 in this regard.

¹⁰² MTN Terms & Conditions at Clause 8.1.

¹⁰³ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).

¹⁰⁴ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

¹⁰⁵ *Afrox Healthcare Bpk* at 35, as cited in Van Eeden (2009) 79.

Court must prefer the meaning that best promotes the purposes of the Act, and will best improve the realisation and enjoyment of consumer rights generally...”. And there it is! The principles of fairness, reasonableness and justice have been crystallised. This provision alone develops the view taken by the Court in *Afrox Healthcare Bpk* that “a contractual provision that is unfair to such an extent that it conflicts with public interest will not be legally enforceable”¹⁰⁶ a step further insofar as the contractual provision would need to pass the standard set by the CPA first, before any other weighing of public interest. In effect the bar has been lowered to a weighing of the purpose of the relevant legislation rather than the onerous task of determining varying public interest in such matters. In short, the relevant provision would need to pass the muster of the CPA before it can be argued that upholding the provision is in- or contrary to- public interest.

The crux of the liability issue, the central focus of this discussion, is contained in Clause 10¹⁰⁷ of the MTN Terms and Conditions. Whilst this and other clauses pertaining to liability, from a variety of ISPs, will be critically discussed later, for the purposes of a global understanding of the contractual relationship between ISP and consumer – the aim of this particular chapter is to take note of the various limitations of liability that the ISP relies on, the so-called exemption clauses. These terms and conditions are very clearly worded: MTN (and all of its affiliates and associates) may not be held liable for “any loss, damage, costs, expense or injury, including without limitation direct, indirect, incidental, special, punitive or consequential loss, loss of profit, loss of anticipated savings, loss of goodwill, loss of revenue, loss of customers or clients, caused or arising in any manner whatsoever ...”

On the face of it this appears to be a very comprehensive list of those things an ISP cannot be held liable for. Van Eeden takes a rather dim view of exemption clauses as can be gleaned from his discussion and criticism of the *Afrox Healthcare Bpk* judgement.¹⁰⁸ The court found that the evidence did not support the argument that the patient (the claimant in the court of first instance) was in a position of weaker bargaining power than the company that owned the hospital. Van Eeden goes on to criticise the court’s decision by asking what evidence should be proffered in order to prove the discrepancy in bargaining power, and by way of example shows that such a situation would become unreasonable and untenable.¹⁰⁹ The questions he asks are directly application to the situation at hand, *inter alia*: Is the consumer

¹⁰⁶ *Ibid.*

¹⁰⁷ MTN Terms & Conditions at Clause 10: Limitation of liability.

¹⁰⁸ Van Eeden (2009) 70.

¹⁰⁹ *Ibid.*

expected to have approached other hospitals (in this case, other service providers) to ascertain their contractual terms? This fails to set a precedent and follows a rather “case by case” approach, which for the sake of legal certainty is unacceptable. It follows that should the consumer have to shop around in order to establish an industry norm of unequal bargaining power this process in itself would amount to undue prejudice and unnecessary costs to them.

Viewing this clause through the CPA-tinted spectacles produces a very different picture. Section 48 of the CPA very clearly prohibits a supplier from requiring a consumer to waive any rights; assume any obligation; or waive any liability of the supplier on terms that are unfair, unreasonable or unjust.¹¹⁰ And before the policy consideration debate of what is unfair, unreasonable or unjust enters the fray, Section 48(2) comes to the rescue by expressly qualifying that any terms or conditions (or even the transaction/agreement as a whole) is unfair, unreasonable or unjust if the terms of such a transaction are so adverse to the consumer as to be inequitable or *inter alia* if the terms are excessively one-sided in favour of any person other than the consumer.

As for the “when”, Clause 10 further makes provision for the following cases, in which the ISP can also not be held liable: “...including (without limitation) any damages suffered due to: any interruption of, or error in the Internet Service; MTN’s failure to fulfil obligations as a result of a third party service provider’s (being agents, sub-contractors, suppliers, etc) failure, default, neglect, refusal to supply services to MTN; network-related technical problems; or *force majeure*.” From this non-exhaustive list of “when” the ISP is not liable, it can be deduced that not only does the ISP intend to cover itself but also those parties higher up on the “food-chain”, the suppliers and sub-contractors of the ISP; as well as those lower down – the agents. This appears to be a very unique contractual situation in which there are only two contracting parties: the ISP and the consumer, however, in protecting other parties, such as the sub-contractors of the ISP a situation arises that appears to be akin to a stipulation to the benefit of a third party. It is submitted that this may be the central reason for a very conspicuous lack of case law surrounding this particular topic – there is no room to litigate, the proverbial (liability) buck has nowhere to stop, particularly in the South Africa legal atmosphere in which the sanctity of contracts is so highly regarded.

The question does arise though, how far down the proverbial “failure, default, neglect” rabbit-hole does the consumer have to fall before the law and her protections stop the practise of on-going abuse to consumer rights? As much as the courts are prepared and eager to uphold the maxim *pacta sunt*

¹¹⁰ Section 48(1)(c) of the CPA.

servanda, there must surely be a breaking point – the National Credit Act began the process and the CPA has gone a very long way to offer a helping hand to consumers. It would appear that the legislature has realised the depth of the rabbit-hole but, as evidenced by the inclusion of this series of clauses in a modern contract offered to the average consumer, it would take the judiciary adopting a tough stance and rigidly applying and developing the underlying values of modern consumer-orientated legislation to make a meaningful difference to the common industry practise of contracting. Christies specific wording on this topic can only emphasis this point in his saying that “the legislature may use its overriding power to nullify or control any attempt by the parties to exclude a term implied by statute or common law in their contract”.¹¹¹ I would proffer that those provisions of the CPA have become and are intrinsically implied in contracts of this nature specifically and further that the legislature now must use its power to curb prejudicial practises and give effect to consumer rights.

Continuing the discussion as to limitations of liability addressed in clause 10, clause 9 becomes of special interest – “Disclaimer of Warranties”. The construction of the clause is the first note-worthy topic, it takes on a kind of “voetstoets” approach in that “The subscriber therefore acknowledges and agrees that the Internet Service is rendered on an ‘as is’ and on an ‘as available’ basis...”. This particular clause expressly excludes a warranty, in that “MTN does not provide any warranties, representations or guarantee whatsoever that the Internet Services will be available, accurate, continuous, complete, correct, error-free, secure, up-to-date and/or reliable at all times”. This particular clause goes on to list a further twenty circumstances in which the subscriber is to acknowledge as having an impact on the use of the Internet Services and/or quality and coverage availability thereof. This list includes among others, “limitations upon national bandwidth capacity”, “network failures” and “quality of service of telecommunication links and lines”. At the risk of appearing ignorant, I beg the question, what is the subscriber in this contract actually receiving in terms of the agreement? I would proffer that clauses 9 and 10 read together, lead to a situation that, at best, tips the scales in an already unequal situation regarding bargaining power between ISP and subscriber by leaving the subscriber with no legal leg to stand on, and at worst brings about a situation somewhat akin to purchase of a hope (for a service that may be available in the future). Finally, but also most importantly for later discussions on this topic, clause 9.3, which provides that “MTN does not ... assume any responsibility for the quality of the Internet Services or of the data transmitted as part of the Services and shall not be liable for any loss, cost, claim, damage or expense which may be caused by weak signals and/or data lost”, strikes at the heart of this

¹¹¹Christie (2011) 167.

discussion and brings to the fore the fact that a situation may arise in which consensus is affected due to one or more of the data messages, communicating same consensus, being lost. And in such a case, the ISP has expressly excluded itself from liability from any claims arising from its role in the failure to communicate and reach consensus timeously.

This clause can be challenged in terms of Section 54 of the CPA – Consumer’s rights to demand quality service, in terms of which a consumer is entitled to timely performance and completion of the services undertaken by a supplier and further timely notice of any unavoidable delay in the performance of the services.¹¹² Further, a consumer is entitled to performance of the contracted services in a manner and of a quality that “persons are reasonably entitled to expect”.¹¹³ These provisions are given effect by the provisions of Section 54(2), which places the consumer in a position to claim a remedy for any defect in the services provided or a refund for a reasonable portion of the price paid in accordance with the extent of the failure. It is obviously worrying that in practise the consumer’s attention is not drawn to these rights of recourse and further that these rights do not form a part of the written agreement between the parties. Once again, it will have to be determined by the judiciary whether or not these rights do in fact form part of the implied terms of the agreement in such circumstances only where the consumer himself is aware of his rights. For the average South African, knowledge of their consumer rights is painfully lacking and many are caught unaware and vulnerable by such agreements – much to their detriment.

Further, section 48 of the CPA clearly prohibits a supplier of services from requiring of a consumer to waive any liability of the supplier on terms that are unreasonable, unjust or unfair or impose such a term on a consumer by means of a condition of entering into a transaction.¹¹⁴ This is most certainly the case with this particular “Disclaimer of Warranties”. In most circumstances a consumer is not given an option to alter the terms and conditions of the agreement between himself and the ISP. The contract is pushed across the desk and the consumer asked to sign. It is highly doubtful, that when questioned on the waiver of liability, that the ISP will be prepared to negotiate the terms of the standard-form contract. This creates a false situation as the contract is concluded not so much due to pre-contractual negotiations, but rather through a situation of “take it or leave it”. It goes without saying that this is an untenable situation in which the consumer (knowingly or otherwise) signs himself into a highly prejudicial situation for which he has limited recourse for the simple fact that he will otherwise not be able to secure the services

¹¹² Section 54(1)(a) of the CPA.

¹¹³ *Id* at Section 54(1)(b).

¹¹⁴ *Id* at Section 48(1)(c)(iii).

he needs. As can be seen in the case study to follow, this particular disclaimer is an industry-wide norm. There is no alternative.

Finally, Section 49 places an important duty on the supplier, and this could well prove to be a fatal failing on the part of the supplier should he/she not comply. In terms of this section, a supplier has to draw the consumer's attention to clauses of a certain nature, *inter alia* provisions which: limit in any way the risk or liability of the supplier or any other person; constitute an assumption of risk or liability by the consumer; impose obligations on the consumer to indemnify the supplier or any other person for any cause; or be an acknowledgement of any fact by the consumer.¹¹⁵ And to further this cause, the manners in which the consumer's attention must be brought to such clauses is clearly laid out, including the fact that such clauses need to be drafted in plain, understandable language; in a conspicuous manner; and prior to the consumer entering into the agreement or being expected to pay for same.¹¹⁶ From personal experience, it would appear that suppliers are unaware of this duty, alternatively assume that the consumer is unaware of their rights and simply do not bother to address the consumer's rights.

This golden trio of provisions described above, may well someday become the proverbial thorn in the side of suppliers. It would require a complete overhaul of the contracting process with careful attention to properly discharge each and every duty imposed by the CPA. A re-education of sales staff and representatives is necessary and would go a long way in creating the atmosphere of a consumer-orientated market place as envisioned in our modern consumer legislation.

Clause 11 contains two clauses that from a practical standpoint appear to give the service provider a kind of advantage in bargaining power. The first places the consumer in the position that should a legal dispute arise or even if a claim is proved against the service provider, he or she may not withhold payment for services received.¹¹⁷ Practically speaking, should a dispute arising from this agreement become a matter for the courts to decide, the consumer is still liable to pay the service provider despite proving a claim against it. Litigation can become a very lengthy, very expensive exercise. Given this, consumers with legitimate claims may be discouraged from proving their claims due to the cost of litigation as well as the on-going cost for internet services throughout the litigation process. This may

¹¹⁵ *Id* at Section 49(1)(a) – (d).

¹¹⁶ *Id* at Section 49(3) – (5).

¹¹⁷ MTN Terms & Conditions at Clause 11.3.

limit a contracting party's right to recourse that would otherwise be afforded in terms of the general principles of the law of contract and the CPA.

Secondly, clause 11.5 gives much reason for concern in providing that "MTN reserves the right, in its sole discretion to vary the terms and conditions of this agreement" and that further "MTN may elect, in its sole discretion, to notify the subscriber of such variation in writing or to publish such variation at its principle place of business, or on the MTN website". It is submitted that this clause severely affects the balance of power in this particular contractual relationship. The average subscriber is a layperson with little or no understanding of the complexities of contractual relationships – this already places the subscriber at a disadvantage, to then be in a position that the "rules of engagement" may change with or without your knowledge leaves the subscriber in a very vulnerable spot.

Special Undertakings

Whilst the following are not enforceable contractual terms, they do provide an insight into the aims of the service provider with regard to the relationship with their users. It is important for the purposes of this discussion, as in many instances, that the atmosphere in which these "Key Commitments and Consumer Rights" are interpreted is very different from the underlying theme of the Terms and Conditions as discussed above. Perhaps these commitments are to be viewed as a springboard from which to critically analyse the enforceable terms of the contract, and further perhaps to launch a discussion in the light of the Consumer Protection Act. To summarise these "Key Commitments and Consumer Rights": many commitments are a further entrenchment by the rights afforded to all South Africans in terms of the Constitution of the Republic of South Africa. An example of this is found in the commitment made "...MTN will: not unfairly discriminate against or between consumers on the basis of race, gender, sex, age, religion, belief, disability, ethnic background or sexual orientation", thus reiterating section 9 of the Bill of Rights.¹¹⁸ Apart from the obvious entrenchment of the fundamental human rights, this undertaking resounds deeply with the CPA and particularly with the preamble, policy and purpose thereof. Section 8 of the CPA also mirrors both the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act.¹¹⁹ These undertakings on the part of a large company, as this and most ISPs are, set an important standard in our country in that the provisions of the

¹¹⁸ Chapter 2 of the Constitution of the Republic of South Africa, 1996.

¹¹⁹ Act 4 of 2000.

Bill of Rights are carried through to the economic sphere and thereby put into practical use and made available to all.

Further the Commitment “to provide customers with information regarding services and pricing” as well as that “to act in a fair, reasonable and responsible manner in all dealings with the consumer” bear a strong resemblance to and convey the aims of the Consumer Protection Act. These Key Commitments also enforce the ties to - and the aims and functions of - the Independent Communications Authority of South Africa Act.¹²⁰ By asserting its ties to ICASA, the ISP acknowledges its accountability to this authority in that “... MTN will: advise consumers to refer a complaint to the ICASA”. The relevant authority’s (whose duty it is to establish a Complaints and Compliance Committee in terms of S17A(1) of the ICASA Act) details are also provided and will be discussed more fully in Chapter 5 hereunder.

It is interesting to note that this service provider does not refer the subscriber to the relevant Provincial Consumer Protection Authority or even the National Consumer Commission¹²¹. This would most effectively give power to the consumer’s rights that the ISP commits to uphold. It would further give consumer’s faith and confidence in the ISP knowing that their complaints can be adjudicated by at least two competent authorities. It is my view that whilst the consumer-orientated culture is being developed, and as the relevant legislation is gaining traction, adjudication of such matters should be left to the relevant forums and their experts (very much in the same way that labour disputes are adjudicated by the Council for Conciliation Mediation and Arbitration) prior to being brought before a competent court. This for the simple fact that the interactive process driven by these councils and commissions, are best suited for efficient and inexpensive redress to consumers which would otherwise have been beyond their financial means. This view I feel further entrenches and grounds the purposes and policies as highlighted in section 3 of the CPA by bringing protection to consumers who need it the most.

The Constitution read with the Consumer Protection Act and the ICASA Act, as is the case in these Key Commitments and Consumer Rights, together form the foundation for a consumer-orientated market place. It is encouraging to note that this ISP makes public their commitment to these important pieces of consumer legislation. However, an undertaking does not a policy make! Whilst it may be the ISP’s intention to base their agreements on these fundamental pillars of consumer rights, the clauses, wording

¹²⁰ Act 13 of 2000, hereinafter “ICASAA”.

¹²¹ As established in terms of Sections 84 and 85 of the CPA respectively.

and impression of the agreements fall short of a consumer-orientated business practise. As discussed above, many of the clauses fall short of the Consumer Protection Act's express purpose and policy. Further, as it pertains to liability, this ISP makes no effort to equalise the unbalanced bargaining power between them and their subscribers.

Conclusion

I find it difficult to understand the hard line taken by MTN regarding liability. The fact remains that whilst this agreement is between the client and the ISP, the issue at hand transcends many other pieces of legislation that are of application and will be discussed in later chapters. The ISP may well find itself in a position in which it attempted to limit liability in terms of the relationship with its client but may well find itself on the receiving end of the apportionment of liability should such a dispute arise, and other applicable legislation enters the picture.

Case Study 2: Vodacom

Introduction

Having already established a general understanding of the relationship between ISP and consumer in the previous case study, it would seem most effective to discuss the provisions of the following agreement in light of what has been discussed above in order to establish which clauses are similar – indicative of an industry norm, and which are distinctive. For the sake of keeping this work concise and to prevent a repetition of those issues discussed above in light of the CPA and general principles of contract, it would be prudent to refer to those discussions above as they are relevant to this agreement particularly.

Definitions

“Agreement” refers to the documents in their entirety including the General Terms and Conditions,¹²² a separate Service Schedule (encompassing separate Terms and Conditions particular to the type of service forming the subject of the agreement between ISP and consumer), read together with the Acceptable

¹²² Vodacom's General Terms and Conditions.

Usage Policy as well as other schedules, amendments and annexures.¹²³ It appears from this definition as well as the previous case study that in essence the agreement between the ISP and its client is contained not in a single document but in a number of smaller agreements together with policy documents – an Acceptable Usage Policy appears to be a common document in these types of contractual relationships, as does a specific undertaking applicable to the specific service forming the subject of the contract.

“Internet Services”: it is interesting to note that this particular ISP does specifically define the services which it undertakes to render in terms of the contract with its client. Both the General Terms and Conditions and the Service Schedule – dealing specifically with the terms according to which the services will be rendered, are silent on any attempt to define the exact nature and scope of the services. It is submitted that perhaps in not defining what exactly the internet services are, that which they are not are not expressly excluded by definition. In approaching the contractual relationship from this perspective, perhaps the ISP is allowing for development in the technology central to the service they provide without the practical hurdle of having to update and amend each contract concluded to reflect a technical advancement as these are brought to the fore and included in their ongoing service agreements.

The term “Equipment” as defined by Vodacom for the purposes of rendering services as an ISP is rather noteworthy in that the equipment is supplied to the user “on the basis of a loan or rental, to enable the Customer to utilise the Services”.¹²⁴ In terms of the contractual relationship between the parties – the proverbial plot thickens in that the contract becomes even more distinctly *sui generis* by this incorporation of a loan agreement. The effect of this incorporation, and bearing in mind that those parts of the entire agreement pertaining to the equipment have a separate set of Terms and Conditions, which (whilst strictly speaking are also *sui generis*) contain many elements that are characteristically associated with loan agreements, leads to a very complex contractual situation. From a practical standpoint, this construction makes more sense as it gives legal effect to the reality of the situation – being that in more cases than not, equipment is supplied along with the Internet Services.

It has been highlighted above that for the sake of comparison, critical assessment and overall understanding of the relationship between the ISP and its client, as far as practically possible the case studies would be assessed according to the same terms. While MTN refers to “Subscriber Terms and Conditions”, Vodacom in Clause 2 makes use of the term “Service Schedule”, for purposes of this

¹²³ *Id* at Clause 2.1.1.

¹²⁴ *Id* at Clause 2.1.8.

discussion the two terms refer, in principle, to the same document.¹²⁵ “Service Schedule” is used to denote yet another set of Terms and Conditions that is referenced in the General Terms and Conditions that “in respect of each service which VSP (Vodacom Service Provider) provides to the customer, the Service Schedule concluded between the parties setting out, *inter alia*, a description of the Service, the fees payable, the service levels applicable”. Referencing so many various sets of terms and conditions to form part of a single agreement unduly complicates an already complicated contractual relationship. If we were to keep score, an agreement of this nature incorporates the general principles of the law of contract, many elements of a loan agreement as well as aspects of contracts for rendering of services.

“Network” means “the physical wireless and wired network operated and made available by Vodacom as well as a virtual network ... operated and made available by Vodacom over its own network as well as the networks of the ECNS providers”.¹²⁶ Particularly as it pertains to the question of liability (as more fully discussed later) it is my submission that, when assessed together with the Case Study of MTN, Vodacom has come a long way in clarifying this aspect of the agreement between ISP and client.

“ECNS providers” is a term used to denote electronic communications network service providers, other than Vodacom, that are licensed in terms of the Electronic Communications Act¹²⁷ to provide the same services. When read together, it becomes clear that despite contracting with a particular Service Provider, many of the wireless and wired networks are shared between the various ISPs, and as long as these ISPs are licensed in terms of the Electronic Communications Act, this practical arrangement is logical and simple. It is, however, questioned why, when the state of affairs is so simple, the respective terms and conditions provided for by MTN are so complex – a criss-cross of dodging liability behind what appears to be numerous other parties in the form of “agents, sub-contractors, affiliates, etc.”. This definition in particular goes a long way in simplifying not only the contract but the relationship between the parties, and also caters for the client, who in reality does not have expert knowledge in this field, in plain legal language that will make it easy to understand and in the long run encourage faith in the ISP. This is most definitely in line with the aims of the CPA and more particularly complies with the requirements Section 49 as more fully discussed above.

¹²⁵ *Id* at Clause 2.1.10.

¹²⁶ *Id* at Clause 2.1.9.

¹²⁷ Act 36 of 2005, hereinafter the “ECA”.

Clauses of Special Interest

Clause 5 of Vodacom's General Terms and Conditions raises particular interest, not necessarily for purposes of this discussion but as an added facet to an already complex relationship between ISP and consumer, one which has been overlooked thus far in this assessment of ISP-client contracts. Within the South African context, most businesses and private individuals contract with their ISP on a basis that they will receive monthly invoices calculated according to their data usage, alternatively a set monthly fee (this not taking into account the nature of the charges or penalty fees that may arise during the period of the contract) is charged. And whilst it has been brought to light that an ISP charges interest and penalty fees on those amounts not paid according to the payment arrangement between the parties, this particular clause gives jurisdiction in that the parties may agree that "VSP (Vodacom Service Provider) may in its sole discretion, levy interest in terms of the National Credit Act¹²⁸ on any unpaid or overdue amount..."¹²⁹ Whilst the provisions of the National Credit Act are not necessarily strictly relevant to a discussion pertaining to the general principles of the law of contract, the NCA brings to the fore another aspect of this particular contractual relationship – this particular form of agreement may very well include aspects of a credit agreement that must as a result comply with the specific statutory requirements prescribed by the NCA.¹³⁰

As previously discussed, considering the inherent characteristics of the internet and the boundless nature thereof, it is important that Service Providers, at any level in the network, play a role in curbing the use of the internet for unlawful and possibly harmful ends. Clause 7 of the Terms and Conditions employed by Vodacom enforces this goal in binding the client contractually to "... comply strictly with all restrictions imposed on the computer networks by legislation through which any information and/or data transmitted by the Customer passes".¹³¹ The user is also bound contractually to compliance with the Service Provider's Acceptable Use Policy – the intricacies of which will be discussed below. In order to enforce these provisions, the customer further agrees that the ISP has discretion to terminate access to the services, delete offending content or request the customer to remove the content themselves, should the customer transmit or publish any content that is in contravention of the law or the Acceptable Usage

¹²⁸ Act 34 of 2005, hereinafter the "NCA".

¹²⁹ Clause 5.6 of Vodacom's General Terms and Conditions.

¹³⁰ Section 1 read together with section 8 of the NCA.

¹³¹ Clause 7.1 of Vodacom's General Terms and Conditions.

Policy.¹³² Whilst this provision undoubtedly has an honourable aim, it does open the door to violation of the privacy of the user. In the economic sphere, access to the sensitive information of a business or so-called “trade secrets” may have detrimental effects. Further, the scope of “unlawful or offensive” content is subject to debate, constant change, interpretation and perhaps even abuse.

Continuing on the topic of use of the service provided, the service provider indemnifies itself to a degree in that contractually “the Consumer acknowledges that any third party services and products accessible or used in conjunction with any services are provided subject to the terms and conditions specified by the third party providers thereof”.¹³³ This appears to be a little vague in comparison to the similar clause provided for by the MTN service provider in that the meaning of “third party” requires clarification. Does this refer to a third party from a “service providing” perspective – akin to an associate, affiliate or sub-contractor as referred to in the MTN equivalent of this clause? Should this be the case, this clause appears to be somewhat contrary to the definition of “network” as discussed above which has an underlying inclusive policy. Alternatively, this clause could be used by the service provider to exclude itself from liability in those cases where the services it renders are used in conjunction with other hardware or software, not provided by it. In this case, such exclusion is understandable in so far that it is unreasonable to expect a service provider to foresee and accept liability based on elements that are not included in the service it provides.

Clause 8 links to - and furthers the definition of - “equipment” as seen above. Throughout this clause one gets the impression that the service provider is emphasising the loan characteristics of the contract with the consumer. At first glance the clause seems like a reiteration of the general principles of the laws relating to loan contracts: “the customer acknowledges and agrees that all rights of ownership in and to the equipment shall, at all times, remain vested in VSP and accordingly, the Customer shall not hold itself out as the owner of the equipment, nor sell, transfer, dispose of, mortgage, charge or pledge the equipment or permit the possession of the equipment to be taken away from the Customer.”¹³⁴ Whilst to those with a legal education this clause seems straightforward and an echo of the well-known common law principles of rental agreements – the rights afforded in terms of ownership are strictly denied and the limitations of possession as afforded by a contract of loan clearly defined – this clause makes it clear to the average lay person and goes a long way to promoting understanding of the “legalese” in this

¹³² *Id* at Clause 10.1.

¹³³ *Id* at Clause 7.6.

¹³⁴ *Id* at Clause 8.1.

contractual relationship. However, whilst the full personal rights associated with ownership are limited – ownership of the equipment does not pass as this is a contract of loan, the consumer does assume all risk pertaining to the equipment in terms of Clause 8.2.¹³⁵ The risk passes on delivery of the equipment and the consumer will be liable “for all loss, theft or destruction of or damage thereto, howsoever arising”. Further, the Consumer is bound to the higher degree of care equivalent to that of a *bonus paterfamilias*, explained in this contract as “no lesser degree of care than it would had same (equipment) belonged to it”.¹³⁶ Given this inclusion of aspects of rental agreements, and specifically the higher degree of care that is expected of the subscriber in his/her capacity as lessee, I would proffer that these clauses would fall into that category of clauses to which the consumer’s attention must be drawn by the supplier for the simple fact that it is obviously clear that this clause constitutes an assumption of risk on the part of the consumer. In this regard Sections 48 and 49 of the “golden trio” of provisions forming a challenge to clauses of this nature, as discussed above, would apply *mutatis mutandis* in this case.¹³⁷

Vodacom makes the following warranties to its contracting clients, which as far as this study is concerned set it apart from its competitor and goes a long way to addressing the unequal contracting positions between an ISP and its client. Many of these clauses are more policy-orientated and therefore would have to be subject to litigation in order to be enforced. Examples can be seen in the following warranties “unto and in favour of the customer”:

- that the Service Provider has the necessary competency to fulfil its obligations in terms of the agreement; that the services will be rendered according to industry standard (in respect of quality of the services), in a professional and “workman-like” manner;¹³⁸
- that no lien, claim or action is pending against the ISP that may interfere with its duty to provide services to its client or with the client’s rights afforded in terms of the agreement;¹³⁹
- that the Service Provider has complied with all licensing requirements, authorisations, and etcetera to perform the services rendered in terms of the agreement.¹⁴⁰

¹³⁵ *Id* at Clause 8.2

¹³⁶ *Id* at Clause 8.3.

¹³⁷ See discussion relating to the application of Sections 48 and 49 above.

¹³⁸ Vodacom’s General Terms and Conditions at Clause 9.1.1.

¹³⁹ *Id* at Clause 9.1.2.

¹⁴⁰ *Id* at Clause 9.1.3.

Despite these warranties, the service provider still maintains that it in no way makes any representations or warranties in respect of the services it provides,¹⁴¹ which is contrary to the warranties expressly afforded to the consumer in the previous clause. This state of affairs needs to be clarified as it is confusing and unclear in exactly which circumstances the service provider is prepared to make warranties and in which not. It is further submitted that this is another aspect of this type of *sui generis* contract that needs to be determined through litigation. As far as equipment is concerned, the ISP is prepared to cede its warranties provided by the manufacturer to the customer.¹⁴² This is the most logical and “user-friendly” construction for averting equipment-related claims. It stands to reason that the ISP cannot make any warranty in regard to equipment that it did not manufacture itself. Further, by conceding its warranties to the consumer, it effectively cuts itself out of the middle of any dispute that may arise between the consumer – who is the end user of the product, and the manufacturer – thereby avoiding liability. As logical as this construction of a pseudo-rental agreement may seem, as with the MTN Agreement, this clause falls foul of the CPA in so far as Section 56 provides for an implied warranty of quality for goods supplied to a consumer. This provision is a hefty one in so far as this implied warranty extends to the producer, importer, distributor and retailer. The extent of the warranty goes so far to warrant that the goods comply with the requirements and standards demanded in terms of Section 55 – that the goods are reasonably suited for the purpose for which they are generally intended; are of good quality, in working order and free of defects; will be useable and durable for a reasonable period of time; and comply with the applicable standards set out in the Standards Act.¹⁴³ This effectively means that Vodacom is as responsible for the quality of the rented goods, in their capacity as retailer, as the producer or manufacturer would be. And coupled to this warranty is a right of recourse that affords the consumer the right to have the goods replaced or the rental/purchase price refunded.¹⁴⁴

The contractual relationship between the ISP and its clients should hold central a policy of transparency and mutual benefit – this in order to promote equality between the contracting parties. Vodacom promotes a relationship of mutual benefit in binding itself to providing services by means of “up-to-date technology” which it undertakes to make available to all its customers through notification or request

¹⁴¹ *Id* at Clause 9.2.

¹⁴² *Id* at Clause 9.3.

¹⁴³ Act 29 of 1993.

¹⁴⁴ Section 56(2) and (3) of the CPA.

from the customer.¹⁴⁵ This clause encourages open communication between the parties and inspires confidence in the customer that the ISP is rendering services *bona fide* in the client's best interest. This in turn leads to transparency in the relationship and ultimately a relationship of mutual benefit.

It is common knowledge that technology is constantly progressing and in order to stay abreast of the developments, both hardware and software need to be regularly upgraded. This poses a problem for Service Providers who provide services to their clients on an on-going basis – in order to provide their clients with the most up-to-date services per the latest technology it is essential that Service Providers upgrade their system regularly. This inevitably means that the service will have to be interrupted, in turn causing problems for the consumers who rely on uninterrupted service. “VSP shall be entitled, at anytime and upon such notice to the customer as may be reasonable in the circumstances, to suspend provision of the services or any part hereof for the purposes of modifying expanding, maintaining or repairing the system and/or networks...”¹⁴⁶ This clause can be interpreted in favour of the consumer, to the degree that should the period of notice afforded to the consumer be unreasonable, alternatively should the suspension of the services be unreasonable, the Service Provider may be held liable. In order to determine what would constitute a “reasonable” notification period or suspension, can and probably should be best left to expert debate – this in turn means that apportioning liability in disputes arising from this issue would be most effectively dealt with through litigation. It is important to note, that in light of arguments proffered in terms of the similar clause in the MTN Agreement, the underlying policy resonating through this clause, is in line with the requirements of the CPA.¹⁴⁷

“The Customer shall be obliged to continue to pay all charges and fees due under each Service Schedule during the period – during which the Services is/are suspended and acknowledges and agrees that under no circumstances shall it be entitled to resile from this Agreement... withhold or defer payment or be entitled to a reduction in any charge or have any other right or remedy against VSP.”¹⁴⁸ While, from the standpoint of the consumer and possible economic loss sustained during this suspension of services, this provision is harsh and further unbalances the power in the relationship with the ISP. However, this is an unfortunate but unavoidable characteristic of the nature of the service provided – the services require that the technology be maintained and upgraded; in order to maintain the technology the services need

¹⁴⁵ Vodacom's General Terms and Conditions at Clause 12.1.

¹⁴⁶ *Id* at Clause 14.2

¹⁴⁷ See page 36 and 37 above.

¹⁴⁸ *Id* at Clause 14.5.

to be suspended. A somewhat equalising factor is that the clause is tempered with reasonableness – this holding the ISP to a certain standard and allowing the consumer a remedy, albeit a meagre one.

Within this agreement exists an exception to what seems the “no liability” tenure of the agreement and clearly a further effort in promoting reasonableness as we have seen in Clause 14 of Vodacom’s General Terms and Conditions. Having consulted the more product-specific terms and conditions, specifically those pertaining to the ADSL Internet Services¹⁴⁹, that form part of the multitude of agreements that define the relationship between subscriber and ISP, the following is of special interest, as it pertains to repairs to the service: “The customer shall be entitled to a credit on the rental amount payable for the service, pro rata to the duration of the interruption if the ADSL service has been completely unavailable for a continuous period of at least twenty four (24) hours.” This provision is the most effective in addressing the imbalance of power throughout the agreement. It is clear from this that the Service Provider acknowledges its duty to maintain and keep in good working order the network (as highlighted in clause 9 discussed above) and that should it fail in its duty to do so, its clients are at best not receiving their “money’s worth” so to speak and at worst stand to lose much in revenue, income, profit, etcetera should their economic interests depend on the continuity of the services being provided by the ISP. This clause offers a form of redress, although be it not for possible economic losses, for those monies paid in terms of the agreement between the parties. Having critically discussed the rights of recourse and redress offered to the consumer in terms of the CPA, it would seem that this stance adopted by Vodacom has been carefully weighed against the requirements of the Act so as to support its policy and purpose generally.

Clause 17 forms the crux of the liability debate which is the central theme of this discussion. The liability clause in this agreement takes the form of a disclaimer in that “VSP shall not be liable in any way to the Customer or to any third party for any loss or damage of whatsoever nature and/or howsoever arising (including consequential or incidental loss or damage which shall include but shall not be limited to loss of property or of profit, business, goodwill, revenue, data or anticipated savings) or for any costs, claims or demands of any nature whether asserted against VSP or against Customer...”¹⁵⁰ In considering the position of MTN as discussed above, it appears that this “cover all” provision is a standard clause throughout the industry. Such a “cover all” has the effect of being unreasonable and for this reason could lead to disputes being settled through litigation – an unnecessary situation. It could perhaps benefit the

¹⁴⁹ Vodacom’s ADSL Terms and Conditions.

¹⁵⁰ Vodacom’s General Terms and Conditions, Clause 17.1.

ISP more should a more practical stance be assumed towards possible liability claims – in this case perhaps a complete explanation or breakdown of liability. Assuming a more realistic position this ISP makes provision for a maximum liability should it be found to be liable. This position is realistic for the fact that a party cannot completely contract out of liability - according to the general principles of the law of contract and the specific requirements and protection mechanisms offered by the CPA, therefore this limitation of liability would act as a failsafe of sorts for the ISP in its providing: “...the maximum liability of VSP under this Agreement in respect of any claim for direct damages by the Customer in respect of any wilful misconduct and/or negligent act or omission of VSP or any person for whose acts and omissions VSP is vicariously liable in law, for any event or series of connected events, whether as a result of breach of contract, delict or any reason whatsoever, shall be limited to the total fees, excluding Value Added Tax, paid by the Customer to VSP in the 12 (twelve) month period immediately preceding the month in which the incident arose which gave rise to the claim.”¹⁵¹ This limitation amounts to a kind of restitution – a principle well recognised in the general principles of the law of contract. It is, however, interesting that this restitution is found, not only in terms of breach of contract but also as a remedy for any potential claim for damages or delictual action that may arise-proverbially killing two birds with one stone. This deviation may be justified by the fact that this construction in limiting liability is a simplification of the general principles, for convenience or better understanding on the part of the consumer.

Furthering this clause in a strictly economical sense: “Under no circumstances whatsoever shall any party be liable for any indirect, incidental or consequential damages, (including, but not limited to, damages for loss of business, profits, revenue, data, use, or other economic advantage) incurred by the other party, arising out of or relating to this Agreement and/or any Service Schedule”.¹⁵² Given the broad spectrum of application that internet services find in the international marketplace, it would be prudent for any service provider to make provision for limitation of liability that may arise for loss of profit/income. In this case, however, completely excluding liability in such a scenario is not prudent as the ISP runs the risk that, should a dispute arise on the basis of this provision, the provision may be disregarded *in toto* for the fact that it is inconsistent with the policies and purposes of the CPA.¹⁵³ Further, it could well be argued that should the ISP be found to have acted *mala fide*, alternatively grossly negligent, this alone may be grounds for the Courts to set this clause aside.

¹⁵¹ *Id* at Clause 17.2.

¹⁵² *Id* at Clause 17.3.

¹⁵³ See in this regard “the golden trio” of clauses as discussed above.

Vodacom, when compared to MTN, holds their clients to a less stringent confidentiality regime. The duty of confidentiality is limited to a year and does not run *in perpetuum* as in the latter case. Interestingly, the duty of confidentiality is reciprocal which gives the impression that the ISP in this case makes an effort to address the unequal bargaining power inherent in this type of contractual relationship. Considering the position MTN takes in this regard, it inspires confidence that Vodacom understands that confidentiality is a two-way street and that many of their clients put themselves in a vulnerable position in concluding contracts of this nature, particularly those consumers who have business interests central to their procuring the services rendered by the ISP.

Clause 20 reiterates the common law principles of the law of contract, specifically the remedies for breach of contract. Allowance is made for a “penalty-free” period in which to remedy the breach, once notice thereof is given to the defaulting party by the other contracting party.¹⁵⁴ However, and being completely unbiased, the aggrieved party has the right to cancel the contract (wholly or partially depending on the nature of the breach) should the breach committed by the defaulting party be: 1) repeated (on an on-going basis) and 2) be of such a nature that the aggrieved party would be reasonable in concluding that the conduct is inconsistent with the defaulting party fulfilling their obligations in terms of the contract (either in intention or ability).¹⁵⁵ Further, the right of the aggrieved party with respect to a claim for specific performance is maintained in conjunction with the right to cancel as well as all other rights afforded in law – which I understand to mean, in terms of the common law. These remedies will be discussed more fully below.¹⁵⁶

In terms of clause 21, the ISP proposes that any disputes arising out of this agreement be referred to resolution, first following an internal procedure involving the management of the ISP, and then externally by means of a third party mediator who would be independently appointed.¹⁵⁷ Finally, should mediation fail, any dispute is to be referred to arbitration for final settlement.¹⁵⁸ Despite all these alternative dispute resolution mechanisms, either party retains the right to seek urgent relief through the

¹⁵⁴ Vodacom’s General Terms and Conditions at Clause 20.1.1.

¹⁵⁵ *Id* at Clause 20.1.2.

¹⁵⁶ See Chapter 5 hereunder.

¹⁵⁷ Vodacom’s General Terms and Conditions at Clause 21.2.

¹⁵⁸ *Id* at Clause 21.3.

court process.¹⁵⁹ This alternative dispute resolution process, if implemented properly, and with co-operation of both parties could amicably and swiftly settle disputes that may arise, and in so doing take cognisance of the position of both parties with respect to the dispute. To a larger degree, this procedure is in essence one that can properly apportion liability and save costly litigation in so doing. It is worth bearing in mind that the CPA makes provision for a structure of dispute resolution of its own, as does the ECTA, both of which will be discussed in Chapter 5 hereunder.

Clause 11.3 draws specific attention in its providing that: “No addition to, variation, or agreed cancellation of this Agreement shall be of any force or effect unless recorded in a written document and signed by or on behalf of the duly authorized representatives of both parties. For purposes hereof a ‘written document’ shall exclude any written document that is in the form, either wholly or partly, of a data message as defined in the Electronic Communications and Transactions Act 25 of 2002.”¹⁶⁰ ECTA defines a data message as being “data generated, sent, received or stored by electronic means and includes: voice (where the voice is used in an automated transaction; and a stored record.”¹⁶¹ It appears in this case that the service provider does not have faith in the reliability of data messages when it may have an effect / impact on their own contract; ironically this would also include such messages passing through networks operated by Vodacom. Given the uncertain nature of the validity of electronically concluded contracts (and by extension amendments to same), in this scenario the Service Provider is “playing it safe” so to speak, in order to ensure that any amendments/variations made to the contract are made through means that will ensure the validity thereof and will not give rise to disputes with regard to validity. This clause also highlights the very position that needs to be remedied in the South African (and most certainly, the global) context – this remedy would most logically find its roots in international instruments such as the Model Law, as well as in national legislation that effectively supports and governs this extension of the law of contract. This form of hesitation towards accepting the validity of conclusion (or amendment) of contracts through electronic means needs to be answered with legal certainty.

¹⁵⁹ *Id* at Clause 21.4.

¹⁶⁰ *Id* at Clause 11.3.

¹⁶¹ Section 1 of the ECTA.

Conclusion

Having considered the above discussion, it appears that Vodacom makes a concerted effort to address the unequal bargaining power between itself and its clients. Whilst this may be so, the situation remains that in many instances the clauses require the knowledge of a technological expert, alternatively the language used is such that it may well be argued to be beyond the understanding of the lay person. By comparison this ISP-client agreement is the more “reasonable” of the two given the more lenient line taken on the limitation of liability. It can also generally be said that the underlying impression of Vodacom’s agreement with the consumer is in-line with the spirit of the CPA to a greater extent than that of MTN. While this limitation of liability is the prudent road, I do not believe that “signing on the dotted line” can exempt all liability, and that, as above, this agreement too has a number of elements that fall short and is heavily scrutinized in terms of the CPA and other consumer-orientated policies.

Chapter 4

With whom does liability lie? The rights and duties of each party

Introduction

Having regard to the case studies discussed above, it is of critical importance for the aims of this work, to explore those rights and duties of the contracting parties outside of the scope of the agreement. These *sui generis* contracts have many facets and as a result they are subject to various specific legislation insofar as that legislation applies to those specific aspects of the agreement. This chapter aims to “fill out” the picture started above regarding liability and those obligations and rights created and founded in a typical ISP-client contract.

Consumer Protection Act

Application of the Act

The Consumer Protection Act aims to “promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection...” Further, according to the preamble to the CPA, “[t]he people of South Africa recognise that recent and emerging technological changes, trading methods, patterns and agreements have brought, and will continue to bring, new benefits, opportunities and challenges to the market for consumer goods and services within South Africa and that it is desirable to promote an economic environment that supports and strengthens a culture of consumer rights and responsibilities, business innovation and enhances performance”. For this purpose and to better understand the application of the CPA, a closer inspection of particularly Section 3 and 5 are necessary.

Section 3 states that the purposes of the CPA are “to promote and advance the social and economic welfare of consumers in South Africa by- establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;¹⁶² promoting fair business practise;¹⁶³ protecting consumers from:

¹⁶² Section 3(1)(a) of the CPA.

¹⁶³ *Id* at Section 3(1)(c).

unconscionable, unfair, unreasonable, unjust or otherwise improper trade practises or other deceptive, misleading, unfair or fraudulent conduct;¹⁶⁴ improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;¹⁶⁵ providing for a consistent, accessible, and efficient system of consensual resolution of disputes arising from consumer transactions;¹⁶⁶ and providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.¹⁶⁷ This section reads like a veritable wish list of consumer legislation. Of all the consumer-orientated legislation discussed throughout this work, this Section most clearly lays out the intention of the legislature in this new dawn of consumer policy. The influences of consumer legislation as it pertains to business practise, potential fraud, credit law and dispute resolution can clearly be traced through this section.

Section 5 chalks out a road map for consumers in applying the CPA, beginning with subsection 1 in that the CPA applies to every transaction occurring within the Republic (subject to certain exemptions);¹⁶⁸ the promotion of goods or services;¹⁶⁹ and the supply of goods or performance of services in terms of transaction to which the CPA applies.¹⁷⁰ This three-prong approach seeks to broaden the scope of the CPA in so far as not only formal transactions are considered but also those circumstances such as promotion or performance that may take place prior to- or in the absence of- a transaction to which the CPA applies. The application of the CPA takes on a more narrow approach as well in so far as certain transactions are exempt from the application of the CPA, *inter alia* those transactions concluded with a consumer that is a juristic person with an asset value or annual turnover that exceeds the threshold value determined by the Minister;¹⁷¹ or those transactions that fall within the scope of other consumer legislation, such as the National Credit Act and Labour Relations Act.¹⁷² This narrow application of the

¹⁶⁴ *Id* at Section 3(1)(d).

¹⁶⁵ *Id* at Section 3(1)(e).

¹⁶⁶ *Id* at Section 3(1)(g).

¹⁶⁷ *Id* at Section 3(1)(h).

¹⁶⁸ *Id* at Section 5(1)(a).

¹⁶⁹ *Id* at Section 5(1)(b).

¹⁷⁰ *Id* at Section 5(1)(c).

¹⁷¹ *Id* at Section 2(b).

¹⁷² Act 66 of 1995.

CPA was most likely intended to emphasize the purpose and policy of the CPA in addressing the unequal bargaining power between parties to a transactions and further to bring redress to those consumers who are vulnerable for lack of expertise. Further, these exemptions also give a clear message that the CPA cannot be applied at will and to every situation in which a consumer is likely to be prejudiced. The CPA makes no claim to expertise in all spheres of agreements and for that reasons refers those disputes arising out of credit agreements and labour-related issues to those relevant pieces of legislation that have been carefully promulgated with the necessary knowledge of those specific fields.

Considering section 5 in the order in which it has been drafted we find that the application of the CPA is once again broadened, this time for the sake of clarity and legal certainty in subsection 6. The definition of a transaction is specifically extended to arrangements of a certain nature – this to put off unscrupulous suppliers from attempting to circumvent the protections offered to consumers by the CPA. The so-called “arrangements” are deemed to be transactions between supplier and consumer for the purposes of the CPA if they purport to: 1) supply any goods or services in the ordinary course of business to members of a club, trade union, association, society or other collectivity, irrespective of whether such collectivity is corporate or unincorporated, an organisation for a common purpose, voluntarily associated persons; and finally irrespective whether the transaction is for fair consideration, charge or economic contribution expected.¹⁷³ 2) In so far as franchise agreements are concerned, any solicitation of an offer, offer made by a potential franchisor, supplementary agreements to the main franchise agreement or the supply of goods or services to already existing franchisees are considered to be transactions in terms of the CPA and thus offer protection to the parties to that arrangement.¹⁷⁴ This list, whilst it gives clarity, has a penetrative quality. I say this for the reason that in the case of franchise agreements, the main agreement most often governs the general relationship between the parties whereas the day-to-day running of a franchise is made up of a series of smaller transactions and agreements, which in light of this section, are now also subject to scrutiny by the CPA. This effectively takes the protection of the consumer to a deeper level and the so-called “internal structure” of an agreement or contractual relationship.

In terms of the CPA, an agreement is defined as “an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between or among them”.¹⁷⁵ A so-called “consumer agreement” is distinguished from an (ordinary) agreement in that the definition is

¹⁷³ Section 5(6)(a) of the CPA.

¹⁷⁴ *Id* at Section 5(6)(b) – (e).

¹⁷⁵ *Id* at Section 1.

broader: “an agreement between a supplier and a consumer other than a franchise agreement”.¹⁷⁶ This second definition is broader for the reason of including as many such agreements into the jurisdiction of the CPA as possible – a broader scope to ensure as much protection is afforded as possible, which is consistent with the preamble to the CPA.

Aside from the specific aims of this chapter, it is interesting to note that in terms of the CPA, no formalities are prescribed for the conclusion of an agreement between the parties, except as it pertains to franchise agreements.¹⁷⁷ It is further necessary to explore the definition of “consumer” as provided for by the Act – “A person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business...”.¹⁷⁸ It is noteworthy that no distinction is made between consumers who are natural persons and those that are businesses or themselves service providers. It would be prudent to accept that no distinction is made in order to broaden the scope of application of the Act.

A service provider is deemed to mean “a person who promotes, supplies or offers to supply any service”.¹⁷⁹ A service is “the provision of access to any electronic communication infrastructure”.¹⁸⁰ I interpret this to mean that the particular agreement between client and ISP falls within this definition and thus places such an agreement within the jurisdiction of this Act. Following this interpretation the client would qualify as a consumer in terms of the CPA and similarly the ISP as a supplier. Lastly, electronic communication is defined in the Act as “communication by means of electronic transmission, including by telephone, fax, sms, wireless computer access, email or any similar technology or device”.¹⁸¹ Should any doubt have arisen as to the possible application of the CPA to the specific client-ISP agreements, such doubts have been summarily dismissed by the specific inclusion of the definition of electronic communication.

It is thus my summation that those rights and duties afforded to either party of e-contracts in terms of the CPA are here afforded to the client in his/her capacity as a consumer as well as to the ISP in its capacity as a service provider.

¹⁷⁶ *Ibid.*

¹⁷⁷ These formalities can be found in Section 7 of the CPA.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

Interpretation

The legislature has made very good use of Section 2 of the CPA to reinforce its consumer-orientated policy on a far more practical level. This section boldly states that the CPA is to be interpreted in a manner that gives effect to the purposes set out in Section 3.¹⁸² Considering this provision in light of the discussion of Section 3 above, complying with this directive may well prove to be a hefty task. Viewed in isolation, it could be said that the CPA is very pro-consumer, even excessively so. I would proffer that whilst this may be true, it is necessary. In the South African context the consumer has historically been vulnerable and subject to exploitation and in recent years, with the exponential growth of the South African economy, unfair market practises have been seen to become industry-norms. From the standpoint of the supplier, the terms and implications of the CPA are harsh and necessitate an overhaul of their commonly-accepted market practises.

The CPA further issues a directive to the Courts, Tribunal and Commission applying the CPA on a more judicial or disciplinary level in that they are extended a discretion to consider appropriate foreign and international law, international conventions, declarations or protocols relating to consumer protection; precedent of consumer courts, ombuds or arbitrations made in terms of the CPA.¹⁸³ This is of particular importance for the aims of this work in making recommendations for solutions to the study question highlighted above. This provision effectively gives the relevant Authorities discretion to consider the Model Law as discussed above, in all its practical glory. It would further be my opinion that this is the provision needed to bring the Model Law and all of its advantages to the forefront of South African e-commerce. The Model Law has been carefully prepared against the backdrop of a variety of legal cultures all with the same common goal – regulation of electronic contracting in a manner that protects consumers. I feel that it is the most important alternative source to consider in adjudication of these matters. This is particularly suitable for e-contracts forming the crux of this discussion – perhaps even of vital importance in furthering the causes of harmonising this aspect of international economic transactions. It is thus clear to me that, even subconsciously, the Model Law has already penetrated our national legislation and I thus conclude that it reasonable and logical to further this integration.

As a final backstop in the interpretation of the CPA, Section 2(10) effectively opens the floodgates for litigation on e-contracts in so far as the CPA may not be interpreted in a manner that precludes a consumer from exercising any rights afforded in terms of the common law. This is a very safe clause to

¹⁸² *Id* at Section 2(1).

¹⁸³ *Id* at Section 2(2).

incorporate in any consumer-orientated legislation for the fact that the legislature does not purport to incorporate the wealth of legal rules and tradition that make up the common law. This does however leave the consumer in an uncertain position as the last right of recourse may very well be lengthy and expensive litigation should the dispute come down to an interpretation of the common law.

Consumer Rights

Chapter 2 of the CPA reads as a veritable Consumer's Bill of Rights. Made up of a mammoth 59 different rights, there can be no question that the CPA should be held in the same esteem as the Constitution as it applies to consumers. To summarise this Chapter briefly: the CPA makes it abundantly clear that the purpose of this Act is to protect consumers from, firstly, unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and deceptive, misleading, unfair or fraudulent conduct; and lastly; provides for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.¹⁸⁴ Melville refers to section 4(5) as a "useful introductory overview" in that it prohibits persons engaged in business from:

- a) Engaging in any conduct that is contrary to, or calculated to frustrate or defeat the purposes and policy of the CPA;
- b) Engaging in any conduct that is unconscionable, misleading or deceptive, or that is likely to mislead or deceive;
- c) Making any representations about a supplier or any goods or services, or a related matter, unless the person has reasonable grounds for believing that the representation is true.¹⁸⁵

The rights afforded to the consumer stem from this overview and can generally be broken down into the following general categories, which will be discussed shortly in view of the study aims of this work:

1. Right of equality in the consumer market.

Section 8 of the CPA relies on the Section 9 of the Constitution and Chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁸⁶ for much of its wording and application.

This section of the CPA has effectively bridged the gap between the sphere of Human Rights and

¹⁸⁴ *Id* at Section 3(1)(d) and (h).

¹⁸⁵ Melville (2010) 29.

¹⁸⁶ Act 4 of 2000.

the commercial world. I assume that it was the intention of the legislature to use this section to enforce its purpose of promoting, *inter alia*, a fair, accessible and sustainable marketplace.

As with the application of the Promotion of Equality and Prevention of Unfair Discrimination Act, the key word in any claim alleging discrimination is “unfair”. The test in determining unfair discrimination in terms of the CPA relies on a two-part test. The first part being the “how” is tested by assessing the supplier’s conduct towards the consumer. This conduct is regulated by the prohibitions contained in section 8(1) and includes prohibitions against excluding persons or categories of persons from accessing goods or services; granting such persons exclusive access to goods or services (which would discriminate against other consumers in general); assigning priority of supply to anyone (and so discriminating against all other consumers); supplying different quality goods or services to certain persons or groups of persons; charging different prices to certain persons or groups of persons; targeting particular communities, districts, populations or market segments for exclusive, priority or preferential supply of goods or services; and excluding a particular community, district, population or market segment from the supply of goods or services.

Section 8(2) forms the basis for the second part of the test, the so-called “when” and sets out the circumstances in which a supplier may not discriminate unfairly against a consumer. These circumstances include: assessing the ability of a person to pay the cost or otherwise meet the obligations of the proposed transaction or agreement; deciding whether to enter into the transaction or agreement or to offer to enter into the transaction or agreement; determining the costs or any aspect thereof of the transaction or agreement to the agreement; interacting with the consumer in the supplier’s place of business, or in the course of displaying or demonstrating any goods, testing or fitting any goods, or negotiating the terms of the transaction or agreement; selecting, preparing, packaging or delivering any goods for or to the consumer, or providing any service to the consumer; proposing or agreeing to the terms and conditions of a transaction or agreement; assessing or requiring compliance by the consumer with the terms of a transaction or agreement; exercising any right of the supplier under a transaction or agreement in terms of the CPA or applicable provincial consumer legislation; determining whether to continue, enforce or seek judgment in respect of terminating the transaction or agreement; or determining whether to report, or actually reporting any personal information of such a person.

The legislature has extended the scope of this section of the CPA in so far as it also applies to associations and juristic persons – this in an effort to unfair discrimination against any such

association or juristic person based on the characteristics of a natural person linked to that association or juristic person. The scope of this provision is further extended in so far as an inherent discretion is extended to courts to consider any conduct of a supplier towards a consumer that is not expressly included in this provision and further to find such conduct to be unfair discrimination as contemplated by the Constitution or the Promotion of Equality and Prevention of Unfair Discrimination Act.

It would be my recommendation that consumers acquaint themselves with their rights in terms of this section as well as the Constitution and Promotion of Equality and Prevention of Unfair Discrimination Act so that they are armed with the necessary knowledge to identify and report any conduct that they feel constitutes unfair discrimination against them. I would further recommend to suppliers that for the sake of protecting their own interests, that the rights afforded by this section be included in any effort the supplier may make in drawing the consumers attention to their rights in terms of any transaction or agreement.

Should any consumer feel that their rights have been infringed and that they are victims of unfair discrimination on the part of the supplier, the consumer has a choice to approach either the National Consumer Commission or the Equality Court (as provided for in Chapter 4 of the promotion of Equality and Prevention of Unfair Discrimination Act). These remedies will be discussed in the following chapter.

2. Consumer's right to privacy;

A consumer's right to privacy is two-fold and revolves around only the marketing aspect. Section 11 arms the consumer with the right to restrict the supplier from marketing goods or services to him/her. In order to restrict any unwanted marketing a consumer may refuse to accept, require a person to stop, or pre-emptively block any approach or communication should that approach or communication be for the purposes of directly marketing goods or services to the consumer.¹⁸⁷ Even after conclusion of the transaction or agreement a consumer may request a supplier or any other person who directly markets goods or services to the consumer to desist with such marketing.¹⁸⁸ Finally, in an effort to curb any undesirable marketing practises, the CPA places a positive duty on the supplier or person conducting the marketing in so far as they have to ensure

¹⁸⁷ Section 11(1) of the CPA.

¹⁸⁸ *Id* at Section 11(2).

that they have procedures in place that can receive and address the requests made by consumers to stop / desist unwanted direct marketing and further to ensure that once such a request is received the wishes of the consumer are respected.¹⁸⁹

The second part of the protection mechanism offered to consumers prohibits a supplier from directly contacting a consumer for the purposes of direct marketing at the consumer's home within certain times.¹⁹⁰ These times are determined by the Minister and include specific days, dates, public holidays and times of day on which a supplier is prohibited from implementing their direct marketing strategies.¹⁹¹

Unfortunately there exists no special penalty for suppliers or persons conducting such direct marketing and until such time as such a penalty is prescribed the consumer will have to approach the National Consumer Commission in order to have their rights effectively enforced. It would seem that this is an extreme measure and probably not very popular with consumers given the inevitable cost and lengthy process involved in referring such complaints to the Commission.

3. Consumer's right to choose;

As part of a consumer's right to free choice of goods and services is the right offered in terms of Section 13 of the CPA. A supplier is prohibited from requiring a consumer to enter into any additional agreement or transaction with- or to purchase any goods from- the same supplier or a designated third party.¹⁹² This prohibition is however tempered by the fact that should the supplier be able to prove that the convenience of having such goods and services bundled together would outweigh the consumer's right to choose, would be to the economic benefit of the consumer, or the bundled goods and services are offered separately and at individual prices.¹⁹³ This is better explained by means of a suitable practical example: A consumer wishes to enter into an agreement with an ISP for internet services. As a result of entering into such an agreement, the consumer is eligible to purchase a modem for a special price from the supplier. Normally, this transaction would be prohibited. However, the supplier is able to prove that the price that the

¹⁸⁹ *Id* at Section 11(4).

¹⁹⁰ *Id* at Section 12(1).

¹⁹¹ *Id* at Section 12(2).

¹⁹² *Id* at Section 13(1)(a) – (c).

¹⁹³ *Id* at Section 13(1)(i)-(iii).

consumer will pay for the modem in terms of the transaction is far cheaper than he/she will be able to purchase it elsewhere. In this regard, the convenience of entering in to the agreement and purchasing the modem together (a so-called “bundled” transaction), is clearly to the benefit of the consumer and outweighs his/her right to freedom of choice.

This section has been wisely worded for the fact that it echoes the underlying purposes and policy of the CPA. In structuring deals this way the consumer cannot possibly be prejudiced, only benefitted. And whilst such offers of agreements are usually made in a flurry of bright colours and by means of an irresistible marketing campaign, it would be best if consumers did not rely on the protections offered by this section without carefully scrutinising any transaction or agreement offered by a supplier.

Completely unrelated to the foregoing provision, section 14 deals with the boundaries of fixed-term contracts and specifically with the expiry or cancellation thereof. At the outset it must be noted that this section does not apply to juristic persons irrespective of their annual turnover. Most contracts concluded between consumers and ISPs, including those assessed above, are fixed-term contracts. As it pertains to their expiry, the following is important for consumers to note:

- A fixed-term contract may not exceed the maximum period as determined by the Minister from time to time.¹⁹⁴
- A consumer has the right to cancel a fixed-term agreement, without penalty or charge, on expiry of the agreement or at any stage during the agreement provided he/she gives the supplier 20 business days notice.¹⁹⁵
- The supplier has the right to cancel the agreement, but only in such circumstances when the consumer has materially failed to comply with the agreement. Should the consumer have so failed, the supplier must give the consumer 20 business days notice to remedy such failure and can only cancel the agreement at the expiry of such time.¹⁹⁶
- Whilst fixed-term agreements may still be automatically renewed, there is a duty on the supplier to warn the consumer at least 40 days before the agreement expires. The supplier

¹⁹⁴ *Id* at Section 14(2)(a).

¹⁹⁵ *Id* at Section 14(2)(b)(i).

¹⁹⁶ *Id* at Section 14(2)(b)(ii).

should further bring to the consumer's attention any material changes that would apply if the agreement is renewed (for example: the monthly cost of the internet connection, or the change in speed / bandwidth of the internet connection), and what the consumer's other options are apart from renewing the agreement.

- In a situation where the supplier has notified the consumer of the pending expiry of the agreement and the material changes in the agreement, the supplier, having complied with his obligations under section 14(2)(b), may renew the fixed-term agreement on a month-to-month basis (which obviously would no longer constitute a fixed-term agreement but fall into the general category of consumer agreements). The consumer does however have to right to direct the supplier to terminate the agreement on the expiry date, alternatively indicate that he/she wishes to renew the agreement for a further fixed term.¹⁹⁷
- Should a consumer cancel a fixed-term agreement, he/she is not exempt but remains liable for any amounts owed to the supplier up to the date of cancellation. A consumer may however be held responsible for a reasonable cancellation penalty.¹⁹⁸

The CPA affords the consumer a “cooling-off period”, extending the scope of the same provision introduced by the National Credit Act. However, the protection offered to consumers in terms of Section 16 of the CPA does not apply to transactions that fall within the ambit of section 44 of the ECTA which has been discussed hereunder. The scope of section 44 of ECTA is wider than that of the CPA and tailor-made for the types of agreements between ISPs and subscribers. In order to best protect themselves, I would recommend to consumers to rather lay complaints with the relevant authority in terms of the ECTA should a dispute arise in terms of direct marketing on the part of the ISP.

Similarly to section 16, section 19 of the CPA also does not apply to those agreements concluded between ISPs and subscribers as the legislature has determined that section 36 of the ECTA is better suited to dealing with such matters. As discussed more fully hereunder, a supplier is charged to execute and order for services within 30 days after receiving an order for same from a consumer. This is a much stricter requirement than the CPA's “reasonable time”. This puts the consumer in a better position to demand service and lay a complaint against the supplier should

¹⁹⁷ *Id* at Section 14(2)(d).

¹⁹⁸ *Id* at Section 14(3).

he/she not receive timeous services. Foregoing the protections of the CPA in favour of those offered by the ECA, in these circumstances, encourage accountability on the part of the service provider.

4. Consumer's right to disclosure and information.

Melville links this right to the purpose and policy of the CPA in so far as it promotes informed consent on the part of the consumer. He believes that in order for a consumer to make informed decisions in respect of any transaction or agreement contemplated in the CPA, the consumer needs to have all of the relevant information relating to the transaction or agreement.¹⁹⁹ The most important of the provisions relating to access to information are those pertaining to:

- Plain and understandable language.²⁰⁰ The definition of “plain language” falls within section 22(2) of the CPA as being “if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort.” This definition is to be understood and interpreted in a wider manner that goes beyond the scope of the mere words. The provision forces an interpretation that gives regard to external factors such as context, comprehensiveness, consistency, organisation, form, style, vocabulary, usage, sentence structure, illustrations, examples, headings and reading aids. Having regard to all of these factors it is clear that the legislature intends to promote a culture of transparency, accessibility and openness between suppliers and consumers. In agreements between ISPs and subscribers this may very well be the crux of the consumer-protection issue. Traditionally ISP-subscriber agreements are fraught with technical jargon which is beyond the scope of the average subscriber. By implementing this provision, the ISP may well avoid disputes arising from misunderstanding of the agreement. Further, a culture of trust is nurtured between the parties because the consumer does not feel vulnerable but for a lack of technical knowledge and thus have a better understanding of their rights and responsibilities in terms of the agreement.

¹⁹⁹ Melville (2010) 42.

²⁰⁰ Section 22 of the CPA.

- Sale of any property or services.²⁰¹ An intermediary²⁰² is forced to disclose prescribed information to the consumer in agreements or transactions for the sale of property or supply of services to be performed by a third party. Further, an intermediary is required to keep records of all such relationships and transactions. For purposes of a transaction or agreement between subscriber and ISP, this would mean that the ISP (or its representative) must disclose the prescribed information to the subscriber and keep a record of the transaction should it be successfully concluded. This information is yet to be prescribed by the Minister and until that point, the consumer has no leg to stand on. In order to avoid lengthy policy-orientated arguments I would advise all subscribers to request a copy of the record of the transaction from the ISP for every transaction concluded.
- Limitation of risk or liability.²⁰³In terms of section 49(1) a supplier is required to draw the consumers attention to any limitation of risk or liability of the supplier, any assumption of risk or liability by the consumer, any provision that imposes an obligation in the consumer to indemnify the supplier for any cause or any provision that constitutes an acknowledgement of any fact by the consumer. This “drawing of attention to” must be done formally, meaning in plain legal language (as contemplated in section 22 and discussed fully above), in a manner that will likely attract the attention of the consumer, before the consumer either enters into the transaction or signs the agreement or is expected to offer consideration in terms of the transaction or agreement, and once the consumer has been opportunity to receive and comprehend the provision.

In terms of section 58(1) the supplier is obliged to draw specific attention to any potential risks of an unusual nature or character, risks that the consumer would not be expected to reasonably be aware of or be expected to reasonable comprehend, risks that could result in death or injury. This section is fraught with policy considerations. What would constitute

²⁰¹ *Id* at Section 27(1).

²⁰² The term intermediary must interpreted for purposes of this work in terms of section 1 of the CPA as being “a person who, in the ordinary scope of business and for remuneration or gain, engages in the business of representing another person with respect to the actual or potential supply of goods or services; or offering, or soliciting offers services to be supplied by a third person.”

²⁰³ Sections 49(1) and 58(1) of the CPA respectively.

risks of an unusual nature? What would a consumer not reasonably be expected to be aware of? I would proffer that these vague concepts would have to be decided by the courts on a case-by-case basis. The scope is so wide and riddled with words like “reasonable” and “potential” that it would be impossible for a consumer with no expert knowledge or legal background to decide whether or not their claim / complaint is justified.

5. Consumer’s right to fair and honest dealing.

In considering a consumer’s right to fair and honest dealing as it pertains to the supply of internet-related services the CPA places great emphasis on the prohibition of so-called “unconscionable conduct”. A description of what the CPA deems to be unconscionable conduct is given in Section 40 and is most effectively examined in two parts: namely the manner (or specific conduct), and the circumstances under which such conduct is prohibited.

The CPA specifically indicates that physical force, coercion, undue influence, pressure, duress, harassment or unfair tactics used against the consumer constitute unconscionable conduct. And whilst most of these actions are echoes of the common law (and would constitute grounds for declaring the agreement void), the act is silent on what exactly constitutes “unfair tactics”. In recommending a course of action for consumers, it would appear that should the consumer feel that the supplier has acted in a way that is tantamount to unconscionable conduct, or falls foul of fair and honest dealing, the consumer has a choice to either approach the courts for an order declaring the agreement void or to follow the legal framework established by the CPA, as will be discussed more fully hereunder. Should the consumer feel that he/she was enticed to enter into an agreement with a supplier by means of “unfair tactics”, it would be up to the adjudicating body to determine, on the basis of precedent or careful investigation, what such unfair tactics are.

Such unconscionable conduct as discussed above is expressly prohibited in the following circumstances in the contracting process: marketing of the service; supply of the services; negotiation, conclusion, execution or enforcement of an agreement with the consumer; and demand for and collection of payment for the services supplied.²⁰⁴ This provision requires very careful consideration and it has far-reaching implications for many different facets of the economy. In the absence of guidelines as to what exactly constitutes unfair tactics marketing strategies will have to be amended and carefully planned in order to prevent complaints and

²⁰⁴ *Id* at Section 40(1)(a)-(e).

possible liability; collection agents (including attorneys) will have to be trained and advised in the purposes and policies of the CPA in order to bring their conduct in line with this provision, especially as it pertains to enforcement and collection in terms of the agreement with the consumer. Finally, suppliers and their agents will require formal training in the manner in which contracts with consumers are negotiated and concluded as the possible financial implications to the supplier, should they be found guilty of exerting unfair tactics, could be devastating.

Finally, a higher degree of care is required of a supplier in his / her dealings with a consumer. Section 40(2) swings the bargaining power between supplier and consumer in favour of the consumer. “It is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.” And whilst this section practically places a burden on the supplier to take careful cognisance of the characteristics of the consumer, it also requires the supplier to be aware of the fact that most consumers are laypersons and in this regard require that suppliers more deeply integrate the concepts of plain legal language into their contracts. Looking forward, should a competent authority or the courts be asked to apply this section, it would seem unlikely that a supplier would be able to prove that he/she unknowingly took advantage of a consumer.

In attempting to decipher what would possibly constitute unfair tactics, I would recommend that Section 40 be read with Section 41 of the CPA. In short this section would apply most often to the marketing of services and negotiation of contracts with consumers. And whilst we are all familiar with the common practises of “puffing” by suppliers or their representatives in order to punt their services, it is a common consequence of such “puffing” that suppliers over-promise and under-deliver in the eyes of the consumer. To control the extent of these practises, the CPA clearly sets boundaries that the supplier must adhere to in its representations to the consumer. For a start, the supplier may not directly or indirectly express or imply false, misleading or deceptive representations regarding material facts to the consumer. The supplier may also not use exaggeration, innuendo or ambiguity regarding any material fact and may also not fail to disclose such a fact to the consumer.²⁰⁵ Despite making no indication as to what would constitute a material fact the tone of this provision is clear – the supplier must disclose all material information to the consumer in terms that are straight forward, understandable and clear. I

²⁰⁵ *Id* at Section 41(1).

interpret this to mean that the consumer should in no way be able to misunderstand his/her rights and responsibilities in terms of the agreement and the services supplied. A consumer must have a very clear idea of what he/she is getting for their money whether or not this is ideal. It is my understanding that in this provision, the legislature has attempted to carry through the principles of transparency and accountability enshrined and encouraged by the Constitution to a practical level that every consumer in the Republic may rely on.

The legislature has seen fit to highlight the following areas and manners in which suppliers may not make false, misleading or deceptive representations regarding the supply of services: performance characteristics, benefits and quality; standard, quality and grade; or can be made available, delivered or performed within a specified time.²⁰⁶ From a legal perspective, a supplier may also not make false representations regarding a transaction to the degree that it affects or does not affect the rights, remedies or obligations of the consumer.²⁰⁷ Assessing this from a practical perspective in terms of the aims of this work, it would appear that should an ISP make representations to a client that the internet services would be available and accessible at the optimum bandwidth at their residence at all hours of the day without first verifying where the consumer lives, the distance from and reception quality of the nearest signal tower/data cable, this would very well amount to a false or deceptive representation in terms of which the ISP may be held liable.

6. Consumer's right to fair, just and reasonable terms and conditions.

Before delving into any discussion on the rights afforded to a consumer by the CPA with respect to contractual terms and conditions it is critical to understand what the legislature intended to be understood by the terms "unfair", "unreasonable" or "unjust" as they apply to contractual terms. Section 48(2) clearly provides that a transaction or agreement, or term or condition of a transaction or agreement is unfair, unreasonable or unjust if:

- It is excessively one-sided in favour of a person other than the consumer; or
- The terms or conditions are so adverse to the consumer as to be inequitable; or

²⁰⁶ *Id* at Section 41(3)(b).

²⁰⁷ *Id* at Section 41(3)(i).

- The consumer relied on a false, misleading or deceptive representation made by a supplier to his/her detriment.²⁰⁸

To give practical effect to these prohibitions and also to extend the scope of application of this provision, the supplier may not:

- Supply services (including making any offers to supply or entering into an agreement with the consumer to supply services);
- Market services;
- Negotiate or administer a transaction or agreement to supply services;

to a consumer at a price or on such terms that are unfair, unreasonable or unjust.²⁰⁹ Further, and most importantly, a supplier may not require a consumer to waive any rights, assume any responsibility or waive any liability of the supplier.²¹⁰ These two provisions provide a bastion of protection to consumers that would otherwise, and to their own detriment be drawn into agreements. Despite the protection offered and what one can only assume are the best intention of the legislature, any complaint the consumer may wish to lodge in terms of this provision would require a great deal of argument to prove as it is based on terms that are otherwise unfamiliar in the context of litigation. Terms such as “inequitable” and “excessively” are unfamiliar and thus open to interpretation by the consumer, the forum adjudicating the dispute and the supplier. The specific wording aside, arguments formulated in terms of this provision should be based on the general tone of the provision which has been so worded to create an impression as to what constitutes unfair, unreasonable and unjust terms and conditions. It is then up to the authority adjudicating the dispute to draw such inferences or make such rulings as they deem fit on the basis of the impression created and proof tendered by the consumer. The supplier on the other hand may be hard-pressed to discharge such an allegation against a wall of pro-consumer policies. By far and wide, the most important provision in protecting the consumer’s right to fair, just and reasonable terms and conditions is Section 51. It is uncompromising and unflattering in its clarity and prohibition of certain transactions, agreements, terms and conditions. The wording of this

²⁰⁸ *Id* at Section 48(2)(a)-(c).

²⁰⁹ *Id* at Section 48(1)(a) and (b).

²¹⁰ *Id* at Section 48(1)(c).

section is of the broadest extent and carries the undertone and policy of the CPA boldly. Simply put, any transaction, agreement, term or condition that's general purpose or effect is to defeat the purposes of the CPA, mislead or deceive the consumer, or subject the consumer to fraudulent conduct is prohibited.²¹¹ Further, if a transaction, agreement, term or condition purports to deprive or waive a consumer's rights as afforded by the CPA, avoid a supplier's obligation imposed by the CPA, set aside or over-ride the effects of the provisions of the CPA, or authorise any unlawful activity prohibited in terms of the CPA or failure to act as required by the CPA, it is unlawful.²¹² And finally, a transaction, agreement, term or condition is unlawful if it limits or exempts a supplier's liability for loss (directly or indirectly) sustained due to the supplier's gross negligence or constitutes an assumption of risk or liability by the consumer.²¹³

In trying to consider the extent of the scope of this provision, one is lead to wonder why the legislature bothered to draft any other prohibitory provisions. The effect of a supplier entering into an agreement or transaction in contravention of these clear prohibitions is that the relevant transaction, agreement, term or condition is void to the extent of its contravention of the CPA.²¹⁴ In this respect the CPA is clear and in its clarity it empowers the consumer to protect themselves and lodge complaints. It also empowers the various authorities of the legal framework established in terms of the CPA, to make the necessary orders without fear or favour – it assists in the legitimacy of the various legal forums in affording the consumers redress for their complaints.

7. Consumer's right to fair value, good quality and safety

Melville believes that section 54 of the CPA “raises the bar for all businesses, as quality is no longer an extra, but a minimum requirement that a consumer can insist upon.”²¹⁵ Section 54, aptly titled Consumer's rights to demand quality service, gives the consumer the right to: timely performance and completion of the services, and if that is not possible, timely notice of the unavoidable delay in the performance of the services and performance of the services in a manner and quality that persons are generally entitled to expect. These 2 powerful provisions are the

²¹¹ *Id* at Section 51(a).

²¹² *Id* at Section 51(b).

²¹³ *Id* at Section 51(c).

²¹⁴ *Id* at Section 51(3).

²¹⁵ Melville (2010)100.

cornerstones of founding liability in such circumstances as when the ISP has failed to provide internet-based services.

With regard to the latter of the two provisions-a policy consideration is born. Melville believes that in order to decide whether the service received was of acceptable quality, a consumer would need to take into consideration what the average person's expectations would be with regard to that particular type of service. Regardless of the endless academic criticism that may be levelled both in support of and against such a policy based approach but I would argue that the tone of the CPA is policy-based and therefore the provisions of Section 54 are in-line with the deeper sentiments of the CPA. It can only be hoped that in leaving the determination of the quality and manner in which services are performed up to the consumer's reasonable expectation, that over time the general standard of performance will be lifted and the industry as a whole will benefit from it.

8. Supplier's accountability to consumers.

This part of the CPA is worded very differently from any other consumer-orientated legislation we have seen emerge from the new consumer-policies that are so popular on our legislative landscape. Whilst the heading of Part I is well-intentioned, it consists of 6 seemingly unrelated provisions. Only section 63 and 64 are of special interest for the purposes of this work as they pertain to prepaid services. The term prepaid services seems to be a bit of a conundrum. We are all familiar with the term "prepaid" as it pertains to cellular devices. A consumer buys a voucher with a pin number which when entered into the service provider's system allows them to use airtime or bandwidth to the value of the voucher purchased. I would proffer that, in light of section 63(1)(a) and (b), this definition must be extended to include those internet-related services central to the agreement between an ISP and subscriber. There are 2 common types of agreements between ISPs and consumers: in terms of the first, a consumer is connected to the ISP's system and uses the internet services for the period of a month. The ISP then charges the consumer for the amount of data used over that period. The second type of agreement is more like that of a prepaid cellular device. The consumer pays a standard monthly fee at the beginning of the month and in return is connected to the ISP's system and may use a certain predetermined amount of data throughout the month. It is in particular this second kind of agreement to which section 63 and 64 are applicable.

The scope of section 63 is limited to those transactions in which a supplier accepts consideration from a consumer in exchange for a prepaid certificate, card, credit, voucher or similar device and

in so doing agrees (either expressly or implicitly) to provide goods or services to any person who subsequently presents the certificate, card, credit, voucher or similar to device, to such a value as represented by it.²¹⁶ Subsection 2 clearly states that any prepaid device does not expire until the date on which its full value has been redeemed, or three years after the date on which it was issued (or at the end of a longer period as agreed by the supplier). To drive this point home, subsection 3 makes clear that any consideration paid by a consumer in terms of a prepaid device will remain the property of the consumer until such time as it has been redeemed by the supplier in exchange for goods, service or future access to services. This section poses a direct challenge to many of the clauses contained in the ISP-subscriber agreements described above. The “use it or lose it” tenure would appear to be unlawful in such circumstances that would constitute a prepaid agreement for ISP services between ISP and consumer. This astonishing development in consumer protection is bound to cause many disputes and it will be critical to monitor case law in order to get certainty from the view taken by the courts when weighing the rights of the consumer in this regard with the principle of *pacta sunt servanda*. It would further be very interesting to understand the reaction of the ISP in such matters. Would an ISP be more willing to reimburse a consumer for that percentage of data that is unused at the end of the month, or will the unused data accumulate to the consumer’s benefit until the maximum prescribed period of 3 years expires?

Section 64(3) is of particular importance to consumers who rely on ISPs for internet-related services. In such circumstances where a supplier of services intends to close a facility which he/she has bound him/her self to provide to the consumer in the future by means of an agreement with the consumer, the supplier is obliged to either: offer the consumer a reasonably accessible alternative facility, give the consumer at least 40 business days notice of the pending closure, and refund the consumer the balance of any monies belonging to the consumer within 5 days of the closure of the facility.

Both of these sections reinforce the ownership of monies paid forward to a consumer in the hope of receiving goods or services in the future. A supplier cannot hope to profit fraudulently from prepaid services and is charged in delivering in full in terms of the agreement with the consumer, or refunding the consumer in circumstances where the supplier cannot perform.

²¹⁶ Section 63(1) of the CPA.

Armed with the knowledge of their rights and protections afforded but the CPA, the consumer further has a right to approach a court, the Consumer Tribunal or the Consumer Commission (acting either in his/her own benefit; acting on behalf of another; acting on behalf of a group or class of affected persons; acting in the public interest; or as part of an association acting in the interest of its members) alleging that consumer's rights afforded in terms of the Act have been impaired, infringed or threatened, alternatively that prohibited conduct is/has occurred.²¹⁷ This will be discussed more fully in the next chapter.

Electronic Communications and Transactions Act

Application of the Act

The Electronic Communications and Transactions Act was promulgated after the Independent Communication Authority of South Africa Act ²¹⁸ but before the Consumer Protection Act and the Electronic Communications Act. It can thus be said that, in the field of e-commerce, it was the first legislation of its kind having regard to consumer protection or striving to incorporate consumer-orientated policy. This statement is clearly supported by the objects of the ECTA as outlined in Section 2: "The objects of this Act are to enable and facilitate electronic communications and transactions in the public interest, and for that purpose to – (a) recognise the importance of the information economy for the economic and social prosperity of the Republic; (b) promote the understanding and acceptance of the growth in the number of electronic transactions in the Republic; (e) promote legal certainty and confidence in respect of electronic communications and transactions; (h) ensure that electronic transactions in the Republic conform to the highest international standards; (k) promote the development of electronic transactions services which are responsive to the needs of users and consumers; (m) ensure compliance with accepted international technical standards in the provision and development of electronic communications and transactions". This bold policy statement reads like a fairytale of consumer protection, and considered in light of its date of promulgation the ECTA was most certainly ahead of its time. The objects and ideals highlighted not only in this section but throughout the ECTA are no less applicable today than they were in 2002 – a sign of confident and capable legislative drafting.

²¹⁷ *Id* at Section 4(1).

²¹⁸ Act 13 of 2002, discussed further below in this Chapter.

Section 4 reinforces the application of the Act to any electronic transaction or data message.²¹⁹

Interpretation of the Act

The ECTA gleans its universal application from Section 3 insofar as it “must not be interpreted so as to exclude any statutory law or the common law from being applied to, recognising or accommodating electronic transactions, data messages or any other matter provided for in this Act”. I would proffer that the ECTA together with the CPA would present a solid basis and formidable challenge in any litigation on the topic of liability of ISPs. When used together these two consumer policies provide absolute protection to the consumer.

Consumer Rights

Those aspects of consumer protection are dealt with in Chapter 8 of the ECTA in 8 comprehensive sections. The consumer rights are clearly laid out by placing the following duties on the supplier:

1. To provide the consumer with a comprehensive list of information including its name, legal status, physical address, registration number, place of registration, name of its office bearers, contact number, membership to an accredited body, contact numbers of that body, code of conduct of the accredited body, description of the main characteristics of the good or services being supplied, price of the goods or services (which must include transport costs, taxes and other applicable fees), manner of payment, terms of the agreement and guarantees, delivery time of the goods and services, the return or exchange policy, dispute resolution code, security procedures, and privacy policy;²²⁰
2. To provide the consumer with a final opportunity to review the entire transaction, correct mistakes and withdraw;²²¹
3. To refund all payments made to the consumer should the transaction be cancelled;²²²

²¹⁹ Section 4(1) of the [ECTA](#).

²²⁰ *Id* at Section 44 (1).

²²¹ *Id* at Section 44(2).

²²² *Id* at Section 44(4).

4. To use a payment system that is secure (as determined with accepted technological standards at the time of the transaction and in relation to the type of transaction);²²³
5. To be liable to the consumer for any damage suffered by the consumer due to failure of the supplier to meet those standards as highlighted directly above;²²⁴
6. To execute an order within 30 days after the day on which the order was placed, unless agreed otherwise²²⁵ and further to notify the consumer immediately should the supplier be unable to perform in terms of the agreement;²²⁶

For the purposes of this discussion, Section 44(6) is a golden ticket. Reading Section 44(5) and (6) together in a broader sense clearly means that a supplier conducting business by means of electronic transactions is forced to keep their electronic medium up to the industry norm and could face a claim for damages should their technology prove to be substandard and cause economic loss to the consumer. In respect of those issues already discussed in this work and specifically those study aims highlighted above, this is a giant leap forward for consumer protection. The difficulty that the average consumer would face is once again, of a technical nature. The burden of proof rests squarely on the consumer to prove that the supplier's technology is outdated and not up to accepted technological standard, this over and above having to prove damage suffered.

Chapter 8 also offers the consumer the following associated rights:

1. The right to cancel the transaction (and related credit agreement) within 7 days of the goods being received or, in the case of an agreement for services, within 7 days of the agreement being concluded (the so called cooling-off period);²²⁷
2. The right to an electronic copy of the code of conduct to which the subscriber subscribes;²²⁸
3. The right to make an informed decision on the proposed electronic transaction based on the description of the goods or services offered by the supplier;²²⁹

²²³ *Id* at Section 44(5).

²²⁴ *Id* at Section 44(6).

²²⁵ *Id* at Section 46(1).

²²⁶ *Id* at Section 46(3).

²²⁷ *Id* at Section 44(1).

²²⁸ *Id* at Section 43(1)(e).

4. The right to access, store and reproduce an electronic copy of the terms (and guarantees) of the transaction with the supplier;²³⁰
5. The right to access an electronic copy of the wording of the alternative dispute resolution code to which the supplier subscribes;²³¹
6. The right to review the entire electronic transaction, correct any mistake and withdraw from the transaction prior to placing any final order;²³²
7. The right to cancel the transaction within 14 days of receiving the goods or services in terms of the transaction should the supplier fail in any of the duties prescribed above;²³³
8. The right to lodge a complaint with the Commission against any supplier that fails to comply with any of the provisions of Chapter 8 of the ECTA.²³⁴

This Chapter contains 3 noteworthy provisions in Sections 47, 48 and 49. Firstly, Section 47 founds jurisdiction for disputes arising out of the ECTA, in that irrespective of the legal system applicable, the protections offered to consumers under Chapter 8 will be applied. This provision is the first attempt by the legislature that I have come across that addresses the jurisdictional issue lying at the very heart of electronic transactions. This provision will come as a comfort to South African consumers who can rest assured knowing that they are protected, in principle at least. How will this protection be upheld when the supplier is situated on the other side of the world? This provision seems to over-promise and under-deliver for lack of direction on how to uphold these protections against suppliers in distant jurisdictions.

Section 48 is the ECTA's cover-all umbrella provision. It clearly and boldly declares that any provision in an agreement to which the ECTA applies will be null and void should it exclude any rights as provided for in Chapter 8 of the ECTA. This section again reaffirms the progressive tone of the ECTA, and makes clear the intention of the legislature. I would proffer that the various impractical yet well-intentioned protections offered by the ECTA are the foundation for the consumer-orientated policies that have so

²²⁹ *Id* at Section 43(1)(h).

²³⁰ *Id* at Section 43(1)(k).

²³¹ *Id* at Section 43(1)(o).

²³² *Id* at Section 43(2).

²³³ *Id* at Section 43(3).

²³⁴ *Id* at Section 49.

recently come to the fore. And as the predecessor of modern consumer policies, it can be expected that the legislature has become more streamlined and refined in their drafting and as such, modern consumer-orientated legislation, whilst maintaining the same tone and many of the same provisions, is more practical in its application.

Finally, Section 49 gives the consumers the means to have their disputes settled. The ECTA has been amended to make provision for referral of disputes to the National Consumer Commission which has been established and defined in the Consumer Protection Act. The Consumer Commission is granted a wide jurisdiction in terms of the ECTA in so far as any non-compliance by a supplier may be referred and/or a complaint lodged.

Electronic Communications Act

Introduction

The Electronic Communications Act, aims to “provide for the regulation of electronic communications in the Republic in public interest...”²³⁵ And whilst this may seem vague and rather open-ended, the preamble to the ECA makes specific provision “to provide for the granting of new licenses and social obligations”. The obvious question raised is: what are social obligations? This new term is not defined in section 1 of the ECA and it is submitted that at best this may be deemed to be an attempt to instil a sense of duty towards the public or consumers in terms of the services provided – a watered-down, well-meaning attempt at incorporating the scope that is otherwise dealt with in terms of the Consumer Protection Act. At worst, this is a case of careless drafting on the part of the legislature that may “sound nice” and hint at a social-based policy but will in all likelihood either lead to either, much costly litigation in order to attain legal certainty, or will be flatly disregarded.

As part of the object of the ECA and in order to fulfil its purpose the ECA undertakes to *inter alia* “promote an environment of open , fair and non-discriminatory access to ... electronic communication networks and electronic communications services”;²³⁶ “ensure the provision of a variety of quality electronic communication services at reasonable prices”;²³⁷ “promote the interests of consumers with

²³⁵ *Id* at Section 2.

²³⁶ *Id* at Section 2(g).

²³⁷ *Id* at Section 2(m).

regard to the price, quality and the variety of electronic communications services”²³⁸; and “ensure information security and network reliability”.²³⁹ These undertakings, read with Section 3 of the ECA, paint a pretty picture that is ultimately dependant on the Minister to put these undertakings to work in the form of policies.

Application of the Act

The Act provides a very technical and wide definition of electronic communications, far wider than any other Act discussed here or even the Model Law. This is due to the fact that this definition technically defines both concepts of electronic communication, the mediums through which such communication is made as well as data under the guise of so-called information – “the emission, transmission or reception of information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures, signals or combinations thereof by means of magnetism, radio or other electromagnetic waves, optical, electromagnetic systems or any agency of any like nature, whether with or without the aid of tangible conduct, but does not include content service”.²⁴⁰ Whilst it may seem more convenient to combine these definitions due to the fact that in the practical reality these concepts are inevitably linked and the one would be rendered useless without the other, this definition unnecessarily complicates this matter in so far as it may be more difficult to apportion liability should the services fail and cause damage of any nature. Electronic Communications Network and Electronic Communications Network Services are similarly, technically defined.

Further, Electronic Communications Service is defined as: “any service provided to the public, sections of the public, the State, or the subscribers to such service, which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services”²⁴¹ This is clumsy drafting in so far as terms are introduced that are not familiar and cannot be used universally linked to other pieces of legislation that may assist users in claiming for damages suffered. An example of this can be seen in the definition of an end-user (“a

²³⁸ *Id* at Section 2(n).

²³⁹ *Id* at Section 2(q).

²⁴⁰ *Id* at Section 1.

²⁴¹ *Id* at Section 1.

subscriber and persons who use the services of a licensed service referred to in Chapter 3²⁴²). This definition is akin to that of user, client, subscriber or consumer. However, the ECA also makes provision for a definition for “subscriber”²⁴³ – it appears that the only difference in terms of this Act between an end-user and a subscriber would be that a subscriber uses the services provided by the supplier for a fee, whereas an end-user does not necessarily pay such a fee for use of the service. This again complicates the interpretation and possible application of the Act and for practical purposes these two definitions would be better and more succinct if combined.

In applying the ECA, section 2 alerts us to the fact that in formulating an argument from the point-of-view of the consumer, the ECA can, and should be used in conjunction with the Consumer Protection Act in the specific wording: “The primary object of this Act is to provide for the regulation of the electronic communications in the Republic in the public interest and for that purpose to ensure the provision of a variety of quality electronic communications services at reasonable prices, and to promote the interests of the consumers with regard to the price, quality and variety of electronic communications services, and to ensure information security and network reliability.”²⁴⁴ In terms of the ECA, despite being vague, a consumer can find redress for losses sustained, and through a rather lengthy extension, a service provider can be found liable should it be found to have acted unreasonably. However, reasonableness is a concept that is difficult to determine and in this way, this subject should form the basis of litigation in order to determine a clearer test for ISP reasonable conduct. As far as reliability is concerned, it has already been determined above that a service provider is incapable of providing a completely reliable service in that, for example, the networks, hardware and software need to be maintained which in many cases would result in the temporary suspension of the service. It is my understanding that whilst this provision may give the consumer an “in” into a possible claim based on unreliability, such a claim would in all likelihood not stand judicial scrutiny for the fact that the nature of the service provided is such that reliability cannot be guaranteed. This leaves us in the position that in order for a claim to succeed in terms of the services being unreliable or having failed, an investigation would have to be launched in terms of which the reasons for the failure are determined – a rather technical exercise that requires expert knowledge. In this area, the ECA is quite clear and driven towards its purpose. Section 36 gives the Authority (the Independent Communications Authority of South Africa established in terms of the

²⁴² *Id* at Section 1.

²⁴³ *Id* at Section 1.

²⁴⁴ *Id* at Section 2(m), (n) and (q).

Independent Communications Authority of South Africa Act) the power to prescribe standards for the performance and operation of any equipment or electronic communications facility,²⁴⁵ and must direct such standards to protect the integrity of the electronic communications network and ensure the proper functioning of connected equipment or electronic communications facilities.²⁴⁶ This is a very technical process and may well be outside the general knowledge of the average user. As discussed above, whilst Section 36 is a protection mechanism of sorts that may well work in the favour of the consumer, proving a claim for damages based on such an industry standard would be a complex and prejudicial process for the consumer involved. Effectively, one would need to be armed with a wealth of industry-specific jargon and an army of experts prepared to testify on your behalf in order to succeed with what may be a miniscule claim. This is the inevitable weighing of interests in any litigious matter.

Consumer Rights

Consumer-related issues as a whole are dealt with in Chapter 12 of the Act. Sections 69, 70 and 71 contain an exhaustive list of “the Authority must...” including prescribing of regulations setting out a code of conduct and whilst these serve as well-documented way-points towards a consumer-orientated policy it realistically is little more than a map. The specific Regulations setting out the minimum standards for End-user and Subscriber Service Charters have been drafted and promulgated under Government Gazette No. 32431 and published on 24 July 2009.²⁴⁷ Prior to a discussion of these minimum standards it is worth noting Section 69(5) in so far as it outlines what specifically could be addressed in an End-User and Subscriber Service Charter, including: the provision of information to end-users and subscribers regarding services, rates and performance procedures; end-user and subscriber charging, billing, collection and credit practices; and complaint procedures and remedies that are available to address the matters at issue.²⁴⁸ The legislature, Minister and Authority have now had sufficient time and the benefit of the consumer-orientated Consumer Protection Act being promulgated to bring the ECA in line with the general trend of consumer policies. Consumer-orientated legislation is rapidly gaining momentum on the South African legal landscape which is a very positive step in not only encouraging consumers to become

²⁴⁵ Section 36(1) of the ECA.

²⁴⁶ *Id* at Section 36(2)(a) and (b).

²⁴⁷ Hereinafter “the Regulations”.

²⁴⁸ *Id* at Section 69(5)(a), (d) and (e).

actively involved in the economy, but also takes a huge leap forward in guaranteeing legal certainty and accountability on the part of service providers in general.

The purpose of the Regulations is simply “to prescribe the minimum standards for end-user and subscriber service charters” and is applicable to Electronic Communications Service and Electronic communications Network Service licensees as defined in the ECA. The Regulations provide important definitions that not only assist consumers in understanding and applying the regulations to their own agreements but also give clarity and depth to supplement the understanding of the ECA. For the purpose of this discussion it is important to bear in mind the following definitions:

- “Connectivity” is described as setting up and connecting the end-user to the Electronic Communications network. Accordingly, “connectivity failure” means the inability of an electronic communications network system to initiate and maintain connection between end-users. Further, “fault” is defined as a failure of performance so serious as to destroy the ability of a network or some elements of a network to function effectively.²⁴⁹
- “Complaint” refers to a communication lodged by an end-user by means of voice communications, personal visit, post or by data messaging, expressing dissatisfaction with the service rendered by the licensee. Similarly, a “fault report” is such a communication of a fault by the end-user.²⁵⁰

The provisions of the ECA culminate and are enforced through the Regulations which holds strict compliance requirements and stern penalties for ISPs. As it affects the consumer, the following provisions act as the foundation for any liability claims against ISPs and provide the framework for the consumer’s right to redress:

1. Service Availability:

Regulation 4.1 and 4.2: A licensed ISP is required to achieve an average of 95% network service availability, over a period of 6 months as it pertains to Electronic Communication Network Services and Electronic Communications Service.

²⁴⁹ Regulation 3 of the Regulations.

²⁵⁰ *Id.*

2. Installation and Activation of Service:

Regulation 4.3 and 4.4: All licensed ISPs must achieve an average 90% success rate within 30 days pertaining to meeting requests for installing and activating services, within their coverage area, for qualifying service applicants. The remaining 10% must be attended to within 40 days of the request.

With respect to activation, the success rate must be an average of 90% in 7 days within the coverage area and for qualifying applicants, and a further 8 days are afforded for successful activation of the remaining 10%.

For both of these regulations, an ISP may be called upon by the consumer to provide full reasons for the failure to provide the service within the specified time frame.

3. Connectivity:

As far as connectivity is concerned, the Authority has deemed it necessary to include so-called “dropped calls” into the scope of connectivity failure. The percentage of dropped calls and other connectivity failures may not exceed 3% over all connections, determined over a period of 6 months.²⁵¹ 90% of all faults reported must be resolved within 3 days and the remaining 10% must be resolved in no more than 6 days.²⁵²

4. Monitoring:

All ISPs must monitor their electronic communications networks 24 hours a day, 7 days a week²⁵³.

5. Accountability:

An ISP is required to keep and maintain records of all complaints lodged by end-users and subscribers. These reports must be compiled into six-monthly reports and copies of these

²⁵¹ Regulation 4.6.

²⁵² Regulation 4.9.

²⁵³ Regulation 4.8.

reports must be submitted to the Authority every 6 months. Further, the ISP is required to prepare and submit bi-annual reports on the standards embodied in Regulation 4.²⁵⁴

6. Penalties:

Should the Complaints and compliance Committee (a division of the Authority) find that an ISP is not complying with the Regulations; such an ISP will be liable to a fine, calculated as follows:

Contravention of Regulation 4: R500 000.00;

Contravention of Regulations 5 and 6: R150 000.00;

Repeat offences: R50 000.00 per repeat offence.²⁵⁵

These regulations strike at the very heart of this work. It is encouraging to see that the Authority takes the needs of the consumers seriously and is addressing the conduct of ISPs as it pertains to the services that they offer. The use of the phrase “network service availability” encourages a wider definition which can be interpreted to mean more than just access and should include reliability. There are however two failings in these Regulations. Firstly, there are no regulations drafted that address the issues of charging, billing, collection and credit practises as envisioned by the ECA. It goes without saying that the incorporation of regulations to this effect would have carried the purposes of the ECA, ECTA and CPA through to a practical level and better addressed the consumer-orientated policy on which these regulations are purportedly based. Secondly, the Regulations are only effective for redress against ISPs that are licensed in terms of the ECA. This effectively leaves a margin for unscrupulous ISPs to exploit consumers with no fear of penalties. It is further very encouraging to note that throughout the process of drafting and preparing these Regulations, a number of the major service providers, including those on which the case studies above were based, participated in active debate and made valuable contributions towards the Regulations. This is grounds enough for the consumer to have faith in these regulations and in their ISP, whilst being mindful of the goals of the Regulations.

²⁵⁴ Regulation 6.

²⁵⁵ Regulation 7.

Independent Communications Authority of South Africa Act

The Independent Communications Authority Act has limited but specific application to e-contracts due to the fact that one of the specific objects of this Act is to “establish an independent authority which is to regulate electronic communications in the public interest”.²⁵⁶ As has been shown throughout this work regulation of this form of communication is an almost impossible task for the reason that the majority of electronic communication is borderless and in many instances spans many jurisdictions – the question is thus, whilst the ICASAA itself makes no mention of the Model Law, as discussed above,²⁵⁷ why does this Model Law not feature more strongly given its universality and harmonising potential? It is true that the ICASAA in Section 4(1)(c) places a duty on the Authority to develop the application and implementation of ICASAA in line with international standards in that the Authority “subject to section 231 of the Constitution, must act in a manner that is consistent with the obligations of the Republic under any applicable international agreement.”. In light of this provision, the Authority together with the legislature have the power and would go a long way in providing legal certainty in a very broad sense should they initiate steps to incorporate and apply the Model Law, or even those relevant provisions pertaining to accountability of – and redress against- an ISP. Incorporation of this Model Law would also place South Africa amongst those frontrunner-jurisdictions in expanding the regulation of electronic communication across the conventional boundaries of a particular jurisdiction. In doing so a “safe space” is created for those parties relying on electronic communication as a medium through which they conduct economic transactions – an atmosphere in which the parties understand that they are accountable but also protected by legislation that transcends the traditional views of “jurisdiction”. This specifically encourages economic activity and similarly growth within this sector.

In summary, the ICASAA seeks to establish a regulatory body for the electronic communications sector that among many other duties “must function without any political and commercial interference”.²⁵⁸ I would refer to this regulatory body as a form of industry “watch dog” in that it relies on complaints from the consumer clients of the ISP to initiate investigation and further proceedings. Further it expands the “jurisdiction” of this regulatory body by incorporating all associated legislation effectively making this an industry-wide regulatory body that is competent to deal with disputes that in all likelihood will arise

²⁵⁶ Section 2(b) of ICASAA.

²⁵⁷ See in this regard Chapter 2 above.

²⁵⁸ Section 3 (4) of ICASAA.

from numerous legislative, industry-related and common law grounds. The exact competencies of this body will be further explored below.²⁵⁹

²⁵⁹ See Remedies and Protection Mechanisms below in Chapter 5.

Chapter 5

Remedies and Protection Mechanisms

“If the general legal framework for society’s political, social and economic activities is appropriately designed and managed, it will advance the interests of society, individuals and groups. If it is poorly designed and managed, it can weaken society’s foundations and reduce stability and welfare.”²⁶⁰

Introduction

Despite the legal uncertainty surrounding e-contracts it can only be estimated how many thousands or possibly millions of transactions take place in this manner every day. The basic convenience that this form of contracting offers coupled with accessibility to countless markets, locally and internationally, continues to drive this form of commerce onward and upward. However, the unprecedented rise of e-commerce and its speedier cousin m-commerce²⁶¹ has left the legislature in the proverbial cyber dust as far as regulating the market and protecting consumers goes.

In recent years the climate surrounding consumer protection in South Africa has changed dramatically with the introduction of the National Credit Act and more recently the Consumer Protection Act. Any discussion surrounding the protection mechanisms and remedies available to contracting parties (in this context contracting parties must be viewed in their capacity as users of a particular electronic medium) would be incomplete without an assessment of the application of the newest of these groundbreaking pieces of legislation as well as the Electronic Communications and Transactions Act, the Electronic Communications Act and the Independent Communications Authority of South Africa Act. For the purposes of this study, these pieces of legislation are considered to be of critical value both independently and in the way that work together in promoting consumer protection. The more

²⁶⁰ Van Eeden (2009) 96.

²⁶¹ Mobile commerce, also called mobile electronic commerce. Defined as “the commercial transactions and communication activities conducted through wireless communication services and networks by means of short message services (SMS), multimedia messaging services (MMS), or the internet, using small handheld mobile devices that typically are used for telephonic communication.” OECD M-Commerce Policy Guidance 2009:2. As referenced in Papadopoulos (2012) 63.

traditional common law remedies are obviously available to either contracting party, in both the contractual relationship between user and ISP as well as between parties to the electronic contract. These remedies will not be fully dealt with here, but will be referred to shortly for the sake of completeness and for the purpose of keeping this study focused.

Whilst it may appear that elements of this Chapter are a repetition of the foregoing Chapter, this has been done because it is of vital importance that consumers understand and are armed with their rights when approaching the relevant authority to have their disputes settled. It is my intention that this, as well as the preceding Chapter, will act as a very clear guide for consumers in addressing their grievances. At the same time it is my aim that the average supplier can use these two chapters to amend their contracting practises so that they may more effectively comply with- and address- consumer rights.

Electronic Communications and Transactions Act

It is important to remember that the contractual relationship between user and ISP is a contract like any other. More specifically, in most instances it is a contract in terms of which the user is paying for the service provided by the ISP. When viewed in this context the user is also a consumer and the ISP a supplier. Bearing this in mind the ECTA outlines a number of protective measures in Chapter 7, designed to protect online consumers. In this regard, Van der Merwe agrees and favours a wider, rather than limiting, interpretation for this chapter.²⁶² Whilst most of us are familiar with these mechanisms as an ordinary part of any online transaction, they should be viewed as further requirements in the conclusion of a contract, specifically between consumer and supplier. This influence on the common law principles of the law of contract is evidenced most effectively in Section 43(3) and (4) in that failure to comply with those measures as set out in Chapter 7 give the consumer a right to cancel the contract within 14 days of receiving the services from the supplier

Section 42 details a list of electronic transactions that are specifically excluded from the scope of the protection measures offered by the ECTA. And while the list is extensive it does not exclude electronic transactions specifically for ISP or related services. In fact, certainty can be found in the definitions of “transaction” and “consumer”. Papadopoulos goes so far as to say that “the scope of application hinges on the definitions or interpretations of the terms”.²⁶³ “Transaction” is defined as “a transaction of either

²⁶² Van der Merwe et al. (2008) 182.

²⁶³ Papadopoulos et al (2012) 65.

commercial or non-commercial nature, and includes the provision of information and e-government service”.²⁶⁴ “Consumer” means “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”.²⁶⁵ It is interesting to note that the legislature has included reference to those parties who intend entering into a transaction. Simply put, window-shoppers are put into the same category of protection as those that have fulfilled the traditional requirements for conclusion of an electronic transaction. I assume that this was done in order to determine the nature of the contracting process as well as to regulate the manner in which parties negotiate such transactions – an extension of the protective foundation of the chapter.

Further, it is worth noting that contrary to the NCA and the CPA, no protection is offered to smaller businesses or other juristic persons. After having created a culture in which smaller juristic persons have been protected and supported – a situation in which the unequal bargaining position is temporarily addressed, the absence of similar provisions here is noticeable and perhaps constitutes a step backwards in the growing development of a culture of consumer protection. It is left to these juristic persons to find protection in alternative forums. Effectively, any transaction concluded with an ISP in relation to such related services is subject to the requirements as well as the protection of the ECTA.

Section 43(1) raises the bar for ISPs. A long and detailed list of information that is legally required of ISPs to provide to potential consumers. This in an effort to curb unscrupulous fraudulent suppliers and promote a marketplace that is transparent and reliable. From an enforcement perspective this is a solid platform from which to launch legal proceedings against service providers. On the other hand, consumers cannot hide behind a lack of knowledge or information should they breach the terms of the contract. Section 43(2) clearly provides the “rules of the game” when concluding an electronic transaction. Amongst others, the ISP has a duty to provide the consumer with an opportunity to review the entire transaction; correct his/her mistakes and ultimately withdraw from the contract should he/she be inclined to do so. These 3 golden rules form the pillars of consumer protection in terms of the ECTA and rightly promote caution in an environment when the contracting parties never meet and the services on offer are seldom tested until after conclusion of the contract. Sections 43(3) and (4) hang like the proverbial sword over the provisions of Section 43 in so far as the consumer may cancel the agreement within 14 days of receiving the services he/she contracted for, should the supplier fail in

²⁶⁴ Section 1 of the ECTA.

²⁶⁵ *Ibid.*

those express duties as laid out above. In such a case the consumer is obliged to cease using the services provided and is entitled to full restitution of those amounts paid under the contract – an echo of the traditional common law principles of contract.

Sections 45(5) and (6) are of particular importance to this work, not so much in the direct wording of the sections but in the underlying intention and possible extension. Section 45(5) places a duty on a supplier to use a payment system that is safe and secure in reference to accepted technological standards at the time of the transaction. I read into this that the supplier is compelled to use the latest technology in order to protect the consumer. Section 45(6) goes further in so far as it makes provision for damages to be claimed should the supplier fail to ensure that the payment system used is of an acceptable technological standard at the relevant time. In my interpretation, this effectively boils down to: should the supplier, who for our purposes is a supplier of internet services, fail to update the technology used by the consumer so as to ensure the consumer's protection, the supplier will be held liable for those damages suffered by the consumer. And therein is the golden thread! A supplier has a duty to protect the consumer by means of the common accepted standard of technology. I would like to extend this in so far as to say, should the supplier not maintain/upgrade his/her technology to the standard that exacts the most protection to the consumer, he or she will be liable for the damages. Initially, this offers a glimmer of support to the study aims in so far as should conclusion of an electronic contract be jeopardised by the failure of an ISP to ensure that the technology through which the contract was concluded was safe and in line with the technological standards of the time, the ISP would be liable for the damages suffered as a result of the failure to successfully conclude or communicate such conclusion of a contract.

Section 44 goes a long way in extending the “cooling-off period” right initially offered by the NCA.²⁶⁶ In respect of services as the subject of the agreement, a consumer may terminate the agreement within 7 days (as opposed to the 5 days offered by the NCA) and is entitled to a full refund should payment have been effected within the 7 day “cooling-off” period. This protection mechanism is offered without limitations based on the nature of the contract as we see in the NCA – the only limitations applicable are those as highlighted above in Section 43. Over and above this extension, subsection 4 gives this section power in that express interpretational guidelines are laid out – the section cannot be construed as prejudicing the consumer's rights in any other law. This blanket provision far supersedes the scope of not only the ECTA but also the NCA and the CPA.

²⁶⁶ Section 121 of the NCA.

Finally, Section 46 of the ECTA gives “wheels” to the consumer protection mechanisms of this Act in that the supplier is held to a deadline of 30 days in which to “execute the order”. This time period starts to run from the day on which the order is received. In practical terms, should the services not be rendered or made available to the consumer within 30 days of conclusion of the contract, the consumer may summarily cancel the agreement with 7 days written notice to the supplier. The supplier is however not left completely helpless – should circumstances beyond their control, such as the services not being available, the supplier is forced to notify the consumer and unless otherwise agreed, refund the consumer any payments made within 30 days.

All of these protection mechanisms could just as easily disappear and render the consumer helpless. The “Achilles Heel” of Chapter 7 may well be in its application. Papadopoulos points out, which was previously highlighted by both Buys & Cronje²⁶⁷ and Eiselen²⁶⁸, that in requiring that all the various parts of the agreement must be finalised electronically, which would include the payment or performance by the consumer as well, could very well hinder the extension of protection to consumers.²⁶⁹ This flies very much in the face of the underlying values of consumer protection that the ECTA tries very hard to uphold. Again, it would appear that the legislature has over-refined the wording of the Act to such an extent that hybrid transactions, which electronic contracts for a long time were, would be excluded from the scope of application and thus the scope of protection of the ECTA. It would have been more prudent to rather err on the side of leaving the floodgates wide open and thus the consumers better protected, than to create another group of consumers that are half-in, half-out of the favour of the ECTA. A situation that will at a later stage have to be addressed and legislative history will have to be repeated.

As far as enforcement of the protective provisions of the ECTA is concerned, it is welcoming to note the cross-over and intertwined relationship created between the various consumer protection legislation. Section 49 makes provision that non-compliance by a supplier may be reported and a complaint lodged with the National Consumer Commission that was established under the CPA. This is a refining and streamlining of the legal process in so far as it creates a single forum of specialised presiding officers to oversee the enforcement and control of consumer protection related matters across the board. It goes without saying that any fragmentation of the consumer remedies and related processes would

²⁶⁷ Buys & Cronje (2004) 140.

²⁶⁸ As referenced in Van der Merwe *et al* (2008) 183.

²⁶⁹ Papadopoulos *et al* (2012) 65.

undermine the certainty that has now been created. This in the long run would lead to a more rigid consumer protection structure and speedier development of this particular fundamental branch of law.

Any consumer who wished to lodge a complaint alternatively have a dispute adjudicated in terms of the ECTA, particularly such a dispute arising from non-compliance on the part of a supplier with the fundamental consumer rights afforded in terms of the ECTA, may do so with the National Consumer Commission as provided for in Section 49. The ECTA is otherwise silent on the specific role of the National Consumer Commission. I would argue that whilst this may be an oversight on the part of the legislature, it is more likely an effort on the part of the legislature to avoid the ECTA being a repetition of the CPA. One must remember that the CPA was promulgated after the ECTA and the role of the Commission included by substitution through amendment in 2008. This may well be a wiser way of dealing with disputes arising out of the ECTA in avoiding a situation where a number of competent bodies are established under various legislations to deal with materially the same issue – consumer protection. It is better to have a single, competent authority to develop the culture and apply the applicable legislation to all consumer-related disputes. This in turn would assure legal certainty and more accurate development of consumer-orientated policies.

The ECA does however re-affirm the jurisdiction of the South African courts and application of the common law in Sections 90 and 91 respectively. The jurisdiction of the South African courts is wide in so far as it extends over any offence committed in the Republic (including preparation towards an offence or commission of only a part of the offence); where the result of the commission of such an offence has an effect within the Republic; or the offence was committed by any South African citizen, resident or person carrying on business in the Republic. Given the international nature of the electronic commerce, this provision can be construed as a legitimate attempt to prosecute those guilty of offences, irrespective of their physical location, and further to offer to all South Africans the benefit of protection within their own borders. The common-law, which has stood the test of the ages, is also preserved, in so far as Chapter 14 of the ECTA and its provisions do not affect criminal or civil liability which may be founded in terms of the common law. This provision respects the traditional approach to litigation we so value in South Africa. It pays homage to our long-developed legal culture and in its preservation the ECTA affords consumers an even wider protection. Consumers have a long-standing faith in the South African court's interpretation and application of legislation. This historical relationship will go a long way in assisting the newly founded Commission in applying consumer policy – the members of the Commission and consumers alike may turn to the courts to find a sounding board on issues such as interpretation, sentencing and application of the ECTA. The role, function and jurisdiction of the Commission will be discussed later on in this Chapter as part of the discussion on the CPA.

The Consumer Protection Act

Melville commences his discussion on enforcement and dispute resolution with the following statement which is pivotal to understanding the broader scope of the discussion to come, “One of the central aims of the Act is to ensure that aggrieved consumers have access to redress, which is one of the international consumer rights.”²⁷⁰ He elaborates on this by further saying that “the approach taken in the Act is consistent with its philosophy generally and international best practice: consumers are permitted a choice as to how they wish to follow up the complaint”.²⁷¹ He generally suggests that the redress procedure be viewed as a pyramid in which the volume of complaints diminishes towards the top of the pyramid as the procedure becomes more formalistic.²⁷² The aim of this pyramid is to have a larger volume of complaints being attended to and redressed by informal means, with only a smaller percentage of claims (and subsequently those with more complex issues) is being referred to the next, more formal level of adjudication. This approach followed by Melville varies from the approach followed by the CPA. In terms of section 69, a consumer can seek to enforce any right afforded in terms of the CPA or in terms of a transaction or agreement by referring the matter directly to the Tribunal,²⁷³ referring the matter to the applicable industry ombud with jurisdiction over the supplier,²⁷⁴ by applying to the consumer court with the necessary jurisdiction,²⁷⁵ referring the matter to any other alternative dispute resolution agent,²⁷⁶ by filing a complaint with the Commission,²⁷⁷ or referring the matter to a court with jurisdiction over the matter – but only in such cases as when all the other remedies available to the consumer in terms of national legislation have been exhausted.²⁷⁸ The CPA makes no specific reference to which order should be followed in seeking redress at the respective institutions. The consumer is free to choose their forum as he/she will.

²⁷⁰ Melville (2010) 125.

²⁷¹ *Id.*

²⁷² *Id* at 126.

²⁷³ Section 69(1)(a) of the CPA.

²⁷⁴ *Id* at Section 69(1)(b).

²⁷⁵ *Id* at Section 69(1)(c).

²⁷⁶ *Id* at Section 69(1)(c)(iii).

²⁷⁷ *Id* at Section 69(1)(c)(iv)

²⁷⁸ *Id* at Section 69(1)(d).

In order to make more sense of the myriad of fora and each forum's specific process, it would be correct to break down the process of redress into 2 simple question-based areas: who may complain? And to whom may that person complain?

In answering the first question: Section 4 mentions 5 classes of persons: a person acting on his/her own behalf, an authorised person acting on behalf of another person who cannot act in his or her own name, a person acting as a member of, or in the interest of, a group or class of affected persons, a person acting in the public interest or an association acting in the interests of its members.²⁷⁹

In answering the second question, again Section 4 should be assessed prior to focusing on more specific provisions further on in the CPA. Section 4(2) sets out the basic guidelines that the Tribunal or courts should rely on in adjudicating matters in terms of the CPA. The court specifically is charged to develop the common law as necessary to improve the realisation and enjoyment of consumer rights generally,²⁸⁰ whereas the Tribunal and court must promote the spirit and purposes of the CPA, and make such orders that give practical effect to the consumer's right of access to redress.²⁸¹ The Tribunal and courts are also given the tools to make such orders as they are given the power and discretion to make any order provided for in the CPA,²⁸² or to make any innovative order that better advances, protect, promote and assure the realisation by consumers of their rights.²⁸³

The consumer basically has 6 options for having a dispute resolved in terms of the CPA, as follows:

- **Alternative Dispute Resolution**

The CPA makes provision for alternative dispute resolution in a single section – section 70. The role of alternative dispute resolution can be gleaned from the provided definition of an alternative dispute resolution agent who is: an ombud with jurisdiction; an industry ombud accredited in terms of the CPA; or a person or entity providing conciliation, mediation and arbitration services

²⁷⁹ *Id* at Section 4(1).

²⁸⁰ *Id* at Section 4(2)(a).

²⁸¹ *Id* at Section 4(2)(b).

²⁸² *Id* at Section 4(2)(b)(ii)(aa).

²⁸³ *Id* at Section 4(2)(b)(ii)(bb).

to assist in the resolution of consumer disputes, other than an ombud as mentioned above.²⁸⁴ Whilst the aim of this discussion is not to explore the structures and processes of arbitration, mediation and conciliation, it would suffice to say that these processes are informal, efficient and adjudicated by experts in the field of dispute resolution. To a large extent this process is a private, user-friendly process and requires no expert knowledge on the part of the consumer. The effectiveness of this form of dispute resolution is clear from the development and success of the CCMA as it pertains to labour-related matters.

In short, section 70(2) reaffirms the informal nature of alternative dispute resolution in stating that should the alternative dispute resolution agent conclude that there is no reasonable probability of the parties resolving their dispute through the process provided for, the agent may terminate the process. It is then up to the consumer to take the process further and refer the dispute to the National Consumer Commission. It is noteworthy that this section does not make provision for referral to other institutions or statutory bodies, but only to the Commission. Also, there is no definition of “reasonable probability”. Should such parameters have been given, the consumer may have been in the position to make an informed decision about whether or not to approach an alternative dispute resolution agent in the first place. By leaving the section so open-ended the process of alternative dispute resolution may be open to abuses and “passing the buck” in that it would appear that a supplier need only resist the complaint lodged to such a degree as to show that the dispute cannot reasonably be settled – and the consumer is left out in the cold once more.

On the other hand, if the dispute is successfully resolved by means of alternative dispute resolution, the agent may record the resolution in a form of quasi-order and submit it to the Tribunal or division of the Supreme Court for it to be made a consent order.²⁸⁵ Melville recommends that the court or Tribunal should deal with the application for a consent order on an Application proceedings basis and either make the order, amend the order or refuse the order in terms of the Uniform Rules of Court.²⁸⁶

²⁸⁴ *Id* at Section 1.

²⁸⁵ *Id* at Section 70(3).

²⁸⁶ Melville (2010) 129.

- **Ombuds**

Van Eeden believes that the powers and procedures of the ombuds fall within a sphere of so-called “private adjudication”.²⁸⁷ In terms of section 69(b) a consumer may refer a dispute to the applicable ombud in whose jurisdiction the matter falls. Unfortunately, in order to institute proceedings against a specific supplier through an ombud, the supplier must be subject to the jurisdiction of the particular ombud. Jurisdiction to a particular ombud is voluntary on the part of the supplier who must agree to be held by the decisions of a particular ombud and so subject him/herself to the jurisdiction of such an ombud. Alternatively, a consumer may approach the applicable industry ombud which is accredited in terms of section 82(6).²⁸⁸ Either of these ombuds mentioned above are commercial institutions who are controlled by the industry they govern.

The ombud is generally regarded as a form of alternate dispute resolution, and as such has the power to facilitate and record a resolution or settlement between the parties, which can then be referred to the National Consumer Tribunal or court to make a consent order.²⁸⁹

For practical purposes, there are no dedicated ombuds in South Africa to deal with disputes arising from agreements between ISPs and subscribers. This is a situation that desperately needs remedying for the fact that ombuds offer an informal and efficient manner of assisting consumers in finding redress for their complaints. It offers an affordable solution through conciliation and mediation between the parties and if structured correctly could reduce the backlog of complaints to the more formal structures discussed below.

- **Consumer Courts**

As with the Ombud and Alternative Dispute Resolution, Consumer Courts are an alternative to the more rigid and formal structures of the National Consumer Commission and the National Consumer Tribunal. In terms of Section 1 of the CPA, a consumer court is defined as being “a body of that name, or a consumer tribunal, that has been established in terms of the applicable

²⁸⁷ Van Eeden (2009) 99.

²⁸⁸ Section 69(b) of the CPA.

²⁸⁹ Ibid at Section 70.

provincial consumer legislation”. Section 70(1)(d) enables a consumer to seek redress in respect of any transaction or agreement concluded with a supplier by referring the dispute to the consumer court of the province with jurisdiction over the matter (if there is such a consumer court in the province). As with the other forms of alternative dispute resolution, the court may facilitate and record a resolution or settlement between the parties and submit same to a division of the High Court or Tribunal to be made a consent order.

Where the consumer court does differ from the other forms of alternative dispute resolution, is that it has an extended jurisdiction afforded to it by the National Consumer Commission. In those matters pertaining to prohibited conduct on the part of suppliers, the Commission may refer the consumer back to the consumer court in the particular province in which the supplier has its principle place of business. The Commission may make such a referral if it is of the opinion that those issues raised could be more expediently dealt with by the consumer court.²⁹⁰

From a practical perspective, the consumer court packs a heftier punch than its alternative dispute resolution counterparts. Section 75 of the CPA enforces the role of the consumer court and to a large extent legitimises its function in that the consumer court is charged to conduct its proceedings in line with those rules and requirements of the Tribunal. The scope of its powers are also far broader in that the consumer court may make any order that the Tribunal may have made had it heard the matter itself and that such orders have the same force and effect, and can further be enforced as if it has been made by the Tribunal.²⁹¹

- **Ordinary Courts**

Consumers may only approach the ordinary courts as a last resort and when every other remedy available to the consumer has failed or been exhausted.²⁹² Van Eeden discusses at length the role that the courts play on a direct level as well in the greater legal framework that is created by the provisions and mechanisms of the CPA. He describes the services rendered by the courts as “the interpretation of the law, the declaration of rights, the granting or refusing of orders, the

²⁹⁰ *Id* at Section 73(2)(a).

²⁹¹ *Id* at Section 73(6).

²⁹² *Id* at Section 69(d).

administration of justice and the dispensing of redress”.²⁹³ In their role within the greater legal framework, Van Eeden is of the opinion and sums up quite distinctly that “the CPA also lays the groundwork for a new role to be played by the courts in the context of the legal framework for the consumer market. In addition it integrates the roles of the courts and the institutions comprising its regulatory framework.”²⁹⁴

At the outset it is important to understand that the CPA makes provision for the creation of both criminal offences (and the associated penalties) as well as civil liabilities. It is thus up to the criminal courts and the laws of criminal procedure to prosecute and punish those offenders in terms of the CPA, and it is up to the civil courts and laws of civil procedure to deal with claims for damages and enforce the rights and agreements created in terms of the CPA.

In enforcing agreements and adjudicating claims for damages, section 52 of the CPA confers on the courts the power to ensure that the terms and conditions of a transaction or agreement between a consumer and supplier are fair, just and reasonable.²⁹⁵ And in coming to its decision, the court is obliged to consider the principles, purposes and provisions of the CPA. What is of vital importance to consumers in terms of their seeking redress at the steps of the courts, is that the court must take into consideration a number of factors, the most pivotal of which is the nature of the parties to that transaction or agreement, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position.²⁹⁶ This provision should form the crux of any argument based on an agreement between consumer and ISP in a case where the consumer alleges that the ISP has failed in his/her contractual duty. This is a giant leap by the legislature and can safely be assumed to be an attempt to level the bargaining playing field. Of more practical importance to consumers are the provisions of subsection 3, in that a court is empowered to make an order, should certain terms and conditions be found to be unfair, unjust, unconscionable, or unreasonable, that includes an order to compensate the consumer for losses or expenses relating to the transaction or agreement itself, and also for the costs of the court

²⁹³ Van Eeden (2009) 297.

²⁹⁴ *Ibid.*

²⁹⁵ Section 52(1) of the CPA.

²⁹⁶ *Id* at Section 52(2).

proceedings.²⁹⁷ In light of previous discussions pertaining to the creation of legal certainty and those matter that would be best determined on a case-by-case basis, this provision provides a measure of hope to consumers who have the appetite to seek clarity and redress through the courts. It is in most cases the high costs of litigation that prevent consumers seeking redress and in incorporating the power of the courts to make an order based on the costs of proceedings may well open the floodgates of litigation against unscrupulous suppliers.

- **The National Consumer Commission**

I feel that it is important to discuss the roles and purposes of the National Consumer Commission in two distinct parts: the functions of the Commission (which will include a discussion on the procedures to be followed in lodging a complaint with the National Consumer Commission); and the powers of the National Consumer Commission.

Functions

The Commission is charged to carry out the functions conferred on it in terms of the CPA or any other national legislation and in so doing may have regard to international developments in the field of consumer protection.²⁹⁸ This provision opens the door for the Commission to incorporate the aims and theories of the Model Law into the practical workings of the CPA. The positive implications of incorporating the Model Law into the South African consumer protection framework has already been discussed at length above and armed with this provision of the CPA, the Commission is at the forefront of the development of an effective and reliable consumer protection structure that effectively ventilates and addresses consumer issues as it pertains to their relationship with ISPs.

In carrying out the duties conferred on it by the CPA, the Commission has a responsibility to enforce the CPA “promoting informal resolution of any dispute arising in terms of this Act between a consumer and a supplier, but is not responsible to intervene in or directly adjudicate any such dispute”.²⁹⁹ The latter part of this provision is somewhat confusing and I feel constitutes a restraint of the powers of the Commission. Whilst I do understand that the CPA makes provision

²⁹⁷ *Id* at Section 52(3)(b).

²⁹⁸ *Id* at Section 92(1) and (2).

²⁹⁹ *Id* at Section 99 (a).

for many other forms of alternative dispute resolution, it is obvious from the CPA and the wealth of powers conferred on the Commission that this particular body wields the appropriate power and authority to enforce the CPA at almost any level. It is a pity that the CPA in itself cannot intervene or adjudicate disputes when it clearly is the most competent body to do so. With a view to recommending a more efficient system of redress for the consumer, this provision may well prove a fatal stumbling block in achieving the purposes and policies of the CPA.

Powers

Section 99 establishes the authority of the Commission to *inter alia* receive and refer complaints; monitor the consumer market and effectiveness of a variety of bodies constituting the legal and regulatory framework of the CPA and investigate prohibited conduct, negotiate undertakings and consent orders.³⁰⁰

In short it would appear that the Commission is a kind of “point man” or first “port of call” for complaints lodged by the consumer. It may investigate complaints and based on that investigation either refer the matter to the National Prosecuting Authority, Equality Court, Consumer Court or the National Consumer Tribunal.³⁰¹ Alternatively, should the investigation prove that the complaint has prescribed, is subject to other proceedings instituted in terms of the CPA, is frivolous or does not contain averments that would otherwise give rise to a remedy provided for in terms of the CPA – may issue a notice of non-referral.³⁰² Finally, the Commission may issue a compliance notice to the supplier in question should the investigation reveal and/or lead the Commission to believe, on reasonable grounds that the supplier has engaged in prohibited conduct.³⁰³

Most importantly for the purposes of this work, the Commission has jurisdiction throughout the Republic of South Africa.³⁰⁴ It would be my recommendation that should a consumer have a complaint against a supplier to first approach the Commission who would be the ideal body to

³⁰⁰ *Id* at Section 99(a) –(i).

³⁰¹ *Id* at Section 73.

³⁰² *Id* at Section 116.

³⁰³ *Id* at Section 100.

³⁰⁴ *Id* at Section 26.

investigate the matter and refer the consumer to the appropriate forum in which to have their complaint adjudicated.

- **The National Consumer Tribunal**

The Tribunal was established in terms of section 26 of the National Credit Act and is the end of the line for consumer complaints lodged in terms of the CPA. The Tribunal is required further in terms of section 26 of the NCA to exercise its functions in accordance with the NCA or any other applicable legislation throughout the Republic.

Despite it being the end of the road for many of the processes highlighted above, the CPA does make provision for the direct referral of a matter to the Tribunal – this however depends on the particular dispute.³⁰⁵ It would appear that in order to successfully apply directly to the Tribunal to have a dispute adjudicated, the consumer would have to have a clear indication of the nature and character of the dispute.

The Tribunal also plays a role akin to that of an appeals court in that: consumers may refer their disputes to the Tribunal after they have been issued with a notice of non-referral from the Commission and after having had leave to do so granted by the Tribunal;³⁰⁶ parties may apply to have settlement agreements reached through arbitration or other alternate dispute resolution methods made an order of the Tribunal;³⁰⁷ the Commission may refer matters to the Tribunal as it pertains to allegations that a supplier has engaged in prohibited conduct;³⁰⁸ or specific applications may be brought by a respondent in a matter that would otherwise be referred to a consumer court by the Commission that such matter be referred to the Tribunal instead.³⁰⁹ In this latter case, matters may be so referred in two cases: the first, if the balance of convenience favours such a referral, and secondly, if such a referral is in the interests of justice.

³⁰⁵ *Id* at Section 69(a).

³⁰⁶ *Id* at Section 75(1).

³⁰⁷ *Id* at Section 70(3).

³⁰⁸ *Id* at Section 73(2).

³⁰⁹ *Id* at Section 73 and 75.

Section 142 of the National Credit Act sets the general tone for the hearings conducted by the Tribunal, and requires that the hearings be conducted in an inquisitorial, quick and informal manner and such proceedings are effected in line with the principles of natural justice. The Tribunal further has the authority to make an order as empowered by Section 150 which includes orders for interim or final relief, declaring conduct to be prohibited and interdicting same, imposing fines, confirm consent orders or condone non-compliance with the rules and procedure of the Tribunal.

For the sake of better assisting the consumer, the remainder of this discussion pertaining to the Tribunal will be dealt with in two distinct spheres: Firstly, those aspects pertaining to procedure, and secondly, those aspects pertaining to the powers of the Tribunal to make binding orders.

Procedure

The consumer can only refer a matter to the Tribunal that is based on an allegation that the consumer's rights have been infringed, impaired or threatened; or that the supplier has acted in such a manner that is consistent with prohibited conduct in terms of the CPA.

This broad basis for referral can be limited in two ways: firstly the complaint must be brought within 3 years of the violation or occurrence of prohibited conduct.³¹⁰ Secondly, a complaint cannot be referred to the Tribunal if it is based on substantially the same conduct (even if such conduct constitutes a violation or prohibited conduct under another section of the CPA) as a matter already before a consumer court of the Tribunal.³¹¹ Both of these limitations are well-known in the common law and serve as a reminder that the proceedings before a Tribunal constitute a legal process with its feet firmly planted in the culture of litigation. In the same vein, the proceedings before the Tribunal are subject to firm rules and requirements. The specific procedural rules that must be complied with have been published in the Government Gazette No. 30225 of 28 August 2007 and pertain to form, documents and information required, application fees, notification and service of processes. The consumer is warned to familiarise themselves with the regulations.

Parties to proceedings before the Tribunal are entitled to appear in person or through their respective legal representatives.

³¹⁰ *Id* at Section 116.

³¹¹ *Ibid.*

Orders

The Tribunal is granted the express power to make the following orders in terms of section 150 of the NCA:

- Declaring conduct of the supplier to be prohibited;
- Interdicting prohibited conduct;
- Imposing an administrative fine on the supplier up to a maximum of the greater of 10% of the supplier's annual turnover or R1 000 000.00;³¹²
- Confirming an agreement between the parties as an order of the Tribunal;
- Condoning non-compliance with the rules, regulations and procedures; and
- Granting interim relief.³¹³

Irrespective of the order made, the Tribunal is charged in terms of section 4 of the CPA to ensure that such an order gives practical effect to the consumer's right of access to redress, that includes but is not limited to any order expressly provided for by the CPA any innovative order that better advances, protects, promotes and assures the realisation of consumer rights as afforded by the CPA.

Any person who fails to comply or contravenes an order made by the Tribunal commits an offence.³¹⁴ Any order made by the Tribunal is to be served, executed and enforced with the power of an order of the Supreme Court and is accordingly binding on those structures lower on the judicial chain.³¹⁵

- **Equality Courts**

Section 10 of the CPA makes provision for any alleged contravention of the rights afforded to the consumer in section 8 to be adjudicated by either the Equality Court or the National Consumer Commission. Should the consumer choose to file a complaint with the National Consumer

³¹² *Id* at Section 112.

³¹³ In terms of Section 114 of the CPA.

³¹⁴ *Id* at Section 109.

³¹⁵ Section 152 of the CPA.

Commission, the Commission is charged to refer the complaint to the Equality Court “if the complaint appears to be valid”.³¹⁶ The CPA is however silent on how the Commission would validate such a complaint. Is it up to the Commission to investigate the claim, and if so what is the procedure for such an investigation. The expertise and qualification of the Equality Court to preside over matters pertaining to unfair discrimination is not challenged, however, this section places the added burden (and associated risks) on the Equality Court to have expert knowledge of not only the Promotion of Equality and Prevention of Unfair Discrimination Act, but also the CPA. This, to my mind, constitutes a “watering-down” of the focus of the Equality Court and poses the risk that the consumer must structure an argument in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act and the CPA – a sort of hybrid application that bears the obvious risk of not being commercially orientated or in line with the specific purposes of the CPA.

However, in having the matter adjudicated, irrespective of the forum, the consumer is protected by the statutory presumption of section 10(2), which is in the favour of the consumer. It is to be presumed that any differential treatment as contemplated in section 8 of the CPA constitutes unfair discrimination, unless it is established otherwise. This places the burden of proving that the discrimination was fair, squarely on the supplier, and rightly so. Having expert knowledge with regards to the transaction the supplier is better suited and in a stronger position to protect him/her self as compared to the consumer who is typically a lay person. The courts are further entitled to draw an inference that the differential treatment constitutes unfair discrimination against the consumer should it appear that the supplier has acted in any manner contemplated in section 8, that this differential treatment appears to be based on a prohibited ground, and the supplier has refused or failed to provide an alternative reasonable and justifiable explanation for the differential treatment. As discussed above, this presumption and inference goes a long way in addressing the unequal bargaining power between the parties and correctly enforces the purposes and policies of the CPA. Melville does however caution against this presumption and inference in so far as it may be interpreted to be in contradiction to Section 35(3)(h) of the Constitution – the right to be presumed innocent until proven guilty.³¹⁷ This would be a very interesting play-off between the right of the supplier afforded in terms of Section 35(3)(h) and the

³¹⁶ *Id* at Section 10(1)(b).

³¹⁷ Melville (2010) 39.

vulnerable position of the consumer which the court is charged to protect in terms of section 8 and 10 of the CPA and is best left for the courts to settle.

Independent Communications Authority of South Africa Act

The ICASAA aims to “provide for the establishment of the Independent Communications Authority of South Africa”.³¹⁸ When read together with the poignant acknowledgement of the Preamble: “acknowledging that the establishment of an independent body to regulate broadcasting and telecommunications is required” it becomes clear that the legislature is very serious about providing for a modern and competent body, with the required expertise to guide the development of the telecommunications industry.

In terms of Section 3 of the ICASAA a juristic person is created under the title of the Independent Communications Authority of South Africa. This is a huge leap forward for consumer protection in that the authoritative body in this industry is a juristic person - a body with separate legal personality and accountability. The Authority acts through a Council which is handpicked by the President himself on advice of the National Assembly.³¹⁹ This critical process is guided by the principles of Section 5 of the ICASAA which in their wording echo the critical principles of the Constitution, namely: participation by the public in the nomination process; transparency and openness; and publication of a shortlist of candidates of appointment.³²⁰ Such candidates must be persons who are committed to fairness, freedom of expression, openness and accountability.³²¹ Further, they are required to possess suitable qualifications, expertise and experience in the fields of broadcasting and telecommunications policy, engineering, law, technology, economics, and many others.³²² It would appear that this Council is a formidable group of experts, covering every aspect and sphere of telecommunications. Again, it is clear that the legislature was very serious in its intention to bring legitimacy and order to this industry. Section 3 highlights two important aspects that can be interpreted as the goals of the Authority: The Authority is independent, and subject only to the Constitution and the law, and must be impartial and

³¹⁸ ICASAA: Aim.

³¹⁹ *Id* at Section 3(2) read with Section 5(1).

³²⁰ *Id* at Section 5(1).

³²¹ *Id* at Section 5(3)(a).

³²² *Id* at Section 5(3)(b).

must perform its functions without fear, favour or prejudice.³²³ And secondly, the Authority must function without any political or commercial interference.³²⁴ A very powerful sentiment that I would assume derives its power from the right to freedom of expression as enshrined in the Bill of Rights. This sentiment resonates very deeply through the South African collective conscience in light of the historical abuses of the freedom of expression.

Whilst the aims and objects of the ICASAA are clearly well-intentioned and deeply entrenched it would seem that this particular act is lacking in the modern tenure of consumer-orientated policies. In light of the fact that the power to enforce international agreements is specifically awarded to the Authority, the ICASAA has outlined the practical provisions and mechanisms to put these agreements, of which the Model Law can be said to be the most progressive, into action in the Republic.³²⁵ The Regulations setting out the Minimum Standards for End-User and Subscriber Service Charters has been published under cover of the Government Gazette Number 32431 on 24 July 2009 which includes a comprehensive complaints procedure. This procedure will be discussed fully hereunder in terms of the Electronic Communications Act which initialised the promulgation of the Regulations.

The Electronic Communications Act

As discussed above, one of the aims of the ECA is to provide for the regulation of electronic communications services, electronic communications network services and broadcasting services. This places the conduct of ISPs and their role in contracting with consumers squarely within the jurisdiction of the Authority as provided for in Section 1 of the ECA. The Authority referred to throughout the ECA is the Independent Communications Authority of South Africa established in terms of the ICASAA discussed above.

As discussed in the previous Chapter, the ECA's role in consumer protection revolves around policies and regulations that have been drafted and put into place under the instruction and supervision of the Minister and the Authority. Should a consumer wish to hold an ISP liable on the grounds that the standard of performance and operation of the equipment or electronic communication facility were not up to the reasonably acceptable standard, he/she would have to invoke and apply the Complaints

³²³ *Id* at Section 3(3).

³²⁴ *Id* at Section 3(4).

³²⁵ *Id* at Section 4 (1) (c).

Procedure as embodied in the Regulations setting out the Minimum Standards for End-User and Subscriber Service Charters.³²⁶ Whilst Regulation 5 does not set out the specific form that complaints should take when lodged with the Authority, it does regulate the manner in which the supplier should address such complaints. Firstly, and prior to receiving any complaints, a supplier must designate and publicise a so-called “point of entry” for complaints to be lodged by consumers.³²⁷ Then, and in the order mentioned below:

- The supplier must acknowledge receipt of the complaint and allocate a reference number to the complaint within 3 days of receiving it.³²⁸
- The supplier may respond in the manner or format it deems appropriate in the circumstances, which may include in writing, telephonically, by e-mail, sms or in person.³²⁹
- Finally, the supplier must formally resolve all complaints within 14 days of initial receipt thereof.³³⁰

Should the 3 step process above fail, and the consumer is still not satisfied with the resolution of their complaint, the consumer can then apply directly to the Authority for resolution of the complaint. Again, a complaint that has been escalated for resolution by the Authority must be formally resolved within 14 days of the complaint being so escalated.³³¹

Whilst this process is very clear and makes for speedy resolution of complaints it has its shortfalls. For a start the technical aspects of such a claim have not properly been outlined, and should it be found that they have, the consumer is already at a disadvantage, as it pertains to expert knowledge. Secondly, the consumer will have no idea of how to lay such a charge or complaint for the fact that the scope and powers of the Authority to adjudicate such a matter have again not been outlined. Each of the so-called technical standards incorporated by the Authority are supposed to be open to inspection by the public

³²⁶ Hereinafter “the Regulations”.

³²⁷ *Id* at Regulation 5.1 (a).

³²⁸ *Id* at Regulation 5.1 (b).

³²⁹ *Id* at Regulation 5.1(c).

³³⁰ *Id* at Regulation 5.1 (d).

³³¹ *Id* at Regulation 5.2.

during normal office hours of the Authority and may also be requested from the Authority for a price.³³² Whilst this does uphold the Authority's (and its functioning organ the Counsel) objects of transparency and accountability, it practically closes this avenue of redress to the consumer. A technical standard is precisely that – a highly technical document that would be outside the scope of reasonable understanding of the average consumer. The consumer is left helpless as to determine the nature and quantum of the ISP's liability but for a lack of resources and expertise. This falls foul of the consumer-orientated, user-friendly legislation that has become the backbone of the modern marketplace.

In terms of section 71, it is a further duty of the Authority to establish a consumer advisory panel that will act as “the eyes and ears” of the Authority as it pertains to matters relating to consumer issues. This has as yet not materialised.

It would be my recommendation to the Authority that they as quickly as possible establish a consumer advisory panel that can act in a para-legal capacity in advising consumers as to their complaints. It would most effectively serve the purposes and policies of this Act if the consumer could approach a competent body of experts with their complaint in order to be advised of the specific technical aspects of their complaint and how to most successfully have those complaints addressed by the supplier.

³³² Section 36(3) (e) and (f) of the ECA.

Chapter 6

Conclusion

In light of the very detailed discussions of each of the previous chapters, and further to prevent lengthily repetition, this conclusion will be kept brief and will focus predominantly on answering the Research Question and Study Aims of this work, as highlighted in Chapter 1 above. To propose a considered and complete answer to the Research Question, the following issues will be discussed separately:

Liability

It can be said with relative certainty, having considered the many discussions above that the question of liability for losses sustained during the electronic contracting process due to failure on the part of the ISP is a complex issue with no clear answer. Essentially it would boil down to an investigation into how the ISP had failed. As gleaned from the discussions above, it can be said that essentially there are 2 particular areas in the relationship between ISP and user which are actionable should the ISP fail in its respective statutory duties.

- Failure to comply with the duties imposed on the ISP in contracting with the user.

In light of the plethora of policy-based provisions in the various legislation discussed throughout this work that are specifically aimed at protecting vulnerable consumers prior to and during the contracting phase with the ISP, it is clear that a vast majority of complaints lodged with the various fora authorised to adjudicate such complaints will be of a contractual nature.

The CPA is without a doubt the most appropriate mechanisms for bringing such disputes to adjudication. The CPA is the so-called Bill of Consumer Rights and its provisions cut both ways. On the one hand the responsibilities, duties and associated penalties of the suppliers are clearly structured. On the other and as a result of the responsibilities heaped on the supplier, the consumer's rights are practically and understandably drafted. Consumers can rest assured knowing that there is finally legislation drafted for the consumer, in language that the consumer can understand and that makes provision for the consumer to be able to help themselves in having their disputes adjudicated.

- Failure to comply with responsibilities and duties in providing of the services.

Failure to properly make available the services that the consumer has approached the ISP to make available to them has far-reaching implications. This work has very clearly set out the various phases and processes in electronic contracting. Each of these phases has been discussed from a risk/liability perspective in order to gain a deeper understanding of the pitfalls and associated responsibility of the ISP in its role in facilitating communication between contracting parties. It goes without saying that without an ISP there would be no form of electronic contracting and we would not experience the benefits of the electronic economy that we have become so dependent on.

Should an ISP fail in its duty and contractual responsibility to provide internet-based services to the consumer, such an ISP can be held liable for the losses sustained by the consumer. This is to a large extent the remedy for consumer for complaints lodged on technical grounds and for that reason the Regulations setting out the Minimum Standards for End-User and Subscriber Service Charters is very clear in what is expected from an ISP. It would be my recommendation that should the consumer be faced with a situation that the ISP has failed to make available the internet-based services for one or another technical reasons, such a complaint would best be lodged according to the process highlighted in these Regulations.

Broadening the scope of complaints – the CPA has been so broadly drafted and favours the widest interpretation in order to better serve consumers of all kinds. For this fact, the procedure established in terms of the CPA is best suited to address *inter alia* those technical issues which fall outside the scope and powers of the Regulations or those circumstances in which the consumer is unsure of exact nature of the technical complaint.

Remedies

It would appear that essentially a consumer who finds themselves in a contractual relationship with an ISP for the supply of internet and such related services would most effectively find redress in the various consumer protection mechanisms offered first and foremost by the Consumer Protection Act and to a lesser degree the ICASAA and the ECA.

It would be my recommendation that a consumer first approach the National Consumer Commission for the fact that, as discussed above, the Commission is best suited to advise the consumer with regards not only to the specific complaint but more importantly with regards to the appropriate authority to

adjudicate the complaint. The legal framework created by the CPA depends heavily on Alternative Dispute Resolution in a variety of fora. This is a far better and more practical system of redress for the consumer as essentially it remains an informal forum in which the consumer, as a lay person, is not expected to rise to the challenge of formal rules of procedure and legal jargon that determine the formal court process. Dispute resolution in such informal means carries the added benefits of limited legal costs, speedy finalisation of matters (for the fact that the parties need not wait for a formal trial date etc.,) and better equipped authorities who deal with such consumer issues more regularly and are responsible for the practical development of consumer remedies than the ordinary courts.

The remedies and legal framework encouraged in terms of the CPA and ECA are unique for disputes of this nature for the simple fact that the CPA expressly provides for referral of complaints to the ordinary courts as a last resort. This has the effect that administration of the common law and the general principles of the law of contract will take a backseat in favour of more modern consumer-orientated legislation.

Both the CPA and ECA (by way of the Regulations setting out the Minimum Standards for End-User and Subscriber Service Charters) provide for a variety of forms of redress ranging from penalties to be levelled against unscrupulous suppliers to voiding of agreements and transactions and damages for loss to be paid to the consumer.

Whilst the arguments and protection mechanisms available to consumers have been discussed at length and from a very critical perspective one must remember that this is a theoretical discussion. Many of the provisions and regulations have not been ventilated by dispute or academic challenge. For this reason, redress for violations of the consumer's rights is still uncertain. I would recommend that consumers not hesitate to lodge complaints through the variety of authorities and legal bodies if just for the sake of aiding the development of our consumer policies.

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