



The Lesotho Electronic Transactions and Electronic Commerce Bill 2013: An Appraisal

by

Mamofana Florina Lichaba

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Adv. S. Papadopoulos

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Abstract

Technological innovations have significantly caused an unprecedented shift from the orthodox paper-based approach to a continuum of internet transactions. Technology redefined the status quo of traditional markets and resulted in the international community and territorial boundaries merging into one population of cyber citizens in the electronic commerce sphere. These new paradigms give rise to legal challenges which are precipitated by legal aspects of electronic commerce necessitating for the legal regulation. The 1996 United Nations Commission on International Trade Law on Electronic Commerce is a global legal framework for legislators. It seeks to address these issues by transposing common law requirements for validly concluded traditional contracts into cyber contracts in order to accord cyber contracts the same legal standing through functional equivalence approach. The Lesotho jurisdiction envisions to embrace this development through the envisaged Lesotho Electronic Transactions and Electronic Commerce Bill 2013. This study is the juxtaposition of the Lesotho Bill and the South Africa's Electronic Communications and Transactions Act 25 of 2002 on electronic transactions provisions covering the legal recognition of electronic messages, time of contract formation, time and place of dispatch and receipt of communication, and the 'in writing' and signature requirements which are applied in online contracts in order to meet the similar common law contract demands for paper based contracts. The interrogation should indicate whether there are any challenges occasioned by the Bill in electronic contracting, and the recommended solutions, considering lessons learned from the South Africa's ECT Act, and compliance with the best international practices.

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Dedication to

*My Mother, **Malisebo Lichaba***

You are more precious than pearls.

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Abbreviations

ARPA	Advanced Research Projects Agency
ARPANET	Advanced Research Projects Agency Network
CUECIC	Convention on the use of Electronic Communication in International Contracts
E-COMMERCE	Electronic Commerce
ECT Act	Electronic Communications and Transactions Act 25 of 2002
EDI	Electronic Data Interchange
E2E	end-to-end
ITU	International Telecommunications Union
SMS	Short Message Service
TCP/IP	Transmission Control Protocol/Internet Protocol
UNCITRAL	United Nations Commission for International Trade Law
URL	Uniform Resource Locator
VOIP	Voice Over Internet Protocol
WWW	World Wide Web

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CHAPTER 1

1.1 INTRODUCTION

The globe is experiencing unprecedented transition into an era of technology marked by the robustness of networks and the impact of convergence, ushering the twenty first century into the realm of digitization and the very popular cyber world. Characterised by these swift changes, are paperless technologies setting into motion a spaceless world, a common place for, what has been termed by Abril, digital natives and digital immigrants alike.¹ Since its inception, cyberspace has grown at an incredible rate, with indications that the rate will continue explosively with the exponential growth in networks.²

The development of the internet is key to all the significant advances made in the technological world.³ The internet plays a paramount role in electronic contracting sphere, the evolution of which is crucial to the development of electronic commerce and growth of electronic transactions. Particular reference is, for instance, the underlying cardinal online processes such as information transmission, and the intertwined networks of computers without which electronic commerce is possible.⁴

1.2 AN OVERVIEW OF THE INTERNET

The internet is referred to as the international network of computers joined together through a common software protocol called TCP/IP⁵ with the key feature of core communication infrastructure as neutral with the intelligence applied at the ends, (end-to-end E2E), design principle.⁶ It means the interconnected system of networks that connects computers around the world using TCP/IP and includes future versions thereof.⁷ TCP/IP is defined as the Transmission Control Protocol used by an

¹ Abril, P. (2007) "Recasting privacy torts in a spaceless world" 21 Harv. J.L & Tech 16.

² Morino, E. (1994) "Cyber space and the law, your rights and duties in the online world" 10; Kariyawasam, R. et al. (2009) "The WTO, intellectual property, e-commerce and the internet" 434 at 437-439.

³ Ahmad, T. (2009) "Cyberlaws, e-commerce & m-commerce" 3-4.

⁴ Fitzgerald, B. et al. (2007) "Internet and e-Commerce law technology, law and policy" 3-4, 13.

⁵ Fitzgerald et al (2007: 3).

⁶ Fitzgerald et al (2007: 2).

⁷ S1 of Electronic Communications and Transactions Act 25 of 2002.

information system to connect to the internet.⁸ The internet has further been described as a main stream medium for business dynamics,⁹ the trailblazer to the information superhighway, a vehicle for tremendous economic growth,¹⁰ a monumental achievement,¹¹ and a giant network that spawned a virtual world where cybercontracts are entered into by cybercitizens.¹² Records indicated that the use of the internet for electronic commerce limit the scope of dealings in the physical world,¹³ due to its ubiquitous, customization, interactivity, scalability, global reach, low transaction cost, and ease of use.¹⁴

1.2.1 History of the internet

Originally confined to military establishments,¹⁵ the internet exploded into the popular consciousness in the mid-to late 1990s.¹⁶ As per Rogers, the internet originated in the United States as Advanced Research Projects Agency Network, ARPANET, for research purposes, and it emerged around 1980s.¹⁷ The idea of connecting machines into a more extensive networks was a product of scientists such as Licklider, who headed the Information Processing Technologies Office at Advanced Research Projects Agency in the United States department of defence, and first documented the idea of Intergalactic Computer Networks, globally interconnected set of computers, later followed by packet switching invented by Paul Baran, and ARPANET became the first ARPA's packet switching network.¹⁸

The internet evolved beyond its research origins to encompass universities, corporations, and people around the world.¹⁹ While the military funded-research at ARPANET had pioneered network computing, academics, private companies, science

⁸ S1 ECT Act.

⁹ Ahmad, F. (2009) "Electronic commerce: an Indian perspective" 9 Int'l J.L & Info Tech 133.

¹⁰ Olivier, H. et al. (1996) "Business and the law on the internet" 39.

¹¹ Ahmad (2009:4).

¹² Pistorius, T. (1999) "Formation of Internet Contracts: an analysis of contractual and security issues" 11 SA Merc LJ 282.

¹³ Snijders, H. et al. (2003) "E-commerce law, national and transnational topics and perspectives" 92.

¹⁴ Ahmad (2009:25).

¹⁵ Ahmad 2001:133; Gahtan, A. (1998) "Internet law: a practical guide for legal and business professionals" 1.

¹⁶ Fitzgerald et al (2007:1).

¹⁷ Kevin, MR. (2011) "The internet and the law" 3.

¹⁸ Brown, I. (2013) "Research handbook on governance of the internet" 4.

¹⁹ Fitzgerald et al (2007:3).

communities and other groups too appreciated its potential.²⁰ Now built on modern commercial technologies, the internet had grown into a conglomerate of million networks worldwide,²¹ and a mass phenomenon in the aftermath of mid 1990s.²²

1.3 BACKGROUND

The Information society has generated the notion of electronic commerce (e-commerce) whereby business is transacted via the internet,²³ using email messages or click-wrap contracts.²⁴ Many writers explored the definition of e-commerce.²⁵ E-commerce embraces amalgam of technologies which bring together information exchange and economic activity into a global marketplace called the internet.²⁶ E-Commerce is also referred to as trade via electronic networks in particular, the internet,²⁷ a paperless exchange of business information using a suite of technologies such as electronic data interchange, electronic mail, electronic fund transfer, credit cards, facsimile, electronic bulletin board systems and database services.²⁸

In its widest context, e-commerce is said to include any kind of transaction made using digital technology in open networks like internet and closed networks such as electronic data exchange and credit card transactions.²⁹ E-commerce accelerates economic growth through myriad of technologies.³⁰ Business transactions are world-wide being conducted in an online environment, and the transmission and store of information is in the electronic form instead of traditional paper documents.³¹

²⁰ Brown (2013:6).

²¹ Brown (2013:9); Lloyd, J. (2011) "Information Technology Law" 6th ed, 443

²² Brown (2013:3).

²³ Fitzgerald et al (2007:13).

²⁴ Fitzgerald et al (2007:486).

²⁵ Jaco, L. (1998) "Electronic commerce: the law and its consequences" *May De Rebus* 64 at 65; Esselaar, P. et al. (2002) "Towards electronic commerce in Africa: a perspective from three country studies" 1 *SAJIC* 1 at 12; Schulze, C. (2006) "Electronic commerce and civil Jurisdiction with special reference to consumer contracts" 18 *SA Merc LJ* 31; Coetzee, J. (2003) "Incoterms, electronic data interchange and the Electronic Communications and Transactions Act" 15 *SA Merc Law Journal* 1.

²⁶ Kariyawasam et al (2009:434 at 435).

²⁷ Kariyawasam et al (2009:157 at 160); Rowland, D. (2012). "Information Technology Law" 4th ed, 233.

²⁸ Ahmad (2009:2); Davidson, A. (2009) "The Law of electronic commerce" 1.

²⁹ Kariyawasam et al (2009:96); Hofman, J et al. (1999). "Cyberlaw: a guide for South Africans doing business online" 30.

³⁰ Kariyawasam et al (2009:434).

³¹ Singh, Y. (2011) "Cyber laws" 4th ed, 147.

1.3.1 Cyber contracts trend

The advent of technologies which brought about e-commerce caused writers such as Singleton to sternly caution those who contract over the internet to consider the legal aspects and issues precipitated by an online environment.³² Singh noted that although the technological inventions, discoveries and innovations are undoubtedly advantageous in, *inter alia*, widening scientific horizons, they also equally pose new challenges for the legal world, in particular, they prove the inadequacy of law while dealing with the information technology itself, and changes brought about by the information technology in an online environment business.³³ Therefore, albeit the subject of e-commerce being one of the modern topical subjects of legal research, its nuances are far from being understood, thus there remains a lot of legal and policy problems connected with e-commerce that suffice a devoted research on this field.³⁴

1.3.1.1 Legal regulation of cyber contracts

The rapid growth of electronic transacting raised new issues such as performance and formation of commercial contracts which necessitated legal regulation.³⁵ Thus, much effort has been expended worldwide on clarifying the principles governing the formation and validity of electronic contracts, also referred to as cyber contracts, with the emphasis on functional equivalence principle to the effect that online contracts should be afforded the same legal treatment as paper-based contracts.³⁶

An electronic contract is a contract that is formed in the cyberspace.³⁷ An electronic contract is typically entered into through the medium of the internet, either by using of the various constructs of the World Wide Web such as click wrap contracting, through EDI agreements,³⁸ by the exchange of emails stating offer and acceptance of the term and conditions of a particular transaction,³⁹ or by Short Messages Service (SMS).⁴⁰

³² Singleton, S. (2001) "Electronic commerce: a practical guide to the law" 52.

³³ Singh (2001:3).

³⁴ Snijders et al (2003: 1).

³⁵ Fitzgerald et al (2007:22).

³⁶ Fitzgerald et al (2007:486).

³⁷ Morino (1994: 34).

³⁸ Eiselen, S. (1995) "The Electronic Data Interchange." 7 SA Merc LJ 1 ; Van der Merwe (2008:160).

³⁹ Ahmad (2009:226).

⁴⁰ Manamela, ME. (2011) 'To meet is to part': resignation by SMS constitute notice in writing as required by basic conditions of Employment Act: Mafika v SA Broadcasting Corporation Ltd. 23 SA Merc LJ 521 at 522.

The electronic contract is explained to be similar to a traditional contract in that it sets out the rights and duties, obligations and liabilities of the contracting parties, as well as the services to be rendered and the consideration to be received by the parties, at the same time, it is distinct from the traditional concept of contract because of the medium through which it is contracted.⁴¹ An electronic contract is legally enforceable when it satisfies common law requirements such as offer and acceptance, consent and contractual and legal capacity, just like a paper-based contract.⁴² Divergent views which have been expressed on the time and place a contract comes into being where the acceptance is communicated electronically⁴³ birthed different theories which are employed to determine the place and time for the conclusion of an electronic contract.⁴⁴

1.3.1.2 The Model Law's intervention

In response to the legal uncertainty of cyber contracts, the United Nations Commission for International Trade Law (UNCITRAL) Model Law on Electronic Commerce,⁴⁵ (hereafter the Model Law), called for countries to adopt internationally recognised uniform electronic transactions rules based on the Model Law.⁴⁶ The Model Law intervened as a product of the expert groups to resolve the legal aspects of information technology, and it was modified to suit commonwealth countries' needs.⁴⁷ The Model Law's perspective is that what holds offline holds online, and due regard must be had to the fact that offline law often entails difficulties when applied to online situations.⁴⁸

The Model Law aims at facilitating the use of e-commerce by removing legal barriers to electronic transacting.⁴⁹ It prescribes the procedures that may be transposed into national laws to provide an equal treatment for users of paper-based document and

⁴¹ Ahmad (2009:226).

⁴² Fitzgerald et al (2007: 487).

⁴³ Pistorius, T. (2002) "Contract formation: a comparative perspective on the Model Law on Electronic Commerce" Int'l L.J. S. Afr. 129 at 145.

⁴⁴ Jason, MCJ. (2004) "The legal consequences of internet contracts" 38.

⁴⁵ The UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 *bis* as adopted in 1998 available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed 27 March 2015).

⁴⁶ Papadopoulos, S. et al. (2012) "Cyberlaw@SAIII" 3rd ed, 41.

⁴⁷ Commonwealth Secretariat, (2001) "Law in Cyber Space" 5.

⁴⁸ Snijders et al (2003: 1-2).

⁴⁹ Van der Merwe, D. et al. (2008) "Information and Communications Technology Law" 145.

users of computer-based information.⁵⁰ The Model Law's pivotal provision is article 5 on functional equivalence which stipulates that information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of a data message, and a data message is defined in article 2(a) as information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy.⁵¹ It is clear from article 5 that the Model Law applies to data messages.

The functional equivalence principle determines how the purpose and functions of traditional paper-based requirements, such as 'in writing' and signature requirements can be met to satisfy similar needs in e-commerce.⁵² The functional equivalence rule is achieved by establishing the essential purpose of paper-based communications and its use to determine the criteria that electronic communications should meet if they were to enjoy the same legal recognition as the corresponding paper-based communications.⁵³ This means that functional equivalence rule is not just there for the taking. The mere fact that communication is electronic is not the only pre-requisite for its legal recognition, it should first pass the common law requirements test set for traditional paper-based contracts.⁵⁴ The overriding requirement is that information must be in the form of a data message.

It is trite that the Model Law does not find direct application in any legal system, however, it merely provides a legal framework on which national legislatures can base their electronic commerce legislation to facilitate greater international harmonisation.⁵⁵ It seeks to address the legal lacunae that developed as a result of technological innovations.⁵⁶ The Model Law has been adapted in economic powerhouses like United States, Canada, Australia and European Union,⁵⁷ and other countries

⁵⁰ Kariyawasam et al (2009:157 at 161).

⁵¹ Fitzgerald et al (2007:507); The UNCITRAL Guide to Enactment available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (accessed 27 March 2015).

⁵² Papadopoulos et al (2012:42).

⁵³ Pistorius (2002:129 at 134).

⁵⁴ Papadopoulos et al (2012:44).

⁵⁵ Van der Merwe et al (2008:145); Davidson (2009:26).

⁵⁶ Pistorius (2002:131).

⁵⁷ Pistorius, T. (2004) "Click-wrap and web-wrap agreements," 16 SA Merc LJ 568; Pistorius, T. (2006) "From snail mail to e-mail: South African perspective on web of conflicting rules on the time of e-contracting rules" 39 CILSA 178 at 190-198.

including, China, Singapore and India,⁵⁸ and of course South Africa,⁵⁹ with Lesotho dragging behind only to follow suit with the envisaged Bill.⁶⁰

It is a settled position of law that electronic transactions legislations provide default rules for determining the time of receipt and dispatch of data messages, and that they do not always provide precise criteria for ascertaining time of contract formation.⁶¹ It is commendable that Lesotho Electronic Transactions and Electronic Commerce Bill 2013 (the Lesotho Bill),⁶² just like the South Africa's Electronic Communications and Transactions Act 25 of 2002 (the ECT Act),⁶³ has a provision for the time of electronic contract formation, which remains a virgin area in most jurisdictions.⁶⁴ The Bill is a welcome move towards the proposed implementation of the Model Law on E-Commerce in Lesotho.

1.4 RESEARCH AIMS AND OBJECTIVES

This study seeks to interrogate the Lesotho Bill, and compare it with South Africa's ECT Act in so far as it relates to electronic contracts. The comparative study is based on South Africa's ECT Act because it is trite that Lesotho applies the same common law contract requirements as South Africa.⁶⁵ The common law of South Africa is based on the Roman-Dutch Law, and that generally, the same common law applies in Botswana, Lesotho, Namibia, Swaziland and Zimbabwe.⁶⁶ This position was reaffirmed by Kee in stating that the South Africa's legal system and its contract law in particular, also applies in Botswana, Lesotho, Namibia, Swaziland and Zimbabwe.⁶⁷

⁵⁸ Fitzgerald et al (2007:544).

⁵⁹ The ECT Act.

⁶⁰ The Lesotho Electronic Transactions and Electronic Commerce Bill 2013 available at www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Pages/In-country-assistance/Lesotho.aspx (accessed 20 October 2014).

⁶¹ Tasneem, F. (2014) "Electronic contracts and cloud computing" 9 JICLT 105.

⁶² S15 of the Bill.

⁶³ S22 ECT Act.

⁶⁴ Pistorius (2006: 178 at 206).

⁶⁵ Non-academic Workers Union v National University of Lesotho available at www.lesotholij.org (accessed 18 April 2014).

⁶⁶ Campell, D. et al. (2009) "Remedies for international sellers of goods" 1.

⁶⁷ Kee, I. (2012) "Global sales and contract law" 25.

The study further examines the Bill against the international standard set by the Model Law to ensure that Lesotho remains abreast with the best international e-commerce practices. It is easy to subscribe to the sentiments of Ewelukwa that:

“...It remains a daunting but not insurmountable challenge to actualize broad-based long term economic development in Africa...it is important to note that the future may yet become brighter if key steps are taken by law and policy makers in the continent to put in place laws and policies that can facilitate the development process. One of the ways in which economic development can be facilitated is to significantly boost Africa’s contribution to global trade.⁶⁸ For African countries to significantly improve their contribution to international trade however, it is important that they utilize innovative means of trading that have been facilitated by global technical advancements.”⁶⁹

The quote is well placed. Is Lesotho ready for electronic commerce? It is expected that the finding would discover what the future holds for Lesotho in the online contracting field.

1.4.1 Research limitation

This research will overview Part I to Part III of the Bill on legal recognition of electronic transactions, with particular reference to sections which warrant comment, including provisions on time of dispatch and receipt of data messages, electronic contract formation and other electronic transactions sections and the similar electronic provisions of the ECT Act.

1.5 CHAPTER STRUCTURE

As it is evident to the reader, chapter one encompassed an introduction, history of the internet, background, research objectives and scope. Hereafter, chapter two deals with common law requirements for legally enforceable contract, and the Model Law’s perspective on electronic contracts. Chapter three analyses the Lesotho Electronic Transactions and Electronic Commerce Bill, and compares it with South Africa’s ECT Act. Lastly, chapter four forms conclusions and recommendations on the possible reforms of the provisions of electronic transaction sections of the Lesotho Bill which may not tally with the best international practices.

⁶⁸ Ewelukwa, N. (2011) “Is Africa ready for electronic commerce: a critical appraisal of legal framework for e-commerce in Africa” 13 Eur. JL Reform 550.

⁶⁹ Ewelukwa (2011:550 at 551).

CHAPTER 2

2.1 INTRODUCTION

The law of contract is in the process of evolving due to the advent of the new information technologies, it has to adapt to modern business dynamics consequent to the internet's invention and electronic commerce.⁷⁰ Despite these changes, the substantive common law principles of the law of contract remain the same regardless of whether a contract is electronic or paper-based.⁷¹

The remarks that the law of internet contracts largely focuses on the legal certainty in the formation of online contracts, particularly on the exact moment at which online contracts are concluded,⁷² are well received. The law of contract lies in, *inter alia*, trade, property and technical engineering transactions, which are conducted mostly in writing, and require a network of carefully drafted contracts.⁷³ The Model Law's legal framework is an important step towards the fulfilment to a counterpart paper-based common law requirements, such as writing and signature requirements.⁷⁴

In prelude to this chapter, it will establish that South Africa and Lesotho jurisdictions apply the same common law principles, for the law of contract, which is the basis for comparisons of the study between Lesotho Electronic Transactions and Electronic Commerce Bill 2013⁷⁵ and South Africa's ECT Act.⁷⁶ It will further comprise a brief history of the law of contract, a definition of contract, and an exposé of common law requirements for conventional contracts and the Model Law's perspective for electronic contracts.

⁷⁰ Applebey, G. (2001) "Contract law" 2; Seddon, NC. Et al. (2002) "Cheshire and Fifoot's law of contract," 8th ed, 137.

⁷¹ Buys, R et al. (2004) "Cyberlaw@SAIL: the law of the internet in South Africa." 2nd ed. 101; Kinsella, NS. et al. (2004) "Online contract formation," 1st ed, 431.

⁷² Rogers, KM. (2011) "The internet and the law" 23.

⁷³ Applebey (2001: 2).

⁷⁴ Pistorius (2002: 129 at 134).

⁷⁵ The Bill.

⁷⁶ ECT Act.

2.2 LESOTHO COMMON LAW CONTRACT PRINCIPLES

The comparative study of the Lesotho Electronic Commerce and Electronic Transactions Bill 2003 with South Africa's Electronic Communications and Transactions Act 2002 emanates from a settled legal position that the common law of South Africa is based on Roman-Dutch Law,⁷⁷ and the same common law applies in Botswana, Lesotho, Namibia, Swaziland and Zimbabwe.⁷⁸ The principle also enjoys the support of other writers such as Van Niekerk,⁷⁹ Pain,⁸⁰ and Mahomed.⁸¹

South African common law was introduced into the Lesotho legal system by a General Law Proclamation of 29th May 1884 following the dis-annexation of the Basutoland from Cape Colony with the terms that the latter would administer Cape Roman-Dutch Law, as converted by South African courts into South African common law, in all Basutoland proceedings, as it was then called.⁸² This position has since been upheld by Lesotho Courts.⁸³

The operation of the doctrine of *stare decisis*, that is, stand by previous decisions, fortifies the position.⁸⁴ The judicial precedent is an important source of law, and binds on account of the doctrine of *stare decisis*.⁸⁵ Lesotho looks up to South Africa's decided cases for judicial precedence, as confirmed in the case of *Non-academic Workers Union v National University of Lesotho*,⁸⁶ whereat the contractual principles of offer and acceptance were dealt with.

⁷⁷ *Pearl Assurance Co v Union Government* 1934 AD 560; *Rood v Wallach* 1904 TS 187 at 195; *Mtembu v Webster* 1904 21 SC 323; *Conradie v Rossouw* 1919 AD 279.

⁷⁸ Campell (2009: 1).

⁷⁹ Van Niekerk, GT. (1998) "A common law for Southern Africa: Roman Law or Indigenous Law?" 31 CILSA 158 at 159-160.

⁸⁰ Pain, JH. (1978) "The Reception of English Law and Roman-Dutch Law in Africa with reference to Botswana, Lesotho and Swaziland" 11 CILSA 137 at 165.

⁸¹ Mahomed, I. (1985) "The future of Roman-Dutch Law in Southern Africa particularly in Lesotho" 2 LJ 357 at 361.

⁸² Poulter, S. (1969) "The common law in Lesotho" 3 J. Afr. L. 127 at 128-129.

⁸³ S2 General Law Proclamation of 29th May 1884; *Khatala v Khatala* 1963-1966 HCTLR 97 at 99-100.

⁸⁴ Poulter (1969: 127 at 141).

⁸⁵ Sharrock, R. (2001) "Business Transactions Law" 28.

⁸⁶ *Non-academic Workers Union v National University of Lesotho* available at www.lesotholij.org (accessed 18 April 2014).

2.3 HISTORY OF THE LAW OF CONTRACT

The freedom to contract reflected *laissez fair* dogma which was the unfettered right to contract.⁸⁷ The Roman-Dutch Law, was introduced by Dutch settlers into the South African's legal system.⁸⁸ The South African law of contract originated from Roman jurists Justinian Institutes⁸⁹ classification of law of obligations under private law, and forms the basis for the modern law of contract.⁹⁰ The legal duty attached to an obligation originally stemmed from contracts entered into between Romans and aliens, and ultimately, Roman-Dutch Law recognised a contract as a legally enforceable agreement.⁹¹

An obligation is referred to as a legal bond, that is, *vinculum iuris*, which is formed by parties,⁹² in terms of which the debtor is bound to render a performance to the creditor,⁹³ attaching legal consequences in the form of the right to claim performance and the duty to perform.⁹⁴ In the case of *Meskin v Anglo American Corporation of South Africa Ltd*,⁹⁵ it was held that an obligation amounts to the one that is regulated by law.

2.3.1 An overview of the definition of a contract

The law of contract is significance to commercial activity,⁹⁶ as the business of buying and selling revolves around it.⁹⁷ It governs an agreement between the parties, and provides for remedies in case of breach.⁹⁸ The courts enforce contracts that are entered into with the intention to create contractual obligations.⁹⁹ The basic task of a

⁸⁷ Kumar, U. (1985) "Freedom of contract and the run-away exemption clauses: a plea for legislative reforms" 2 LLJ 251; Van der Merwe (2008:147).

⁸⁸ Sharrock (2011:27).

⁸⁹ Christie, RH. (2001) "The law of contract in South Africa" 3.

⁹⁰ Christie (2001:4).

⁹¹ Joubert, DJ. (1987) "General principles of the law of contract" 11-14.

⁹² Kerr, AJ. (2002) "The principles of the law of contract," 6th ed, 3.

⁹³ Sharrock (2011:2); Van Der Merwe, D. (2003) "Contract general principles," 2nd ed, 1.

⁹⁴ Fouché, MA. et al. (1999) "The legal principles of contracts and negotiable instruments," 5th ed, 34.

⁹⁵ *Meskin v Anglo American Corporation of South Africa Ltd* 1968 (4) SA 793.

⁹⁶ Christie (2001:1).

⁹⁷ Mahler-Coetzee, J. (2010) "Law lifeline: Law of Contract" 1.

⁹⁸ Gibson, JTR. (1997) "South African Mercantile and Company Law" 9.

⁹⁹ Christie (2001:9).

court in an electronic contract case is similarly to ascertain the intention of the parties to the contract.¹⁰⁰

A contract is formed when the parties who have the requisite intention and comply with the requirements of law agree to enter into a legal relationship with a serious intention that a lawful obligation should be established, without which a contract cannot be formed.¹⁰¹ It means an agreement arising from true or mutual assent which is intended to be legally enforceable.¹⁰² It is also defined as an agreement entered into by two or more persons with the intention of creating a legal obligation to bind the contracting parties,¹⁰³ a set of promises for the breach for which the law gives remedy.¹⁰⁴ In the case of *Wilken v Kohler*,¹⁰⁵ the court held that a contract is an agreement which is legally enforceable.

2.3.2 Common law requirements for a legally enforceable contract

Agreement is the basis of contract, and there must, at least, be two persons to a contract, only the parties who are privy to a contract are bound by it.¹⁰⁶ An agreement constitutes a contract when it complies with the legal requirements for a valid contract which are consensus or agreement, contractual capacity, lawfulness or juridical enforceability, possibility of performance or formalities.¹⁰⁷ Van der Merwe¹⁰⁸ and Papadopoulos¹⁰⁹ similarly outline consensus, contractual capacity, lawfulness, physical possibility or formalities, if any, for conclusion of a valid contract.

It is stated that if any electronic communication between two or more parties can be interpreted as having complied with the formal constitutive requirements of a contract, as stated above, it could be inferred that a valid contract has been concluded, and if

¹⁰⁰ Seddon et al (2001:137).

¹⁰¹ Kerr (2002: 41); Gibson (1999:9).

¹⁰² Christie, HR: (2001:2); Papadopoulos et al (2012:43).

¹⁰³ Hutchison, D. et al. (2009) "The law of contract in South Africa" 6; Baumer, D. (2002) "Cyber Law and E-Commerce" 23.

¹⁰⁴ Morino (1994: 340).

¹⁰⁵ *Wilken v Kohler* 1913 AD 135 at 140.

¹⁰⁶ Sharrock (2011:3).

¹⁰⁷ Fouché, MA. (2007) "Legal principles of contract and commercial law," 6th ed, 37.

¹⁰⁸ Van Der Merwe (2003:8).

¹⁰⁹ Snail, S. (2008) "Electronic contracts in South Africa: a comparative analysis" 2 JILT 5.

any of the said requirements is not present or doubt exists as to the genuineness thereof, it may be declared void or voidable by a court of law.¹¹⁰

2.3.2.1 Consensus

The question of whether a contract exists, depends on whether there is an agreement or consent of two or more parties.¹¹¹ An agreement is reached when the parties consent to be bound by contractual obligations.¹¹² The agreement as an essential element of a contract, must be true agreement in the sense of meeting of the minds or coincidence of the wills of the contracting parties, that is referred to as *consensus ad idem*.¹¹³ The case of *SAR & H v National Bank of South Africa Ltd*¹¹⁴ enunciated the principle that *consensus ad idem* entails that the law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds, parties shall be bound by a contract in so far as there is actual meeting of the minds, and consensus is normally evidenced by offer and acceptance.¹¹⁵ Consensus cannot be obtained through improper means.¹¹⁶ The quasi mutual assent doctrine has been expressly adopted as part of South African Law.¹¹⁷ In the unanimous decision of *Pieters & Co v Salomon*,¹¹⁸ which found application in *Sonap Petroleum (SA) (Pty) Ltd v Papadogianis*,¹¹⁹ the doctrine was canvassed in the following terms:

“...If whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

¹¹⁰ (Snail 2008:5).

¹¹¹ Christie(2001:23); Ismail, R. (2015) “Complexities with the formation of a contract: *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South Africa Post Off Ltd* 2013 2 SA 133 (SCA) ” 78 THRHR 148 at 161.

¹¹² *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241.

¹¹³ Christie(2001:12); Van Der Merwe (2003: 19); Lubbe, GF. (1998) “Farlam and Hathaway contracts cases, material and commentary,” 3rd ed, 20.

¹¹⁴ *SAR & H v National Bank of South Africa Ltd* 1924 AD 704 at 715.

¹¹⁵ *Estate Breet v Peri-Urban Areas Health Board* 1955 (3) SA 523 at 532.

¹¹⁶ Jason, MCJ. (2004) “The legal consequences of electronic contract” 25.

¹¹⁷ *Pieters & Co v Salomon* 1911 AD 121 at 137.

¹¹⁸ *Smith v Hughes* 1871 LR 6 QB 597 at 607.

¹¹⁹ *Sonap Petroleum (SA) (Pty) Ltd v Papadogianis* 1992 (3) SA 234.

2.3.2.2 Contractual capacity

The contracts concluded by persons without capacity to contract will be *void ab initio*.¹²⁰ The presumption is that every person entering into a contract has a legal capacity to contract, unless the contrary is proved, the burden of proving lack of capacity lies on the party setting it up as a defence.¹²¹ Parties must have capacity to perform juristic acts to be able to form a contract, in particular, capacity to bind themselves.¹²² A juristic act means an act which is intended to have, and has legal consequences, when it is performed, a legal obligation is created, altered or terminated.¹²³

2.3.2.3 Lawfulness

It is a fundamental principle of law that a thing done contrary to the direct probation of law is void and has no legal force and effect,¹²⁴ and as such, an agreement *contra bonos mores* is invalid and unenforceable.¹²⁵ It is a general rule that agreements are prohibited by common law if they are against public policy or *contra bonos mores*, other contracts are statutorily prohibited.¹²⁶ It was held in the case of *Reeves v Marfield Insurance Brokers CC*,¹²⁷ that illegal agreements are not legally enforceable.

2.3.2.4 Physical possibility

The general rule with physical impossibility is *impossibilium nulla obligatio est*,¹²⁸ meaning a contract is void if performance is impossible at the time of its inception.¹²⁹ In deciding whether performance of a contract is impossible, the law looks at the substance rather than form.¹³⁰ The performance envisaged by the agreement should be impossible.¹³¹ The position that obtains is that if the court finds that the impossibility

¹²⁰ Jason (2004: 30).

¹²¹ *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 at 271-272; Nagel et al (2000:166).

¹²² Sharrock (2011: 39).

¹²³ Sharrock (2011:1).

¹²⁴ *Sierhout v Minister of Justice* 1926 AD 99 at 109.

¹²⁵ *Nino Bonino v De Lange* 1906 TS 120 at 125.

¹²⁶ Gibson (1997:10).

¹²⁷ *Reeves v Marfield Insurance Brokers CC* 1996 (3) SA 766 at 775.

¹²⁸ *Hersman v Shapiro & Co* 1926 TDP 367 at 375-377.

¹²⁹ Gibson (1997:56); Peters, *Flamman & Co v Kokstad Municipality* 1919 AD 427 at 434; *Aird v Hockey* 1936 EDL at 117.

¹³⁰ Christie (2001:106).

¹³¹ *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 at 383.

was absolute at the time when the agreement was concluded, it will consider the contract void.¹³²

2.3.2.5 Offer and acceptance

The rules of offer and acceptance answer several questions as to whether the agreement has been reached, and presuppose that at least two persons are parties to a contract.¹³³ An offer is a firm statement¹³⁴ of the terms by which the offeror is prepared to be bound.¹³⁵ The lack of intention to be bound by contractual obligations invalidates the offer.¹³⁶ While the offeror may prescribe the manner and place of acceptance, or revoke an offer,¹³⁷ the offeree can accept or reject¹³⁸ an offer within the prescribed timeframe.¹³⁹ An invitation to treat does not amount to an offer.¹⁴⁰

The offeree must expressly accept the offer.¹⁴¹ The acceptance is consent by the offeree to be bound by the terms contained in the offer, it must be communicated to the offeror, and until it has been so communicated, no contract is constituted.¹⁴² There can be no contract until the offeror and offeree are *ad idem*.¹⁴³ The acceptance of an offer must be clear, unequivocal and unambiguous.¹⁴⁴ The principle was expounded in the case of *Boerne v Harris*,¹⁴⁵ and upheld in *Saambou Nasionale Bouvereeniging v Friedman*,¹⁴⁶ which stated that a contract is concluded when the offeror's offer is unequivocally accepted by the offeree resulting in the creation of consensus between

¹³² Wessels, JW. (1951) "The law of contract in South Africa," 2nd ed, 392.

¹³³ *Strydom v Protea Eiendomsagente* 1979 (2) SA 296.

¹³⁴ Christie (2001: 33); *Wasmuth v Jacobs* 1987 (3) SA 629 at 633.

¹³⁵ *Seddon et al* (2002: 103); *Hottentots Holland Motors (Pty) Ltd v R* 1956 (1) PH K22; *Houston v Bletchy* 1926 EDL 305 at 311-312; *Marco Van der Merwe*. (1998) "Cybercontracts." 6 JBL 138 at 140.

¹³⁶ *Seddon et al* (2001: 34).

¹³⁷ *Van der Merwe* (2003: 60).

¹³⁸ *Seddon et al* (2002: 104).

¹³⁹ *Papadopoulos et al* (2012: 45).

¹⁴⁰ *Crawley v Rex* 1909 TS 1105.

¹⁴¹ Christie (2001: 33).

¹⁴² *Orion Investments (Pvt) Ltd v Ujamaa Investments (Pvt) Ltd* 1988 (1) SA 583; *Pretorius v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 at 413; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473; *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl* 1965 (4) SA 475 at 478-479; *Non-academic Workers Union v National University of Lesotho* available at www.lesotholii.org (accessed 18 April 2015).

¹⁴³ Christie (2001: 76).

¹⁴⁴ *Collen v Reitfontein Engineering Works* 1948 (1) SA 413 at 429-430; *Collier, D.* (2008) "E-mail and SMS contracts: lessons from the Labour Court" 16 JBL 20 at 21.

¹⁴⁵ *Boerne v Harris* 1949 (1) SA 793.

¹⁴⁶ *Saambou Nasionale Bouvereeniging v Friedman* 1979 (3) SA 978.

the parties. A counter-offer does not form a contract,¹⁴⁷ as the acceptance must mirror the offer.¹⁴⁸ The offeree should adhere to the mode of acceptance which has been prescribed by the offeror.¹⁴⁹ The cardinal principle is that an offer made to a specific person can be accepted only by that person.¹⁵⁰ In the case of *Bloom v American Swiss Watch*, the court pronounced that the offeree must be in full knowledge of the offer.¹⁵¹

2.3.3 Formalities for the conclusion of a contract

The common law requires no formalities for concluding an enforceable contract,¹⁵² such that any contract, subject to statutory exceptions, may be verbally entered into in accordance with *Goldblatt v Fremantle*¹⁵³ where the burden of an oral agreement was discharged by evidence led before court. However, it may be difficult to discharge the burden of proof for an oral agreement,¹⁵⁴ vis-à-vis proof of a written contract of which reference is made to signature and the contents of the document.¹⁵⁵ The words applied by parties in their contract bear ordinary meaning, unless the meaning leads to absurdity when read in context.¹⁵⁶ The justification for prescribing formalities is to ensure reliable evidence of the terms of the contract.¹⁵⁷

In principle, a contract and its terms are determined by the parties by actual agreement or by reliance in the presence of agreement, that is, formalities are self-imposed by the parties.¹⁵⁸ Nonetheless, the law may imply formalities as a matter of course without reference to the actual intention or conduct of the parties, such provisions are called *naturalia* of the contract.¹⁵⁹ In the case of *Clements v Simpson*,¹⁶⁰ the court

¹⁴⁷ Christie, RH. (1996) "Digest on the Law of Contract" 21; Hutchison, D et al. (2012) "The law of contract in South Africa" 2nd ed, 55.

¹⁴⁸ Van der Merwe (2008: 147-148).

¹⁴⁹ *Drift Properties (Pty) Ltd v Mc Lean* 1971 (3) SA 591; *Laws v Rutherford* 1924 Ad 261 at 264.

¹⁵⁰ Christie(2001:64).

¹⁵¹ *Bloom v The American Swiss Watch Company* 1915 AD 100.

¹⁵² *Woods v Waters* 1921 AD 303 at 305.

¹⁵³ *Goldblatt v Fremantle* 1920 AD 123 at 128.

¹⁵⁴ *Lordan v Pelunsky and Mervis* 1925 OPD 18 at 19.

¹⁵⁵ *Mans v Union Meat Co* 1919 AD 268 at 271.

¹⁵⁶ Cornelius, CJ. (2002) "The principles of interpretation of contracts in South Africa" 169.

¹⁵⁷ Christie(2001:24).

¹⁵⁸ Van der Merwe (2003: 256); *Sentrale Ko-op Graanmpy Bpk v Shifren* 1964 (4) SA 760.

¹⁵⁹ Van der Merwe (2003: 256); *Wendywood Development (Pty) Ltd v Rieger* 1971 (3) SA 28 at 38-39; *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 at 342-343.

¹⁶⁰ *Clements v Simpson* 1971 (3) SA 1.

held that the legislature's reasons for requiring formalities is to prevent uncertainties, excludes disputes and avoid malpractices. It was held in *Neethling v Klopper*¹⁶¹ that the contract was void on account of conclusion without writing requirement envisaged by the statute. Examples of contracts where legislature prescribes formalities as prerequisites for the validity of various types of contracts include alienation of land, suretyship and other types.¹⁶² Van der Merwe outlines reasons for which formalities may be required, to wit, legal certainty which is provided by writing, coupled with identification, attribution, assent, and authentication, which are provided by signature.¹⁶³

2.3.4 Time and place of contracting

The time when, and the place where the contract comes into being may be established by the method of acceptance.¹⁶⁴ The method of acceptance has important legal consequences for the time when a contract is concluded.¹⁶⁵ The different theories which are employed to determine the place and time for conclusion of a contract to determine the moment when consensus is reached are stated below, and they tie in with the basic principles of offer and acceptance.¹⁶⁶

2.3.4.1 Information theory

The information theory relating to time and place of conclusion of contract is accepted as a general rule, and it stipulates that a contract is concluded when and where consensus is reached, at the place and the moment when the offeror is actually informed that the offer has been accepted.¹⁶⁷ The theory revolves around the subjective knowledge of the offeror, the contract only comes into being once the offeror becomes aware that the offer has been accepted.¹⁶⁸ *Fern Gold Mining Co v Tobias*,¹⁶⁹ points out that the contract is established when the offeror comes to know of the acceptance. This theory finds no application with the technological advancements

¹⁶¹ *Neethling v Klopper* 1967 (4) SA 459.

¹⁶² Christie (1996:36).

¹⁶³ Van der Merwe (2008: 163).

¹⁶⁴ Kerr, AJ. (1998) "Principles of the Law of Contract," 5th ed, 109.

¹⁶⁵ Pistorius (1999: 282 at 287).

¹⁶⁶ Jason (2004: 38).

¹⁶⁷ Van der Merwe (2003: 49); *R v Nel* 1921 AD at 339; *S v Henckert* 1981 (3) SA 445 at 451.

¹⁶⁸ Jason (2004: 39).

¹⁶⁹ *Fern Gold Mining Co v Tobias* 1890 (3) SAR 134.

because it applies regardless of whether parties are *praesentes* or *inter absentes*.¹⁷⁰ It may also be misplaced by the offeror's prescribed mode of acceptance.¹⁷¹

2.3.4.2 Expedition theory

The expedition theory or postal rule was found to pose difficulties too. In terms of the expedition theory as explored in the case of *Cape Explosive Works Ltd v South African Oil & Fat Industries Ltd*,¹⁷² a contract concluded via the post comes into being at the time when and place where the letter in terms of which the acceptance took place is posted. In the case of *A to Z Bazaars (Pty) Ltd v Minister of Agriculture*,¹⁷³ the court held that even though the offeree had posted the letter of acceptance, it could be cancelled by another correspondence which would reach the party making the offer before the former one reached which in that event, could effectively render the final intention of the party accepting the offer to prevail. The offeror could also prescribe a mode of acceptance which would render it unnecessary to be informed of acceptance.¹⁷⁴

2.3.4.3 Reception theory

As per the reception theory, the contract is deemed to have been concluded once the letter of acceptance is received by the party making the offer, even without having read the contents thereof.¹⁷⁵

Having briefly stated the common law requirements for a valid contract, the subsequent part of this chapter will focus on addressing how the Model Law transpose the requirements to an online environment.

2.4 The MODEL LAW'S PERSPECTIVE

2.4.1 Introduction

Informed by the background that modern business dynamics render legal rules promulgated for paper-based contracts obsolete in an online environment, the Model

¹⁷⁰ Van der Merwe (2003: 61).

¹⁷¹ Van der Merwe (2003: 61).

¹⁷² *Cape Explosive Works Ltd v SA Oil and Fat Industries Ltd* 1921 CPD 244; *Dunlop v Higgins* 1848 9 ER at 805.

¹⁷³ *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 (3) SA 468 at 478.

¹⁷⁴ Van der Merwe (2003: 61).

¹⁷⁵ Jason (2004: 42).

Law transpose common law requirements for traditional contracts to accommodate electronic contracting. The Model Law is not intended to alter traditional rules on paper-based communications.¹⁷⁶ According to Snail, Cyber Law is a new discipline of law applied on traditional common law requirements.¹⁷⁷ Buys defines online contracts as contracts created wholly or in part through communications over computer networks by e-mail, through web sites, via electronic data exchange and other electronic combinations.¹⁷⁸ Electronic commerce was born of electronic data interchange and came of age with the popular use of the Internet.¹⁷⁹

2.4.2 Historical background of the Model Law

The UNCITRAL Model Law on Electronic Commerce was adopted by the United Nations Commission on International Trade Law in 1996 to promote the harmonization and unification of International Trade Law, and to remove obstacles to international trade caused by inadequacies and divergences in the law affecting trade.¹⁸⁰ The Model Law seeks to address the legal obstacles regarding the validity and the use of data messages.¹⁸¹ Van der Merwe registers this point with a verbatim quote of the guide to enactment of Model Law read with the aim which respectively provides:

“...The use of modern means of communication such as electronic mail and electronic Data Interchange (EDI) for the conduct of international trade transactions has been increasing rapidly and is expected to develop further as technical supports such as information highways and the INTERNET become more widely accessible. However, the communication of legally significant information in the form of paperless messages may be hindered by legal obstacles to the use of such messages, or by uncertainty as to their legal effect or validity.”¹⁸² The stated aim of the Model law is to facilitate the use of modern means of communications and storage of information. It is based on the establishment of a functional equivalent in electronic media for paper-based concepts such as “writing”, “signature” and

¹⁷⁶ The UNCITRAL Guide to Enactment available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (27 March 2015).

¹⁷⁷ Snail (2008:1 at 5).

¹⁷⁸ Buys, R. et al. (2000) “Cyberlaw@SA” 161.

¹⁷⁹ Gregory, GD. (2003-2004) “The proposed UNCITRAL convention on Electronic Commerce: UNCITRAL Model Law on Electronic Commerce” 313; Van der Merwe (2008:142).

¹⁸⁰ Ahmad (2009:384).

¹⁸¹ Ahmad (2009:370).

¹⁸² Van der Merwe (2008: 143); The UNCITRAL Guide to Enactment available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (27 March 2015).

“original”. By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communications...¹⁸³

The Model Law dates back to 1984 where the report of legal aspects of automatic data processing was produced relating to legal issues concerning computer records,¹⁸⁴ which was followed by the recommendations to governments to review legal rules affecting the use of computer records in litigation and writing and signature requirements on trade related documents, and later revisited to include electronic transactions.¹⁸⁵ The Model Law further reviewed the legal response of member states to electronic communications, and urged member states to adopt legislative regimes to the new electronic practices, in particular, to the use of electronic evidence and electronic transactions.¹⁸⁶

In the 1990s, the Model Law developed a coherent set of legal responses to the principal questions posed by electronic commerce, to remove barriers that traditional legal rules precipitated on electronic commerce.¹⁸⁷ It was established in chapter 1 that the internet’s popularity and impact has since been felt around mid-1990s. It may correctly be said that the internet’s aftermath influenced the drafting of the Model Law in an attempt to resolve legal issues thrown by the internet on commerce. The Model Law was finally adopted in 1996, and has henceforth, been very influential around the world in providing a legal basis for commercial use of electronic communications.¹⁸⁸

Ndulo observed that the inadequate participation of developing countries in the international standards drew the attention of the Model Law drafters especially due to the worsening economic conditions thereto.¹⁸⁹ The common ground for electronic transactions legislations is that they authorise conduct and eliminate barriers to

¹⁸³ Van der Merwe (2008: 145); The UNCITRAL Guide to Enactment available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (27 March 2015).

¹⁸⁴ Ahmad (2009: 386).

¹⁸⁵ Ahmad (2009: 392).

¹⁸⁶ Ahmad (2009: 389).

¹⁸⁷ Gregory (2003-2004: 313).

¹⁸⁸ Gregory (2003-2004: 314).

¹⁸⁹ Ndulo, M. (1987) “The United Nations Convention on Contracts for International Sale of Goods (1980) and the Eastern and South Africa trade arena” 20 LLJ 127.

transactions in electronic form, and state that transactions will not be held to be unenforceable simply because they are conducted in an electronic form.¹⁹⁰

The Model Law's cardinal principle of non-discrimination stipulates that data messages may not be denied legal effect solely on the basis of being in an electronic format.¹⁹¹ The principle relies on functional equivalence approach which is based on an analysis of the purpose and function of the traditional paper-based requirements¹⁹² such as ability to be legible, unaltered overtime, reproduced, authenticated by means of signature, and to be in a form acceptable to public authorities and courts, with a view to determine how the stated purposes and functions could be fulfilled through electronic techniques.¹⁹³ The Model Law extends the scope of functional equivalence principle to writing, signature and originality.¹⁹⁴ It further sets out criteria once met by data messages, enables data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function.¹⁹⁵

2.4.2.1 An overview of the Model Law

The general provisions enshrine article 1, article 2, article 3 and article 4, which underscore the sphere of application of the Model Law, definitions of key terms, interpretation of the Model Law, and variations of provisions by agreement respectively. Chapter II of part I covers article 5, and article 5 *bis* as adopted in 1998, article 6, article 7, article 8, article 9 and article 10 which respectively pertain to application of legal requirements to data messages namely, legal recognition of data messages, incorporation by reference, writing requirement, signature requirement, originality and integrity of data messages, admissibility and evidential weight of data messages, and retention of data messages. Articles 5 to 10 are described as mandatory because they provide well established rules regarding the form of legal transactions, in line with mandatory statutory requirements in paper-based contracts.¹⁹⁶ It is observed that Article 3 on the interpretation, provides that regard

¹⁹⁰ Fitzgerald (2007: 506).

¹⁹¹ Gregory (2003-2004:314).

¹⁹² Pistorius (2002: 129 at 134).

¹⁹³ Ahmad (2009:379).

¹⁹⁴ Ahmad (2009:378).

¹⁹⁵ Ahmad (2009:380).

¹⁹⁶ Pistorius (2002: 129 at 136).

should be had to the Model Law's international origin, promotion of uniformity, in its application and observance of good faith, in its interpretation.¹⁹⁷

Chapter III of part I deals with Articles 11 to 15 which are referred to as non-mandatory provisions.¹⁹⁸ These provisions may be varied in line with the principle of party autonomy in terms of article 4 of the Model Law. The non-mandatory provisions covered in chapter III of the Model Law relate to formation and validity of electronic contracts, recognition by parties of data messages, attribution of data messages, acknowledgement of receipt and time and place of dispatch and receipt of data messages.¹⁹⁹

2.4.3 Common law requirements for electronic contracts

2.4.3.1 The online offer and acceptance

Article 11 provides that in the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages, where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose. The different types of e-commerce transactions include an offer and acceptance, through email communications,²⁰⁰ contracting via the internet on World Wide,²⁰¹ EDI transactions,²⁰² click-wrap agreements,²⁰³ shrink-Wrap Agreements.²⁰⁴

The question as to what constitutes a valid electronic contract depends on whether or not the contents of an electronic communication or website constitute a valid offer

¹⁹⁷ Gregory (2003-2004: 275 at 276).

¹⁹⁸ Pistorius (2002: 129 at 135).

¹⁹⁹ Gregory (2003-2004: 275 at 281).

²⁰⁰ *Jafta v Ezemvelo KZN Wildlife* 2008 (10) BBLR 954 where the court held that an offer and acceptance through email communication constituted a valid contract.

²⁰¹ Papadopoulos et al (2012: 42) mentions that goods advertised on the website are ordered by filling an electronic form.

²⁰² Eiselen (1995:1); Snail (2008: 1 at 4); Van der Merwe et al (2008: 142) states that EDI is computer-to-computer transmission of data in a standardised format.

²⁰³ Pistorius (2004: 568 at 569) explains that a computer screen on a commercial website displays terms and conditions accepted by clicking the button; Jason (2004: 65).

²⁰⁴ Pistorius, T. (1999) "The enforceability of shrink-wrap agreements in South Africa 5 SA Merc LJ 1 at 2; Pistorius (1999: 282 at 291) asserts that a shrink wrap agreement is a standard form printed agreement placed on top of the package containing computer software which comes into effect upon tearing shrink-wrap plastic or software installation.

entailing sufficient information to enable the offeree to unequivocally accept it.²⁰⁵ The requirements of contractual capacity, possibility of performance and lawfulness in the internet contracts should align with common law requirements as with the traditional paper-based contracts in order to be legally enforceable.²⁰⁶

The courts have recently dealt with cases of electronic contracts as discussed by Papadopoulos.²⁰⁷ In the case of *Council for Scientific and Industrial Research v Fijen*,²⁰⁸ the email communication was held to constitute a valid letter of resignation, and data and SMS messages were held to be legally recognised form of conducting acts such as electronic contracts as evidenced in *Wellness International Network v MV Navigator*,²⁰⁹ *Jafta v Ezemvelo KZN Wildlife*,²¹⁰ *Mafika v SABC*.²¹¹

2.4.3.2 Functional equivalence approach

The functional equivalence principle stipulates 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.²¹² Article 5 which deals with the legal recognition of data messages, stipulates that where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.²¹³ Functional equivalence approach was introduced by the Model Law to transpose the traditional legal requirements, such as writing and signature, into the electronic contracts with the view to according electronic contracts the same legal recognition, validity and enforceability as paper-based contracts.²¹⁴

2.4.3.3 The Legal recognition of data messages

Article 5 of Model Law is to the effect that information shall not be denied legal effect, force and enforceability solely on the grounds that it is in the form of a data message.

²⁰⁵ Papadopoulos et al (2012: 45).

²⁰⁶ Jason (2004: 75).

²⁰⁷ Papadopoulos et al (2012: 47).

²⁰⁸ *Council for Scientific and Industrial Research v Fijen* CSIR 1996 (2) SA 379.

²⁰⁹ *Wellness International Network v MV Navigator* 2004 (5) SA 10.

²¹⁰ *Jafta v Ezemvelo KZN Wildlife* 2008 (10) BBLR 945.

²¹¹ *Mafika v The SABC*-Unrepted Labour Court case No.J 700/08.

²¹² Gregory (2003-2004: 275 at 276).

²¹³ Gregory (2003-2004: 275 at 278).

²¹⁴ Pistorius (2002: 129 at 135).

The legal recognition of electronic contracts should not be construed to mean that every online agreement that is concluded is automatically valid.²¹⁵ Article 1 provides that the Model Law applies to data messages.²¹⁶ Article 2 provides that a data message means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange, electronic mail, telegram, telex or telecopy.²¹⁷ Article 5 *bis* on incorporation by reference as adopted in 1998, reads that information shall not be denied legal effect, validity or enforceability solely on the ground that it is not contained in the data message purporting to give rise to such legal effect, but merely referred to in that message.²¹⁸

2.4.3.4 The 'in writing' and signature requirements

The writing and signature provisions as entailed in article 6 and article 7 of the Model Law are important because they form the basis for legal certainty and authentication of data messages.²¹⁹ The two provisions seek to transpose prescribed statutory requirements for written contracts into electronic contracts.²²⁰ Article 6 is couched with the terms that where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.²²¹

Whereas article 7 stipulates that where the law requires a signature of a person, that requirement is met in relation to a data message if a method used to identify that person and to indicate that person's approval of the information is contained in the data message, and further 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.²²²

²¹⁵ Buys, R et al. (2004) "Cyberlaw@SA II: the law of the internet in South Africa" 84 points out that the legal recognition of data messages provision is not intended to override any mandatory provisions in South African law relating to data messages but merely provides that information may not be denied legal validity on account that it is contained in the form of a data message; Jason (2004: 44).

²¹⁶ Gregory (2003-2004: 275).

²¹⁷ Gregory (2003-2004: 275 at 276).

²¹⁸ The UNCITRAL Guide to Enactment available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (27 March 2015).

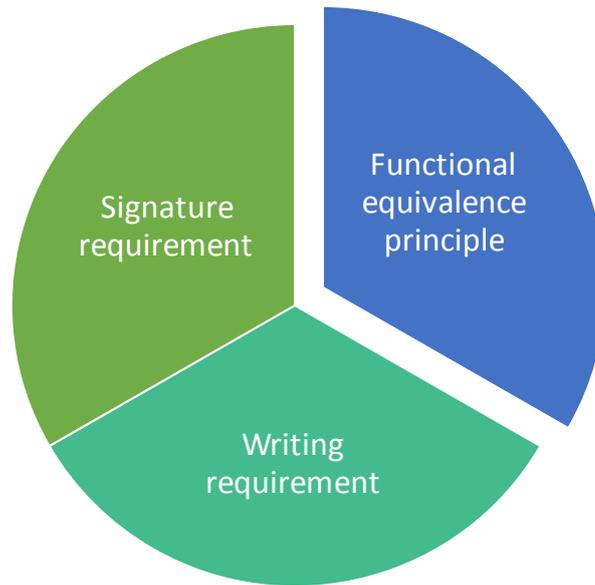
²¹⁹ Van der Merwe (2008: 163).

²²⁰ Pistorius (2002: 129 at 135).

²²¹ Gregory (2003-2004: 275 at 276).

²²² Gregory (2003-2004: 275 at 277).

2.4.3.5 The pillars of the Model Law: Figure 1.



2.4.3.6 Time and place of dispatch and receipt of data messages

The default rules apply in the absence of an agreement between the parties stating the time and place of the dispatch and receipt of data messages.²²³ Article 15 which stipulates the time and place of dispatch and receipt of data messages is important for determining the moment when a contract is concluded, and for such purposes as proper jurisdiction and applicable legal system.²²⁴ Coetzee explains that the answer to the question as to where and when a contract comes into effect depends on the theory of contract formation which is applicable to the particular transaction.²²⁵ As stated above, the information and expedition theories are displaced by technological advancements. Jason is of the view that expedition theory finds proper application in electronic contracts as it accommodates both instantaneous and non-instantaneous means of communication.²²⁶ Notable is the legal lacunae that the Model Law has no provision as to the exact time of formation of an online contract. Many jurisdictions followed suit and have no provision for the exact time of contract formation, the in-

²²³ Fitzgerald et al (2007:520).

²²⁴ *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171; *Improvair (Cape) (Pty) Ltd v Establishments Newman* 1983 (2) SA 138.

²²⁵ Coetzee, J. (2004) "The Electronic Communications and Transactions Act 25 of 2002: facilitating electronic commerce" 3 Stell LR 501 at 513.

²²⁶ Jason (2004: 48).

action which invokes the employment of common law theories which are shown to impose difficulties in electronic contracting because they do not distinguish whether parties are *inter praesentes* or *inter absentes*.²²⁷

Article 15 (1) provides that unless otherwise agreed between the originator and the address, the dispatch of a data message occurs when it enters an information system outside the control of the originator, or of the person who sent the data message on behalf of the originator.²²⁸ A data message should not be considered to be dispatched if it merely reached the information system of the address but failed to enter it, according to Model Law's notion of entry.²²⁹ Receipt of a data message is at the time when it enters a designated information system of the addressee, or at the time when the message is retrieved in the case of undesignated information system.²³⁰ The Model Law regards a place of dispatch as the originator's place of business.²³¹

2.5 CONCLUSION

It was observed that the substantive common law requirements for a legally enforceable paper-based contract find application in electronic contracts through the Model Law. There are generally no formalities required for the conclusion of a valid contract, subject to some agreements mandated by statutory provisions to be reduced into writing in order to be valid. The Model Law's key provisions on writing and signature set out a criteria on how these provisions can be functionally equivalent, and be legally recognised like paper-based contracts. Nonetheless, the Model Law offers no provision for the time of the conclusion of the contract, and leaves it open to legislators to decide on the appropriate theory of time of contract conclusion, based on the peculiar circumstance of each jurisdiction.

The following chapter will entail an in-depth analysis of the Lesotho Electronic Transactions and Electronic Commerce Bill 2013, in comparison with Electronic Communications and Transactions Act 25 of 2002 as aforementioned, in order to investigate how common law requirements for formation of contracts are applied,

²²⁷ Pistorius (2006: 178 at 196).

²²⁸ Pistorius (2002: 129 at 147).

²²⁹ Pistorius (2002: 129 at 147).

²³⁰ Pistorius (2002: 129 at 147).

²³¹ Pistorius (2002: 129 at 148).

based on the Model Law's legal framework to fill the legal lacunae in electronic contracts. It will further explore successes and challenges which are likely to be occasioned by the practical interpretation and implementation of the electronic transactions provisions thereto.

CHAPTER 3

3.1 BACKGROUND TO THE LESOTHO BILL

The Lesotho Electronic Transactions and Electronic Commerce Bill 2013²³² is a much anticipated initiative that responds to the call for the international community to enact electronic transactions legislations²³³ based on 1996 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce.²³⁴ Supported by the International Telecommunications (ITU)'s expertise,²³⁵ the Lesotho Bill is a welcome endeavour that seeks to embrace the global focus for the digital technologies which are said to impinge upon a legal system based on an analogue system.²³⁶ The implementation of the 2005 Lesotho Information and Communications Technology Policy (the Lesotho ICT Policy),²³⁷ and the impending Lesotho digital migration venture,²³⁸ could be well said to indicate Lesotho's appreciation of the so-called information society and knowledge economy.²³⁹

3.1.1 Summary of electronic transactions provisions of the Lesotho Bill

The Bill divides electronic transactions provisions into four parts. Part one deals with preliminary provisions commencing with title, definitions, objects, interpretation, sphere of application, and variation of agreement by parties which constitute sections 1 to 6 respectively. Part two is subtitled legal recognition and effect of electronic communications, and it covers legal recognition of electronic communication, writing and signature requirements from sections 7 to 9. Part three which encompasses

²³² The Bill available at www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Pages/In-country-assistance/Lesotho.aspx (accessed 20 October 2014).

²³³ The UNCITRAL Guide to Enactment available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (27 March 2015).

²³⁴ The UNCITRAL Guide to Enactment available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (27 March 2015).

²³⁵ The ITU available at www.ist-africa.org/home/default.asp?page=doc-by-id-print&docid=5191 (accessed 8 December 2014).

²³⁶ Van der Merwe, D. (2014) "A comparative overview of the (sometimes uneasy) relationship between the digital information and certain legal fields in South Africa and Uganda" 17 Potchefstroom Elec. LJ 296 at 300.

²³⁷ The Lesotho ICT Policy 2005 available at http://www.gov.ls/documents/Lesotho_ICT_Policy_Final.pdf (accessed 22 February 2015).

²³⁸ The digital migration collaboration between Lesotho and South Africa available at www.gov.za/communications-minister-collaborates-lesotho-counterpart-digital-migration (accessed 29 July 2015).

²³⁹ Fitzgerald et al (2007: 13).

default provisions,²⁴⁰ comprises sections 10 to 17, setting out provisions on formation and validity of contracts, variation by agreement, time of dispatch and receipt of electronic communications, the place of dispatch and receipt of electronic communications, time of contract formation, automated transactions and input errors. Finally, part four deals with attribution, original information, admissibility and evidential weight of electronic communications, records retention, production of document or information, notarisisation, acknowledgment and certification, and other requirements, from sections 18 through to section 24.

3.1.2 *An overview of the RSA ECT Act*

South Africa is declared to have joined the ranks of countries legislating on electronic commerce by enacting the Electronic Communications and Transactions Act 25 of 2002 which is comprehensive legislation encompassing fourteen chapters.²⁴¹ The ECT Act took its cue from the 1996 UNICITRAL Model Law on Electronic Commerce with additional article 5 *bis*.²⁴² Coetzee states that unlike many other countries, where different issues are often addressed by a piece-meal legislation, the ECT Act proposes to deal with issues such as the ‘in writing’ and signature requirements, authentication, accreditation, safety and security, national strategy, e-government, access to electronic services, consumer protection, domain name administration and cybercrime, all in one law.²⁴³ Chapter 3 of the ECT Act deals with facilitation of electronic transactions.²⁴⁴ The ECT Act categorises electronic transactions under two parts, part 1 deals with legal requirements for data messages and part 2 covers the communication of data messages.²⁴⁵

Buys notes that the distinction between the two parts in chapter 3 is important because part one from sections 11 to 20 creates obligatory provisions covering the legal recognition of data messages, writing and signature requirements, originality, admissibility and evidential weight of data messages, retention, production of

²⁴⁰ S11 of the Bill.

²⁴¹ Coetzee (2004:501).

²⁴² Papadopoulos S. et al. (2012) “Electronic wills with an aura of authenticity: Van der Merwe v The Master” 24 SA Merc LJ 93 at 95; Van der Merwe (2008: 146).

²⁴³ Coetzee (2004: 501 at 502).

²⁴⁴ Van der Merwe (2008: 146); Michalsons Guide to the ECT Act <http://www.michalsons.co.za/blog/guide-to-the-ect-act/81> (accessed 6 February 2016).

²⁴⁵ Papadopoulos et al (2012: 46).

document or information, notarisation, acknowledgement and certification, other requirements and automated transactions, while part two provides a default position in law that parties to an agreement are free to vary from sections 21 to 26 which deals with variation by agreement between parties, formation and validity of agreements, time and place of dispatch and receipt of data messages, expression of intent, attribution and acknowledgement of receipt of data message.²⁴⁶

The Lesotho Bill is an omnibus document which adopts a similar holistic approach to the South Africa's ECT Act in addressing legal issues on electronic transactions, certification authorities regulation, cryptography, e-government services, consumer protection, and limitation of liability of service providers.²⁴⁷ Owing to the relevance and purpose of this study, only provisions which deal with electronic contracts will be canvassed.

3.1.3 The objectives of the Lesotho Bill

Section 3 outlines the objectives of the Bill. It primarily enables and facilitates electronic transactions, removes legal barriers over writing and signature requirements, authenticates electronic signatures, ensures compliance with international standards for electronic transactions, promotes legal certainty in the integrity of electronic commerce and seeks to achieve technology neutrality of electronic communications and transactions and e-government services.²⁴⁸ Technological neutrality means that the law should not prescribe the use of a certain medium or technology, but should be drafted in widest general terms.²⁴⁹

3.1.4 The objectives of the RSA ECT Act

The relevant objects include *inter alia*, to enable and facilitate electronic communications and transactions, remove and prevent barriers to electronic transactions, create legal certainty and confidence in respect of electronic transactions, and ensure that electronic transactions conform to the highest

²⁴⁶ Buys (2004:83).

²⁴⁷ The Bill available at www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Pages/In-country-assistance/Lesotho.aspx (accessed 20 October 2014).

²⁴⁸ S3 of the Bill.

²⁴⁹ Jacobs, W. (2004) "The Electronic Transactions and Communications Act: Consumer Protection and International Contracts" 16 SA Merc LJ 556 at 557.

international standards.²⁵⁰ The other objectives are to promote universal access to the Internet, and promote technology neutrality and e-government services.²⁵¹ The Minister is enjoined to develop a national e-strategy,²⁵² and formulate an electronic transactions policy.²⁵³ Coetzee submits that this plan is of paramount importance for the effective implementation of the ECT Act.²⁵⁴

The legislator's overall goal in both pieces of legislations is to give legal force and effect to electronic transactions. The legal recognition of electronic transactions is viewed as an important legislative step towards according legal enforceability and a binding effect on electronic transactions as paper-based transactions.

3.1.5 The interpretation of the Lesotho Bill

The Bill commences with a deeming provision to the effect that a public body authorised in law to prescribe any matter in law by a regulation shall be deemed to be vested with the authority to correspondingly prescribe by means of electronic communications.²⁵⁵ The Bill shall further be interpreted to take into account all sources of law in the form of statutes, regulations, subordinate legislation, common law, customary law and the law in force in Lesotho.²⁵⁶

3.1.6 The interpretation of the RSA ECT Act

The ECT Act must not be interpreted so as to exclude any statutory law or the common law from being applied to data messages or any other matter provided thereof.²⁵⁷

²⁵⁰ S2 ECT Act.

²⁵¹ S2 id; Michalsons E-commerce <http://www.michalsons.co.za/blog/e-commerce-getting-the-deal-through-2/4377> (assessed 4 February 2016); Michalsons Guide to the ECT Act <http://www.michalsons.co.za/blog/guide-to-the-ect-act/81> (accessed 6 February 2016).

²⁵² S5 id; Michalsons Guide to the ECT Act <http://www.michalsons.co.za/blog/guide-to-the-ect-act/81> (accessed 6 February 2016).

²⁵³ S10 id.

²⁵⁴ Coetzee (2004: 501 at 503).

²⁵⁵ S4 (1) of the Bill.

²⁵⁶ S4 (2) id.

²⁵⁷ S3 ECT Act; Michalsons Guide to the ECT Act <http://www.michalsons.co.za/blog/guide-to-the-ect-act/81> (accessed 6 February 2016).

The ECT Act's approach takes into account the fact that the validity of contracts is governed by common law,²⁵⁸ as does the Lesotho Bill.

3.1.7 The sphere of application of the Lesotho Bill

The Bill applies to electronic transactions or electronic communication.²⁵⁹ Part II and Part III excludes, subject to the Minister's regulations, the applicability of the Bill on creation and execution of wills, negotiable instruments, creation, performance or enforcement of an indenture, power of attorney or declaration of trust, contract for sale or disposition of immovable property, document of title, conveyance or transfer of any interest in immovable property.²⁶⁰ Parties to the contract have discretion to use electronic communications.²⁶¹

3.1.8 The sphere of application of the RSA ECT Act

In terms of S4 of the ECT Act, it applies to any electronic transactions on data messages but excludes the application to the Wills Act,²⁶² Alienation of Land Act,²⁶³ Bills of Exchange Act,²⁶⁴ Stamp Duties Act,²⁶⁵ and must not be construed to require nor prohibit any person to use data messages.²⁶⁶ This Act also does not give validity to any transaction mentioned in schedule 2 such as an Agreement for alienation of immovable property, an agreement for the long-term lease of immovable property in excess of 20 years, the execution, retention and presentation of a will or codicil and the execution of a bill of exchange.²⁶⁷

There are a number of reasons advanced for the proposed inclusion of electronic wills in the application of data messages. Papadopoulos advocates for the use of meta

²⁵⁸ Papadopoulos. S. (2010) "Short message services and e-contracting: Jafta v Ezemvelo KZN Wildliife" *Obiter* 188 at 190.

²⁵⁹ S5 (1) of the Bill.

²⁶⁰ S5 (2) *id.*

²⁶¹ S5 (3) *id.*

²⁶² The Wills Act 7 of 1953; Hofman, J. (2007). "The meaning of the exclusions in section 4 of the Electronic Communications and Transactions Act 25 of 2002" 124 *SALJ* 262 at 266; Wood-Bodley, MC. (2004) "Wills, data messages and the Electronic Communications and Transactions Act" 121 *SALJ* 526.

²⁶³ The Alienation of Land Act 68 of 1981.

²⁶⁴ The Bills of Exchange Act 34 of 1964.

²⁶⁵ The Stamp Duties Act 77 of 1968.

²⁶⁶ S4 (2) ECT Act.

²⁶⁷ S4 read with Schedule 1 where it states that the sections in Column B do not apply to laws in Column A.

data to ensure that electronic wills remain unaltered to facilitate recognition of data messages as validly executed wills.²⁶⁸

Having further observed that wills and codicils are universally excluded from the ambit of electronic commerce legislation worldwide,²⁶⁹ the learned author contends that since an electronic will is a document that complies with the common law ‘in writing’ requirement, common law signature and witnesses’ attestation requirement which could be fulfilled by means of an advanced electronic signature, would ensure its integrity.²⁷⁰ The definition of a will as a document indicates that at minimum it must be in writing.²⁷¹ This contention further finds support in Coetzee’s observation that digital signatures are secure signatures equivalent to an advanced electronic substitute for manual signatures which serves the same purpose as a handwritten signature, and in principle, serves an important information security purposes that handwritten signature cannot serve because each one is unique for each document that is signed allowing the recipient to determine whether the communication was changed after it was digitally signed as any change will produce a different signature.²⁷²

In the case of *Van der Merwe v The Master*,²⁷³ the court dispensed with the rules of exclusion of wills, and upheld the application of data messages to accommodate an electronic will on the basis that plaintiff proved that the deceased with whom they had agreed to exchange wills, sent the electronic will to plaintiff, and thus, the document had an aura of authenticity. The court ruled that the lack of signature could not be a complete bar to a document being declared a valid will in terms of section 2(3) of Wills Act to ameliorate formalities and technicalities over the true intention of the drafter.²⁷⁴ Papadopoulos mentioned that it would have been judicious to make reference to the provisions of the ECT Act such as integrity in assisting the court to confirm authenticity

²⁶⁸ Papadopoulos (2012:93 at 104) states that meta data establishes file context in relation to file name, format, type, size, date of location and creation.

²⁶⁹ Papadopoulos (2012:93 at 97).

²⁷⁰ Papadopoulos (2012:93 at 97, 104); S38 ECT Act accreditation of an advanced electronic signature is designed as the technological tool that ensures authenticity and integrity of data messages.

²⁷¹ Papadopoulos (2012:93 at 100).

²⁷² Coetzee (2004: 501 at 513).

²⁷³ *Van der Merwe v The Master and another* 2010 (6) SA 544.

²⁷⁴ *Van der Merwe v The Master and another* 2010 (6) SA 544.

and integrity of the will which was the subject of the dispute.²⁷⁵ This was in contrast to *Macdonald v The Master*²⁷⁶ whereat a great deal of care was taken to ensure that the integrity of the will was maintained, such as accessibility of a document via the drafter's password.²⁷⁷ The condonation was granted on the basis of what the court termed a rescue provision.²⁷⁸

The exclusion of wills from data messages is a common denominator between the Lesotho Bill and the ECT Act. The proposition that electronic wills should be included in the sphere of electronic transactions is profound. The legislature should consider including an electronic will in the scope of the application of the Lesotho Bill.

3.2 DEFINITIONS OF KEY TERMS

3.2.1 *The meaning of electronic transaction in the Bill*

The Bill does not define electronic commerce. It was stated that e-commerce encompasses commercial transactions via telecommunications networks with or without partial recourse to physical exchanges or contact.²⁷⁹

However, the Bill defines an electronic transaction as a transaction, action or set of actions of either a commercial or non-commercial nature, and includes the provision of information and/or e-government services.²⁸⁰

3.2.2 *The meaning of electronic transaction in the RSA ECT Act*

The ECT Act does not define an electronic transaction, however, it defines a transaction as of either a commercial or non-commercial nature and includes the provision of information and e-government services.²⁸¹

Papadopoulos submits that the use of an electronic agent, electronic communication or electronic signature with data as common denominator similarly denotes that an

²⁷⁵ Papadopoulos (2012:93 at 102).

²⁷⁶ *Macdonald and others v The Master and others* 2002 (5) SA 64.

²⁷⁷ *Macdonald and Others v The Master and Others* 2002 (5) SA 64 at 71.

²⁷⁸ *Macdonald and Others v The Master and Others* 2002 (5) SA 64 at 71; Wood-Bodley (2004: 526 at 527).

²⁷⁹ Electronic Commerce Commission of the European Union, 'Electronic Commerce-an introduction,' <<http://www.ispo.cec.be/Ecommerce/intoduc.htm>> (accessed 30 May 2015).

²⁸⁰ S1 of the Bill.

²⁸¹ S2 ECT Act; Van der Merwe (2008:182).

electronic transaction includes a transaction where the use of data, defined as electronic representations of information, is intrinsic to or is at the least an element of the transaction.²⁸² It is in point, therefore, to define an electronic transaction as a transaction which includes transactions where the use of data is a basic component of the transaction.²⁸³ Wood-Bodley similarly echoes the inadequacy of the definition.²⁸⁴

The Lesotho Bill's definition of an electronic transaction matches the ECT Act's definition of a transaction. It is noted that the Bill's definition of an electronic transaction only defines a transaction, in exclusion to an element of a data, which is basic in the definition of an electronic transaction.²⁸⁵ It would be desirable that the Bill should rather adopt the definition of an electronic transaction that synchronise a transaction and a data definition, which would depict the definition as a transaction either of a commercial or non-commercial nature where the use of data is a basic component, as propounded by Papadopolous.²⁸⁶

3.2.3 Data messages and electronic communication in the Lesotho Bill

Data message means information generated, sent, received or stored by electronic magnetic optical or similar means including, but not limited to, electronic data interchange, electronic mail, mobile communications e.g. SMS audio and video recordings.²⁸⁷ An electronic communication is a communication by means of data messages as per the definition in the Bill.²⁸⁸

3.2.4 Data message and electronic communication in the RSA ECT Act

The ECT Act defines a data message as 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, whereas, data means electronic representations of

²⁸² Papadopoulos et al (2012: 65).

²⁸³ Papadopoulos, S. Hamann, B. Direct marketing and spam via electronic communications: an analysis of the regulatory framework in South Africa available at www.dejure.up.ac.za/index.php/volumes/47-volume-1-2014/articles/papadopoulos-s-hamann-b (accessed 20 June 2015).

²⁸⁴ Wood-Bodley (2004: 526)

²⁸⁵ S1 of the Bill.

²⁸⁶ Papadopoulos et al (2012:65).

²⁸⁷ S1 of the Bill.

²⁸⁸ S1 of the Bill.

information in any form.²⁸⁹ The definition of an electronic communication in the ECT Act is couched with similar words as in the Bill.²⁹⁰

The common ground between the Bill and the ECT Act is that a data message is a stored or recorded message available for subsequent reference. As per Van der Merwe, the Model Law's requirement is stricter than the common law because if a data message is so ephemeral that it cannot be saved for subsequent reference, it cannot provide certainty.²⁹¹

It was mentioned that the Bill applies to electronic communications pursuant to section 5 thereof.²⁹² It is argued that data messages form the crux for the existence of the Bill, without which electronic transactions provisions, including section 5 on the sphere of application, cannot be afforded legal recognition. Paradoxically, the phrase electronic communication is used instead of a data message, except for reference in section 7 only which gives legal validity to data messages. This is a bizarre legal dichotomy that frustrates the intention of the legislature, and defeats the purpose for which the Bill was drafted in the first place, to wit, to enable and facilitate the use of electronic transactions. This terminological inconsistency constitutes a grave irregularity which produces an unforeseen and undesired interpretation difficulties, which were not initially contemplated by the drafters, being that the Bill should apply to data messages, and not to electronic communication in general.

Although electronic communication is a communication by way of a data message, it is argued, on the strength of the case of *Jafta v Ezemvelo KZN Wildlife*,²⁹³ where the court laid down the critical common elements for the definition of data messages and electronic communication, being the capability to be generated, stored, sent, received, and transmitted, that the two terms are distinct, for the very reason that the court outlined the similarities. It is not every electronic communication that constitutes a data message. Electronic communication is an umbrella term the sub-set of which is

²⁸⁹ S2 ECT Act.

²⁹⁰ S2 ECT Act states that electronic communication means a communication by means of data messages.

²⁹¹ Van der Merwe et al (2008:165).

²⁹² S5 of the Bill.

²⁹³ *Jafta v Ezemvelo KZN Wildlife* 2008 (10) BBLR 954.

a data message.²⁹⁴ This point finds application in the ECT Act's definition of data messages which ousts Skype and Voice Over Internet Protocol (VOIP) from the sphere of application.²⁹⁵ Although Skype and VOIP are electronic communications, they do not fall under the ambit of data messages, and as a result fall away from the scope of the ECT Act.²⁹⁶ The instant and interactive electronic communications like VOIP or telephonic call fall out of the scope of the ECT Act.²⁹⁷

The same argument is advanced against the use of the general term, electronic communication, which replaces data messages as reflected in the Bill. The Bill's definition of a data message covers recorded electronic communication, not instant electronic communications.²⁹⁸ The observation that the live electronic communications do not constitute data messages covered under the Bill is affirmed.²⁹⁹ It is submitted that the use of data messages should not be substituted for electronic communication in order to avoid cases of ambiguity.

Notably, the ECT Act consistently employs the term data messages throughout electronic transactions provisions. It is submitted that the consistent use of data messages in the ECT Act's relevant provisions, coupled with section 4(1) on sphere of application on data messages,³⁰⁰ is the correct approach that is in harmony with the founding provision in section 11 without which electronic transactions would not have been afforded legal force and effect.

²⁹⁴ Electronic communications available at <http://www.alrc.gov.au/publications/6.%20Documentary%20Evidence/electronic-communications> (accessed 9 September 2015).

²⁹⁵ Van der Merwe et al (2008: 151).

²⁹⁶ S2 ECT Act, provides that a data message includes voice, where the voice is used in an automated transaction and a stored record.

²⁹⁷ Van der Merwe et al (2008: 151).

²⁹⁸ S2 of the Bill.

²⁹⁹ Ramokanate, LL. (2015) "The Lesotho Electronic Transactions and Electronic Commerce Bill: Will it replace the Common Law of Contract as we know it?" 1/2 LJ 117 at 120.

³⁰⁰ S4 (1) ECT Act.

3.2.5 The meaning of an information system in the Lesotho Bill

An Information system means a device or groups of interconnected or related devices including the Internet, one or more which, pursuant to a program, performs automatic processing of data or any other function.³⁰¹

3.2.6 The RSA ECT Act's meaning of an information system

The ECT Act defines an information system as a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet.³⁰²

It is clear that both pieces of legislations have identical definitions of an information system the examples of which may include the internet, and electronic devices for information storage or processing such as a computer.

3.2.7 An addressee, originator and intermediary in the Lesotho Bill

An addressee in respect of an electronic communication means a party who is intended by the originator to receive an electronic communication, but does not include a party acting as an intermediary.³⁰³ An originator means a person by whom, or on whose behalf, an electronic communication purports to have been sent or generated prior to storage, if any, but does not include an intermediary.³⁰⁴ An intermediary means a person who, whether as an agent or not, sends, receives or stores electronic communication on behalf of another person or provides other services with respect to that electronic communication.³⁰⁵

3.2.8 An addressee, originator and intermediary in the RSA ECT Act

An addressee means a person who is intended by the originator to receive the data message, but not an intermediary in respect of that data message.³⁰⁶ An originator means a person by whom, or on whose behalf, a data message purports to have been

³⁰¹ S2 of the Bill.

³⁰² S1 ECT Act; Van der Merwe (2008: 84).

³⁰³ S2 of the Bill.

³⁰⁴ S2 id.

³⁰⁵ S2 id.

³⁰⁶ S1 ECT Act.

sent or generated prior to storage, if any, but does not include an intermediary.³⁰⁷ An intermediary means a person who, on behalf of another person, whether as an agent or not, sends receives or stores a particular data message or provides other services with respect to that data message.³⁰⁸

The definitions of the above terms are also identical in both instances. The definition of an addressee and originator signifies that data messages generated automatically by a computer without direct human intervention should be regarded as originating from the legal entity on behalf of which the computer is operated,³⁰⁹ and as such, it is covered under the definitions, as parties may express their intention about offer and acceptance without human intervention.³¹⁰ Thus, parties who engage in electronic automatic response may not raise a defence that an electronic agent exceeded its mandate.³¹¹ Intermediaries only receive, transmit or store messages on behalf of another person.³¹² These concepts portray identical content to the Model Law's definitions of the terms. They should be retained.

3.2.9 An automated transaction in the Lesotho Bill and RSA ECT Act

The Lesotho Bill does not define an automated transaction. It defines an automated message system as a pre-programmed system, or other automated system used to initiate an action, or respond to electronic communication or generate other performances in whole or in part without review or intervention by a party.³¹³

In the RSA ECT Act, an automated transaction means an electronic transaction concluded or performed in whole or in part by means of a data message in which conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment.³¹⁴ An electronic agent means a computer program, or an electronic or other automated

³⁰⁷ S1 id.

³⁰⁸ S1 id.

³⁰⁹ Pistorius (2002: 129 at 140).

³¹⁰ Glatt, C. (1998) "Comparative issues in the formation of electronic contracts" 1/6 Int'l SAJIC 34.

³¹¹ Rens, A. (2003) "Approach with caution" June De Rebus 22 at 25.

³¹² Pistorius (2002: 129 at 141).

³¹³ S2 of the Bill.

³¹⁴ S1 ECT Act.

means used independently to initiate an action or respond to data message or performances in whole or in part, in an automated transaction.³¹⁵

The Lesotho Bill validates an automated transaction in section 16. The reference to an automated transaction in section 16 warrants the insertion of the definition for the term under the definitions section for the legal certainty on the Bill's meaning of an automated transaction. The definition of an automated transaction and electronic agent appearing in the ECT Act both share the common elements of an automated message system definition appearing in the Bill, namely, the use of a computer system to initiate an action without human intervention. The Bill has no definition for an electronic agent. It was earlier indicated that the definitions of an addressee, originator or intermediary also apply where another party uses an electronic agent,³¹⁶ it would be absurd that the definition of an electronic agent should be found missing under the circumstances.

3.2.10 Default and mandatory contracting provisions in the Lesotho Bill

The use of data messages in concluding a contract is at the parties discretion and not mandatory,³¹⁷ and it is in line with the party autonomy principle as contained in the Model Law allowing parties to decide on electronic contract formalities.³¹⁸ Section 11 of the Bill provides that part III of the Bill shall apply unless parties have agreed otherwise.³¹⁹ These default provisions are on the formation and validity of contracts,³²⁰ time of dispatch of electronic communication,³²¹ time of receipt of electronic communication,³²² place of dispatch and receipt of electronic communications,³²³ time of contract conclusion,³²⁴ automated transactions,³²⁵ and input errors.³²⁶ It is observed in section 6 that the Bill stipulates that, the 'in writing' and signature

³¹⁵ S1 id.

³¹⁶ Glatt (1998: 34).

³¹⁷ S21 ECT Act.

³¹⁸ Papadopoulos et al (2012: 47).

³¹⁹ S11 of the Bill.

³²⁰ S10 id.

³²¹ S12 id.

³²² S13 id.

³²³ S14 id.

³²⁴ S15 id.

³²⁵ S16 id.

³²⁶ S17 id.

requirements in sections 8 and 9 respectively, may be varied by agreement between the parties.

3.3.11 Default and mandatory contracting provisions in the RSA ECT Act

Section 21 reads that Part II of the ECT Act pertaining to default provisions will only apply if parties have not reached an agreement on the issues provided therein.³²⁷ The ECT Act's default provisions relevant in electronic contracts are on formation and validity of agreements,³²⁸ time and place of dispatch and receipt of communication.³²⁹ The mandatory provisions are contained in part I of the ECT Act, and relate to the legal recognition of data messages,³³⁰ writing,³³¹ signature,³³² and automated transactions.³³³

The Model Law stipulates that mandatory requirements, of which 'in writing' and signature requirements fall, should not be subject to parties' variation. The 'in writing' and signature requirements also appear under obligatory requirements under the ECT Act. Coetzee remarks that the requirement of writing has always been the main stumbling block in legalising electronic contracts because it can function as a statutory formality requirement for the creation of a valid contract, such as to prove the existence of the contract.³³⁴ The 'in writing' requirement is a statutory formality in some contracts, not subject to parties' variation, such as those under Credit Agreements Act.³³⁵ Should the parties enter a credit agreement contract, the 'in writing' requirement is inescapable, that means such an agreement should be in the form of a data message available for subsequent reference, such as an e-mail, in order to fulfil the 'in writing' statutory formality.³³⁶

It would be anomalous for the Bill to categorise the 'in writing' requirement under non-mandatory provisions because it would mean that the statutory 'in writing' formality

³²⁷ S21 ECT Act.

³²⁸ S22 id.

³²⁹ S23 id.

³³⁰ S11 ECT Act.

³³¹ S12 id.

³³² S13 id.

³³³ S20 ECT id.

³³⁴ Coetzee (2004: 501 at 511).

³³⁵ Credit Agreements Act 75 of 1980.

³³⁶ Rens (2002: 22 at 24).

would apply only if parties have not agreed otherwise. It is submitted that the deviation contradicts the Model Law's transposition of the traditional 'in writing' requirement to electronic contracts which are mandated statutorily to be reduced into writing. It is submitted that section 6 should be struck out as section 11 is a properly placed provision to vary part III of the Bill.

3.2.12 Legal recognition of data messages in the Lesotho Bill

Section 7(1) provides that a data message shall not be denied legal effect, validity and enforceability solely on the ground that it is wholly or partly in the form of an electronic communication.³³⁷ Section 7(2) validates a declaration of will (intent) in the form of an electronic communication.³³⁸

3.2.13 Legal recognition of data messages in the RSA ECT Act

Section 11(1) reads that information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.³³⁹ In terms of section 24 of the ECT Act, an expression of intent or other statement can constitute an offer and acceptance segments of contract formation, the expression can be made through other means other than electronic signature.³⁴⁰

The application of functional equivalence principle is confined to data messages, as the functional equivalent to messages on paper,³⁴¹ in terms of the legal recognition of data messages provisions of the Bill and the ECT Act. Buys notes that the provision on legal certainty of data messages do not override mandatory provisions in South African law.³⁴² It is observed that a data message must be functionally equivalent to a paper counterpart to satisfy these mandatory requirements.

³³⁷ S7 (1) of the Bill.

³³⁸ S7 (2) of the Bill see further discussion on incorporation by reference in para 3.7.1.

³³⁹ S11 (1) ECT Act.

³⁴⁰ Pistorius (2004: 568 at 573) see further discussion on incorporation by reference in para 3.7.2; Stoop, P. (2009) "SMS and E-mail contracts: Jafta v Ezemvelo KZN Wildlife." 21 SA Merc LJ 110 at 118.

³⁴¹ Van der Merwe (2008: 146); Papadopoulos et al (2012: 46).

³⁴² Buys (2004: 84).

3.2.14 The 'in writing' requirement in the Lesotho Bill

Section 8(1) of the Bill commands that where a rule of law requires information to be in writing or provides consequences if it is not, an electronic communication satisfies the requirement, if the information contained therein is accessible for subsequent reference. Section 8(2) reads that sub-section 8(1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not in writing.³⁴³

3.2.15 The 'in writing' requirement in the RSA ECT Act

3.2.15.1 Introductory overview

The ECT Act provides that a requirement in law that a document or information must be in writing is met if the document or information is in the form of a data message and accessible in a manner usable for subsequent reference.³⁴⁴

The main functions served by a written document are, *inter alia*, to provide that a document is legible, remains unaltered over time, can be reproduced so that each party would hold a copy of the same data, and to provide a document in a form that would be acceptable to public authorities and the courts.³⁴⁵ According to Buys, the requirement that a document should be reduced to writing is primarily required for certainty.³⁴⁶ The Bill and the ECT Act reflect that the document should be available for subsequent reference to satisfy the 'in writing' requirement. The ECT Act further says it must be a data message. It has been expressed that the said availability for subsequent reference is important for certainty.³⁴⁷

Section 8(2) of the Bill is vague as it does not clarify under what circumstances the 'in writing' requirement may be required by law, or instances where legal consequences attach merely by failure to reduce an information into writing. Part of subsection 8(1) which reads that where the law provides certain consequences where information is not reduced into writing is misguided. The 'in writing' requirement essentially falls under mandatory provisions in electronic transactions legal framework, and as such

³⁴³ S8 of the Bill.

³⁴⁴ S12 ECT Act.

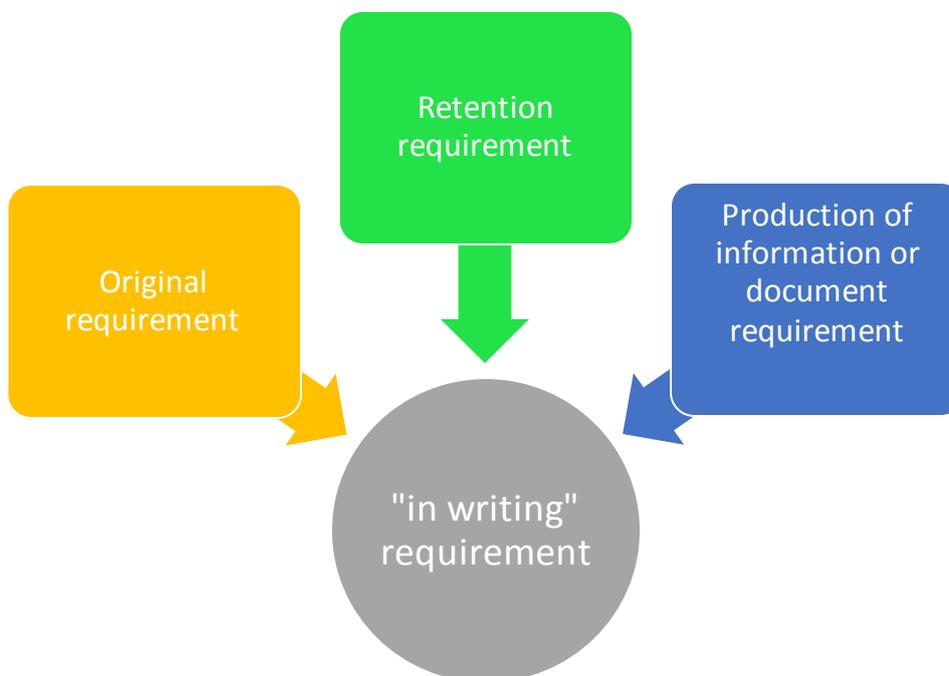
³⁴⁵ Papadopoulos (2012:93 at 101).

³⁴⁶ Buys (2004:85).

³⁴⁷ Van der Merwe (2008: 165).

inherently obligatory. It sufficed that the legislature stated that the law requires a certain information to be in writing, as reflected in the preliminary sentence in section 8(1). It is submitted, therefore, that the said part of subsection 8(1) is redundant. The drafters are recommended to delete section 8(1) to the extent that it reads that the law attaches consequences where the information is not in writing. Section 8(2) should be removed in its entirety for the said lack of clarity.

3.2.15.2 The 'in writing' requirement tie: Figure 2



3.2.15.3 RSA Court decision on 'in writing' and signature requirements

In *Spring Forest Trading 599 CC v Wilberry (Pty) (Ltd) t/a Ecowash and Another*,³⁴⁸ the court enunciated the principles of 'in writing' and signature requirements in electronic contracts. It is an important reference for the use of data messages in electronic contracting.³⁴⁹ The respondents and the appellant entered into a written agreement in terms of which the former appointed the latter as an operating agent of its mobile dispensing units in its car wash business. Subsequently, four agreements were entered into between the parties allowing appellants to lease mobile dispensing

³⁴⁸ *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd (725/13) [2014] ZASCA t/a Ecowash* available at www.saflii.org/za/cases/ZASCA/2014/178.html (accessed 30 July 2015).

³⁴⁹ Kelso, L. (1015). "Electronic communications and contracts" June 14.

units at four different locations, subject to mobile dispensing units agreement, referred to as master agreement. The rental agreements contained a non-variation clause which stipulated that cancellation had to be reduced into writing and signed by parties. The appellant was unable to meet its rental obligations, and cancelled the rental agreements via email communication after the respondents agreed in an email communication that appellant was free to walk away without incurring further costs after settling arrear rentals and returning the equipment.³⁵⁰

The court dismissed the respondents' argument that the email merely recorded a negotiation and did not evince consensual cancellation of the master agreement but was in relation to subsidiary agreements. The court ruled that it was not in dispute that the email communications which constituted data messages fell under the ambit of the ECT Act. Email communication is defined as electronic mail, data message used or intended to be used as a mail message between the originator and addressee in an electronic communication.³⁵¹ The pertinent issue was therefore, whether or not the names appearing at the foot of the email constituted signature contemplated in section 13(1) and 13(3) of the ECT Act.³⁵²

The respondents contended that the contract could only be cancelled by means of advanced electronic signature required by law in terms of 13(1), which section should further be interpreted to include formalities required by parties not only formalities required by law. They submitted that the appellant did not comply with the requirement of advanced electronic signature. The court held that the respondents' argument was without merit because the non-variation clause was imposed by parties not by the law, and also, having regard to the circumstances giving rise to the requirements of an advanced electronic signature, it did not apply to private parties but intended to be used for accredited authentication products designed to identify holder of electronic signature to other parties. The interpretation of the respondents would render

³⁵⁰ See *id* in para 10.

³⁵¹ S1 ECT Act.

³⁵² Para 17 of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd (725/13) [2014] ZASCA t/a Ecowash* available at www.saflii.org/za/cases/ZASCA/2014/178.html (accessed 30 July 2015).

electronic signature in section 13(3) superfluous, the court held. This issue was also addressed by Eiselen.³⁵³

The respondents further argued that the application of section 13(3) did not take the appellants' case any further as the email transaction pertained to oral negotiations and did not constitute a separate transaction, if it did constitute a separate transaction, there was no requirement for electronic signature as envisaged under the section, and finally there was no reliable method used to identify and indicate the parties' approval of information communicated in the emails. The court overruled the respondents' contention that the email communication did not constitute a separate transaction, instead only amounted to oral negotiations pertaining to a written agreement. The learned judge held that in fact the oral negotiations were reduced to writing in the form of emails and consensually constituted cancellation as section 22 emphatically provides that an agreement is not without legal force or effect because it is in the form of data message.³⁵⁴

Second, the court held that the parties required electronic signature to cancel the agreements, but did not specify the type of the signature to be used, therefore section 13(3) was applicable under the circumstances. The court held that typewritten names of the parties at the foot of the emails, which were used to identify the users, constituted 'data' that is logically associated with the data in the body of the emails, as envisaged in the definition of an 'electronic signature.' This was said to accord to pragmatic as opposed to formalistic approach which fulfils the function of a signature to authenticate the identity of the signatory rather than on the form of the signature used. The court further found that there was no dispute regarding reliability of emails, the accuracy of information, and the identity of the parties who appended their signature whose clear intention was to cancel the contract. The appeal was accordingly confirmed.³⁵⁵

³⁵³ Eiselen, S. (2014) "Fiddling with the ECT Act: electronic signatures" 17 Potchefstroom Law Journal 2814-2815. Para 22 of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd (725/13) [2014] ZASCA t/a Ecowash* available at [www. saflii.org/za/cases/ZASCA/2014/178.html](http://www.saflii.org/za/cases/ZASCA/2014/178.html) (accessed 30 July 2015).

³⁵⁴ Para 24 of *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd (725/13) [2014] ZASCA t/a Ecowash* available at www. saflii.org/za/cases/ZASCA/2014/178.html (accessed 30 July 2015).

³⁵⁵ See id in para 32.

3.2.16 Formation of electronic contracts in the Lesotho Bill

Section 10(1) provides that where an electronic communication is used in the formation of a contract, that contract shall not be denied legal effect, validity or enforceability on the sole ground that an electronic communication was used to make an offer or to accept an offer.

3.2.17 Formation of agreements in the RSA ECT Act

Section 22(1) of the ECT Act provides that an agreement is not without legal force and effect merely because it was concluded partly or in whole by means of data messages.³⁵⁶

The above provisions of the Bill and the ECT Act validate contracts that are electronically entered according to the principles of the law of contract,³⁵⁷ as discussed. It was discussed that an ordinary electronic contract can be concluded through the use of data messages such as an email communication.³⁵⁸ An electronic contract can further be concluded through various means, some of which are contained in the Bill and the ECT Act, as discussed below.

3.2.18 Time of dispatch and receipt of communication in the Lesotho Bill

The time of dispatch of an electronic communication occurs when it enters an information system outside the control of the originator, or of the person who sent the electronic communication on behalf of the originator.³⁵⁹ Where the originator and addressee are in the same information system, dispatch occurs when it is capable of being retrieved by the addressee.³⁶⁰ The time of receipt happens when an electronic communication enters the designated information system,³⁶¹ or when an electronic communication is sent to an information system of the address that is not the designated information system, receipt occurs when the electronic communication is capable of being retrieved by the addressee at that address and the addressee

³⁵⁶ S22 (1) ECT Act.

³⁵⁷ Buys (2004:97).

³⁵⁸ Papadopoulos et al (2012:42); *Council for Scientific and Industrial Research v Fijen* CSIR 1996 (2) SA 379 is the authority that authorised the use of an email communication prior to the enactment of the ECT Act.

³⁵⁹ S12 (1) of the Bill.

³⁶⁰ S12 (2) id.

³⁶¹ S13 (1) id.

becomes aware that the electronic communication has been sent to that address.³⁶² The communication is capable of being retrieved on dispatch or receipt when it reaches the addressee's electronic address.³⁶³

3.2.19 Time of dispatch and receipt of communication in the RSA ECT Act

According to the ECT Act, a data message used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee.³⁶⁴ A data message must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee.³⁶⁵

Section 13(2) of the Lesotho Bill stating that communication is deemed to be capable of being retrieved when it reaches the addressee's electronic address is identical to United Nations Convention on Use of Electronic Communication in International Contracts (CUECIC).³⁶⁶ However, this approach is shown to be cumbersome where the addressee does not have means to retrieve communication even though it would have long entered the information system.³⁶⁷ It is sound to prefer the Model Law's notion of entry that says a data message is dispatched upon entry as opposed to mere reaching of the information system,³⁶⁸ over the requirement that communication should reach an addressee's electronic address. It is felt that Section 13(1) (b) of the Bill, stating that communication would be regarded capable of being retrieved where the information system is undesignated when an addressee becomes aware that it has been sent, share some elements of the information theory as opposed to the reception theory to which the Bill applies, and thus should be removed. Section 23(b)

³⁶² S13 (1) (b) id.

³⁶³ S13 (2) id.

³⁶⁴ S23 (a) ECT Act; Van der Merwe (2008: 163) states that an email, for instance, is deemed to have been sent when the message leaves the server and is transported through the internet where the information systems are different.

³⁶⁵ S23 (b) ECT Act; Stoop (2009: 110 at 118).

³⁶⁶ CUECIC available at www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf (accessed 30 June 2015).

³⁶⁷ Papadopoulos (2010:188 at 200).

³⁶⁸ Pistorius (2002: 129 at 147).

of the ECT Act requiring a complete receipt of a data message has often been criticised of being more stringent than in common law where receipt occurs despite the unintelligibility of the message.³⁶⁹

The ECT Act specifies that dispatch of a data message referred to in section 23(a) is intended for the conclusion or performance of an agreement, while section 23(b) on receipt of data messages, and section 23(c) on place of dispatch and receipt of a data message are silent on the question of the conclusion or performance of a contract, as though the conclusion of a contract applies on dispatch of a data message only.³⁷⁰ The Lesotho Bill makes reference to the time and place of dispatch and receipt of communication, and similarly overlooks the legislature's intention for the provisions to apply on conclusion of a contract. In order to avoid the interpretation difficulties which may be posed by this omission, it is correctly argued that the legislature should expressly state in all the provisions that they are intended to apply in the conclusion of an agreement.³⁷¹

3.2.20 Place of dispatch and receipt of communication in the Lesotho Bill

An electronic communication is deemed to have been dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business,³⁷² or if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction having regard to the circumstances known or contemplated by the parties at any time before or at the conclusion of the contract or if there is no underlying transaction, the principal place of business.³⁷³ If the originator or the addressee does not have a place of business, reference is to be made to that person's habitual place of residence and the usual place of residence, in relation to a body corporate means the place where it is incorporated or otherwise legally constituted.³⁷⁴ Section 14 applies notwithstanding that the place where the information system supporting an electronic address is located may be different from the place

³⁶⁹ Pistorius (2006:178 at 207).

³⁷⁰ Buys (2004:97).

³⁷¹ Buys (2004:98).

³⁷² S14 (1) of the Bill.

³⁷³ S14 (2) of the Bill.

³⁷⁴ S14 (2) (b) (c) id.

where the electronic communication is deemed to be dispatched or deemed to be received.³⁷⁵

3.2.21 Place of dispatch and receipt of communication in the RSA ECT Act

Section 23(c) of the ECT Act provides that a data message must be regarded as having been sent from the originator's usual place of residence or residence and as having been received at the addressee's usual place of business or residence.³⁷⁶

The position in the Bill is akin to the Model Law's provisions on place of receipt and dispatch of communication. The provisions apply whether the information system is located at a different place from where the communication is deemed to be dispatched or received. According to Pistorius, this is because the location of the information system is not the determinant element in order to ensure some reasonable connection between the address and what is deemed to be the place of receipt, so that the originator can readily ascertain that place.³⁷⁷ The ECT Act is not extensive in this regard. The provisions of the Bill are quite in point.

3.2.22 Time of contract formation in the Lesotho Bill

Where parties conclude a contract by means of an electronic communication, such contract is formed at the time when, and the place where the acceptance of the offer becomes effective.³⁷⁸ An offer becomes effective at the time when it is received by the offeree.³⁷⁹ The acceptance of an offer becomes effective at the time when it is received by the offeror.³⁸⁰ This means that the contract is formed at the time when and place where the acceptance of an offer is received.

³⁷⁵ S14 (3) id.

³⁷⁶ S23 (3) of ECT.

³⁷⁷Pistorius (2002:129 at 149); Guiles, D. "You've got mail...or have you?" 3 Internet Law Bulletin 12, in concurrence with Pistorius, contends that the approach that considers receipt of an email when it comes to the attention of the addressee in a case where an information system is undesignated is flawed.

³⁷⁸ S15 (1) of the Bill.

³⁷⁹ S 15(2) id.

³⁸⁰ S15 (3) id.

3.2.23 *Time of contract formation in the RSA ECT Act*

The ECT Act invokes reception theory in section 22 (2) which reads that an agreement is concluded at the time when and place where the acceptance of an offer was received.³⁸¹

Though unpopular in many jurisdictions, a time for contract formation is an apex provision in the realm of electronic contracting. It has been shown that many jurisdictions followed 1996 UNCITRAL Model Law by not inserting a provision for contract formation. The Lesotho Bill has adopted the reception theory for contract formation like the ECT Act. Reception theory maintains that a valid contract is concluded once the offeror receives acceptance regardless of whether the offeror is aware of contents of the response therein.³⁸² Reception theory is a default provision both in the Lesotho Bill and the ECT Act, that is, it only applies when parties have not agreed otherwise, and is said to be inherently neutral in terms of the applicable legal system.³⁸³ In order to secure the parties' compliance, the Lesotho Bill should place reception theory under mandatory provisions as it is more appropriate for electronic transactions because of their instantaneous nature.

3.3 TYPES OF ELECTRONIC CONTRACTS

3.3.1 *Incorporation by reference in the Lesotho Bill and RSA ECT Act*

Section 7(3) of the Lesotho Bill recognises incorporation by reference in contracts by providing that information shall not be denied legal force and effect merely on the ground that it is not contained in an electronic communication purporting to give rise to such legal effect, validity or enforceability, but is merely referred to in such electronic communication.³⁸⁴

Similarly, section 11(2) of the ECT Act provides that information is not without legal force and effect merely on account that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred thereto.

³⁸¹ S 22(2) ECT Act; Van der Merwe, S et al (2007) "Contract: general principles." 3rd ed. 72-75; Van der Merwe 2008: 151).

³⁸² Van der Merwe et al (2008:162).

³⁸³ Pistorius (2006: 178 at 207).

³⁸⁴ S7 (3) of the Bill.

Pistorius explains that with incorporation by reference, it entails that a message may have embedded in it a uniform resource locators (URL) that directs the reader to the target document through hypertext links which is regarded as part and parcel of a data message,³⁸⁵ which is a functional equivalent of ticket cases under common law,³⁸⁶ although in electronic contracts a higher standard is set than in common law that terms must be readily accessible to the customer either electronically or as a printout,³⁸⁷ as it is indicated under the ECT Act.³⁸⁸ Contrary to the Lesotho Bill, section 11(3) of the ECT Act outlines the minimum requirements that an incorporated text must meet in order to be valid. The information must be referred to in a way in which a reasonable person would have noticed the reference and incorporation thereto, accessible in a form in which it may be read, stored and retrieved by the other party whether electronically or as a computer printout as long as it is reasonably capable of being reduced to electronic form by the party incorporating it.³⁸⁹

To this end, it is noted that section 11(3) creates a presumption for an enforceable incorporation in contracts of adhesion because a data message does not refer to the information in the public domain.³⁹⁰ It is expressed that the best practice in drafting incorporation by reference agreements would be to ensure that incorporated text is available through a hyperlink,³⁹¹ to ensure that the customer reads the terms before they are enforced.³⁹² It is submitted that this is a good proviso which the Lesotho Bill should incorporate in order to guard against the loopholes, and to conform to the best international electronic transacting practices. It is concluded that generally, for contracts of adhesion,³⁹³ the intention of parties to be bound can be proved in terms of section 7(2) of the Lesotho Bill and section 24 of the ECT Act on an expression to be bound by other means other than the signature, by performing an indicated step to

³⁸⁵ Pistorius (2004: 568 at 574); Michalson e-commerce 2009 <http://www.michalsons.co.za/blog/e-commerce-getting-the-deal-through-2/4377> (assessed 4 February 2016).

³⁸⁶ Papadopoulos et al (2012: 55); Van der Merwe (2008: 167) expounds that tickets cases relate to a document which is signed by parties which makes reference to the applicability of the included standard terms that are available somewhere such as sales dockets.

³⁸⁷ Van der Merwe et al (2008: 168).

³⁸⁸ S 11(3) ECT Act.

³⁸⁹ S3 (1) id.

³⁹⁰ Rens (2002: 22 at 24).

³⁹¹ Rens (2002: 22 at 24).

³⁹² Papadopoulos et al (2012: 55).

³⁹³ Pistorius (1999: 282 at 291) states that contracts of adhesion dispense with the signature requirement.

consent to be bound by the terms. The argument is based on the submission that failure to apply an electronic signature does not nullify an expression of intent to be bound by a data message.³⁹⁴

3.3.2 *Automated transactions in the Lesotho Bill and RSA ECT Act*

Section 16 of the Bill reads that a contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated messages systems, shall not be denied legal force and effect on the grounds that no natural person reviewed the transactions thereof.³⁹⁵ Section 17 thereof provides that an input error in an automated transaction can be withdrawn provided that the other party is notified as soon as possible, reasonable steps are taken to conform to the instructions and no material benefit has been received from the goods.³⁹⁶

In the ECT Act, an automated transaction agreement is formed under the following circumstances, where one or both parties use an electronic agent to conclude an agreement.³⁹⁷ It is stated that an example of an automated transaction where voice is used is a contract entered into telephonically by a consumer with an automated voice answering machine.³⁹⁸ The party using an electronic agent to conclude the contract is presumed to be bound by the contractual terms,³⁹⁹ a party interacting with an electronic agent is not bound by the terms unless those were capable of being reviewed by a natural person prior to contract formation.⁴⁰⁰ Section 20(d) and (e) of the ECT Act makes provision for the review of an electronic agreement in an automated transaction, and withdrawal in case of mistake where there was no opportunity to correct, and having taken all reasonable steps to comply with instructions as well as notifying the other party as soon as practicable, and having received no material benefit.⁴⁰¹

³⁹⁴ Buys (2004:99).

³⁹⁵ S16 of the Bill.

³⁹⁶ S17 id.

³⁹⁷ S20 (c) ECT Act.

³⁹⁸ The Electronic Communications and Transactions Act

<https://www.wits.ac.za/media/migration/files/telelaw12.pdf> (accessed 5 February 2016).

³⁹⁹ S20 (c) id.

⁴⁰⁰ S20 (a) (b) (c) and (d) id.

⁴⁰¹ S20 (d) and (e) id.

Van der Merwe says this is a common law position regarding mistake providing that a contract will be void until the mistake is corrected.⁴⁰² Glaringly, the Bill has no provision for the review of an automated transaction by a natural person, where the other party uses an electronic agent, prior to contract formation. This standard is considered important for certainty purposes, and should be covered by the Bill. The provision of automated transactions is mandatory under the ECT Act and a default position in law under the Lesotho Bill. The automated processes form an important growing trend.⁴⁰³ In light of this development, it is submitted that the Lesotho Bill should make this provision obligatory, which once engaged into by the parties, should apply as a matter of course, not by parties' choice, in order to ensure compliance in this regard.

3.4 OBSERVATIONS

Informed by this interrogation, it is concluded that the provisions of the Bill and the Act pertaining to the exact time for contract formation are commendable. As it was viewed, the juxtaposition indicated that some of the electronic contracting provisions of the two enactments reflect the Model Law's position on functional equivalence approach in according electronic contracts the same legal recognition as the paper-based contracts. It was further indicated that some electronic transactions provisions of the Bill are similar to those of the ECT Act, while others are different. It is equally true that there are other electronic contracting provisions of the enactments which do not adequately address challenges precipitated by electronic commerce in an online environment, and hence a need for legislative reform. It is in light of the foregoing that the next chapter on conclusions and recommendations attempts to propose how the envisaged Bill may resolve these legal issues.

⁴⁰² Van der Merwe (2008: 159).

⁴⁰³ Buys (2004:97).

CHAPTER 4

4.1 CONCLUSION

The significance of information and communications technology law in the field of e-commerce cannot be overemphasised. The perceived notion of some writers that technology can be just as powerful as law in constraining the digital environment,⁴⁰⁴ is rebutted, in particular, by the application of the Model Law to address legal issues arising in electronic contracts.⁴⁰⁵ It was expressed that the Model Law's legal framework is a tool that guides legislator's to enact electronic transactions legislations with a harmonised undercurrent.⁴⁰⁶

Through the Lesotho Electronic Transactions and Electronic Commerce Bill, Lesotho's jurisdiction seeks to join the countries which promulgated electronic transactions legislations, amongst which is the neighbouring South Africa with the Electronic Transactions and Communications Act 25 of 2002. The comparative study of the Lesotho Bill and the ECT Act highlighted some legal issues for consideration which are occasioned by the provisions of the electronic transactions provisions from both enactments.

4.2 RECOMMENDATIONS

There are some provisions of the Lesotho Bill which warrant comments. These are the sections on the interpretation of the Bill, sphere of application of the Bill, key definitions, default and mandatory provisions, the 'in writing' requirement, receipt of electronic communication and time of contract formation.⁴⁰⁷

4.2.1 Inclusion of electronic wills

The investigation revealed that the Bill excludes electronic wills from the sphere of application. The exclusion of electronic wills is generally not uncommon in many jurisdictions, including in the ECT Act. However, it was evident on examination, that

⁴⁰⁴ Fitzgerald et al (2007:2).

⁴⁰⁵ The UNCITRAL Guide to Enactment available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf (27 March 2015); Papadopoulos (2012:93).

⁴⁰⁶ Van der Merwe (2014: 2804 at 2807).

⁴⁰⁷ As discussed in paras 3.2.15, 3.2.10, 3.2.14, 3.2.17, 3.2.19 and 3.2.23.

electronic wills are documents which comply with common law ‘in writing’ requirement, and can be sanctioned by the use of advanced electronic signature. It is therefore, recommended that electronic wills should be included under the sphere of application of the Bill.

4.2.2 Inclusion and amendment of key definitions

It is recommended that an electronic transaction should be defined to also embody a data component. The terms electronic commerce, electronic agent and an automated transactions are material, and should be covered under the definitions section of the Bill. The legislature should expressly state that dispatch and receipt of data messages is in the conclusion of contract.

4.2.3 Substitution of electronic communication with a data message

It is suggested that the Bill should replace the use of the term an electronic communication in electronic transactions provisions with a data message for two grounds. First, the Bill validates a data message, and not an electronic communication, on that basis, it would be an irregularity to substitute a data message for an electronic communication. Second, an electronic communication is not a synonym of a data message, as a result, the two terms may not be used interchangeably.

4.2.4 The ‘in writing’ requirement under mandatory provisions

It is further suggested that the common law ‘in writing’ requirement which the Bill places under default provisions should be moved to obligatory provisions for the purposes of filling the legal lacunae of the statutory ‘in writing’ formality. Section 8(2) on the writing provision should be struck out for ambiguity. Section 8(1) should be deleted for lack of clarity in so far as it relates to the law attaching consequences where information is not in writing.

4.2.5 Incorporation by reference provision

The legislature may consider setting out a criteria for a valid incorporation in order to ensure compliance with the best international standards for electronic contracts.

4.2.6 Amendment of provisions on the dispatch and receipt of communication

It is recommended that section 13(1) (b) should be deleted where it reads that an addressee should become aware of an electronic communication where an information system is undesignated. This proviso depicts information theory in contrast to the reception theory for contract conclusion introduced by the Bill. Section 13(2) stipulating that where an information system is undesignated, receipt occurs when electronic communication reaches addressee's electronic mail should be amended. The Model Law's concept of entry which states that receipt occurs when the message enters into an information system should also cover the cases where the information system is undesignated.

4.2.7 Corrections on the mandatory provisions

It is proposed that the Bill should insert time of contract formation provision appearing in section 15 under mandatory provisions. It was discussed that however appropriate it may be for online contracts, reception theory may not prove useful under non-mandatory provisions. The Bill may further include automated contracts and input error in sections 16 and 17 under mandatory provisions.

4.3 SUMMARY

As it was mentioned, the Bill is a significant legal framework validating electronic contracts so that they have the same legal standing as paper-based contracts. It is hoped that with some lessons learned from the South Africa's ECT Act and the Model Law's perspective, the Lesotho's jurisdiction shall be ready for the legal issues arising in e-commerce jurisprudence. The development of e-commerce may be set on pace as the Lesotho's jurisdiction continues to remain abreast with the best international practices on electronic contracting.

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