

REGULATING THE FORM AND SUBSTANCE OF ONLINE CONTRACTS: SOUTH AFRICAN AND FOREIGN PERSPECTIVES

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DECLARATION

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ABSTRACT

This dissertation focuses on the procedural and substantive problems which arise in the context of online contracts, i.e. standard form contracts appearing in electronic form. Although standard form contracts are not a new phenomenon, the study identifies certain attributes of online contracts which justify specific consideration of this contracting form. The aims of this dissertation are two-fold: it first determines how online contracting fits into existing legal principles in South African law, and secondly analyses and evaluates this outcome from a comparative perspective.

It is argued that the unique characteristics of online contracts – such as their length and ubiquity – render it more difficult to establish assent to these contracts. This concern has featured prominently in American jurisprudence. Central to this issue is the fact that it is not reasonable for consumers to study online contracts, because the cost of reading (in the form of time spent) outweighs the potential benefit. Consequently, the dissertation analyses the formation of online contracts in the South African context. A comparative evaluation with primarily the American legal system – which draws on case law, the provisions of the Draft Restatement of the Law, Consumer Contracts and criticism by American jurists – is used to assess this outcome. It is found that both legal systems subscribe to fairly lenient formation requirements.

The possibility of recognising more stringent assent-related requirements, such as imposing specific disclosure requirements, is investigated. The conclusion is reached that there is little to be gained by insisting on stricter formation requirements for online contracts in general, because consumers rationally choose not to read these contracts. A possible exception in the form of voluntary, opt-in consent, as recognised in the European General Data Protection Regulation, is examined and found advisable for specific clauses.

It is further argued that, in the South African context, the unexpected terms doctrine can provide important protection to consumers' reasonable expectations, and can encourage suppliers to identify surprising terms and bring them to the attention of consumers. This requires courts to recognise that consumers reasonably decide not

to read online contracts, and that consumers' mistakes about surprising terms in online contracts must almost always be reasonable.

The dissertation further identifies and considers specific substantive problems that are affected by uniquely online risks. These include clauses relating to the use of personal information and consumer-generated content, clauses affected by the ongoing nature of online contracts (such as unilateral variation and unilateral termination clauses) and clauses affected by the global nature of online contracts (such as choice-of-law and choice-of-forum clauses). These clauses are evaluated in the light of current measures of substantive control recognised in South African law. The discussion also includes a consideration of procedural issues which could impact the evaluation of the substantive fairness of terms, such as the inequality of bargaining power and possibility of deception. It is found that current measures are inadequate to ensure proper protection for online consumers. Taking guidance from European law, the dissertation suggests legislative amendments to address these issues.

OPSOMMING

Hierdie proefskrif fokus op die prosedurele en substantiewe probleme wat ontstaan in die konteks van aanlynkontrakte, m.a.w. standaardvorm-kontrakte wat in 'n elektroniese formaat verskyn. Alhoewel standaardvormkontrakte nie 'n nuwe verskynsel is nie, identifiseer die studie sekere eienskappe van aanlynkontrakte wat spesifieke oorweging van hierdie kontraksvorm regverdig. Die doelwitte van hierdie proefskrif is tweeledig: dit bepaal eerstens hoe aanlynkontraktering binne die bestaande beginsels van die Suid-Afrikaanse reg inpas, en ontleed en evalueer tweedens hierdie uitkoms vanuit 'n regsvergelykende perspektief.

Daar word aangevoer dat die unieke eienskappe van aanlynkontrakte – soos hulle lengte en alomteenwoordigheid – dit moeiliker maak vas te stel of 'n verbruiker ingestem het tot kontraksluiting, 'n kwessie wat heelwat aandag in die Amerikaanse regstelsel geniet. Sentraal tot hierdie kwessie is die feit dat dit nie redelik vir verbruikers is om aanlynkontrakte te bestudeer nie, aangesien die koste (in die vorm van tyd spandeer) die potensiële voordeel oorskadu. Gevolglik ontleed die proefskrif die vorming van aanlynkontrakte in die Suid-Afrikaanse konteks. 'n Regsvergelykende studie van hoofsaaklik die Amerikaanse regstelsel – wat steun op regspraak, die bepalinge van die *Draft Restatement of the Law, Consumer Contracts* en kritiek deur Amerikaanse juriste – word gebruik om hierdie uitkoms te evalueer. Daar word bevind dat beide regstelses redelik toegeeflike vormingsvereistes onderskryf.

Die moontlikheid om strengere vormingsvereistes te erken, soos spesifieke openbaarmakingsvereistes, word ondersoek. Daar word aangevoer dat min voordeel te verkry is deur strengere vormingsvereistes vir aanlynkontrakte in die algemeen op te lê, aangesien verbruikers rasioneel kies om nie hierdie kontrakte te lees nie. 'n Moontlike uitsondering in die vorm van vrywillige, “opt-in” toestemming, soos erken in die Europese *General Data Protection Regulation*, word ondersoek en toepaslik bevind vir spesifieke klousules.

Daar word verder aangevoer dat die leerstuk van verrassende bedinge in die Suid-Afrikaanse konteks belangrike beskerming kan verleen aan die redelike verwagtinge van verbruikers, asook verskaffers kan aanmoedig om verrassende bedinge te identifiseer en onder die aandag van verbruikers te bring. Dit vereis dat houe erken

dat verbruikers redelikerwys verkies om nie aanlynkontrakte te lees nie, en dat hulle dwaling oor verrassende bedinge in 'n aanlynkontrak byna altyd redelik moet wees.

Die proefskrif identifiseer en oorweeg verder spesifieke substantiewe probleme wat geraak word deur unieke aanlyn-risikos. Dit sluit in klousules met betrekking tot die gebruik van persoonlike inligting en verbruiker-gegenereerde inhoud, klousules wat deur die deurlopende aard van aanlynkontrakte geraak word (soos klousules wat eensydige wysiging of eensydige kansellasië magtig) en klousules wat deur die globale aard van aanlynkontrakte geaffekteer word (soos klousules wat 'n vreemde regsstelsel of forum aanwys). Hierdie klousules word oorweeg aan die hand van meganismes van substantiewe beheer wat tans in die Suid-Afrikaanse reg erken word. Die bespreking sluit ook 'n oorweging in van prosedurele kwessies, soos ongelyke bedingingsmag en die moontlikheid van misleiding, wat die evaluering van die substantiewe billikheid van bedinge kan beïnvloed. Daar word bevind dat huidige maatreëls onvoldoende is om behoorlike beskerming van aanlynverbruikers te verseker. Statutêre wysigings, hoofsaaklik deur Europese instrumente geïnspireer, word voorgestel om hierdie kwessies aan te spreek.

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Al die eer aan God!

LIST OF ABBREVIATIONS

| | |
|------------------------------------|---|
| <i>Alabama LR</i> | <i>Alabama Law Review</i> |
| <i>Albany LJ of Sci & Tech</i> | <i>Albany Law Journal of Science & Technology</i> |
| <i>Am U LR</i> | <i>American University Law Review</i> |
| <i>Berkeley Tech LJ</i> | <i>Berkley Technology Law Journal</i> |
| BGB | Bürgerliches Gesetzbuch |
| <i>Boston College LR</i> | <i>Boston College Law Review</i> |
| <i>Bus L Int</i> | <i>Business Law International</i> |
| <i>Bus L Today</i> | <i>Business Law Today</i> |
| <i>Bus Lawyer</i> | <i>The Business Lawyer</i> |
| <i>BYU J Pub L</i> | <i>Brigham Young University Journal of Public Law</i> |
| <i>Cal LR</i> | <i>California Law Review</i> |
| <i>Cal W LR</i> | <i>California Western Law Review</i> |
| <i>Cardozo LR</i> | <i>Cardozo Law Review</i> |
| <i>Chicago-Kent LR</i> | <i>Chicago-Kent Law Review</i> |
| CILSA | <i>Comparative and International Law Journal of Southern Africa</i> |
| <i>Clev St LR</i> | <i>Cleveland State Law Review</i> |
| <i>Cornell LR</i> | <i>Cornell Law Review</i> |
| CPA | Consumer Protection Act 68 of 2008 |
| DJ | <i>De Jure</i> |

| | |
|-----------------------------|---|
| Draft Restatement | Draft Restatement of the Law, Consumer Contracts |
| ECTA | Electronic Communications and Transactions Act 25 of 2002 |
| <i>Emory LJ</i> | <i>Emory Law Journal</i> |
| EU | European Union |
| ePrivacy Directive | Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 (Directive on Privacy and Electronic Communications) |
| <i>ERCL</i> | <i>European Review of Contract Law</i> |
| <i>Fordham LR</i> | <i>Fordham Law Review</i> |
| GDPR | Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation) |
| <i>Georgia LR</i> | <i>Georgia Law Review</i> |
| <i>Harv LR</i> | <i>Harvard Law Review</i> |
| <i>Hastings LJ</i> | <i>Hastings Law Journal</i> |
| <i>Houston LR</i> | <i>Houston Law Review</i> |
| <i>J Leg Stud</i> | <i>Journal of Legal Studies</i> |
| <i>JBL</i> | <i>Juta's Business Law</i> |
| <i>Jrslm Rev Legal Stud</i> | <i>Jerusalem Review of Legal Studies</i> |
| LAWSA | Law of South Africa |
| <i>Marq Intell Prop LR</i> | <i>Marquette Intellectual Property Law Review</i> |
| <i>Maryland LR</i> | <i>Maryland Law Review</i> |

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|---------------------------------------|--|
| <i>Mich LR</i> | <i>Michigan Law Review</i> |
| <i>Minn LR</i> | <i>Minnesota Law Review</i> |
| <i>MJSS</i> | <i>Mediterranean Journal of Social Sciences</i> |
| <i>NCA</i> | National Credit Act 34 of 2005 |
| <i>Nebraska LR</i> | <i>Nebraska Law Review</i> |
| <i>Nevada LJ</i> | <i>Nevada Law Journal</i> |
| <i>New Mexico LR</i> | <i>New Mexico Law Review</i> |
| <i>NYU Ann Surv Am L</i> | <i>New York University Annual Survey of American Law</i> |
| <i>NYU LR</i> | <i>New York University Law Review</i> |
| <i>OJLS</i> | <i>Oxford Journal of Legal Studies</i> |
| <i>Oregon LR</i> | <i>Oregon Law Review</i> |
| <i>PELJ</i> | <i>Potchefstroom Electronic Law Journal</i> |
| <i>Penn St LR</i> | <i>Penn State Law Review</i> |
| <i>Pepp LR</i> | <i>Pepperdine Law Review</i> |
| <i>POPI</i> | Protection of Personal Information Act 4 of 2013 |
| <i>Regent U LR</i> | <i>Regent University Law Review</i> |
| <i>Rutgers Computer & Tech LJ</i> | <i>Rutgers Computer and Technology Law Journal</i> |
| <i>Rutgers LR</i> | <i>Rutgers Law Review</i> |
| <i>S Cal LR</i> | <i>Southern California Law Review</i> |
| <i>SA Merc LJ</i> | <i>South African Mercantile Law Journal</i> |
| <i>SALJ</i> | <i>South African Law Journal</i> |

| | |
|--|---|
| <i>Santa Clara High Technology LJ</i> | <i>Santa Clara High Technology Law Journal</i> |
| <i>Shidler J L Com & Tech</i> | <i>Shidler Journal of Law, Commerce and Technology</i> |
| <i>Singapore J Leg Stud</i> | <i>Singapore Journal of Legal Studies</i> |
| <i>Southwestern LR</i> | <i>Southwestern Law Review</i> |
| <i>Stanford LR</i> | <i>Stanford Law Review</i> |
| <i>Stell LR</i> | <i>Stellenbosch Law Review</i> |
| <i>THRHR</i> | <i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law</i> |
| <i>Transactions: Tenn J of Bus Law</i> | <i>Transactions: The Tennessee Journal of Business Law</i> |
| <i>TSAR</i> | <i>Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law</i> |
| <i>U Chi LR</i> | <i>University of Chicago Law Review</i> |
| <i>U Ill LR</i> | <i>University of Illinois Law Review</i> |
| <i>U Pa LR</i> | <i>University of Pennsylvania Law Review</i> |
| <i>UC Davis LR</i> | <i>UC Davis Law Review</i> |
| <i>UCC</i> | <i>Uniform Commercial Code</i> |
| <i>UCLA LR</i> | <i>UCLA Law Review</i> |
| <i>Utah LR</i> | <i>Utah Law Review</i> |
| <i>VDU LR</i> | <i>Vytauto Didžiojo Universitetas Law Review</i> |
| <i>Wash LR</i> | <i>Washington Law Review</i> |
| <i>Wm & Mary Bus LR</i> | <i>William & Mary Business Law Review</i> |

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CHAPTER 1: INTRODUCTION

1 1 Problem identification

Classical contract law is based on the ideal that parties bargain on an equal footing about contractual terms.¹ This idea is fundamental to the principle of *pacta servanda sunt*, namely that contracts which are freely concluded must be adhered to.² In the perfect contracting situation:

“Either party is supposed to look out for his own interests and his own protection. Oppressive bargains can be avoided by careful shopping around. Everyone has complete freedom of choice with regard to his partner in contract, and the privity-of-contract principle respects the exclusiveness of this choice. Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.”³

However, this ideal generally does not reflect the reality, and most legal systems recognise that it is in the public interest that some limitations to the principle of freedom of contract are recognised.⁴ One well-known example where the notion of a negotiated bargain between two equal parties is divorced from reality, is where consumers are faced with standard form contracts.⁵ In these instances, consumers have no real

¹ See for instance M Chen-Wishart "Regulating Unfair Terms" in L Gullifer & S Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 105 107; AE Ghirardelli "Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts" (2015) 98 *Oregon LR* 719 720. In the South African context, see for example D Hutchison "The Nature and Basis of Contract" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 3 25; L Hawthorne "The Principle of Equality in the Law of Contract" (1995) 58 *THRHR* 157 164-166; GTS Eiselen *Die Beheer oor Standaardbedinge: 'n Regsvergelykende Ondersoek* LLD thesis Potchefstroom University (1988) 80.

² *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 874 (A) 767: "die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, [word] in die openbare belang afgedwing".

³ F Kessler "Contracts of Adhesion - Some Thoughts about Freedom of Contract" (1943) 43 *Columbia LR* 629 630 (footnotes omitted).

⁴ E Kahn, C Lewis & C Visser *Contract and Mercantile Law: A Source Book 1 - General Principles of Contract; Agency and Representation* 2 ed (1988) 31.

⁵ See for instance D Wijayasriwardena "Consent in Online Contracts - Mindless or Mindful?" (2016) *Queen Mary University of London, School of Law Legal Studies Research Paper No. 234/2016* 18 (available at <<https://ssrn.com/abstract=2783793>>).

opportunity to influence the terms of the contract⁶ and often do not have the option of obtaining a similar product elsewhere on substantially different terms.⁷

Standard form contracting means that consumers are usually ignorant of the contract terms, which in turn renders the existence of consent problematic. Furthermore, the unequal bargaining power between the drafter of the contract (i.e. the supplier) and the adherent (i.e. the consumer) creates the opportunity for a contract which unfairly favours the drafting party.⁸ It is thus possible to identify two broad categories of problems associated with standard form contracts, namely procedural problems related to their formation and substantive problems related to their content. These problems are, of course, interrelated – an issue that will be addressed in greater detail in a subsequent chapter.⁹

Technological advances have escalated the use of standard form contracts in the online context. Consumers increasingly use the internet for various purposes, including commercial, social and informational reasons, and suppliers have recognised a need to regulate these online interactions through the use of online contracts.¹⁰ The defining difference between online contracts and traditional standard form contracts is that it is presented on a different medium: instead of a more durable medium such as paper, online contracts are presented in electronic form. According to Kim, this change in form “creates seismic shifts in both methods of contracting and the substance of the contract itself.”¹¹

⁶ See EJ Leib & ZJ Eigen "Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead" 2017 *U III LR* 65 98; DD Barnhizer "Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts" (2014) 44 *Southwestern LR* 215 216-217; M Nortje "Of Reliance, Self-Reliance and Caveat Subscriptor" (2012) 129 *SALJ* 132 140; O Ben-Shahar "The Myth of the 'Opportunity to Read' in Contract Law" (2009) 5 *ERCL* 1 2; RA Hillman & JJ Rachlinski "Standard-Form Contracting in the Electronic Age" (2002) 77 *NYU LR* 429 446; Eiselen *Standaardbedinge* 107.

⁷ Most goods and services are provided subject to standard terms, and those terms are often quite similar (see Wijayasriwardena 2016 *Queen Mary University Research Paper* 11, 18).

⁸ GB Bradfield *Christie's Law of Contract* 7ed (2016) 14. Also see ch 4 (4 3 4).

⁹ See ch 4 (4 3).

¹⁰ See the definition of "online contracts" as used in this dissertation in ch 2 (2 2 1).

¹¹ N Kim *Wrap Contracts: Foundations and Ramifications* (2013) 4.

These “seismic shifts” that result from a change in form can be attributed mainly to the fact that online contracting has greatly increased both the number of standard form contracts that face the average consumer,¹² and the general contract length.¹³ A study published in 2008 has indicated that the average American would have to spend 201 hours per year to read the privacy policies of the websites visited by him¹⁴ – a figure which does not even include the other terms and conditions of the various online transactions. Although no similar studies exist with regard to South African consumers, there is no reason to suspect that these figures should be drastically different for the local internet user.

These physical differences have two main effects. First, it is often unreasonable for consumers to read standard form contracts, because

“informing oneself is typically more costly than the expected losses from not informing oneself and the prospect of minimal potential influence proportionally adds to this negative calculus”.¹⁵

Because online contracts are generally lengthier and more ubiquitous than paper-based contracts, it renders reading even more costly.¹⁶ This aggravates the formation problem associated with standard-term contracts, because it not only decreases the likelihood of true consensus being attained, but also plays a role in the determination of whether the supplier could reasonably rely on the existence of consent.¹⁷ The formation problem is further affected by the impact that the electronic nature of these

¹² Kim *Wrap Contracts* 59.

¹³ CB Preston & EW McCann "Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse" (2011) 26 *BYU J Pub L* 1 27. Also see AD Hoffman "From Promise to Form: How Contracting Online Changes Consumers" (2016) 91 *NYU LR* 1595 1604-1605 and JM Moringiello "Notice, Assent, and Form in a 140 Character World" (2014) 44 *Southwestern LR* 275 276, both of whom discuss the increase in the length of online contracts. See also section ch 2 (2 4) for a more detailed analysis on the differences between traditional standard form contracts and online contracts.

¹⁴ AM McDonald & LF Cranor "The Cost of Reading Privacy Policies" (2008) 4 *I/S: A Journal of Law and Policy for the Information Society* 540 562. The time lost will, according to their estimates, result in annual loss to the American economy of about \$781 billion.

¹⁵ S Grundmann "A Modern Standard Contract Terms Law from Reasonable Assent to Enhanced Fairness Control" (2019) 15 *ERCL* 148 167. Also see Ben-Shahar 2009 *ERCL* 6.

¹⁶ See ch 2 (2 4 2).

¹⁷ These aspects are considered in ch 3.

contracts has on consumer perceptions:¹⁸ consumers usually have less transactional awareness when contracting online than when concluding an offline transaction.¹⁹ As such, it can be questioned whether clicking or continued browsing can be construed as acceptance of contractual terms.²⁰

A second consequence of the shift from paper-based to online standard form contracts is that due to their length, online contracts generally contain more terms than traditional standard form contracts and also more onerous terms, because suppliers know that consumers do not read these contracts. This relates to the problem of substance, and it allows online suppliers to insert contractual terms to exploit certain risks that exist in the online environment, for example those related to the use of personal information of consumers.²¹

Consequently, the migration of standard form contracts to the online environment has aggravated both the procedural and substantive problems identified above. The principles which apply in the case of negotiated contracts are often insufficient to address the unique problems encountered in the case of standard form contracts. Similarly, it may not always be sensible to treat standard form contracts encountered online in the same manner as their paper equivalent. Many of the problems which academics have raised in respect of the American approach to online agreements stem from the insistence of the American courts on treating these types of contracts as similar to the paper alternative.²² It has further been argued by American academics that:

“Despite their claims to the contrary, courts *have* created new law. They have instinctively focused their analysis on attaining the result that felt right, and have done so by manoeuvring around existing rules, leaving doctrinal chaos in their wake. They recite law that originates from the paper-based contracting world to this brave new digitally based world when they might be better off acknowledging the difference that contract form and function make to the reasonable expectations of the parties. The problem with adhesion contracts is not that they are nonnegotiable or that they are unlikely to be read; the real

¹⁸ NS Kim “The Wrap Contract Morass” (2014) 44 *Southwestern LR* 309 316; Hoffman 2016 *NYU LR* 1606-1607.

¹⁹ See ch 2 (2 4 3).

²⁰ See ch 3 (3 2 3).

²¹ See ch 4, where these risks are identified and discussed.

²² Barnhizer 2014 *Southwestern LR* 217; Kim *Wrap Contracts* 5, 56; Ghirardelli 2015 *Oregon LR* 733.

problem is that their terms may be unexpected and unfair. Wrap contracts, by their form, permit companies to impose more objectionable terms than paper contracts of adhesion. Judicial adoption of a one-size-fits-all approach to agreements has resulted in companies sneaking into standard contracts terms that are ill-suited to them and unexpected by the nondrafting party.”²³

Disregarding the unique challenges posed by online standard form contracts allows suppliers to exploit the differences to the detriment of consumers²⁴ and can lead to the creation of precedent which is often unreasonably onerous on the consumer, and which may also erode the principles of contract law.²⁵ South African courts have not yet been called upon to consider the issues surrounding online contracts specifically, and have the opportunity to recognise these distinct challenges from the outset, and to address them in a way which optimises efficiency and consumer protection. The overall purpose of the dissertation is to identify these particular challenges relating to online contracts and to suggest a way forward for South African law to deal with them.

1 2 The terminology and limited scope of the dissertation

The term “online contract” is defined later in this dissertation,²⁶ but in short it is used to refer to standard form contracts concluded in electronic form. The focus of this study is mainly on the procedural and substantive issues that can largely be attributed to the non-negotiated nature of these contracts, and it asks whether the South African legal system is equipped to protect consumers against the proliferation of standard form contracts appearing in electronic form.

While the dissertation is largely concerned with issues of form and substance, these aspects are equated with the process of contract formation and the fairness of the eventual bargain respectively. They should not be understood in a similar manner as analyses of form and substance in the law of contract, such as those undertaken in the South African context by Cockrell, whereby

²³ Kim *Wrap Contracts* 125 (emphasis in the original). As explained in ch 2 (2 2 1), “wrap contracts” is the American term generally used to refer to online contracts.

²⁴ Kim *Wrap Contracts* 69.

²⁵ 112.

²⁶ See ch 2 (2 2 1).

“[t]he matters of substance deal with the political morality that underpins the law of contract; [and] the matters of form deal with the manner in which legal doctrines are to be expressed.”²⁷

Although the normative considerations discussed by Cockrell inevitably affect the evaluation of the issues raised in this study (i.e. the value that should be placed on individual consent²⁸ and whether a more rule-based or standard-based response is appropriate),²⁹ these considerations are not the primary focus of this dissertation.³⁰

Generally, the two parties to a standard form contract are the drafter and the adherent. For all practical purposes, the drafter will be the supplier of the goods or services forming the subject of the transaction, whereas the adherent is the consumer thereof. As such, the contracting parties are mostly referred to as the supplier and consumer throughout the dissertation.³¹ It is recognised that not all adherents to online contracts are consumers, especially not as defined in section 1 of the Consumer Protection Act 68 of 2008 (CPA). However, the focus of this dissertation is on the contracting method, rather than on the contracting parties. The question of which class of consumers should enjoy protection when contracting online (in other words, whether this should be limited to natural persons or include certain juristic persons as well) is not addressed. There is a strong argument for not limiting the scope of application of any proposed regulatory measures only to one class of consumers; a large juristic person generally enjoys as little power over the terms of an online contract as a natural person. Furthermore, online suppliers generally do not differentiate between users; a natural person using a website is bound to the same terms as a commercial user. However, the legislative amendments suggested in this dissertation anticipate incorporation in

²⁷ A Cockrell “Substance and Form in the South African Law of Contract” (1992) 109 *SALJ* 40 41.

²⁸ 41-42.

²⁹ 42-43.

³⁰ A similar argument applies to the work of Atiyah and Summers, who engage with the differences between a legal system inclined to formal reasoning (such as the English system) and one which follows a more substantive approach (such as the American system) (see PS Atiyah & RS Summers *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987)).

³¹ For the sake of grammatical convenience and consistency, the male pronoun will be used throughout this dissertation, although naturally this should be understood to include all genders.

existing legislation, and will thus be limited in accordance with the ambit of those instruments.

Although internet transactions potentially give rise to a plethora of legal issues – for example the increased risk of fraud or the right of consumers to return goods not complying with the online advertisement – they mostly fall outside of the ambit of this dissertation. The focus is limited to issues arising specifically from online contracts.

Problems relating to standard form contracts in general are also not addressed. As mentioned above, online contracts (in the sense used in this dissertation) are a specific type of standard form contract and therefore the issues experienced generally with standard form contracts are also reflected in online contracting situations. However, the purpose of this dissertation is to identify and discuss specifically the problematic aspects of online contracts which distinguish them from other types of standard form contracts, and not to provide a detailed analysis of standard form contracts in general. For this reason, provisions of international instruments (such as the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and the Draft Common Frame of Reference) which pertain to standard form contracts in general, but do not specifically consider the online environment, are not analysed.

Furthermore, the purpose of this study is not to investigate the challenges relating to the mechanics of electronic contract conclusion (for example, what type of contracts can be validly concluded online and the time and place of contract conclusion).³² The

³² These issues mainly formed the focus of early South African commentary on electronic contracts. See, for example, P Bagraim "Transacting in Cyberspace" (1998) 6 *JBL* 50; DJ Löt & C Du Plessis "Elektroniese Koopkontrakte: 'n Tegnologiese Hemel of Hel? (Deel 1)" (2004) 37 *DJ* 1; DJ Löt & C Du Plessis "Elektroniese Koopkontrakte: 'n Tegnologiese Hemel of Hel? (Deel 2)" (2004) 37 *DJ* 224; N Helmholtz *Contract Formation and the Internet: An Analysis of Contract Formation in English, South African and German Law with special regard to the Internet* LLM thesis Stell (2002); JMC Johnson *The Legal Consequences of Internet Contracts* LLM thesis UFS (2003) [also published in (2005) 37 *Transactions of the Centre for Business Law* 1]; W Jacobs "The Electronic Communications and Transactions Act: Consumer Protection and Internet Contracts" (2004) 16 *SA Merc LJ* 556 556 n 9; T Pistorius "The Enforceability of Shrink-Wrap Agreements in South Africa" (1993) 5 *SA Merc LJ* 1; T Pistorius "Shrink-wrap and Click-wrap Agreements: Can They be Enforced?" (1999) 7 *JBL* 79; T Pistorius "Formation of internet contracts: an analysis of the contractual and security issues" (1999) 11 *SA Merc LJ* 282.

dissertation is also not intended as a complete overview or analysis of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), and its provisions will only be discussed to the extent that they are relevant to the topics under consideration. Similarly, no attention is given to the strategy on Information and Communications Technology envisioned by the Southern African Development Community (SADC), because no aspects of that strategy pertain to the issues considered in this dissertation.³³

1 3 Purpose of the dissertation, research questions and methodology

Against the backdrop of the general overview of the research problem and core concepts provided above, the aims and significance of this dissertation can be considered more closely.

The regulation of online contracts has received insufficient attention in South African law thus far, especially compared to American jurisprudence. The American experience has shown that mechanisms used to regulate standard term contracts in general, although helpful, are not capable of addressing the specific issues that arise when concluding online contracts.³⁴ It has been averred that “[m]odern life ... would break down if we treated [online] contracts just like other contracts.”³⁵

The study argues that online contracts pose problems that do not occur in the same manner in contracts presented in another format, and that solutions should be found which cater specifically for the online environment. It further argues that the principles which presently exist in our law of contract do not in their current format provide a solution which addresses these unique problems, and that it is necessary to create rules tailor-made for contracts concluded online.

Because of the lack of South African jurisprudence in this regard, it is expected that South African courts, when faced with these issues, will regard it as beneficial to

³³ See SADC “Information and Communication” (date unknown) *Southern African Development Community* <www.sadc.int/issues/information-communication/> (accessed 7-11-2019).

³⁴ For an overview of the academic debate regarding formation of online contracts, see ch 3 (3 5 3 3). For an overview of American measures relating to control over substantively unfair contract terms, see ch 4 (4 5).

³⁵ Kim *Wrap Contracts* 213.

consider foreign law for guidance. It is logical to take such guidance from jurisdictions that have influenced our consumer protection legislation and that have extensive experience in dealing with the issue of online contracts. Arguably, the two jurisdictions which best fit that description are the United States of America, particularly because the issue of online contracts has received considerable attention from American jurists, and the European Union (EU), because of the European Council's pro-active approach with regard to legislative instruments addressing online issues.

The aims of this dissertation are thus two-fold: it first determines how online contracting fits into existing legal principles in the South African law, and secondly analyses this outcome from a comparative perspective. This analysis informs the suggestions made to reform the law in order to improve both the quality of consent and to ensure greater substantive fairness in online contracts.

The following methodology will be utilised to identify and address the issues arising from online contracts, and also serve as the focal points of the chapters of this dissertation. The dissertation will commence with a general overview of standard form contracts and online contracts, focusing *inter alia* on how online contracts differ from traditional standard form contracts and broadly identifying the main problems experienced with these non-negotiated contracts.³⁶ This will be done by considering the factual circumstances surrounding online contracts, as well as problems which have been identified either through case law in other jurisdictions or by academics.

Thereafter, the two specific main problems with online contracts, namely their formation (the procedural dimension)³⁷ and their content (the substantive dimension),³⁸ will be considered in more detail. These problems will be analysed within the framework of current South African law, and a comparative study will also be undertaken to determine how the selected jurisdictions approach these issues. This will inform an evaluation of the South African approach undertaken in respect of each problem, which serves to identify shortcomings in our system. Attention will also be

³⁶ Ch 2.

³⁷ Ch 3.

³⁸ Ch 4.

paid to the interaction between procedural and substantive issues in the context of online contracts.

Finally, possible solutions are identified and analysed to determine whether they truly address the problems identified, and whether they are practically feasible in the South African context.³⁹ Legislative amendments will also be suggested to address specific issues identified in the previous chapters.

³⁹ Ch 5.

CHAPTER 2: A GENERAL OVERVIEW OF THE MEANING AND CHARACTERISTICS OF ONLINE CONTRACTS

2 1 Introduction

Online contracts – such as the terms and conditions of websites or the privacy policies of online suppliers – are rarely negotiated. Thus, virtually all online contracts are standard form contracts, which are presented to consumers on a take-it-or-leave-it basis.¹ Standard form contracts have formed an essential part of commercial practice for a long time and are used in billions of transactions every year:² it was estimated in 1971 that 99 per cent of written contracts in the United States were standard form contracts.³ Although this might be an overestimation,⁴ there is little doubt that they are widely used.⁵ Also in South Africa, it is estimated that more than 90 percent of all contracts are concluded in this manner.⁶ Most consumers daily encounter multiple contracts pre-drafted by suppliers,⁷ while few conclude written negotiated contracts.

Yet, standard form contracts have remained controversial, mainly due to the general absence of consensus and the fact that they are open to abuse by the drafting party.⁸ The problems created by these contracts have been exacerbated in the modern technological era, with the rise of electronic and online contract conclusion.⁹ Despite

¹ K Hopkins "Standard-Form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice Versus Natural Justice" 2003 *TSAR* 150 154.

² Y Bakos, F Marotta-Wurgler & DR Trossen "Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts" (2014) 43 *J Leg Stud* 1 1.

³ WD Slawson "Standard Form Contracts and Democratic Control of Lawmaking Power" (1971) 84 *Harv LR* 529 529.

⁴ See TD Rakoff "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 *Harv LR* 1173 1189n57.

⁵ See GB Bradfield *Christie's Law of Contract* 7ed (2016) 210; M Chen-Wishart "Regulating Unfair Terms" in L Gullifer & S Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 105 105; RA Hillman & JJ Rachlinski "Standard-Form Contracting in the Electronic Age" (2002) 77 *NYU LR* 429 431.

⁶ See D Hutchison "The Nature and Basis of Contract" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 3 25.

⁷ Hillman & Rachlinski 2002 *NYU LR* 435.

⁸ Hutchison "Nature and Basis of Contract" in *Law of Contract* 26; P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 20; Hopkins 2003 *TSAR* 153.

⁹ Studies from 2013 indicate a marked increase in online transactions in the United Kingdom – 72 per cent of adults in the United Kingdom purchased goods or services online (D Wijayasriwardena

many similarities between traditional paper-based standard form contracts and their electronic counterparts, legal scholars have identified various differences between these two forms of non-negotiated contracts.¹⁰ These differences have led to a debate whether the rules governing paper-based¹¹ standard form contracts are sufficient to regulate online standard form contracts.¹²

Certain academics, such as Kim, feel strongly that:

“Although [online] contracts and paper adhesive contracts share many of the same problems pertaining to assent and bargaining power, [online] contracts are unique due to their form and the issues created by form.”¹³

Consequently, she is very critical of the fact that “courts apply doctrinal rules without considering the impact of the electronic form on the behaviour of the parties”.¹⁴

Other jurists consider “the common law of contracts ... sufficiently malleable to address the problems arising out of [modern technologies]”,¹⁵ although they admit there might

"Consent in Online Contracts - Mindless or Mindful?" (2016) *Queen Mary University of London, School of Law Legal Studies Research Paper No. 234/2016* 3 (available at <<https://ssrn.com/abstract=2783793>>)). Also see Chen-Wishart "Unfair Terms" in *Contract and Commercial Law* 109; E Mik "Contracts Governing the Use of Websites" (2016) *Singapore J Leg Stud* 70 74.

¹⁰ See 2 4 below.

¹¹ Traditional standard form contracts are not limited to terms printed on paper, and could appear on all sorts of surfaces, e.g. plastic or metal display signs. The phrase “paper-based” is therefore used to cover various physical means of presenting standard terms, but excludes terms appearing electronically.

¹² Compare, for example, N Kim *Wrap Contracts: Foundations and Ramifications* (2013) with JM Moringiello & WL Reynolds "From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting" (2013) *72 Maryland LR* 452.

¹³ NS Kim "Situational Duress and the Aberrance of Electronic Contracts" (2014) *89 Chicago-Kent LR* 265 316.

¹⁴ 266.

¹⁵ Moringiello & Reynolds 2013 *Maryland LR* 456. Also see E Mik "The Unimportance of Being 'Electronic' or – Popular Misconceptions About 'Internet Contracting'" (2011) *International Journal of Law and Information Technology* 324 346: “The new transacting environment frequently exacerbates pre-existing difficulties, but it does not necessarily *create* them ... This does not imply, however, that new, technology-specific principles are necessary or that legal problems need technological solutions.”

be a few exceptions requiring regulation.¹⁶ American courts especially continue to maintain that:

“While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”¹⁷

In order to address this vital issue, this chapter will provide an overview of the following aspects: (i) the definition and development of online contracts;¹⁸ (ii) the definition, benefits and problems with standard form contracts;¹⁹ and (iii) the differences between traditional standard form and online standard form contracts.²⁰

2 2 Overview of online contracts

2 2 1 Definition of online contracts

The primary focus of this dissertation is online contracts. There is no universally accepted definition of the term, but it is used in this dissertation to refer to a non-negotiated or standard form contract²¹ which a supplier presents to a consumer in electronic form and by using the internet, for example on its website or through a mobile application.²² A more accurate description would therefore be “online standard form contracts”, but for convenience the briefer term “online contracts” will be used. There are thus two criteria for classifying a contract as an online contract as the term is used in this dissertation: (i) it only refers to contracts which are not negotiated between the parties (the “standard form” part of the definition); and (ii) the contractual terms must appear electronically and be accessible through use of the internet (the “online” part of the definition).

¹⁶ Moringiello & Reynolds 2013 *Maryland LR* 456.

¹⁷ *Register.com v Verio Inc* 356 F 3d 393 (2nd Cir 2004) 403.

¹⁸ At 2 2.

¹⁹ At 2 3.

²⁰ At 2 4.

²¹ See 2 3 1 below for a definition of standard form contracts.

²² For use of the term “online contract” in this context, see CB Preston “‘Please Note: You Have Waived Everything’: Can Notice Redeem Online Contracts?” (2015) 64 *Am ULR* 535 537 (“[c]onsumer online adherence contracts”); AE Ghirardelli “Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts” (2015) 98 *Oregon LR* 719 722; *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 388 (“online contracts of adherence”).

The term “online contract” in this context closely resembles the American phrase of “wrap contracts”. The exact definition of wrap contracts is not always clear, but Kim defines it as standard form contracts presented to the consumer “in a non-traditional format.”²³ She further defines a non-traditional format as:

“[A] contracting form [that] wasn’t commonly used prior to 1980 and [which] includes electronic media and offline mediums. The single common characteristic is that the adhering party does not have to use a pen in order to accept the terms.”²⁴

Presumably, the date she uses refers to the time when the use of computers started to become widespread. However, it is unclear which other non-electronic mediums she is referring to. The definition is also problematic, because it creates the impression that all paper-based standard form contracts require signature – a proposition which disregards the multitude of paper-based standard form contracts not requiring a pen for assent, for example terms printed on the back of tickets.

From the discussion below,²⁵ as well as its use in case law²⁶ and academically,²⁷ it appears that the phrase “wrap contracts” is mostly reserved for standard form contracts appearing on websites, similar to the foregoing definition of online contracts. The exception is shrink-wraps which, as is explained below, are printed standard terms which traditionally accompany computer software sold to a consumer.²⁸ They are usually enclosed underneath the plastic wrap used to seal the box containing the software,²⁹ and it is this practice that gave rise to the admittedly rather confusing “wrap” terminology.³⁰

²³ Kim *Wrap Contracts* 2: “This book uses ‘wrap contract’ as a blanket term to refer to a unilaterally imposed set of terms which the drafter purports to be legally binding and which is presented to the nondrafting party in a nontraditional format.”

²⁴ 2-3

²⁵ See 2 2 1 1 and 2 2 2 1 below.

²⁶ See, for example, *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 395; *Register.com v Verio Inc* 356 F 3d 393 (2nd Cir 2004) 428-429.

²⁷ See, for example, E Canino “The Electronic ‘Sign-in-Wrap’ Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability” (2016) 50 *UC Davis LR* 535 539.

²⁸ See 2 2 2 1 below.

²⁹ *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996) 1449; B Goodman “Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract” (1999) 21 *Cardozo LR* 319 319-320, 333.

³⁰ Goodman 1999 *Cardozo LR* 319-320.

2 2 1 1 Different forms of online contracts

Online contracts can be presented to consumers in various ways, but they mainly take one of two forms.³¹ The first is where the consumer is required to click “I agree” or indicate consent to the terms in a similarly positive manner, usually before he can proceed with the online transaction or gain access to a website. These types of online contracts are called click-wraps.³² They have also been referred to as click-through contracts.³³ The term has been used to cover various situations requiring an affirmative click by the consumer, for example cases where the electronic terms are presented to the consumer after the transaction has been completed. This will include for instance a scenario where software is purchased or downloaded and a click-wrap appears before the product can be installed. The term is also sometimes used to refer to some of the hybrid forms of wrap contracts identified below, including situations where the user for example clicks to download a file or to create an account, and thereby also accepts terms displayed by way of a hyperlink (i.e. a so-called sign-in wrap).³⁴ As discussed below, to avoid unnecessary confusion, it is suggested that the phrase “click-wrap” should only apply where the icon the consumer is required to click on to indicate acceptance serves the sole purpose of indicating contractual consent.

The second main type of online contracts, referred to as browse-wraps (or less frequently web-wraps³⁵ or click-free contracts³⁶), do not require any positive act by the consumer indicating affirmation and purport to become binding when the consumer

³¹ Hillman & Rachlinski 2002 *NYU LR* 464; JM Moringiello “Notice, Assent, and Form in a 140 Character World” (2014) 44 *Southwestern LR* 275 280. Also see *Nguyen v Barnes & Noble Inc* 763 F 3d 1171 (9th Cir 2014) 1175-1176.

³² Kim *Wrap Contracts* 3; I Ayres & A Schwartz “The No Reading Problem in Consumer Contract Law” (2014) 66 *Stanford LR* 545 549n14; Bakos et al 2014 *J Leg Stud* 12; CB Preston & EW McCann “Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse” (2011) 26 *BYU J Pub L* 1 17; Goodman 1999 *Cardozo LR* 334; Mik 2016 *Singapore J Leg Stud* 73; Moringiello 2014 *Southwestern LR* 280.

³³ CL Kunz, JE Ottaviani, ED Ziff, JM Moringiello, KM Porter & JC Debrow “Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements” (2003) 59 *Bus Lawyer* 279 279.

³⁴ See n 43 below.

³⁵ T Pistorius “Click-Wrap and Web-Wrap Agreements” (2004) 16 *SA Merc LJ* 568 570; PGJ Koornhof “The Enforceability of Incorporated Terms in Electronic Agreements” (2012) *Speculum Juris* 41 45.

³⁶ Kunz et al 2003 *Bus Lawyer* 279.

performs the action specified in the contract, usually by browsing the website.³⁷ The terms are normally contained in a hyperlink somewhere on the webpage of the supplier, and the consumer is thus required to click on the hyperlink in order to access its terms.³⁸ It is possible for the consumer to continue browsing the website and using the supplier's services without accessing the terms of the browse-wrap contract.³⁹

As mentioned above, click-wraps and browse-wraps are the two main forms of online contracts, but various hybrid forms have developed.⁴⁰ These include scroll-wraps, multi-wraps and sign-in wraps. Scroll-wraps are similar to click-wraps in the sense that the consumer also has to click to indicate consent to the terms, but the webpage requires the consumer to scroll through the entire agreement before consent can be given.⁴¹ Arguably, requiring the consumer to scroll through the terms improves the quality of assent.⁴² Multi-wrap contracts also require the consumer to indicate acceptance by clicking on an "I agree" or similar icon, but the terms are contained in a hyperlink next to the icon, and thus not immediately visible like with a click-wrap.⁴³ Although very similar to multi-wraps, sign-in wraps are contracts where the consumer indicates agreement to terms contained in a hyperlink when registering an online account or signing up for a website service by clicking, for example, a "sign up" or "create account" icon.⁴⁴ Because all these require an affirmative click, they are often classed with click-wraps.⁴⁵ This is less problematic when dealing with scroll-wraps or

³⁷ *Fteja v Facebook Inc* 841 F Supp 2d 829 (SDNY 2012) 837. Also see Preston & McCann 2011 *BYU J Pub L* 18; Wijayasriwardena 2016 *Queen Mary University Research Paper* 12; Mik 2016 *Singapore J Leg Stud* 73; Moringiello 2014 *Southwestern LR* 280.

³⁸ Kim *Wrap Contracts* 3; Ghirardelli 2015 *Oregon LR* 719 728; *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 383.

³⁹ Ghirardelli 2015 *Oregon LR* 729.

⁴⁰ See *Vernon v Qwest Communications International Inc* 925 F Supp 2d 1185 (D Colo 2013) 1149.

⁴¹ *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 395; Canino 2016 *UC Davis LR* 540.

⁴² Canino 2016 *UC Davis LR* 540.

⁴³ NS Kim "Wrap Contracting and the Online Environment: Causes and Cures" in JA Rothchild (ed) *Research Handbook on Electronic Commerce Law* (2016) 11 25; Moringiello 2014 *Southwestern LR* 280.

⁴⁴ *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 366, 395, 399; *Fteja v Facebook Inc* 841 F Supp 2d 829 (SDNY 2012) (recognising this as a hybrid form, although not specifically using the term sign-in wrap); U Benoliel & SI Becher "The Duty to Read the Unreadable" (2019) 60 *Boston College LR* (Forthcoming) (available at <<https://ssrn.com/abstract=3313837>>) 10; Kim "Wrap Contracting" in *Electronic Commerce Law* 29.

⁴⁵ See *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 398.

multi-wraps, where the icon used to signify assent serves the sole purpose of indicating acceptance. However, in the case of sign-in wraps it might lead to courts overlooking the ambiguity of the click: it can be argued that the consumer intends to sign up for a service, instead of his intention being to accept an online contract.⁴⁶

The categories mentioned above distinguish online contracts based on the manner of presentation of the terms. However, online contracts are not only presented in different forms, but they also serve different functions and, although this is done less frequently, a distinction can also be drawn based on the functions of a particular online contract. There are two main categories: contracts that regulate the use of a website and those that pertain to transactions such as the sale of goods, services or a licence to use intellectual property.⁴⁷ In the online environment, this distinction is not always so evident, especially where the use of the website is the service that is sold (for example social networking sites like Facebook or Twitter). However, this confusion can be circumvented to a certain extent by limiting the second category to transactions for which payment in money is required, and thus to interactions that the average consumer will view as something which is transactional in nature.⁴⁸

The distinction between these two types of contracts based on function becomes relevant when one considers consumer perception and whether the reasonable consumer would have expected to conclude a contract in the circumstances, as discussed below.⁴⁹

2 2 1 2 Advantages attached to the categorisation of online contracts based on manner of presentation

The distinction between click-wraps, browse-wraps and various other forms of wrap-contracts is based solely on the way in which these online contracts are presented to the consumer. This distinction may be useful, since different forms of presentation could have an impact on consumer perception, and consequently on the quality of the consumer's consent. For example, consumers are more likely to ignore browse-

⁴⁶ Benoliel & Becher 2019 *Boston College LR* 10-11.

⁴⁷ Mik 2016 *Singapore J Leg Stud* 73; Mik 2011 *International Journal of Law and Information Technology* 336.

⁴⁸ Also see 2 4 3 below for a discussion regarding the absence of monetary payment.

⁴⁹ See 2 4 3 below.

wraps,⁵⁰ which makes consensus even more problematic when dealing with this form of online contract.⁵¹

Labelling an online contract according to the way in which it appears on the website provides a convenient mechanism to classify the contract according to the likely degree of consumer awareness. This can serve as an explanation of why certain online contracts may be regarded as enforceable, and help suppliers to know how they should present terms to consumers to ensure enforceability.

2 2 1 3 *Disadvantages attached to the categorisation of online contracts based on manner of presentation*

Despite the possible practical value of creating classes of online contracts, it can be problematic to force constantly evolving online contracts into a limited number of pre-labelled categories, and cause courts to become too entangled in their classification. Two possible pitfalls are inherent in such an approach.

The first risk is that courts might fail to recognise a new type of online contract, and attempt to place it into a pre-existing category, despite possible distinguishing features. For example, American courts sometimes fail to distinguish multi-wraps or sign-in wraps from click-wraps,⁵² instead struggling to classify terms containing elements of both click- and browse-wraps.⁵³ This leads to inconsistent judgments and legal uncertainty.⁵⁴ The lines between the different types of online contracts can also get blurred: for example, if the consumer clicks on a download icon, but the words “Please review and agree to the terms before downloading and using software” appears above or below that icon.⁵⁵ In those cases, it can either be classified as a click-wrap (if the

⁵⁰ Hillman & Rachlinski 2002 *NYU LR* 493.

⁵¹ 464.

⁵² *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 399.

⁵³ Moringiello 2014 *Southwestern LR* 280, with reference to *Fteja v Facebook Inc* 841 F Supp 2d 829 (SDNY 2012) 838. Also see the court’s difficulty in classifying the terms in *DeVries v Experian Info. Sols. Inc.* 2017 U.S. Dist. LEXIS 26471.

⁵⁴ See H Daiza “Wrap Contracts: How They Can Work Better for Businesses and Consumers” (2018) 54 *Cal WLR* 202 218: “specific nuances distinguish one case from another, making it difficult to know whether a given contract will be enforceable”.

⁵⁵ These were the facts in *Specht v Netscape Communications Corp* 150 F Supp 2d 585 (SDNY 2001).

court construes the download icon as an indication of assent) or a browse-wrap (if the court follows a different construction).⁵⁶

A second risk created by a system of classification by means of presentation is that the enforceability of an online contract could depend too much on the category in which it falls and too little on its true mode of presentation.⁵⁷ Different contracts within the same category can contain different features, which could also affect their enforceability. This was recognised by an American court in *Register.com v Verio Inc.*⁵⁸ In discussing two different cases, both concerning browse-wrap contracts, the court pointed out that the crucial difference between the cases⁵⁹ was that only in the one instance did sufficient evidence exist that the consumer was made aware of the contractual terms.⁶⁰ Despite the fact that the consumer did not have to click to indicate consent, the court said that in circumstances where the consumer was aware of the terms of the transaction, “we see no reason why the enforceability of the offeror’s terms should depend on whether the taker states (or clicks), ‘I agree’.”⁶¹ As stated by Moringiello and Reynolds:

“In the world of electronic contracts ... clickwrap is a meaningless term. Click-to-agree transactions come in many flavors. Sometimes the click is at the end of the terms so that a reader must at least scroll through to reach the ‘I agree’ icon, while [at] other times the click is next to a hyperlink that leads to the terms, either in one click or in several. Whether the terms are classified as clickwrap says little about whether the offeree had notice of them.”⁶²

These risks related to an overreliance on classification of different type of online contracts should not be ignored, especially when considering whether different rules

⁵⁶ The second construction is the one followed in *Specht v Netscape Communications Corp* 150 F Supp 2d 585 (SDNY 2001) 588: “Visitors are not required to affirmatively indicate their assent to the License Agreement”.

⁵⁷ Mik 2016 *Singapore J Leg Stud* 74: “arguments ... hinge on a single design feature – that of an additional click.”

⁵⁸ 356 F 3d 393 (2nd Cir 2004).

⁵⁹ The cases discussed by the court are *Ticketmaster Corp v Tickets.com Inc* 2000 WL 1887522 (CD Cal 2000) and *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002).

⁶⁰ *Register.com v Verio Inc* 356 F 3d 393 (2nd Cir 2004) 403.

⁶¹ 403.

⁶² 2013 *Maryland LR* 466. This extract is also referred to in *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 399.

should be applied depending on the category of online contract, or whether a more flexible approach is advisable.

2 2 1 4 Concluding remarks regarding the categorisation of online contracts

In the case of paper-based standard form contracts, a distinction is drawn between signed and unsigned contracts. In a similar manner, it could make sense to distinguish between online contracts where a consumer had to specifically indicate consent and online contracts where no such indication was required. However, this cannot be the sole consideration on which the quality of consent, and thus the enforceability of the contract, rests.

The classification of online contracts in terms of various categories can therefore be a useful tool, and the terminology will be used in this dissertation where a specific form of online contract is discussed. However, other factors could also influence the enforceability of these contracts, such as the way in which features of the transaction are advertised and the nature of the terms contained therein. These will be discussed in the following chapters.⁶³

2 2 2 The judicial approach to online contracts: a brief comparative perspective

As previously mentioned, online contracts have not formed the subject of notable judicial inquiry in South Africa. The discussion regarding the development of online contracts will therefore mainly focus on the American experience. However, despite the lack of relevant case law in South Africa, a short overview will be provided of legislation and academic opinion pertaining to online contracts in South Africa. A brief overview of the European approach will also be provided.

2 2 2 1 The development and enforcement of online contracts in America

The development of the American approach to the enforcement of online contracts can be traced back to the treatment of shrink-wrap contracts in this jurisdiction.⁶⁴ Although these are not online contracts, because they are printed on paper, the approach

⁶³ Specifically ch 3 (for example, see 3 5 3 1 for some website design features which played a role in American decisions regarding the enforceability of online contracts).

⁶⁴ See the definition in 2 2 1 above.

adopted by American courts to this type of contract was fundamental to the development of the doctrine applicable to online contracts.

Shrink-wraps made their appearance when suppliers in the software industry needed a way to protect their intellectual property in their products. Intellectual property law failed to develop rapidly enough to provide the necessary protection for developers of these new products.⁶⁵ Due to the ease with which software programs can be copied, it was found to be commercially necessary to impose certain restrictions on the use, reproduction, transfer and modification of software programs by providing that the purchaser does not become the owner of the software, but merely a licensee.⁶⁶ This was done by enclosing terms in the outer packaging of the product, and providing that they become binding when the product is opened.

Because shrink-wraps are included underneath the outer packaging of the product, their terms can only be accessed when the product is opened by the consumer.⁶⁷ By their very nature, they allow no negotiation between the parties.⁶⁸ They thus enable suppliers of computer software to impose standard terms and conditions on a “take-it-or-leave-it” basis, since the consumer’s only option is to accept the product with the terms as they are, or to return the product (where he is given that option).⁶⁹

Because this method means that consumers are only presented with the standard terms drafted by the supplier after the time of contract conclusion, it was argued that the terms of the contract did not form part of the bargained-for-exchange.⁷⁰ For this reason, American courts initially refused to enforce these terms.⁷¹ However, in *ProCD Inc v Zeidenberg*⁷² (“*ProCD*”) Judge Easterbrook introduced a new approach.⁷³ To understand the reasoning in that case, a brief discussion of the facts is required.

⁶⁵ Goodman 1999 *Cardozo LR* 335; Kim “Wrap Contracting” in *Electronic Commerce Law* 13.

⁶⁶ Goodman 1999 *Cardozo LR* 332.

⁶⁷ See 2 2 1 1 above.

⁶⁸ Goodman 1999 *Cardozo LR* 320.

⁶⁹ 320.

⁷⁰ Ghirardelli 2015 *Oregon LR* 724; Goodman 1999 *Cardozo LR* 337.

⁷¹ Ghirardelli 2015 *Oregon LR* 724; Goodman 1999 *Cardozo LR* 337; Kim “Wrap Contracting” in *Electronic Commerce Law* 14.

⁷² 86 F 3d 1447 (7th Cir 1996).

⁷³ Ghirardelli 2015 *Oregon LR* 725; Goodman 1999 *Cardozo LR* 344.

In *ProCD*, the plaintiff compiled a database with contact information obtained from thousands of directories.⁷⁴ This information was put on CD-ROM disks and sold to customers. The plaintiff charged a higher price for commercial users and offered the product at a reduced price to consumers purchasing it for personal use.⁷⁵ Because the plaintiff was unable to distinguish between the two types of users at the point of sale, it used an end user licence, encoded on the CD-ROM disks and printed in the manual, to restrict the use of the product.⁷⁶ The box contained a warning that the software was subject to an enclosed licence, but the content of the contract could only be accessed when the box was opened.⁷⁷

The defendant purchased the software as a private consumer for the reduced price, but, contrary to the conditions of the shrink-wrap contract, he resold the information over the internet.⁷⁸ The question before the court was whether a contract can be enforced if the consumer was unable to access its terms before conclusion of the transaction.

The district court refused to enforce the terms, holding that the defendant could not have agreed to hidden terms.⁷⁹ This finding was overturned on appeal. The Court of Appeal focused largely on the economic rationale behind the limitation,⁸⁰ as well as on the practical restrictions to providing the terms before completion of the transaction.⁸¹ It was determined that all that is required for enforcement of the terms of the shrink-wrap to be procedurally fair is:

“Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable”.⁸²

Although many viewed the court’s decision in *ProCD* as based on the particular facts of that case, its applicability was extended shortly thereafter by the same judge in *Hill*

⁷⁴ *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996) 1449.

⁷⁵ 1449.

⁷⁶ 1450.

⁷⁷ 1450.

⁷⁸ 1450.

⁷⁹ 1450.

⁸⁰ 1449-1450.

⁸¹ 15451-1452.

⁸² 1451.

*v Gateway2000 Inc*⁸³ (“*Hill*”). It was made clear that the reasoning in *ProCD* applied to the law of contract in general, and was not limited to specific transactions relating to software.⁸⁴ In the *Hill* case, the consumers disputed the enforceability of an arbitration clause contained in a shrink-wrap contract relating to the sale of a computer which accompanied that computer. The terms of the shrink-wrap stipulated that if the consumer does not consent to their application, the computer must be returned within 30 days, which the plaintiffs failed to do.⁸⁵ Despite the argument by the plaintiffs that the disputed arbitration clause was not noticeable and that *ProCD* should not apply, the terms were found to be enforceable.⁸⁶ One reason for the court’s finding was that it would be impractical to expect the supplier to recite the entire contract over the phone, because most buyers would end the call and thus terminate the sale.⁸⁷ The judge acknowledged that shipping costs could be a deterrent to return of the product once received, but stated that the consumers were aware that some terms would be included, and failed to take steps to discover these beforehand.⁸⁸

This decision stirred a great amount of controversy, and it has been described as “the most criticized contracts case of the last twenty-five years.”⁸⁹ The decision to enforce shrink-wrap contracts was clearly motivated by economic rather than legal considerations, and was done “to assist software manufacturing businesses by endorsing a pro-business approach to shrink-wrap contracts.”⁹⁰ Although the finding in *ProCD* was perhaps the correct one on the facts of that case,⁹¹ taking into account the fact that the consumer was a sophisticated businessman and the particular condition served an important economic function,⁹² it created a precedent which

⁸³ 150 F 3d 1147 (7th Cir 1997).

⁸⁴ Kim “Wrap Contracting” in *Electronic Commerce Law* 15. Also see *Hill v Gateway2000 Inc* 150 F 3d 1147 (7th Cir 1997) 1148.

⁸⁵ *Hill v Gateway2000 Inc* 150 F 3d 1147 (7th Cir 1997) 1148.

⁸⁶ 1149.

⁸⁷ 1149.

⁸⁸ 1150.

⁸⁹ DA Hoffman “From Promise to Form: How Contracting Online Changes Consumers” (2016) 91 *NYU LR* 1595 1603. Also see Goodman 1999 *Cardozo LR* 352; RC Bern “‘Terms Later’ Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding” (2004) 12 *Journal of Law and Policy* 641-796.

⁹⁰ Ghirardelli 2015 *Oregon LR* 726.

⁹¹ Goodman 1999 *Cardozo LR* 359.

⁹² 352.

caused “a substantial shift in power away from the consumer to the computer software publishers who already occupy the position of superior bargaining power.”⁹³ The new approach allowed suppliers to bind consumers to terms presented to them only after completion of the transaction,⁹⁴ and further endorsed the idea that consumers can consent to contractual terms through their conduct, even where they are unaware that the specific act would indicate assent.⁹⁵

This development indirectly contributed to the acknowledgement of both click-wrap and browse-wrap contracts.⁹⁶ Click-wrap contracts were initially introduced as digital shrink-wraps⁹⁷ – i.e. they were loaded on the disk containing software, and the consumer had to agree to the terms when using the disk for the first time.⁹⁸ When the internet became more commonly used, click-wraps migrated to the online environment and required consumers to agree to terms before continuing with an online activity.⁹⁹

Modern click-wraps therefore fundamentally differ from shrink-wraps, because the consumer can review the terms prior to agreement and has to give an indication of assent.¹⁰⁰ Due to this, click-wraps are generally regarded as enforceable by American courts.¹⁰¹ Authority for this is often found in Article 2-204 of the Uniform Commercial Code, which provides that a contract for the sale of goods can be formed “in any

⁹³ 344.

⁹⁴ Ghirardelli 2015 *Oregon LR* 727.

⁹⁵ 727.

⁹⁶ Ghirardelli 2015 *Oregon LR* 728; Kim “Wrap Contracting” in *Electronic Commerce Law* 18.

⁹⁷ See, for example, *i.Lan Systems Inc v Netscout Service Level Corp* 183 F Supp 2d 328 (D Mass 2002) for the early use of the term “clickwrap”. Also see Moringiello & Reynolds 2013 *Maryland LR* 464-465; Koornhof 2012 *Speculum Juris* 44.

⁹⁸ See Moringiello & Reynolds 2013 *Maryland LR* 464-465 for a discussion on the historical development of the term “click-wrap”.

⁹⁹ See Kim *Wrap Contracts* 39-41.

¹⁰⁰ Moringiello & Reynolds 2013 *Maryland LR* 465. Also see T Zynda “Ticketmaster Corp. v Tickets.com, Inc: Preserving Minimum Requirements of Contract on the Internet” (2004) 19 *Berkley Tech LJ* 495 506.

¹⁰¹ Canino 2016 *UC Davis LR* 539. See, for example, *Feldman v Google Inc* 513 F Supp 2d 229 (ED Pa 2007) 236; *i.Lan Systems Inc v Netscout Service Level Corp* 183 F Supp 2d 328 (D Mass 2002) 336-338. Also see WJ Condon “Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?” (2004) 16 *Regent U LR* 433 440-453 for an overview of early click-wrap decisions.

manner sufficient to show agreement”.¹⁰² Where enforcement is denied, it is usually due to terms which are substantively unconscionable or violate public policy, and not because of procedural flaws, such as failing to give the consumer adequate notice of the terms.¹⁰³

As with shrink-wraps, American courts were initially reluctant to enforce browse-wraps,¹⁰⁴ because of the concern that a consumer might be unaware of the existence of the contract¹⁰⁵ and due to the absence of an “unambiguous indication of assent.”¹⁰⁶ As indicated earlier, browse-wraps purport to bind consumers through their conduct (by accessing a website), even though terms are not presented to them upfront. One American court remarked that:

“Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”¹⁰⁷

However, despite these concerns, the recognition of browse-wraps as generally enforceable gradually has increased,¹⁰⁸ allowing suppliers to bind consumers to contractual terms by the mere presence of a hyperlink providing for implied consent.¹⁰⁹ This was done to provide suppliers with an efficient process of contract formation without hampering the consumer’s online experience,¹¹⁰ thereby supporting online market growth.¹¹¹

¹⁰² Art 2-204(1) of the Uniform Commercial Code. Also see Zynda 2004 *Berkley Tech LJ* 505; Kim “Wrap Contracting” in *Electronic Commerce Law* 17.

¹⁰³ Condon 2004 *Regent U LR* 453, 454.

¹⁰⁴ Ghirardelli 2015 *Oregon LR* 729; Zynda 2004 *Berkley Tech LJ* 507; *Specht v Netscape Communications Corp* 150 F Supp 2d 585 (SDNY 2001).

¹⁰⁵ *Specht v Netscape Communications Corp* 150 F Supp 2d 585 (SDNY 2001) 594.

¹⁰⁶ *Specht v Netscape Communications Corp* 150 F Supp 2d 585 (SDNY 2001) 595; Zynda 2004 *Berkley Tech LJ* 507.

¹⁰⁷ *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002) 335.

¹⁰⁸ Ghirardelli 2015 *Oregon LR* 729. See, for example, *Ticketmaster Corp v Tickets.com Inc* 2003 WL 21406289 (CD Cal 2003).

¹⁰⁹ Ghirardelli 2015 *Oregon LR* 730.

¹¹⁰ 731.

¹¹¹ 731.

American courts therefore hold that browse-wraps are enforceable if sufficient notice was given to the consumer of the existence of the terms.¹¹² However, some uncertainty arose about what constitutes sufficient notice, and an investigation of the facts is required in each case.¹¹³ For example, enforceability has been denied where the notification of the terms was not visible on the home page without scrolling to the bottom of the page,¹¹⁴ or questioned where it was presented as small grey text on a light grey background.¹¹⁵ Courts are also reluctant to enforce browse-wraps against individual consumers, but are more willing to enforce them against businesses.¹¹⁶ However, courts have emphasised that browse-wraps are not unenforceable *per se*, even against consumers, because “people sometimes enter into a contract by using a service without first seeing the terms.”¹¹⁷

The hybrid forms of online contracts have met with mixed reactions. Scroll-wraps are generally viewed in the same manner as click-wraps and thus found to be valid.¹¹⁸ Requiring the consumer to scroll through the contractual terms before he can indicate assent has been described as a good practice which ensures that the consumer is given sufficient notice and the opportunity to read the terms of the contract.¹¹⁹ Although this format may have satisfied judicial scrutiny,¹²⁰ there is little evidence to suggest that they encourage a higher reading percentage than any other form of online contract.

However, more uncertainty exists in respect of multi-wraps and sign-in wraps. Although some courts have found these contracts to be invalid due to a lack of

¹¹² *Nguyen v Barnes & Noble Inc* 763 F 3d 1171 (9th Cir 2014) 1177; *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000) 981-982; *Register.com v Verio Inc* 356 F 3d 393 (2nd Cir 2004) 403; Zynda 2004 *Berkley Tech LJ* 507; Mik 2016 *Singapore J Leg Stud* 73. MA Lemley “Terms of Use” (2006) 91 *Minn LR* 459 477: “Courts may be willing to overlook the utter absence of assent only when there are reasons to believe that the [consumer] is aware of the [supplier’s] terms.”

¹¹³ *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 395; *Starke v Squaretrade Inc.* 913 F 3d 279 (US App 2019) 289; Canino 2016 *UC Davis LR* 539.

¹¹⁴ Zynda 2004 *Berkley Tech LJ* 507.

¹¹⁵ See *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000) 981, although the court found it unnecessary to make a finding in this regard.

¹¹⁶ *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 396; Lemley 2006 *Minn LR* 462.

¹¹⁷ *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000) 982.

¹¹⁸ Canino 2016 *UC Davis LR* 539. See, for example, *Barnett v Network Solutions Inc* 38 SW 3d 200 (Tex 2001) 203-204.

¹¹⁹ *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 386.

¹²⁰ 398-399.

sufficient notice and indication of assent,¹²¹ others have treated them as similar to click-wraps and have held them to be enforceable.¹²² According to Canino, the inconsistent treatment of sign-in wraps reflects a division in the judicial approach towards online contracts: the courts that enforce sign-in wraps generally adhere to the view that the current common-law principles of the law of contract can apply to online contracts without modification, whereas others are more sceptical and thus refuse enforcement.¹²³

The view generally held by American courts nowadays is that the rise of online contracts has not necessitated any changes to the fundamental principles of the law of contract.¹²⁴ For example, some courts have argued that there is no difference between printing terms on the back of a ticket and providing them by way of a hyperlink.¹²⁵ With a few exceptions¹²⁶ and despite academic criticism, American courts have generally been unwilling to take into account the differences occasioned by electronic contracting.¹²⁷

2 2 2 2 *The enforcement of online contracts in South Africa*

As mentioned above, South African courts have not had the opportunity to consider online contracts. Although electronic contract conclusion has received some academic interest, most writers discussing the occurrence of contracts in the online environment

¹²¹ See *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 367; *Nguyen v Barnes & Noble Inc* 763 F 3d 1171 (9th Cir 2014).

¹²² See *Fteja v Facebook Inc* 841 F Supp 2d 829 (SDNY 2012); *Vernon v Qwest Communications International Inc* 925 F Supp 2d 1185 (D Colo 2013); *DeVries v Experian Info Sols. Inc.* 2017 U.S. Dist. LEXIS 26471.

¹²³ 2016 *UC Davis LR* 546.

¹²⁴ *Register.com v Verio Inc* 356 F 3d 393 (2nd Cir 2004) 403: "While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract"; *Starke v Squaretrade Inc.* 913 F 3d 279 (US App 2019) 289: "We apply these same contract law principles to online transactions".

¹²⁵ *Fteja v Facebook Inc* 841 F Supp 2d 829 (SDNY 2012) 839; Canino 2016 *UC Davis LR* 550. Also see Kim 2014 *Chicago-Kent LR* 270.

¹²⁶ For example *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015).

¹²⁷ See for example *Cullinane v Uber Technologies Inc* 2016 U.S. Dist. LEXIS 89540 17. Also Canino 2016 *UC Davis LR* 568; Goodman 1999 *Cardozo LR* 322: "today's judiciary has failed to give these new adhesion contracts the special treatment they deserve"; Kim 2014 *Chicago-Kent LR* 269; Kim "Wrap Contracting" in *Electronic Commerce Law* 30; Moringiello & Reynolds 2013 *Maryland LR* 492.

initially focused on the mechanics of electronic transactions: whether it is possible to conclude a contract electronically (i.e. whether it is possible to meet all the requirements for a valid contract) and questions such as the time and place of contract conclusion.¹²⁸ Most of these issues became moot with the enactment of the Electronic Communications and Transactions Act 25 of 2002 (ECTA).

ECTA aims “to enable and facilitate electronic communications and transactions”.¹²⁹ In line with this objective, ECTA ensures that contracts concluded online are enforceable, and thus viewed in the same manner as those concluded on paper. Specifically, sections 11(1) and (2) provide that:

- “(1) Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.
- (2) Information is not without legal force or effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in such data message.”

Also of relevance in this regard is section 13(5), which reads as follows:

- “(5) Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force and effect merely on the grounds that –
 - (a) it is in the form of a data message; or
 - (b) it is not evidenced by an electronic signature but is evidenced by other means from which such person’s intent or other statement can be inferred.”¹³⁰

These provisions make it clear that electronic contracts will be valid and enforceable if it is found that they comply with the traditional requirements for contract formation. A more detailed discussion regarding the enforceability of click- and browse-wraps follows later.¹³¹ However, it is expected that clicking will be construed as an indication of assent in a similar manner as signature, provided that the supplier clearly indicates that the click serves as an indication of consent to contractual terms. Consequently, it

¹²⁸ See the sources mentioned in ch 1 (1 2 n 32). Another topic which received considerable attention in these and other sources is that of internet safety and the risk of fraud.

¹²⁹ S 2 of ECTA.

¹³⁰ Also see s 24(b) of ECTA, which contains a similar provision.

¹³¹ See ch 3 (3 4 3 2 and 3 4 3 3).

is expected that click-wraps will usually be enforced¹³² subject only to the general principles which also apply in the case of signed paper-based contracts.¹³³ With regard to browse-wraps, it is mostly accepted that their enforceability will be determined in the same manner as unsigned paper-based contracts, according to the requirements set out in the so-called ticket cases.¹³⁴ The applicable principles will be discussed in more detail in the next chapter, but the enquiry into the enforceability of unsigned standard terms mainly focuses on whether the consumer noticed the terms and, if not, whether a reasonable person would have noticed the existence of the terms.¹³⁵

ECTA also contains provisions aimed at consumer protection. This includes placing a duty on suppliers to disclose various types of information, including “any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers”.¹³⁶ The supplier is required to:

“[P]rovide a consumer with an opportunity –

- (a) to review the entire electronic transaction;
- (b) to correct any mistakes; and
- (c) to withdraw from the transaction, before finally placing any order.”¹³⁷

However, ECTA does not prescribe how this information must be made available to the consumer,¹³⁸ except for providing that it must be done “on the web site where ... goods or services are offered”.¹³⁹ Failure to comply with these provisions allows the

¹³² See ch 3 (3 4 3 2). Also see T Pistorius "Shrink-wrap and Click-wrap Agreements: Can They be Enforced?" (1999) 7 *JBL* 79 82; T Pistorius "Formation of internet contracts: an analysis of the contractual and security issues" (1999) 11 *SA Merc LJ* 292.

¹³³ Koornhof 2012 *Speculum Juris* 64-65.

¹³⁴ Pistorius 2004 *SA Merc LJ* 575; JMC Johnson *The Legal Consequences of Internet Contracts* LLM thesis UFS (2003) 81-84; Koornhof 2012 *Speculum Juris* 65.

¹³⁵ Pistorius 2004 *SA Merc LJ* 574; Pistorius 1999 *SA Merc LJ* 291. Also see S 11(3)(a) of ECTA; *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A).

¹³⁶ S 43(1)(k) of ECTA.

¹³⁷ S 43(2) of ECTA.

¹³⁸ W Jacobs "The Electronic Communications and Transactions Act: Consumer Protection and Internet Contracts" (2004) 16 *SA Merc LJ* 556 558.

¹³⁹ S 43(1) of ECTA.

consumer to cancel the transaction within fourteen days of receiving the goods or services.¹⁴⁰

The limitations of mandated disclosure as a form of consumer protection will be discussed later.¹⁴¹ However, it may be mentioned here that disclosure will only serve as an effective measure if the consumer has both read and fully comprehended the implications of the disclosed terms. Because ECTA does not prescribe how the information must be made available, there is nothing preventing the supplier from “hiding” the information in a multi-page browse-wrap which the consumer is unlikely to read. It is thus very unlikely that a consumer will notice anything but the most salient provisions of the transaction, and even more unlikely that he will cancel the transaction because of non-disclosure of non-salient terms.

In addition to the disclosure requirements, ECTA also grants consumers a seven-day cooling-off period, in which they may cancel the transaction for any reason without penalty.¹⁴² This provision clearly finds application in the case of an online transaction of sale, but it is less certain how this will operate where the service which is provided is use of a website, for example in the case of a consumer who becomes bound by an online agreement by virtue of creating an online account. Although the consumer can cancel his account, any information provided to the supplier will still remain in the supplier’s possession – if the online contract for example authorises the supplier to use the contact details of the consumer or photos uploaded by the consumer for marketing purposes even after cancellation of the account, the cooling-off right will not assist the consumer. If the information provided is recognised as valid counter-performance (an aspect which is addressed later),¹⁴³ it could be argued that termination implies a duty to surrender such benefits. However, this position is unclear and section 24(1)(b) of Protection of Personal Information Act 4 of 2013 (POPI) merely grants the consumer the right to demand deletion of the data, without imposing an automatic obligation on the supplier. Furthermore, it is just as unlikely that consumers will scrutinise the terms

¹⁴⁰ S 43(3) of ECTA.

¹⁴¹ See ch 5 (5 3 3).

¹⁴² S 44 of ECTA.

¹⁴³ See ch 4 (4 3 3).

of the contract shortly after purchase (and to cancel the contract as a result) as for them to do so before and thus refuse to contract.¹⁴⁴

The example above also illustrates the inadequacy of the remedy provided for in both the provisions relating to disclosure and the cooling-off period when dealing with transactions where no payment of money is required. If the consumer cancels the transaction pursuant to either the provisions dealing with disclosure or exercise of his cooling-off right, the supplier must give the consumer a full refund, except for the direct cost of returning the goods.¹⁴⁵ As explained above, this is problematic if the transaction involved use of a “free” website. In such a case, the currency of the transaction is not monetary payment, but rather the provision of personal information.¹⁴⁶ Ostensibly, this is not what is contemplated by ECTA, which explicitly refers to a refund of payments made.¹⁴⁷

Except for the considerations mentioned above regarding the enforceability of click-and browse-wraps, the occurrence of standard form contracts in the online environment has received very little academic attention in South Africa.¹⁴⁸ Generally, jurists who have touched on this issue have focused on how the South African principles of the law of contract will apply in an online environment, without considering whether modification of the principles is called for.¹⁴⁹ The main focus has thus been on whether these contracts will be enforceable, and not whether they should be enforced. No consideration has been given to the difference form makes to consumer

¹⁴⁴ RA Hillman "Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications" in JK Winn (ed) *Consumer Protection in the Age of the 'Information Economy'* (2006) 283 299.

¹⁴⁵ S 43(4)(b), 44(2) and 44(3) of ECTA.

¹⁴⁶ See 2 4 3 below.

¹⁴⁷ The same problems arise in respect of the remedy provided for in other consumer legislation, such as s 16 of the Consumer Protection Act 68 of 2008 (CPA), which in any event does not apply to transactions which fall under ECTA.

¹⁴⁸ Although Pistorius has touched on selected issues arising from online contracts, such as exemption clauses and copyright issues (see T Pistorius "The Rights of the User of a Computer Program and the Legality of 'Shrink-Wrap' Licences" (1991) 3 *SA Merc LJ* 57; Pistorius 1993 *SA Merc LJ* 11-19; Pistorius 1999 *JBL* 84-85). Eiselen has also identified some of the issues which could arise in the online context (see S Eiselen "E-Commerce" in D van der Merwe, A Roos, T Pistorius, S Eiselen & S Nel (eds) *Information and Communications Technology Law* 2ed (2016) 149).

¹⁴⁹ See, for example, Johnson *Internet Contracts*, specifically 79-84; Jacobs 2004 *SA Merc LJ* 557.

perception and the behaviour of suppliers, and whether consumers require more protection against abusive contracts in the online environment.

2 2 2 3 *The enforcement of online contracts in the European Union*

The Court of Justice of the European Union (the “Court of Justice”) relatively recently had its first opportunity to consider the enforceability of a click-wrap contract.¹⁵⁰ The court had to determine the validity of a jurisdiction clause contained in a click-wrap, and thus had to consider whether the provisions of Article 23 of the Brussels I Regulation¹⁵¹ were complied with.¹⁵² Article 23(1) of the Brussels I Regulation requires jurisdiction clauses to be in writing, but Article 23(2) stipulates that:

“Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.”

The court found that since click-wrap contracts can be printed and saved before their conclusion, the Regulation was complied with and therefore the contract was enforceable.¹⁵³

Except for the specific question arising from the case discussed above, the Court of Justice has not had the opportunity to consider click-wraps, nor have any cases concerning the enforceability of browse-wraps been brought before the court.¹⁵⁴ However, the EU Commission has recognised the need to act pre-emptively in order

¹⁵⁰ *El Majdoub v CarsOnTheWeb.Deutschland GmbH* (Case C-322/14) 2015.

¹⁵¹ Council Regulation (EC) No 44/2001 of 22 December, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

¹⁵² *El Majdoub v CarsOnTheWeb.Deutschland GmbH* (Case C-322/14) 2015 para 23. The Brussels I Regulation has since been recast as the Brussels Ia Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters), but since its Art 25 is identical to Art 23 of its predecessor, the same principle should apply (see M Young & P Bradley-Schmieg “Court of Justice of the EU Upholds Exclusive Jurisdiction Clauses in B2B ‘Click-wrap’ Contracts” (4-6-2015) *Inside Tech Media* <<https://www.insidetechmedia.com/2015/06/04/court-of-justice-of-the-eu-upholds-exclusive-jurisdiction-clauses-in-b2b-click-wrap-contracts/>> (accessed 7-11-2019)).

¹⁵³ *El Majdoub v CarsOnTheWeb.Deutschland GmbH* (Case C-322/14) 2015 paras 39-40.

¹⁵⁴ I Gupta “Are Websites Adequately Communicating Terms and Conditions Link in a Browsewrap Agreement?” (2012) 3 *European Journal for Law and Technology* <<http://ejlt.org/article/view/47/239>> (accessed 7-11-2019).

to protect consumers transacting online,¹⁵⁵ and various regulations and directives have been issued or proposed which will impact on the validity of online contracts.¹⁵⁶ For example, the European Parliament addressed the issue of online tracking in the Directive on Privacy and Electronic Communications.¹⁵⁷ Article 5(3) of the Directive provides that a consumer must consent to cookies¹⁵⁸ being stored on his computer, except in very specific circumstances.¹⁵⁹

The specific provisions contained in these instruments may be of value when evaluating the South African approach to online contracts, and will be discussed in more detail in the following chapters.

2 3 Overview of standard form contracts

As mentioned above, the focus of this dissertation is on standard form contracts presented to consumers in an electronic format. However, these contracts must be analysed against the background of standard form contracts in general. Despite the differences between online contracts and traditional standard form contracts, the former is merely a specific example of the latter. It is therefore useful to provide a brief overview of the broader category of standard form contracts.

The use of standard form contracts, which are drafted by one of the parties and presented to the other party for signature or consent in some other manner, has spread

¹⁵⁵ European Commission "Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Digital contracts for Europe - Unleashing the Potential of E-commerce COM(2015) 633 final" (9-12-2015) *European Commission* <<https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-633-EN-F1-1.PDF>> (accessed 7-11-2019) 7.

¹⁵⁶ See ch 4 (4 6).

¹⁵⁷ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, as amended by Directive 2009/136/E of the European Parliament and of the Council of 25 November 2009 (Directive on Privacy and Electronic Communications).

¹⁵⁸ Cookies are small pieces of data stored on the computer of the consumer which enables a website to remember information about the consumer. Certain types of cookies also allow a website to track the consumer's web activity (see Unknown "Tracking Cookie" (22-7-2014) *Symantec* <https://www.symantec.com/security-center/writeup/2006-080217-3524-99?om_rssid=sr->) (accessed 7-11-2019)).

¹⁵⁹ See ch 4 (4 7 2 1) below.

rapidly since their conception.¹⁶⁰ The aim of this section is to explore the reasons for their popularity, as well as to identify the possible problems associated with the use of these non-negotiated contracts. But first, standard form contracts will be defined and their historical development described.

2 3 1 Definition of standard form contracts

Standard form contracts can be defined as contractual terms offered by one party, who is in a stronger bargaining position (hereafter referred to as “the supplier”), to the other party (hereafter referred to as “the consumer”) on a take-it-or-leave-it basis.¹⁶¹ Eiselen identifies four features which characterise standard contract terms: (i) the terms obtain legal significance when they are accepted as part of a contract; (ii) they are drafted with the intention of being used in numerous future contracts; (iii) they are pre-formulated and already exist before any negotiations between the contracting parties have been undertaken; and (iv) they are drafted by only one of the parties.¹⁶² The last two features are especially important, since they indicate that there is no scope for negotiation on the part of the consumer,¹⁶³ and that he has to agree to the terms as presented to him, or refuse to transact with the supplier.¹⁶⁴ For this reason, these types of contracts are also known as “contracts of adhesion”.¹⁶⁵

¹⁶⁰ See 2 1 above.

¹⁶¹ Also see D Hutchison & C Pretorius “Glossary” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 509 520; M Nortje “Of Reliance, Self-Reliance and Caveat Subscriptor” (2012) 129 *SALJ* 132 139; Chen-Wishart “Unfair Terms” in *Contract and Commercial Law* 108; Ghirardelli 2015 *Oregon LR* 723; P Linzer “Contract as Evil” (2015) 66 *Hastings LJ* 971 975; Goodman 1999 *Cardozo LR* 321, 324; Hillman & Rachlinski 2002 *NYU LR* 435-436.

¹⁶² See GTS Eiselen *Die Beheer oor Standaardbedinge: 'n Regsvergelykende Ondersoek* LLD thesis Potch (1988) 42-43. See 35-45 in general for an exposition on the difficulties of formulating a workable definition for standard terms.

¹⁶³ Nortje 2012 *SALJ* 139; Kim *Wrap Contracts* 21; Goodman 1999 *Cardozo LR* 321.

¹⁶⁴ Canino 2016 *UC Davis LR* 539; Kim *Wrap Contracts* 21, 26; JC Kanamugire “The Future of Standard Form Contracts in South Africa with Particular Reference to Recent Developments in the Law” (2013) 13 *MJSS* 335 340; Condon 2004 *Regent U LR* 436.

¹⁶⁵ E Kahn, C Lewis & C Visser *Contract and Mercantile Law: A Source Book 1 - General Principles of Contract; Agency and Representation* 2 ed (1988) 33; LF Van Huyssteen, GF Lubbe & MFB Reinecke *Contract General Principles* 5 ed (2016) 304; Goodman 1999 *Cardozo LR* 324; Aronstam *Consumer Protection* 16; Kanamugire 2013 *MJSS* 339; Pistorius 2004 *SA Merc LJ* 569; AA Leff “Contract as Thing” (1970) 19 *Am U LR* 131 142. Standard form contracts are also sometimes

While the format in which a contract is presented to the consumer is irrelevant in so far as its classification as a standard form contract is concerned, it does not mean that all such contracts are created equally. There is a difference (both in the quality of assent and consumer awareness) between a standard form contract which the consumer is required to sign, and one which appears printed, for example on the back of a ticket or displayed on a notice board. In a similar fashion, as indicated earlier,¹⁶⁶ a distinction can be drawn between standard form contracts which appear in more traditional formats, such as those printed on paper, and online standard form contracts.¹⁶⁷

2 3 2 Historical development of standard form contracts

Standard form contracts are hardly a new occurrence – their use became widespread during the industrial revolution due to the development of mass production and mass distribution.¹⁶⁸ Suppliers needed a way to regulate transactions concluded with a growing and dispersed client base. Drafting a single standard contract and concluding all its transactions on those terms provided a way for a supplier to manage various risks arising from these transactions, such as liability for defects and implied warranties, in a cost-effective manner.¹⁶⁹

Courts recognised the need of suppliers to regulate their business affairs in this manner and enforced standard form contracts to help businesses grow.¹⁷⁰ It was expected that these benefits would result in price reductions operating to the benefit of consumers.¹⁷¹ However, the recognition of standard form contracts also influenced the manner in which courts viewed the requirement of consensus.¹⁷² By watering down the requirement of consensus,

referred to as boilerplate. This originates from the way in which the terms were printed (MJ Radin *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013) xvi-xvii).

¹⁶⁶ See 2 1 above.

¹⁶⁷ Also see n 11 above.

¹⁶⁸ F Kessler "Contracts of Adhesion - Some Thoughts About Freedom of Contract" (1943) 43 *Columbia LR* 629-631; Aronstam *Consumer Protection* 17; JH Braun *Policing Standard Form Contracts in Germany and South Africa: A Comparison* LLM thesis University of Cape Town (2005) 10.

¹⁶⁹ Kessler 1943 *Columbia LR* 631-632.

¹⁷⁰ Ghirardelli 2015 *Oregon LR* 722-723; Goodman 1999 *Cardozo LR* 321-322.

¹⁷¹ Ghirardelli 2015 *Oregon LR* 7243-724.

¹⁷² Ghirardelli 2015 *Oregon LR* 724; Rakoff 1983 *Harv LR* 1197.

“[a]dhesion contracts deeply changed the importance of full negotiation and mutual assent, which are the very essence of traditional contracts. In fact, with adhesion contracts, consumers usually lack any opportunity to negotiate the one-sided terms offered by businesses and they have to accept these terms under take-it-or-leave-it conditions. These contracts also create the false expectation that consumers will read several pages of terms, which is generally unlikely. The result is that these contracts allow businesses to bind consumers over terms that the consumers most likely never read and, therefore, ignore.”¹⁷³

The deviation from the traditional requirements for contract formation, based on the notion of a bargained-for exchange, was so extensive that some authors questioned whether standard terms should at all be regulated by contract law.¹⁷⁴ Rakoff also concluded that “a new legal structure is needed”.¹⁷⁵

The relaxation of the rules regarding the formation of a contract paved the way for enforcing standard forms presented in new ways, such as shrink-wrap contracts which provided even less opportunity for consensus between the parties.¹⁷⁶ Unsurprisingly,

“businesses took advantage of the lack of mutual assent typical of these contracts and started including unconscionable terms, imposing harsh conditions, and limiting consumers’ rights.”¹⁷⁷

Consequently, the necessity of regulating standard form contracts became apparent. Most jurisdictions have some form of legislation aimed at protecting consumers against the possible abuse flowing from the use of standard form contracts.¹⁷⁸ Due to the important role fulfilled by standard form contracts, the measures instituted do not abolish the use of these instruments, but rather aim to create a remedy for consumers who would otherwise be bound by unfair contractual provisions.

¹⁷³ Ghirardelli 2015 *Oregon LR* 723 (footnotes omitted).

¹⁷⁴ Leff (1970 *Am U LR* 150-151) developed the so-called “contract-as-product” theory, in terms of which he proposed that contracts of adhesion should be viewed as part of the product, instead of categorising non-negotiated terms as contractual in nature. This theory is explained more fully in ch 5 (5 3 2). It has found some support among academics, such as Radin (*Boilerplate* 199), but has not received judicial approval.

¹⁷⁵ 1983 *Harv LR* 1284.

¹⁷⁶ 724.

¹⁷⁷ Ghirardelli 2015 *Oregon LR* 724.

¹⁷⁸ T Naudé “Unfair Contract Terms Legislation: The Implications of Why We Need It for Its Formulation and Application” (2006) 17 *Stell LR* 361 361. In South Africa, the primary legislation in this regard is the Consumer Protection Act 68 of 2008 (CPA).

To understand the debate surrounding standard form contracts, and especially online contracts, it is necessary to consider both the advantages and disadvantages associated with these types of contracts.¹⁷⁹

2 3 3 Importance and benefits of standard form contracts

The biggest benefit associated with standard form contracts is the reduction in transaction costs.¹⁸⁰ Because suppliers can draft one contract which applies to thousands of consumers, drafting costs are significantly reduced and negotiation costs are virtually eliminated. One of the reasons why courts were partly swayed by this argument is that these cost-saving measures would result in an eventual cost-benefit for consumers, since it would lower prices.¹⁸¹ It must be mentioned however that the extent to which this benefit is in actual fact passed on to the consumer is uncertain.¹⁸² The problem is that this benefit will only be fully passed on if the market is perfectly competitive, which is rarely the case in practice.¹⁸³ In other word, this reduction in the price is dependent on market forces – if suppliers are not forced to lower their prices due to the fear of not being competitive, they will not do so willingly. A further concern is that the consumer has no way of measuring whether the rights he abandons by way of the standard form contract results in an equivalent reduction in price.¹⁸⁴

Another benefit associated with standard form contracts is that their use can enhance certainty. First, they can serve to clarify the relationship between the parties.¹⁸⁵ By setting out the rights and obligations of the parties, standard form contracts can

¹⁷⁹ Also see Eiselen *Standaardbedinge* 23-33 for a discussion of the advantages and disadvantages of standard terms.

¹⁸⁰ Kahn et al *Contract and Mercantile Law* 34; Hopkins 2003 *TSAR* 153; Bakos et al 2014 *J Leg Stud* 5; Ghirardelli 2015 *Oregon LR* 720, 722; Goodman 1999 *Cardozo LR* 325; Aronstam *Consumer Protection* 16; Kunz et al 2003 *Bus Lawyer* 289.

¹⁸¹ Hopkins 2003 *TSAR* 153-154; Wijayasriwardena 2016 *Queen Mary University Research Paper* 15; Linzer 2015 *Hastings LJ* 981; EJ Leib & ZJ Eigen "Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead" 2017 *U III LR* 65 84; Wijayasriwardena 2016 *Queen Mary University Research Paper* 15; Ghirardelli 2015 *Oregon LR* 720.

¹⁸² Wijayasriwardena 2016 *Queen Mary University Research Paper* 15; Ghirardelli 2015 *Oregon LR* 724; Linzer 2015 *Hastings LJ* 981.

¹⁸³ G de Geest "Signing Without Reading" (2015) *Washington University in St. Louis Legal Studies Research Paper No. 16-09-01 2* (available at <<https://ssrn.com/abstract=2834314>>).

¹⁸⁴ Wijayasriwardena 2016 *Queen Mary University Research Paper* 15.

¹⁸⁵ Kahn et al *Contract and Mercantile Law* 34.

eliminate costly litigation.¹⁸⁶ Secondly, the use of standard form contracts can lead to the “accumulation of judicial experience”¹⁸⁷ in the interpretation of terms that regularly appear in these types of contracts. This ensures uniformity in their interpretation,¹⁸⁸ because their meaning has already been judicially considered.¹⁸⁹ Although the interpretation of contractual terms is context-specific, and therefore unlike statutes an authoritative interpretation cannot be established, judicial consideration of similar clauses can enhance legal certainty with regard to their enforceability. This can result in a reduction in litigation costs.¹⁹⁰

Standard form contracts further enable suppliers to predict and manage the risk of transacting and to protect legitimate business interests without incurring excessive (extra) costs.¹⁹¹ The use of standard form contracts enables senior management of a supplier to control the content of the contract, despite the contract being concluded by subordinates such as the sales staff.¹⁹² Efficient allocation of risks further serves to minimise the cost of goods.¹⁹³

It is widely accepted that standard form contracts are essential in an economy where products are mass-produced and distributed.¹⁹⁴ Their extensive usage is due to their efficiency and high degree of utility.¹⁹⁵ It means that time and skills can be employed to greater benefit elsewhere, and that the process of transacting is simplified and costs reduced.¹⁹⁶ However, these benefits are only one aspect of standard form contracts and cognisance must also be taken of the problems associated with this form of contracting.

¹⁸⁶ Hopkins 2003 *TSAR* 154.

¹⁸⁷ Goodman 1999 *Cardozo LR* 325.

¹⁸⁸ Aronstam *Consumer Protection* 16.

¹⁸⁹ Hopkins 2003 *TSAR* 154.

¹⁹⁰ Hillman & Rachlinski 2002 *NYU LR* 439; Kunz et al 2003 *Bus Lawyer* 289.

¹⁹¹ Ghirardelli 2015 *Oregon LR* 722.

¹⁹² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 139; Kanamugire 2013 *MJSS* 341.

¹⁹³ Hillman & Rachlinski 2002 *NYU LR* 438, 439.

¹⁹⁴ Bradfield *Christie's Law of Contract* 211; Nortje 2012 *SALJ* 151; Hutchison “Nature and Basis of Contract” in *Law of Contract* 26; Kim *Wrap Contracts* 21; Goodman 1999 *Cardozo LR* 325.

¹⁹⁵ Goodman 1999 *Cardozo LR* 322.

¹⁹⁶ Goodman 1999 *Cardozo LR* 325. Also see *Restatement of the Law (Second) of Contracts* (1981) s 211 Comment (a).

2 3 4 Problems with standard form contracts

The problems raised by the use of standard form contracts, such as the enforceability of terms which the consumer did not read, and which he would have been unable to amend even if he did read them, have plagued courts and legal scholars in South Africa¹⁹⁷ and abroad.¹⁹⁸ One of the primary concerns is that these types of contracts are open to abuse by the drafting party.¹⁹⁹

The consumer's inability to influence the eventual terms which regulate the transaction between him and the supplier creates the opportunity for a contract which unfairly favours the drafting party (i.e. the supplier).²⁰⁰ Furthermore, because consumers are not involved in the drafting process, but are confronted with contractual terms which they are powerless to change, they often fail to read or take proper notice of the terms. Standard form contracts are therefore problematic for two reasons in particular: (i) the absence of true consensus (because consumers are often ignorant with regard to the meaning or implications of the terms, or in some instances, even their existence); and (ii) unfair or one-sided contractual terms, which the consumer is in no position to negotiate.²⁰¹ Often these reasons co-exist: onerous terms are inserted by suppliers precisely because they know that consumers do not read standard terms.

The problems associated with standard form contracts can be classified into two broad categories, namely procedural and substantive problems. The procedural problems relate to the formation of standard form contracts – and the most serious of these is the absence of consensus, since only a very small, almost negligible, percentage of consumers read standard form contracts.²⁰² As discussed more fully later, a contract can also come into existence where there is deemed consensus.²⁰³ Traditionally, this

¹⁹⁷ See Hutchison "Nature and Basis of Contract" in *Law of Contract* 25-27; Kahn et al *Contract and Mercantile Law* 33-34.

¹⁹⁸ Ayres & Schwartz 2014 *Stanford LR* 555; Kim *Wrap Contracts* 26; NS Kim "The Wrap Contract Morass" (2014) 44 *Southwestern LR* 309 312; Radin *Boilerplate*.

¹⁹⁹ Hutchison "Nature and Basis of Contract" in *Law of Contract* 26; Aronstam *Consumer Protection* 20; Hopkins 2003 *TSAR* 153.

²⁰⁰ Bradfield *Christie's Law of Contract* 14; DK Hart "Form & Substance in Nancy Kim's Wrap Contracts" (2014) 44 *Southwestern LR* 251 258.

²⁰¹ Kahn et al *Contract and Mercantile Law* 34.

²⁰² See ch 3 (3 1 n 1). Also see Hillman & Rachlinski 2002 *NYU LR* 448; Rakoff 1983 *Harv LR* 1179.

²⁰³ See ch 3 (3 3 2).

protects the supplier where the consumer created the reasonable reliance of assent, for example by signing a standard form contract (in which case, the *caveat subscriptor* rule will apply).²⁰⁴ However, it must be questioned when this reliance will be reasonable, especially where the contract contains surprising terms.²⁰⁵

Substantive problems on the other hand arise because these contracts are generally drafted to further the supplier's interests and maximise the protection enjoyed by the supplier, without taking into account the reasonable expectations of the consumer.²⁰⁶ It "permits the strong and the adept to win over the weak and the trusting",²⁰⁷ and by upholding "harsh and oppressive standard-form contracts ... private law is in effect facilitating an abuse of power by the party in a stronger bargaining position."²⁰⁸

These problems will be discussed extensively in the following two chapters.²⁰⁹ However, it must be mentioned here that these substantive and procedural problems cannot be completely separated from each other. This can be illustrated by the way in which American courts determine unconscionability. They often apply a sliding scale, whereby "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa".²¹⁰

More evidence of the overlap between these problems is that part of the reason why suppliers can insert onerous terms (without losing clientele or suffering a reputational risk), is because consumers do not read or understand the terms of the contract.²¹¹ There is thus little incentive for suppliers to offer fairer terms;²¹² to the contrary, they

²⁰⁴ See ch 3 (3 3 4 13 3 2).

²⁰⁵ See ch 3 (3 4 6).

²⁰⁶ Goodman 1999 *Cardozo LR* 326.

²⁰⁷ Linzer 2015 *Hastings LJ* 957.

²⁰⁸ Hopkins 2003 *TSAR* 153.

²⁰⁹ See ch 3 for procedural problems and ch 4 for substantive problems.

²¹⁰ *Armendariz v Found Health Psychcare Servs Inc* 6 P3d 669 (Cal 2000) 690, as quoted in RA Hillman "Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire" (2006) 104 *Mich LR* 837 853-854.

²¹¹ Bakos et al 2014 *J Leg Stud* 6.

²¹² Naudé 2006 *Stell LR* 398.

“effectively ‘trade’ or ‘speculate’ on the customer’s typical lack of knowledge, experience, time, bargaining skill, choice and/or assertiveness to include onerous terms, which maximize only the interests of the [business].”²¹³

Competition between suppliers does not lead to fairer terms, because no competitive advantage can be gained if consumers are unaware of which supplier offers the best terms.²¹⁴ In fact, a supplier who fails to take advantage of the benefits which can be gained by contract terms favourable to it will suffer a competitive disadvantage.²¹⁵ Evidence suggests that suppliers only compete on terms which are more likely to influence the regular consumer, such as the price of the product.²¹⁶

Despite their interdependence, for practical reasons the procedural and substantive problems will be discussed separately in the following two chapters. These fundamental issues affect all standard form contracts, but will be considered specifically in the context of online contracts. Therefore, clarity first needs to be obtained on the relationship between traditional standard form contracts and online contracts.

2 4 Distinguishing online contracts from traditional standard form contracts

As explained above, online contracts (as defined in this dissertation) are a subcategory of standard form contracts. They are thus subject to the same rules which apply in the case of other standard form contracts. Given that this study focuses on whether rules should be developed which cater specifically for online contracts, it will first be determined whether online contracts can and should be distinguished from their paper equivalent, and what the grounds are for such a distinction. According to Kim, online contracts “differ from other contracts of adhesion in their form and manner of presentment.”²¹⁷ The true enquiry, however, is whether these differences constitute sufficient justification for the development of specific rules dealing with this particular category of standard form contracts.

²¹³ 369.

²¹⁴ Hopkins 2003 *TSAR* 156.

²¹⁵ Braun *Policing Standard Form Contracts* 13.

²¹⁶ Hopkins 2003 *TSAR* 156.

²¹⁷ Kim *Wrap Contracts* 53.

The discussion will commence with an exposition of the similarities between traditional and online standard form contracts, and then proceed to the differences. The discussion will illustrate how the physical differences between traditional and online standard form contracts influence both consumer perception and supplier behaviour. Consequently, the differences are divided into three categories, namely physical differences, the impact on consumer perception and the impact on supplier behaviour. However, this is a somewhat artificial classification and a measure of overlap is unavoidable.

2 4 1 The similarities between online and traditional standard form contracts

Because online contracts are a specific form of standard form contracts, they share the two main characteristics identified above in respect of standard form contracts, namely that they are standardised documents, drafted by a party in a stronger bargaining condition and offered to the other party on a take-it-or-leave-it basis.²¹⁸ They further provide the same benefits to both the consumer and the supplier, such as the reduction in costs and enhanced certainty,²¹⁹ but also lead to the same two main problems, namely procedural and substantive issues.²²⁰ As Hillman & Rachlinski state:

“The principle issue that standard-form contracts present is whether the law should enforce boilerplate terms. This basic issue remains the central question in both the paper and the virtual worlds of contracting.”²²¹

Suppliers, in both the online and offline environment, can exploit consumers through their superior knowledge and experience.²²² They are further aware that consumers, regardless of whether they are presented with an electronic or paper standard form contract, are unlikely to read the terms of the contract.²²³ Many of the differences discussed below means that an online contract is less likely to be read by consumers. However, it must be borne in mind that readership of traditional standard form contracts is in any event so low²²⁴ that a further reduction cannot have that much of an effect.

²¹⁸ See 2 3 1 above. Also see Koornhof 2012 *Speculum Juris* 42.

²¹⁹ See 2 3 3 above.

²²⁰ See chs 3 (procedural issues) and 4 (substantive issues).

²²¹ 2002 *NYU LR* 434.

²²² Hillman & Rachlinski 2002 *NYU LR* 432; Kim 2014 *Chicago-Kent LR* 267.

²²³ Hillman & Rachlinski 2002 *NYU LR* 432-433; Kim 2014 *Chicago-Kent LR* 267.

²²⁴ See n 202 above.

Although the distinctions are still relevant, as the ideal is to encourage readership, commentators sometime lose sight of the fact that offline standard form contracts are already very far removed from the idealised notion of negotiated contracts and that most of the problems existed long before the invention of the internet.

2 4 2 The physical differences between paper-based and online contracts

We now proceed to the differences between traditional standard form contracts (especially signed contracts)²²⁵ and online contracts. The fact that online contracts are weightless and not bound to a printed document has important implications regarding their physical attributes.

First, online contracts are generally lengthier than paper-based standard form contracts.²²⁶ Compare a consumer buying clothes at a traditional store with one purchasing it from an online supplier like Superbalist.com: the former is at most subject to the store's return policy (possibly printed on the back of the receipt), whereas the latter is required to consent to a more than 50-page online contract.²²⁷

This difference in length can be attributed mainly to two factors. The first is consumer perception: lengthy paper contracts may cost the company in the form of consumer goodwill, but consumers rarely notice the length of an online contract.²²⁸ Especially in cases where the consumer is not required to scroll to the end of the terms to indicate assent, for example with browse-wraps or sign-in wraps, it is doubtful that consumers will have any idea how many terms are contained in the document.

The second reason for lengthier online contracts is the marginal cost associated with paper contracts – the longer the contract is, the more expensive it is to print and the more space it takes to store.²²⁹ The physical constraints posed by, for instance, the size of a printed ticket also limit the number of terms.²³⁰ None of these constraints

²²⁵ In other words, terms that the consumer is required to sign in order to indicate assent. See ch 3 (3 4 1) in this regard.

²²⁶ See sources in ch 1 (1 1 n 13).

²²⁷ See Superbalist.com "Terms and Conditions" (date of publication unknown) *Superbalist.com* <https://superbalist.com/terms_and_conditions> (accessed 7-11-2019).

²²⁸ Preston & McCann 2011 *BYU J Pub L* 27; Kim *Wrap Contracts* 58. Also see 2 4 3 below.

²²⁹ Kim *Wrap Contracts* 58; Kim 2014 *Chicago-Kent LR* 271.

²³⁰ Preston & McCann 2011 *BYU J Pub L* 27; Moringiello 2014 *Southwestern LR* 281.

exist in the online environment²³¹ – a multipage document on the internet does not cost more than one that is half a page long,²³² and there is no factor limiting the length of the document. The number of terms which generally form part of an online contract therefore greatly exceeds the number found in most other standard form contracts.²³³

The difference in length is problematic for two reasons: first, the longer the document, the less rational it is for the consumer to read the contract²³⁴ and secondly, it enables suppliers to include more terms in the contract limiting the rights of consumers. For example, Marks indicates that terms such as disclaimers of warranties, liability limitations and arbitration clauses are not usually found in the terms of brick-and-mortar stores, but frequently included in online contracts.²³⁵

A further characteristic of the electronic nature of online contracts is the ease with which they are reproduced, copied and amended. This means that the terms contained in these contracts are widely reproduced by suppliers, leaving consumers without realistic alternatives,²³⁶ and that suppliers using online contracts have the ability to amend the terms on the website with ease and without alerting the consumer. This affects the way in which suppliers behave, and is discussed below.²³⁷

Online contracts are much more ubiquitous than traditional standard form contracts²³⁸ – they occur almost everywhere in the online environment. It has been averred that one of the reasons for this is that suppliers generally only require consumers to consent to paper-based standard form contracts for more important transactions, due to the cost and inconvenience associated with obtaining consumer signature.²³⁹ However, because online contracts “are weightless and often invisible to the consumer, [they] are used in even unimportant or minor transactions which in the offline world would not

²³¹ Kim *Wrap Contracts* 58; Kim 2014 *Southwestern LR* 309-310.

²³² Kim *Wrap Contracts* 58.

²³³ Preston & McCann 2011 *BYU J Pub L* 27.

²³⁴ O Bar-Gill *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (2012) 20.

²³⁵ CP Marks "Online and 'As Is'" (2017) 46 *Pepp LR* 1 29.

²³⁶ Kim *Wrap Contracts* 60.

²³⁷ See 2 4 4 below.

²³⁸ Kim *Wrap Contracts* 59; Preston & McCann 2011 *BYU J Pub L* 27.

²³⁹ Kim 2014 *Chicago-Kent LR* 272.

require a contract.”²⁴⁰ This can again be illustrated by the example relating to the purchase of clothes mentioned above:²⁴¹ traditional suppliers will find it too burdensome to present every consumer purchasing clothes with a contract for signature, whereas online suppliers do not experience the same obstacle.

Furthermore, although it is not always the case, it is customary for traditional standard form contracts to contain all the terms applicable to the consumer in the document presented to him. Online contracts on the other hand often make use of hyperlinks, which places the burden on the consumer to find the applicable terms and read them.²⁴² Should a consumer wish to access the terms of the online contract, he is sometimes required to click on a hyperlink which takes him away from the page on which the transaction appears, and which can lead to the loss of the items selected or of information already filled out.²⁴³ Although this will only make a difference where consumers decide to access and read the terms of the contract – and as mentioned earlier, evidence suggests that they rarely do²⁴⁴ – it nonetheless acts as a deterrent to proper informed consent by the consumer.

Another difference relates to the manner of presentation: paper-based standard form contracts are usually presented to consumers for their signature by a salesperson or representative. This has been described as the most significant difference between online and paper contracts,²⁴⁵ due to the fact that an online consumer does not deal with a salesperson, which means that he cannot ask questions regarding the meaning of certain terms in the contract²⁴⁶ and it further eliminates the limited power he may have to change a term by negotiating with the representative, such as striking through an offensive term. Nonetheless, one must bear in mind that a salesperson, who will usually be the representative presenting a standard form contract to the consumer in the real world, generally has limited knowledge of the terms of the contract and almost no negotiating power.²⁴⁷ Furthermore, it fails to take into account that not all paper-

²⁴⁰ 272.

²⁴¹ See text to n 227.

²⁴² Hart 2014 *Southwestern LR* 254.

²⁴³ Kim *Wrap Contracts* 133; Barnhizer 2014 *Southwestern LR* 219; Kim 2014 *Chicago-Kent LR* 272.

²⁴⁴ See n 202 above.

²⁴⁵ Kunz et al 2003 *Bus Lawyer* 290.

²⁴⁶ Hillman & Rachlinski 2002 *NYU LR* 468.

²⁴⁷ Kunz et al 2003 *Bus Lawyer* 290.

based standard form contracts require signature by the consumer, for example those contained on the reverse side of tickets or on notice boards. It is therefore not a very convincing distinction.

One possible benefit of online contracting, depending on the structure of the website, might be that the consumer can choose at what stage of the transaction to access the contractual terms.²⁴⁸ In the offline world, these terms are usually only made available when the salesperson deems it appropriate, which is often towards the end of the transaction. Online suppliers, who are not subject to these constraints, might find it easier and cheaper to give consumers timely access to terms.²⁴⁹

The physical attributes are what distinguishes online contracts from their traditional, paper-based equivalent. It is these attributes which change the way these contracts are perceived by consumers, and also the way they are employed by suppliers. Most of these distinctions are even more prominent when comparing standard form contracts which the consumer is required to sign with online contracts in respect of which a click is required.

2 4 3 The impact of the online nature of a contract on consumer perception and behaviour

The form a contract is presented in makes a psychological difference to consumer perception.²⁵⁰ There are at least three factors that may contribute to the change in perception when a contract is presented electronically. First, paper serves a warning function – it alerts the consumer that the document has legal significance and gives an indication of the length of the document.²⁵¹ A consumer confronted with signing a multi-page document in small print to enter a “free” public area or to purchase a low value item might reconsider the transaction.²⁵² Kim states that

“[t]he length of a contract signals the importance of a transaction to a customer. Even if consumers generally don’t read their contracts, they may view with suspicion a thick contract handed to them to complete a simple transaction. Even if a customer is unable to

²⁴⁸ 290.

²⁴⁹ Moringiello 2014 *Southwestern LR* 275.

²⁵⁰ Kim *Wrap Contracts* 54, 58.

²⁵¹ Barnhizer 2014 *Southwestern LR* 217; Preston & McCann 2011 *BYU J Pub L* 27.

²⁵² Barnhizer 2014 *Southwestern LR* 217.

negotiate, she will likely flip through the pages and skim the terms. An unusually hefty document for a minor transaction is likely to arouse the customer's suspicion."²⁵³

This warning function is diminished where contracts appear online: consumers have to take extra steps to assess their length.²⁵⁴

Secondly, paper contracts are subject to certain procedures associated with their conclusion, such as requiring a signature and using a pen to indicate assent.²⁵⁵ These serve to warn consumers that they are concluding a binding legal agreement.²⁵⁶ Whereas a consumer signing a standard form contract may not have any power to change it and therefore signs somewhat grudgingly, in most instances he is at least aware that he is concluding a binding legal agreement,²⁵⁷ because

“[t]he requirement of a signature is nothing less than the law's signal to consumers that the document in front of them is important and that they should be cautious about agreeing to it.”²⁵⁸

In the case of online contracts, and especially browse-wraps, consumers are often oblivious of even the existence of contractual terms regulating the use of the website.²⁵⁹ Even in the case of click-wraps, there is evidence which indicates that consumers do not view a click in the same way as they do a signature²⁶⁰ and its simplicity “often ‘hides’ the very fact of contracting.”²⁶¹ Part of the reason is that a signature is usually an act to which some significance is attached – often legal

²⁵³ Kim *Wrap Contracts* 58. Also see Kim 2014 *Chicago-Kent LR* 270; Preston & McCann 2011 *BYU J Pub L* 27.

²⁵⁴ Kim *Wrap Contracts* 60.

²⁵⁵ Kim *Wrap Contracts* 59; Preston & McCann 2011 *BYU J Pub L* 28.

²⁵⁶ Hillman & Rachlinski 2002 *NYU LR* 481; Canino 2016 *UC Davis LR* 554; Mik 2011 *International Journal of Law and Information Technology* 340.

²⁵⁷ Kim *Wrap Contracts* 55.

²⁵⁸ Hillman & Rachlinski 2002 *NYU LR* 481.

²⁵⁹ Kim *Wrap Contracts* 55.

²⁶⁰ Kim *Wrap Contracts* 2: “clicking doesn't register in many people's minds in the same way that signing on a dotted line does”; Kim 2014 *Chicago-Kent LR* 265-266, 272: “even the affirmative action of clicking is typically reflexive rather than deliberate and may not be perceived the same way as signing a document with a pen”; Kim “Wrap Contracting” in *Electronic Commerce Law* 12; Canino 2016 *UC Davis LR* 555. Also see ch 3 (3 2 3 1).

²⁶¹ Mik 2011 *International Journal of Law and Information Technology* 335.

significance – but the same cannot be said for clicking.²⁶² Clicking on the “I accept” icon is just one of thousands of clicks performed daily by a consumer, while most consumers apply their signature far less frequently.²⁶³

This ties in with another important contracting signal, namely the type of compensation which generally forms the subject of the transaction. Most popular websites – for example Facebook,²⁶⁴ Google²⁶⁵ and Twitter²⁶⁶ – offer their services for “free”. It is alleged that these services are not truly free – although the consumer does not pay in money, he compensates the supplier by making personal data available.²⁶⁷ The absence of monetary exchange causes consumers to view their interaction with the supplier differently from the way in which they perceive a sale transaction, because the payment of money has an important signalling function.²⁶⁸ Consumers therefore lack transactional awareness – they do not appreciate that they are engaging in a transaction if they are “just Googling something”.²⁶⁹

This lack of transactional awareness can also be influenced by the context in which the transaction takes place, as well as the function fulfilled by the online contract.²⁷⁰ While some websites are aimed at the sale of goods and are thus clearly transactional, others operate in a more social context (e.g. Facebook) or simply lack any indication

²⁶² Canino 2016 *UC Davis LR* 555; Mik 2016 *Singapore J Leg Stud* 76; Mik 2011 *International Journal of Law and Information Technology* 340.

²⁶³ See Preston & McCann 2011 *BYU J Pub L* 18; Kim 2014 *Southwestern LR* 312-13.

²⁶⁴ www.facebook.com (accessed 7-11-2019). The site used to state that signing up to the website is “free and always will be”, but this has recently been changed (see R Moynihan & A Asenjo “Facebook quietly ditched the 'It’s free and always will be' slogan from its homepage” (27-8-2019) *Business Insider* <<https://www.businessinsider.com/facebook-changes-free-and-always-will-be-slogan-on-homepage-2019-8?IR=T>> (accessed 7-11-2019).

²⁶⁵ www.google.com (accessed 7-11-2019).

²⁶⁶ <https://twitter.com> (accessed 7-11-2019).

²⁶⁷ See M Loos & J Luzak “Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers” (2015) 39 *Journal of Consumer Policy* 63 67; Leib & Eigen 2017 *U III LR* 96; Mik 2016 *Singapore J Leg Stud* 77.

²⁶⁸ Mik 2016 *Singapore J Leg Stud* 78, 79.

²⁶⁹ 79.

²⁷⁰ See 2 2 1 1 above.

of a transaction (e.g. Google).²⁷¹ These contexts do not contain the usual signals that consumers associate with concluding a contract, because

“there is not price indication, no virtual shopping basket, no ordering function and no input of payment data.”²⁷²

Furthermore, consumers are used to being faced with standard form contracts when concluding certain real-world transactions – for example opening a bank account – and should therefore not be surprised that an online contract applies when a similar function is performed electronically. Other online contracts, however, do not have a direct paper equivalent, for example a contract regulating the use of a website aimed at the sale of goods. This would be similar to entering into a multi-page contract when walking into a store²⁷³ or browsing through a brochure.²⁷⁴

Consumers therefore do not expect to enter into a formal contract when visiting these websites²⁷⁵ and a small hyperlink stating “Terms of Service” will usually not affect that perception.²⁷⁶ All of these factors contribute to the fact that the way in which consumers, who are already distracted by the visually stimulating online environment,²⁷⁷ approach online contracts differs from the way in which they approach paper-based contracts,²⁷⁸ and can play a role in whether or not the presence of contractual terms is expected by consumers, as well as which type of terms are expected.

It has been mentioned above that online contracts are much more ubiquitous than traditional standard form contracts.²⁷⁹ Consequently, consumers enter into these transactions daily, and often numerous times a day.²⁸⁰ Due to the widespread

²⁷¹ Mik 2016 *Singapore J Leg Stud* 77. Also see Koornhof 2012 *Speculum Juris* 43.

²⁷² Mik 2016 *Singapore J Leg Stud* 77.

²⁷³ Although stores often have notices containing contractual terms which purport to become binding when the consumer enters the store, those notices are generally rather limited in scope.

²⁷⁴ Zynda 2004 *Berkley Tech LJ* 511.

²⁷⁵ Ghirardelli 2015 *Oregon LR* 735; Mik 2011 *International Journal of Law and Information Technology* 340.

²⁷⁶ Radin *Boilerplate* 12.

²⁷⁷ Kim “Wrap Contracting” in *Electronic Commerce Law* 12.

²⁷⁸ Canino 2016 *UC Davis LR* 548.

²⁷⁹ See 2 4 2 above.

²⁸⁰ Kim *Wrap Contracts* 54.

occurrence of online contracts, most modern consumers conclude more contracts annually than a consumer two generations ago concluded in a lifetime.²⁸¹ Repeatedly clicking “I agree” to terms which the consumer has not read becomes so habitual that consumers rarely pause to contemplate that they are concluding a contract,²⁸² especially in the absence of other signals generally associated with the conclusion of a contract. They also become so used to the existence of these omnipresent “terms and conditions”, that it diminishes the perceived consequences of that action.²⁸³

Consumer behaviour may also be influenced by the manner of contracting. Consumers expect instant results on the internet, and may be “overeager, even ‘click-happy’”.²⁸⁴ It has been argued that the online environment induces impulsivity and impatience.²⁸⁵

Studies have further shown that consumer comprehension is generally lower when reading a document in an electronic format.²⁸⁶ This effect is exacerbated when the document contains hyperlinks.²⁸⁷ Therefore, form plays an important role in how much

²⁸¹ Hoffman 2016 *NYU LR* 1596, with reference to E Felten “Postmodern Times: Are We All Online Criminals?” 2011 *Wall Street Journal* D8.

²⁸² See Hoffman 2016 *NYU LR* 1596-1597. Most consumers cannot recall whether or not they clicked on an icon to indicate their acceptance of contractual terms (Kim *Wrap Contracts* 128-129; Radin *Boilerplate* 88-89). Consumers have further become “trained to manifest consent without reading [click-wraps]” (Kim 2014 *Chicago-Kent LR* 273).

²⁸³ Kim *Wrap Contracts* 59.

²⁸⁴ RA Hillman “Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications” in JK Winn (ed) *Consumer Protection in the Age of the “Information Economy”* (2006) 283 285; Wijayasriwardena 2016 *Queen Mary University Research Paper* 27. Also see Hillman & Rachlinski 2002 *NYU LR* 480.

²⁸⁵ Kim *Wrap Contracts* 61; Preston & McCann 2011 *BYU J Pub L* 27; Wijayasriwardena 2016 *Queen Mary University Research Paper* 33; Hillman & Rachlinski 2002 *NYU LR* 479.

²⁸⁶ Canino 2016 *UC Davis LR* 556, with reference to A Mangen, B Walgermo & K Brønnick “Reading Linear Texts on Paper Versus Computer Screen: Effects on Reading Comprehension” (2013) 58 *International Journal of Educational Research* 61. Also see G Quinot “Transformative Legal Education” (2012) 129 *SALJ* 411 425-428 for a brief exposition of the impact of a digital form on the way in which people engage with information. Specifically, it is stated that reading online causes people to quickly scan through text in an F-pattern, instead of the traditional linear method of reading (428). Furthermore, Wijayasriwardena (2016 *Queen Mary University Research Paper* 35) states that reading on a screen is more tiring on the eyes, which also reduces the likelihood of terms being read.

²⁸⁷ Canino 2016 *UC Davis LR* 557, with reference to D DeStefano & J LeFevre “Cognitive Load in Hypertext Reading: A Review” (2007) 23 *Computers Hum Behav* 1616 1616-1617.

information consumers assimilate when agreeing to the terms of a contract²⁸⁸ and a consumer reading an online contract will generally be less informed than one reading a paper-based contract.

There are some differences between online and paper contracts which may be to the benefit of the consumer. For example, it is easier and cheaper to comparison-shop online²⁸⁹ – that includes “shopping” for better terms. Obtaining information regarding a product and supplier, which might possibly include its standard terms or the enforcement thereof, could also be considerably more convenient online. A dissatisfied consumer can easily voice his opinion to a large potential customer base with the minimum of effort.²⁹⁰ However, the same applies to traditional suppliers, who are perhaps just as likely to find themselves the subject of online complaints.²⁹¹ Furthermore, because consumers believe that the risks addressed in standard form contracts are unlikely to occur,²⁹² they fail to utilise these resources at their disposal and evaluate the terms before transacting.²⁹³

A consumer browsing from the comfort of his own home may experience less time pressure if he decides to read the terms, helped by the absence of a long queue of impatient customers behind him.²⁹⁴ The lack of human interaction may also have some benefits. It reduces the social pressure which can be created by the sales agent and an online consumer has no fear of appearing confrontational if he chooses to read the contract presented to him.²⁹⁵

Overall, the absence of a warning function and the usual markers associated with contract conclusion, combined with the ubiquity of online contracts and impetuosity of online consumers, not only cause consumers to be unaware of the content of the

²⁸⁸ Kim 2014 *Southwestern LR* 310.

²⁸⁹ Kim *Wrap Contracts* 4; Bakos et al 2014 *J Leg Stud* 8; Hillman & Rachlinski 2002 *NYU LR* 478; Mik 2011 *International Journal of Law and Information Technology* 336.

²⁹⁰ Hillman & Rachlinski 2002 *NYU LR* 470.

²⁹¹ 471.

²⁹² See ch 3 (3 2 2 2).

²⁹³ Hillman & Rachlinski 2002 *NYU LR* 484.

²⁹⁴ Kim *Wrap Contracts* 3-4; Hillman & Rachlinski 2002 *NYU LR* 478; Kunz et al 2003 *Bus Lawyer* 290; Mik 2011 *International Journal of Law and Information Technology* 336; Moringiello 2014 *Southwestern LR* 275; Moringiello & Reynolds 2013 *Maryland LR* 465.

²⁹⁵ Kunz et al 2003 *Bus Lawyer* 290.

online contract, but often leads to ignorance regarding its existence. It can therefore be argued that online consumers are generally even less informed or even aware of transacting than those confronted with traditional standard form contracts.

2 4 4 The impact of the online nature of a contract on supplier behaviour

The online nature of a contract does not only influence consumer behaviour, but also supplier behaviour – both in terms of how the terms are presented and what is included in the contract.

One of the biggest contributing factors in this regard is that the information asymmetry which generally exists between the supplier and consumer in standard form contracts is aggravated in the online environment. Information asymmetry refers to the fact that the drafter's knowledge of the content and meaning of the terms of a standard form contract far exceeds that of the consumer, enabling the supplier to exploit the consumer's ignorance.²⁹⁶ Suppliers who rely on traditional standard form contracts have limited information about their consumers, and generally have only empirical data to rely on. However, technology allows online suppliers to collect vast amounts of data about their customers or potential customers and to gain insight into their consumers by analysing their browsing patterns.²⁹⁷ In this way, suppliers are able to identify what is most likely to attract and keep the attention of consumers and, for example, to see how many consumers access the online contract and how much time the average consumer spends reading it. Suppliers who engage in data tracking, a practice often consented to by consumers by way of browse-wrap contracts,²⁹⁸ not only gain information about which pages the consumer visited on its website, but can obtain information about all the websites accessed by the consumer. This worsens the information asymmetry between the supplier and the consumer, because it means that the supplier obtains even more information about the consumer without the latter enjoying a similar advantage, possibly leading to a bigger disadvantage for the consumer.

There is little evidence to show that suppliers use this information to better educate consumers regarding the terms on which they are contracting. To the contrary, it can

²⁹⁶ Hart 2014 *Southwestern LR* 258; Radin *Boilerplate* 103.

²⁹⁷ Hillman & Rachlinski 2002 *NYU LR* 471.

²⁹⁸ See ch 4 (4 2 & 4 7 2 1). Also see Leib & Eigen 2017 *U III LR* 77-78.

be expected that suppliers aim to make their contracts as unobtrusive as possible and thereby reduce the number of consumers accessing the contract.²⁹⁹ Even if the main aim of suppliers is not to hide contractual provisions from consumers,³⁰⁰ they tend to structure their websites to maximise browsing of products and minimise the chances of the consumer's attention being diverted to the online contract,³⁰¹ with its off-putting pages of unappetising legalese.³⁰²

The overwhelming quantity of data available to online suppliers further allows them to differentiate between individual customers based on their browsing patterns,³⁰³ to the extent that there has been evidence of suppliers offering different prices to various consumers.³⁰⁴

As mentioned above, the electronic nature of online contracts means they are easy to amend.³⁰⁵ Online contracts often provide that terms can be modified by posting the revised version on the website of the suppliers, with or without notification to the consumer.³⁰⁶

Traditional suppliers may be more reluctant to amend terms in paper form due to the cost involved in the printing and distribution of the amended agreements, as opposed

²⁹⁹ Hillman & Rachlinski 2002 *NYU LR* 479, 483; Mik 2011 *International Journal of Law and Information Technology* 340.

³⁰⁰ Although there is evidence that suppliers often attempt to make standard form contracts less comprehensible (MJ Radin "The Deformation of Contract in the Information Society" (2017) 37 *OJLS* 505 520, with reference to R Van Loo "Helping Buyers Beware: The Need for Supervision of Big Retail" (2016) 163 *University of Pennsylvania LR* 1311), and it is thus not inconceivable that online suppliers would want to discourage consumers from accessing the terms of the contract.

³⁰¹ Hillman & Rachlinski 2002 *NYU LR* 482.

³⁰² Kim 2014 *Chicago-Kent LR* 265: "Companies intentionally minimize the disruptiveness of contract presentment in order to facilitate transactions and to create a smooth website experience for the consumer." It can be argued that this is precisely the reason many suppliers prefer to use browse-wraps instead of click-wraps, because they are seen as less intrusive (see Kunz et al 2003 *Bus Lawyer* 280). Also see Jacobs 2004 *SA Merc LJ* 559, who recognises that wordy documents on a website would scare away consumers.

³⁰³ Hoffman 2016 *NYU LR* 1636.

³⁰⁴ Hillman & Rachlinski 2002 *NYU LR* 471-472.

³⁰⁵ See 2 4 2 above.

³⁰⁶ See the example from Apple's terms of service at ch 4 (4 7 3 1 n 421). Also see Kim *Wrap Contracts* 54, 66; Preston & McCann 2011 *BYU J Pub L* 23; Wijayasriwardena 2016 *Queen Mary University Research Paper* 33; Kim 2014 *Chicago-Kent LR* 271; Moringiello & Reynolds 2013 *Maryland LR* 471.

to terms in electronic format which can be amended by a few strokes of the keyboard, with the minimum effort and cost involved.

The content of online contracts and normal standard form contracts can also differ. According to Kim, “[f]orm affects process but it also affects substance.”³⁰⁷ Certain risks consumers face are more pertinent online, for instance issues of privacy and copyright.³⁰⁸ Personal information relating to users is a valuable commodity online, prompting suppliers to include authorisation for various uses of this information in their online contracts.³⁰⁹

Issues of copyright over material posted by a consumer on a website might also prove problematic, as online contracts often contain terms giving the supplier who owns the website a broad licence to user-generated content.³¹⁰ For instance, some websites “claim a perpetual license to user-generated content.”³¹¹ Others may go even further and claim ownership of any creative works that a consumer posts to the website.³¹²

These specific risks rarely exist where traditional standard form contracts are used. The experience in American law is that the terms of online contracts are often much more aggressive than paper contracts and the subject matter often extends far beyond the primary transaction.³¹³

2 5 Conclusion

Despite their differences, there are resemblances between concluding a standard form contract in the paper and electronic worlds.³¹⁴ Online suppliers are just as reliant on standard form contracts to manage risks and regulate relationships, and a blanket

³⁰⁷ Kim 2014 *Southwestern LR* 309.

³⁰⁸ See ch 4 (4 2).

³⁰⁹ See the example of Facebook’s sponsored stories, discussed at ch 4 (4 2). Also see Moringiello 2014 *Southwestern LR* 283-284.

³¹⁰ Preston & McCann 2011 *BYU J Pub L* 26-27; Kim *Wrap Contracts* 70-71; Ghirardelli 2015 *Oregon LR* 737.

³¹¹ Kim *Wrap Contracts* 71.

³¹² 71.

³¹³ Kim *Wrap Contracts* 70; Ghirardelli 2015 *Oregon LR* 737; Kim 2014 *Chicago-Kent LR* 273.

³¹⁴ Hillman & Rachlinski 2002 *NYU LR* 432.

refusal by the courts to enforce these contracts will make the online provision of goods and services potentially less efficient and may significantly increase costs.³¹⁵

Even though online contracts raise the same two problems identified in respect of traditional standard form contracts, namely the procedural and substantive problems, the important distinctions described previously suggest that the manner in which traditional paper contracts are regulated and the rules which govern their conclusion may not always be sufficient or optimal for regulating online contracts.

The majority of writers seem to agree that online contracts lead to less informed consumers and more onerous contracts. It was recently stated by an American court that:

“It is not unreasonable to assume that there is a difference between paper and electronic contracting. Based on assumptions about internet consumers, they require clearer notice than do traditional retail buyers.”³¹⁶

As mentioned above, American courts have attracted considerable criticism for their unwillingness to recognise the difference that form makes both in the transactional awareness of consumers and the behaviour of suppliers.³¹⁷ This has allowed suppliers to exploit online contracts to benefit themselves to the disadvantage of consumers.³¹⁸ Kim argues that:

“Some courts presiding over wrap contract cases have downplayed or dismissed the differences between digital and paper forms of contracting and the differences between the online and physical world contracting environments. They have ignored that the weightlessness of digital terms might encourage their overuse as digital terms do not create cost or storage problems. Their flexible form encourages hyperlinking, thus incorporating by reference terms on other web pages which increases the burden on the consumer to find them. The absence of a signature requirement and intangibility reduces consumer awareness and increases consumer habituation to online contracting, which in turn further diminishes consumer awareness. Some courts also ignored that digital contracting forms lack the signaling effects of signed paper contracts. Instead, they emphasized the

³¹⁵ See Hillman & Rachlinski 2002 *NYU LR* 475-476, who describe the use of online contracts as “essential to e-commerce”.

³¹⁶ *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 382.

³¹⁷ Goodman 1999 *Cardozo LR* 322: “Today’s judiciary has failed to give these new adhesion contracts the special treatment they deserve”; Hillman & Rachlinski 2002 *NYU LR* 492: “courts should be sensitive to the new kinds of procedural abuses available to e-businesses.”

³¹⁸ Kim “Wrap Contracting” in *Electronic Commerce Law* 33.

similarities between digital and paper terms in an effort to encourage innovation and facilitate transactions. Rather than determining whether the user actually agreed to terms, these courts focused on 'constructive assent,' and whether notice of terms was 'reasonable.' The determination of reasonableness, however, is an ex-post analysis which fails to reflect the presentation of contract terms from the standpoint of the consumer. Studies and cases support the conclusion that in online transactions consumers do not believe they have consented to contract terms and are often unaware that they have entered into a legally binding agreement."³¹⁹

In the following two chapters, the application of the South African law of contract to online contracts and specifically the procedural and substantive problems associated with online contracts will be considered in more detail. The focus is not on whether the principles of the law of contract are sufficiently flexible to allow for contract conclusion by way of electronic means – it is accepted that this is the case, and this is also confirmed in ECTA. The true question is whether the South African law of contract is equipped to deal with the proliferation of non-negotiated online contracts facing consumers in the electronic environment. On the more positive side, it must also be considered whether the online environment offers opportunities that were not previously available to improve the bargaining position of consumers. Technology might create the opportunity for processes which would be impractical or too time consuming otherwise, for example providing for consent to be given in a specific manner. The following chapters will also study the problems experienced in other jurisdictions with online contracts, and use the experiences there to assess the South African approach to this form of contracting.

³¹⁹ 21.

CHAPTER 3: THE FORMATION OF ONLINE CONTRACTS – PROBLEMS WITH ESTABLISHING ASSENT IN THE ONLINE CONTEXT

3 1 Introduction

The core difficulty regarding the formation of online contracts is to establish the legal basis for their enforcement. Because consumers generally do not read or understand the terms of the contract,¹ there cannot be a true meeting of the minds, which classically is required for liability under the “subjective” will theory of contract formation.² It is therefore only by applying “objective” theories of contract formation, which enquire into the appearance of or reliance on consent, that liability could nonetheless be imposed. The primary focus of this chapter is to determine whether online contracts meet the requirements for contract conclusion in terms of these theories.

Especially in America, the enforceability of online agreements has received extensive judicial attention. In general, and barring a few decisions to the contrary,³ American courts regard click-wraps as enforceable – the act of clicking is construed as a manifestation of consent.⁴ With browse-wraps, however, the courts have had more difficulty recognising that a consumer can be bound in the absence of an unequivocal expression of consent. The conditions set by the courts for enforceability are that there must be sufficient notice that contractual terms apply.⁵ Courts have also been willing

¹ See e.g. Y Bakos, F Marotta-Wurgler & DR Trossen “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts” (2014) 43 *J Leg Stud* 1 10-33 (who studied 92 411 American households, and found that less than 0.2% of consumers purchasing software online access the electronic End User License Agreement, and more than 90% if those access it for an insufficient period of time to read the terms); I Ayres & A Schwartz “The No Reading Problem in Consumer Contract Law” (2014) 66 *Stanford LR* 545 547-548. Two other studies regarding consumers’ reading habits of online contracts returned slightly higher results, with one indicating 7% of adults read the terms and the other, 4% (see D Wijayasriwardena “Consent in Online Contracts - Mindless or Mindful?” (2016) *Queen Mary University of London, School of Law Legal Studies Research Paper No. 234/2016* 26 (available at <<https://ssrn.com/abstract=2783793>>)).

² See the discussion at 3 3 1 below regarding objective and subjective theories of contract formation.

³ See an overview of the decisions by American courts regarding click-wrap and browse-wrap contracts in N Kim *Wrap Contracts: Foundations and Ramifications* (2013) ch 4. Also see CB Preston & EW McCann “Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse” (2011) 26 *BYU J Pub L* 1 28-31.

⁴ Kim *Wrap Contracts* 41.

⁵ Kim *Wrap Contracts* 43; Preston & McCann 2011 *BYU J Pub L* 18, 28.

to enforce terms presented on a “pay now, terms later” (PNTL) basis – such as shrink-wraps – which are only made available to the consumer after the purchase is completed, provided notice of the terms was given to the consumer and he has the opportunity to return the product.⁶

As mentioned before, these decisions have not been above criticism.⁷ Analysing these decisions as well as their consequences can provide valuable guidance to South African courts when faced with similar legal problems. Ultimately, the aim of this chapter is to identify whether the principles regarding the formation of contracts in South African law must be adapted or supplemented to accommodate online contracts.

The chapter commences by identifying specific practical problems that might arise in the context of the conclusion of online contracts, and aims to highlight the reasons why establishing consent to online contracts are often fraught with difficulty.⁸ Thereafter, the general principles regarding contract formation in South African law are set out,⁹ before the application of these principles is considered in the context of online contracts.¹⁰ This is followed by brief exposition of the American approach to contract formation (and specifically standard form contracts) and an overview of their approach to online contracts.¹¹ The penultimate section involves a comparative analysis of the formation of online contracts in South African and American law,¹² whereafter the chapter concludes by offering some observations and preliminary suggestions based on this analysis.¹³

3 2 Problem identification: establishing consent in the online environment

3 2 1 Introduction

The focus of this chapter is specifically on the problem of establishing consent to online contracts. There are two factors which might render this enquiry problematic. The

⁶ *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996) 1449-1451.

⁷ See ch 2 (2 2 2 1).

⁸ At 3 2.

⁹ At 3 3.

¹⁰ At 3 4.

¹¹ At 3 5.

¹² At 3 6.

¹³ At 3 7.

first, which can be called the masking effect of online contracts,¹⁴ refers to the fact that in most cases online contracts are accepted by a party without their terms being seen, read or understood by him.¹⁵ Consumers are generally only aware of the salient terms of a transaction, such as the contract price, and remain ignorant of the further terms which forms part of the contract with the supplier. The second is the effect of the online environment on consumer perception. This impacts on the intention of consumers to conclude a contract and thus affects the determination of whether certain acts by the consumer (such as clicking or browsing) can be construed as a manifestation of consent.

3 2 2 The masking effect of online contracts

The masking effect of standard form contracts means that consent given by the consumer to an online contract is usually imperfect, because consumers are unaware of the content or meaning of the terms. There are various factors that cause the consumer not to read the terms presented to him, or that contribute to an incomplete understanding by the consumer of the effect of the terms. This section will briefly focus on some of these factors.

3 2 2 1 *Failure to read*

It is widely accepted that only a very small, almost negligible, percentage of consumers read standard form contracts¹⁶ – an assumption which has been supported by empirical data.¹⁷ In the online environment, this is even more prevalent, for the reasons discussed earlier.¹⁸ Experiments have shown that consumers do not hesitate to agree

¹⁴ This is a translation of what Eiselen terms the “versluitingseffek” (GTS Eiselen *Die Beheer oor Standaardbedinge: 'n Regsvergelykende Ondersoek* LLD thesis Potchefstroom University (1988) 103). It was used by him in the context of traditional standard form contracts, but also applies in the case of online contracts.

¹⁵ Eiselen *Standaardbedinge* 103.

¹⁶ RA Hillman & JJ Rachlinski “Standard-Form Contracting in the Electronic Age” (2002) 77 *NYU LR* 429 448; O Ben-Shahar “The Myth of the ‘Opportunity to Read’ in Contract Law” (2009) 5 *ERCL* 1 2.

¹⁷ TD Rakoff “Contracts of Adhesion: An Essay in Reconstruction” (1983) 96 *Harv LR* 1173 1179; MJ Radin “The Deformation of Contract in the Information Society” (2017) 37 *OJLS* 505 519-520. In the context of online contracts, see n 1 above.

¹⁸ See ch 2 (2 4).

to an online contract promising free wi-fi in return for their first-born child,¹⁹ or to promise their immortal souls in order to play a video game, even where they were given the choice to opt-out of the clause.²⁰ It is therefore little wonder that the Urban Dictionary defines the phrase “I have read and agree to the terms of use” as “[p]retty much the biggest lie on the planet.”²¹

There are various reasons for this failure to read. Consumers may deem reading the contract a pointless exercise, either because the legalese contained in the contract is beyond their comprehension,²² or because they have no bargaining power and therefore cannot influence the terms in any event.²³ Furthermore, it is inefficient for consumers to spend a long time reading a complex list of standard terms for every transaction:²⁴ the cost of reading (in the form of time spent) for the consumer is much higher than the perceived benefit.²⁵ This is true in particular for online contracts, due to their added length and ubiquity.²⁶ Consumers also suffer from what has been

¹⁹ N Bajekal “Londoners Unwittingly Exchange First Born Children for Free Wi-Fi” (29-9-2014) *Time* <<http://time.com/3445092/free-wifi-first-born-children/>> (accessed 7-11-2019); A Blaszczyk-Bloxie “Give Up Firstborn for Free Wi-Fi? Some Click ‘I Agree’” (30-9-2014) *CBS News* <<http://www.cbsnews.com/news/give-up-firstborn-for-free-wi-fi-some-click-i-agree/>> (accessed 7-11-2019).

²⁰ FoxNews.com “7,500 Online Shoppers Unknowingly Sold Their Souls” (15-4-2010) *Fox News* <<http://www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls.html>> (accessed 7-11-2019). Also see Wijayasriwardena 2016 *Queen Mary University Research Paper* 27-28.

²¹ <<https://www.urbandictionary.com/define.php?term=I%20have%20read%20and%20agree%20to%20the%20terms%20of%20use>> (accessed 7-11-2019).

²² E Kahn, C Lewis & C Visser *Contract and Mercantile Law: A Source Book 1 - General Principles of Contract; Agency and Representation* 2 ed (1988) 34, with reference to *Western Bank Ltd v Sparta Construction Company* 1975 1 SA 839 (W); Kim *Wrap Contracts* 54; Wijayasriwardena 2016 *Queen Mary University Research Paper* 29, 32; Hillman & Rachlinski 2002 *NYU LR* 436, 446; Radin 2017 *OJLS* 520; EJ Leib & ZJ Eigen “Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead” 2017 *U Ill LR* 65 98; MJ Radin *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013) 12.

²³ See ch 1 (1 1 n 6).

²⁴ T Naudé “Unfair Contract Terms Legislation: The Implications of Why We Need It for Its Formulation and Application” (2006) 17 *Stell LR* 361 367, 371; H Kötz “Controlling Unfair Contract Terms: Options for Legislative Reform” (1986) 103 *SALJ* 405 414.

²⁵ Hillman & Rachlinski 2002 *NYU LR* 436, 446.

²⁶ See ch 2 (2 4 2).

described as “disclosure overload”²⁷ – the volume of standard form (and especially online) contracts presented to consumers on a daily basis makes it irrational and impractical for them to read each one and renders reading too costly.²⁸ Because the supplier’s competitors often use similar terms, the consumers cannot benefit by being well-informed and shopping around for better terms,²⁹ which further acts as a disincentive against reading the terms.

Suppliers further contribute to a lack of consumer knowledge by discouraging consumers from reading standard form contracts. This is done by presenting the terms of the contract to consumers at the end of the transaction, after the consumer has already invested time and effort in selecting the product he wishes to buy, and is already committed to the purchase.³⁰ The most pertinent example of this is the use of shrink-wraps or PNTL contracts, but suppliers also introduce other forms of online contracts at the end of the transacting process, such as requiring consent to a multi-wrap when consumers are finalising their orders. In those cases, consumers are usually already committed to the purchase and are therefore likely to view the contract in a manner that supports their desire to obtain the item.³¹

Often consumers are not even aware of the existence of the terms, which therefore remain unread.³² Especially where browse-wraps are used, consumers often fail to notice the presence of terms governing the transaction.³³ Even in the case of click-wraps consumers often do not realise that their act of clicking constitutes acceptance

²⁷ T Wilkinson-Ryan “The Perverse Consequences of Disclosing Standard Terms” (2017) 103 *Cornell LR* 117 118, 120.

²⁸ Wilkinson-Ryan 2017 *Cornell LR* 123. Also see H Daiza “Wrap Contracts: How They Can Work Better for Businesses and Consumers” (2018) 54 *Cal WLR* 202 208-209.

²⁹ Hillman & Rachlinski 2002 *NYU LR* 436; Wijayasriwardena 2016 *Queen Mary University Research Paper* 11, 30.

³⁰ DD Barnhizer “Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts” (2014) 44 *Southwestern LR* 215 219.

³¹ Hillman & Rachlinski 2002 *NYU LR* 453.

³² Radin *Boilerplate* 12; EA Zacks “The Restatement (Second) Of Contracts S 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts” (2016) 7 *Wm & Mary Bus LR* 733 790.

³³ See 3 2 3 2 below.

to contractual terms.³⁴ The effect of the online environment in this regard is discussed below.³⁵

3 2 2 2 *Failure to comprehend*

The failure to read is not the only factor causing imperfect comprehension of the effect of standard terms by consumers. The choices made by people are not always strictly rational, because:

“We are not good at assessing risk; we tend to stay with the status quo; and we make choices according to particular surrounding circumstances that are salient to us, ignoring others that may be more pertinent.”³⁶

This form of irrational decision-making is the result of a heuristic failure leading to a cognitive bias, or what can be referred to as a heuristic bias.³⁷ Even where consumers understand the meaning of a clause which, for example, excludes liability on the part of the supplier, they deem it unlikely that the risk will materialise.³⁸ Consumers believe that suppliers will not insert unreasonable terms in their contracts,³⁹ and that even if they do, that suppliers will not risk their reputation by relying on the terms in the standard form contract to exploit them.⁴⁰ Furthermore, as a rule consumers do not expect courts to enforce unreasonably oppressive or harsh contractual terms.⁴¹

The average consumer is incapable of considering all the various factors and risks that could play a role when entering into a transaction, and therefore tends to limit his decision-making process to a small number of core factors, such as the price and

³⁴ See 3 2 3 1 below.

³⁵ See 3 2 3 below.

³⁶ Radin *Boilerplate* 26.

³⁷ Also see O Bar-Gill *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (2012) 18-23.

³⁸ Radin *Boilerplate* 12, 27, 103; Hillman & Rachlinski 2002 *NYU LR* 436; Wijayasriwardena 2016 *Queen Mary University Research Paper* 30.

³⁹ Radin *Boilerplate* 12.

⁴⁰ Hillman & Rachlinski 2002 *NYU LR* 447; Wijayasriwardena 2016 *Queen Mary University Research Paper* 31.

⁴¹ Hillman & Rachlinski 2002 *NYU LR* 436, 447; Radin *Boilerplate* 12.

quantity of the product.⁴² This is known as bounded rationality,⁴³ and suppliers take advantage of this well-known limitation by providing an overload of information to consumers,⁴⁴ thereby “hiding” terms which they prefer consumers not to notice. Online contracts are particularly well-suited for being abused in this manner. Since these contracts are generally lengthier than traditional standard form contracts and even more prevalent,⁴⁵ suppliers may find it easier to conceal terms in them.

Information asymmetry further contributes to the lack of proper consumer consent to standard form contracts.⁴⁶ This allows the supplier to take advantage of known consumer habits to ensure that only favourable terms come to the consumer’s attention. As previously discussed, the availability of data in respect of online consumers widens the divide between consumer and supplier knowledge even further.⁴⁷

3 2 3 Effect of the online environment on the intention to contract

Establishing legal intention is more problematic for online contracts than for traditional standard form contracts. This can be ascribed to the “disconnect between perception and reality”⁴⁸ which is present in the online environment. Mik states that:

“Unsurprisingly, most users do not perceive their online interactions as *transactions*. They would contend that because online resources are free, there is no need to provide something in return. As there is no exchange, there is no legal intention and therefore no contract.”⁴⁹

The influence that the online environment has on both consumers and suppliers has been discussed previously.⁵⁰ However, what remains to be considered is whether the manifestations of consent in the online environment can be equated to offline action

⁴² Hillman & Rachlinski 2002 *NYU LR* 451-452; Wijayasriwardena 2016 *Queen Mary University Research Paper* 34-35.

⁴³ See R Korobkin "Bounded Rationality, Standard Form Contracts and Unconscionability" (2003) 70 *U Chi LR* 1203 1206.

⁴⁴ Wijayasriwardena 2016 *Queen Mary University Research Paper* 34.

⁴⁵ See ch 2 (2 4 2) in this regard.

⁴⁶ Wijayasriwardena 2016 *Queen Mary University Research Paper* 24; Radin *Boilerplate* 24, 103.

⁴⁷ See ch 2 (2 4 4).

⁴⁸ See Kim *Wrap Contracts* 1.

⁴⁹ 79 (emphasis in the original).

⁵⁰ See ch 2 (2 4).

such as signature or acceptance through conduct. The role of consumer perception on clicking and browsing as manifestations of assent must therefore be analysed.

3 2 3 1 *Clicking as a manifestation of assent*

Evidence suggests that “clicking to agree to an online agreement does not induce deliberation or necessarily connote a legal contract”.⁵¹ It has thus been questioned how merely clicking an icon can be equated to signing an agreement.⁵² Even if the act of clicking is intentional, it does not necessarily mean that the consumer intended any legal consequences to flow from the act.⁵³ Mik argues that:

“Due to their limited expressiveness, clicks do not belong in the same category as such culturally entrenched communicative signs like handshakes, nods or signature and are not universally perceived as capable of producing legal consequences.”⁵⁴

The main concern in this regard is that clicking lacks the signalling function associated with signature,⁵⁵ and thus also does not perform the cautionary function of signature.⁵⁶ Because consumers click for a multitude of purposes, most of them devoid of legal meaning, clicking cannot necessarily be seen as an indication of assent in a similar manner as signature.

3 2 3 2 *Browsing as a manifestation of assent*

Intention is even more difficult to establish in the case of browse-wraps, because they require no unambiguous act of acceptance and consequently consumers are often unaware that there is a contract.⁵⁷ Due to the ambiguity created by the online context,⁵⁸ it must be asked whether

⁵¹ Zacks 2016 *Wm & Mary Bus LR* 743.

⁵² See Preston & McCann 2011 *BYU J Pub L* 18; NS Kim “The Wrap Contract Morass” (2014) 44 *Southwestern LR* 309 312-13.

⁵³ Mik 2016 *Singapore J Leg Stud* 82-83.

⁵⁴ 76.

⁵⁵ See JM Moringiello “Signals, Assent and Internet Contracting” (2005) 57 *Rutgers LR* 1307.

⁵⁶ 1316: “a written signature provides the traditional evidence of assent because when we are asked to sign something, we are conditioned to think that we are doing something important”.

⁵⁷ Kim *Wrap Contracts* 54. Also see 3 2 1 above.

⁵⁸ Mik 2016 *Singapore J Leg Stud* 76.

“it [can] be assumed that the average user intends to create a legal relationship with the operator (e.g. Google or Amazon) when ‘just browsing’?”⁵⁹

Because consumers do not expect to enter into a contract through the use of a free website, a hyperlink stating “Terms of Service” or something similar might be insufficient to give notice to consumers that a contract is concluded.⁶⁰ Courts thus have to decide whether a contract can be formed where the consumer provides no unambiguous manifestation of assent, lacks the intention to contract on the basis of a standard form contract and often does not have knowledge of the existence of the terms.⁶¹

3 2 4 Conclusion

The masking effect inherent in online contracts and the impact of the online environment on consumer perception cause consumers to lack transactional awareness – and thus also the necessary *animus contrahendi* – when entering into online contracts. Their ignorance regarding the terms of the transaction further means that any consent given must be imperfect. Accepting that a contract was concluded between the parties is even more problematic where the consumer was not even aware of the existence of contractual terms.⁶² This is often the case in browse-wrap contracts, where the only warning the consumer has that contractual terms apply to his online interactions is a hyperlink at the top or bottom of a webpage (usually a page filled with other information and links).

It is clear that true or actual consensus cannot be present in such a case, and thus liability in terms of the subjective theory of contractual liability – such as the will theory – cannot be imposed. However, while some legal systems, including South African law,⁶³ accept the will theory as providing the primary rationale for contractual liability,⁶⁴ very few (if any) legal systems subscribe to an unqualified version of this theory.⁶⁵ In

⁵⁹ 71.

⁶⁰ Ghirardelli 2015 *Oregon LR* 735.

⁶¹ See E MacDonald "When is a Contract Formed by the Browse-Wrap Process?" (2011) 19 *International Journal of Law and Information Technology* 285 286, 289.

⁶² Kim *Wrap Contracts* 54.

⁶³ See 3 3 1 below.

⁶⁴ CJ Pretorius "The Basis of Contractual Liability (2): Theories of Contract (Will and Declaration)" (2005) 68 *THRHR* 441 446.

⁶⁵ 453.

South African law, the reliance theory is recognised as a residual basis for ascribing contractual liability,⁶⁶ thereby protecting the reasonable reliance of the other contracting party on the impression of consensus.⁶⁷ In the context of online contracts, it raises the question whether the reliance of suppliers can ever be reasonable in the face of overwhelming evidence that online contracts are not read and if studies indicate that it would be irrational for the consumers to study the terms of the multitudes of online contracts they are faced with daily.⁶⁸ This also requires courts to decide whether to take cognisance of the evidence which suggest that consumers do not view online contracts in the same manner as paper-based contracts, or whether they will equate online manifestations of consent to the offline variety.

3 3 General principles of contract formation in South African law

3 3 1 Introduction

South African law recognises various theories that could potentially govern contractual liability. In light of these theories, the manner in which consensus is established in specific factual situations, as well as the principles relating to offer and acceptance, can be considered.

Although this section aims to provide an overview of the general principles relating to contract formation in South African law, the focus is on the principles and fact patterns which have particular relevance in the formation of standard form contracts. After setting out these general principles, the formation of online contracts will be considered below.⁶⁹

3 3 2 Theories of contractual liability

It is generally accepted that the primary basis for contractual liability in South Africa is provided by the will theory.⁷⁰ In terms of this theory, a basic requirement for the

⁶⁶ 454.

⁶⁷ See 3 3 2 below.

⁶⁸ Bakos et al 2014 *J Leg Stud* 4, 6.

⁶⁹ At 3 4.

⁷⁰ *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A); *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A); LF Van Huyssteen, GF Lubbe & MFB Reinecke *Contract General Principles* 5 ed (2016) 22; CJ Pretorius "The Basis of Contractual Liability in South

conclusion of a contract is consensus or an actual meeting of the minds between two or more parties.⁷¹

However, due to the problems inherent in following a purely subjective approach, the will theory is only the point of departure, and operates in a qualified manner.⁷² An objective corrective is essential, for

“[i]f this were not so, it is difficult to see how commerce could proceed at all. All kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like, would become relevant and no party to any contract would be safe: the door would be opened wide to uncertainty and even to fraud.”⁷³

Allowing an objective basis for contractual liability offers security to a contracting party and in doing so serves a dual purpose: facilitating commerce and combating deceptive practices.

It was confirmed in *Saambou-Nasionale Bouvereniging v Friedman*⁷⁴ that:

“Weliswaar word daar in die algemeen aanvaar dat die wilstoerie as uitgangspunt moet dien ... en dat slegs in geval van werklike dissensus 'n ander benadering toegepas moet word. Maar oor wat hierdie ander benadering moet wees is daar nie eenstemmigheid nie.”⁷⁵

Generally, the so-called reliance theory is accepted as a corrective to the will theory.⁷⁶ Thus, the contract assertor can enforce a contract even in the absence of consensus

African Law (2)" (2004) 67 *THRHR* 383 383; D Hutchison "The Nature and Basis of Contract" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 3 20.

⁷¹ *Bourbon-Leftley v WPK (Landbou) Bpk* 1999 1 SA 902 (C) 916; JC de Wet & AH Van Wyk *De Wet en Van Wyk Die Suid-Afrikaanse Kontrakereg en Handelsreg* 1 4 ed (1978) 14, 19; DJ Joubert *General Principles of the Law of Contract* (1987) 21; GB Bradfield *Christie's Law of Contract* 7ed (2016) 29; Van Huyssteen et al *Contract* 22; GF Lubbe & CM Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* 3 ed (1988) 106.

⁷² See *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A) 78: "Op grond van hierdie toepassing word vry algemeen aanvaar dat die wilsteorie, as grondslag van kontraktuele aanspreeklikheid in ons reg, in gespaste gevalle deur die vertrouensteorie getemper word." Bradfield *Christie's Law of Contract* 29-30; De Wet & Van Wyk *Kontrakereg* 14.

⁷³ *Irvin and Johnson (SA) Ltd v Kaplan* 1940 CPD 647.

⁷⁴ 1979 3 SA 978 (A).

⁷⁵ 995-996: "It is generally accepted that the will theory should serve as starting point ... and that only in instances of true dissensus a different approach should be applied. But there is no unanimity about what this other approach should be." (Own translation).

⁷⁶ *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A) 78.

if he can prove that the contract denier created the impression that there was consensus, and the former reasonably relied on this representation. This is given practical effect through the doctrine of quasi-mutual assent, as expressed in the following dictum of Blackburn J in *Smith v Hughes*:⁷⁷

“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 the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he intended to agree to the other party’s terms.”⁷⁸

The other side of the “reliance” coin is that the contract denier can escape liability where he can prove that he made a reasonable and material mistake which excluded consensus, i.e. if he can prove an *iustus error*.⁷⁹ Generally, the outcome would be similar, irrespective of whether one applies the quasi-mutual assent or *iustus error* doctrines: thus, if a contractasserter was responsible for the contract denier’s mistake due to the use of a misleading form, the contractasserter could not reasonably rely on assent, and the contract denier’s mistake would be reasonable. Both doctrines would then point to the absence of liability.⁸⁰

It is not entirely clear when a mistake can be deemed reasonable, but there is some judicial support for the following division.⁸¹ The first situation is where the mistake is induced by misrepresentation.⁸² A second, more contentious instance which would render a contract denier’s mistake reasonable, is if the contract denier cannot be blamed because he acted reasonably and without negligence.⁸³ Lastly, the contract

⁷⁷ (1871) LR 6 QB 597. See *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A); Bradfield *Christie’s Law of Contract* 31-32; M Nortje “Unexpected Terms and Caveat Subscriptor” (2011) 129 *SALJ* 741 744.

⁷⁸ *Smith v Hughes* (1871) LR 6 QB 597 601, as quoted in *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A) 239.

⁷⁹ De Wet & Van Wyk *Kontraktereg* 20; Nortje 2011 *SALJ* 743-744. Also see *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D) 172, where it was confirmed that the objective approach to contract formation does not preclude a reliance on mistake to avoid contractual liability.

⁸⁰ D Hutchison “Traps for the Unwary’: When Careless Errors are Excusable” in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 39 41.

⁸¹ See *Prins v Absa Bank Ltd* 1998 3 SA 904 (C) 908.

⁸² Nortje 2011 *SALJ* 744; C Pretorius “Mistake / Absence of Consensus” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 83 104. See the discussion of what constitutes a misrepresentation in ch 4 (4 3 3).

⁸³ Pretorius “Mistake” in *The Law of Contract* 105.

denier's mistake will be *iustus* where the contract assertor could not reasonably rely on the appearance of consensus.⁸⁴

The last instance makes it clear that the *iustus error* doctrine can give indirect effect to the reasonable reliance theory. It suggests that the deciding factor in determining whether liability should be imposed is whether the belief of the contract assertor was reasonable.⁸⁵ This is especially relevant where there is a potential clash of doctrines, and both the error and the reliance are unreasonable, for example where the consumer is careless, but the supplier is aware of or should have realised that he is mistaken.⁸⁶ In those cases, the contract denier should be allowed to escape liability.⁸⁷ This aligns the *iustus error* doctrine with the doctrine of quasi-mutual assent and ensures the same outcome regardless of which doctrine is relied upon, because in both cases it is the reliance of the contract assertor which ultimately determines the enforceability of the contract.⁸⁸

The consumer will further have to prove that his reasonable mistake was material for the contract to be void according to the *iustus error* doctrine; this requirement indicates that consent is absent.⁸⁹ However, if the mistake is not material (i.e. an error in motive), there may be consensus, but all is not lost: if the mistake was induced by a misrepresentation that meets certain requirements, this improper conduct taints the consent and renders the contract voidable, which means the consumer may elect to rescind it.⁹⁰ This issue is discussed in chapter 4, in the context of other situations where consent exists, but is obtained in an improper manner.⁹¹

⁸⁴ 106.

⁸⁵ Hutchison "Traps for the Unwary" in *Essays 44*; J Barnard-Naudé "The Decision in *Hartley v Pyramid Freight (Pty) Ltd*: Justice Miscarried?" (2007) 18 *Stell LR* 497 502.

⁸⁶ Barnard-Naudé 2007 *Stell LR* 502.

⁸⁷ See *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A) 241: "If he realised (or should have realised as a reasonable man) that there was a real possibility of a mistake in the offer, he would have had a duty to speak and to enquire whether the expressed offer was the intended offer."

⁸⁸ See Hutchison "Traps for the Unwary" in *Essays 44-45*.

⁸⁹ Pretorius "Mistake" in *The Law of Contract* 85-89.

⁹⁰ 85.

⁹¹ See ch 4 (4 3).

3 3 3 Establishing consensus or deemed consensus in the case of standard form contracts: some standard fact patterns

The general principles discussed above regarding the theories of contractual liability apply in cases where the parties conclude a standard form contract, whether online or not. In this regard, three situations were identified in *Durban's Water Wonderland (Pty) Ltd v Botha*.⁹² This case dealt specifically with unsigned terms (sometimes called “ticket cases”), but the same three possible situations can be distinguished in the case of signed documents,⁹³ namely:

- (i) where the consumer noticed, read and accepted all the terms;
- (ii) where the consumer noticed that there were contractual terms, but did not read them; and
- (iii) where the consumer did not notice the terms.⁹⁴

Regardless of which scenario applies, two requirements are set for the inclusion of terms in the transaction between parties: the terms must be provided before or in conjunction with contract conclusion,⁹⁵ and notice (either true or constructive) is

⁹² 1999 1 SA 982 (SCA) 991.

⁹³ *Hartley v Pyramid Freight t/a Sun Couriers* 2007 2 SA 599 (SCA) para 5 where the court, relying on *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA), stated that in the absence of mistake, actual consensus would be present where the signatory admitted he could have read the conditions of carriage, but had not done so. Also see Hutchison “Traps for the Unwary” in *Essays* 42-43.

⁹⁴ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991: “[i] Had Mrs Botha read and accepted the terms of the notices in question there would have been actual consensus... [ii] Had she seen one of the notices, realised that it contained conditions relating to the use of the amenities but not bothered to read it, there would similarly have been actual consensus on the basis that she would have agreed to be bound by those terms, whatever they may have been. [iii] Mrs Botha ... did not admit to having actually seen any of the notices at the appellant's park on the evening concerned, or for that matter at any other time”.

⁹⁵ See *D&H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 3 SA 593 (SCA) 599 (discussed in M Nortje & D Bhana “General Principles of Contract” (2006) *Annual Survey of South African Law* 178 189-191); *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 4 SA 408 (SCA) 419 (where the Supreme Court of Appeal rejected the factual finding of the Full Bench in *Paltex Dyehouse (Pty) Ltd v Union Spinning Mills (Pty) Ltd* 2000 4 SA 837 (B) that the terms were introduced after contract conclusion, although not disputing that such a finding would render the terms unenforceable. Also see the discussion of the Full Bench’s decision in M Nortje “General Principles of Contract”

required.⁹⁶ This follows from the general requirements for formation, or what has been referred to as “the fictionalized appeal to consensuality”.⁹⁷ In other words, without notice of the terms, neither actual nor purported consensus can be present.⁹⁸

3 3 3 1 *The consumer read and consented to the standard terms*

Where the consumer studied the terms presented to him and consented to them – i.e. the first situation mentioned in *Durban’s Water Wonderland* – true consensus can be present.⁹⁹ This scenario is therefore the easiest to reconcile with the primary point of departure in South African contract law: contractual liability is based on a meeting of the minds (the will theory).

Unfortunately, this scenario is probably also the rarest when dealing with standard form contracts. The reality is that consumers are often unaware of the fact that their transaction is regulated by standard terms. Even if they are aware that the terms will form part of the transaction, consumers regularly fail to read the terms of standard form contracts for the reasons discussed above.¹⁰⁰ These cases fall under the second and third categories mentioned in *Durban’s Water Wonderland* above.

3 3 3 2 *The consumer noticed but did not read the standard terms*

As mentioned above, the court in *Durban’s Water Wonderland*¹⁰¹ drew a distinction between a scenario where the consumer noticed the existence of the terms, but failed

(2000) *Annual Survey of South African Law* 161 166: “if a binding contract had been concluded between the parties prior to the dispatch of the order confirmation forms (as was found by the court), then *cadit quaestio*: the terms in the form would then have had no application to the relationship between the parties, unless it could be shown that they had agreed to vary the terms of the initial agreement”). Further see *Reynolds v Donald Currie & Co* 1875 NLR 1 14: “It would, I must say, be almost revolting to my judgment to hold, when looking for a deliberate agreement, that a ticket put into the consignor’s hands only after his contract is complete, should be held to be a contract by him”; JR Harker “Imposed Terms in Standard-Form Contracts” (1981) 98 *SALJ* 15 19.

⁹⁶ *Central South African Railways v McLaren* 1903 TS 727 735; *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd* 1977 2 SA 709 (W) 713-714; *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 4 SA 408 (SCA) 411; Eiselen *Standaardbedinge* 114; Harker 1981 *SALJ* 18.

⁹⁷ Harker 1981 *SALJ* 18.

⁹⁸ Also see the discussion in 3 5 4 below.

⁹⁹ See *Durban’s Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A) 991: “Had Mrs Botha read and accepted the terms of the notices in question there would have been actual *consensus*”.

¹⁰⁰ See 3 2 2 1 above.

¹⁰¹ *Durban’s Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991.

to read them, and where he was completely ignorant of their existence. Scott JA held that where the consumer had

“seen one of the notices, realised that it contained conditions relating to the use of the amenities but not bothered to read it, there would similarly have been actual *consensus* on the basis that she would have agreed to be bound by those terms, whatever they may have been.”¹⁰²

Whether this statement can be accepted as correct depends on how consensus is interpreted. Consensus can be defined as

“a meeting of the minds of the parties on all material aspects of their agreement; the parties are completely *ad idem*”.¹⁰³

In *Saambou-Nasionale Bouvereniging v Friedman*,¹⁰⁴ it was said that

“[o]ns bronne, literatuur en regspraak is deurspek met terminologie en stellings wat daarop dui dat met *consensus* bedoel word die saamval van wat elke party werklik (psigologies) wil.”¹⁰⁵

If this definition is strictly adhered to, it is difficult to see how true consensus can be achieved if the consumer does not have knowledge of the content of the standard terms governing the transaction. The parties can have consensus *ad idem* with regard to certain aspects of their transaction – including the fact that standard terms will apply – but not in respect of the transaction in its entirety. Whether liability can be established in terms of the will theory in these circumstances thus hinges on whether consensus in respect of the entire transaction is required, or whether it is sufficient for the parties to be in agreement with regard to the core, salient terms and the fact that further (not agreed upon) terms apply.

¹⁰² 991.

¹⁰³ D Hutchison & C Pretorius “Glossary” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 509 511. Also see Bradfield *Christie’s Law of Contract* 29-30 which describes consensus as true agreement or a meeting of the minds.

¹⁰⁴ 1979 3 SA 978 (A).

¹⁰⁵ 384: “Our sources, literature and case law are rife with terminology and statements which indicate that what is meant with *consensus* is the coincidence of what each party truly (psychologically) wills.” (own translation).

As authority for his statement above, Scott JA relies on *Central South African Railways v James*.¹⁰⁶ There it was said that

“having taken the ticket, having read the printing at the back of it, and having been informed thereby that the ticket was issued subject to the rules and regulations contained in the tariff book, the defendant must be taken to have *assented that those rules and regulations should form part of the contract* between himself and the plaintiffs.”¹⁰⁷

The court in *Durban’s Water Wonderland*,¹⁰⁸ and the subsequent decisions which have confirmed this dictum,¹⁰⁹ seem to require assent to the *application* of standard terms, but not actual assent to their content in order to find liability based on consensus. This is confirmed to a certain extent in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*,¹¹⁰ where it was said that

“one cannot agree to something which one has not read, let alone understood, *unless one specifically agrees to do so*.”¹¹¹

Provided therefore the consumer was aware of the writing and that it contains contractual terms, actual consensus with regard to those terms will (supposedly) be present. However, in light of the previous comments regarding consensus, it should be recognised that in respect of the standard terms, it is not actual consensus but rather deemed consensus which is present. The parties can be in actual agreement in respect of the salient, core terms pertaining to the transaction and the incorporation of the standard terms, but without knowledge of the content of the standard terms actual or true consensus in respect of the terms is not possible. Ultimately, of course, it does not really matter whether the courts describe these situations as actual or deemed consent; on both approaches, the consumer who knew about or noticed the terms is held liable.

¹⁰⁶ 1908 TS 221.

¹⁰⁷ 225 (emphasis added).

¹⁰⁸ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991.

¹⁰⁹ See e.g. *Hartley v Pyramid Freight t/a Sun Couriers* 2007 2 SA 599 (SCA); *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 5 SA 180 (SCA); *Sun Couriers (Pty) Ltd v Kimberley Diamond Wholesalers* 2001 3 SA 110 (NC).

¹¹⁰ 2010 1 SA 8 (GJS).

¹¹¹ 19 (emphasis added).

This idea of deemed consensus based on knowledge of the terms, but not their content, reflects the American notion of blanket assent discussed below: by knowingly electing not to read the terms, the consumer consents to the terms whatever they might be.¹¹² However, there are exceptions. Courts have in certain instances allowed consumers to rely on the defence of *iustus error* to escape liability in respect of noticed but unread terms, provided that the consumer can show his mistake regarding the terms was both material and reasonable.¹¹³ The application of the *iustus error* doctrine in the context of a unilateral mistake is summarised in the following two *dicta*:¹¹⁴

“When can an *error* be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? . . . If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame, and the first party is not bound.”¹¹⁵

And:

“Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (*error*) would have to be reasonable (*justus*) and it would have to be pleaded.”¹¹⁶

Harms AJA distilled these judgments into the following enquiry in order to determine whether a party can resile from a contract based on mistake:

“[D]id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented

¹¹² See 3 5 2 below.

¹¹³ See the discussion below at 3 3 4. Also see e.g. *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA); *Brink v Humphries & Jewel (Pty) Ltd* 2005 2 SA 419 (SCA); *Davids v ABSA Bank Bpk* 2005 3 SA 361 (C).

¹¹⁴ Also see *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A) 239.

¹¹⁵ *George v Fairmead* 1958 2 SA 465 (A) 471.

¹¹⁶ *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) 479.

his actual intention?... To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? ... The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?"¹¹⁷

This statement again shifts the focus to the reasonable reliance of the contract assertor, and confirms that the determining factor is whether the supplier was reasonable in relying on the impression of consensus created by the conduct of the consumer. As discussed above,¹¹⁸ this is reflected in the doctrine of quasi-mutual assent (also known as the *Smith v Hughes* principle), which provides a more direct protection of the contract assertor's reliance.

Holding a consumer to the terms of a contract that were noticed but unread is often justified by the argument that the consumer only has himself to blame if the terms are unfavourable. If he notices but elects not to read the terms, he voluntarily assumes the risk of possible adverse terms.¹¹⁹ This view has rightly been criticised as being disconnected from modern reality where consumers often have little choice but to accept the offered terms.¹²⁰ This lack of meaningful choice can be attributed to various factors, such as the impracticality of reading and comparing the terms of different suppliers¹²¹ and the power imbalance which generally characterises the relationship between the consumer and the supplier.¹²²

In applying these principles to determine enforceability of standard terms, a distinction can be drawn between signed and unsigned contracts. The principles which apply in each case are considered below, but the last fact pattern – where the consumer did not notice or read the standard terms – will first be discussed.

¹¹⁷ *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A) 239-240.

¹¹⁸ See 3 3 1 above.

¹¹⁹ *Eiselen Standaardbedinge* 120-121.

¹²⁰ 121.

¹²¹ See 3 2 2 above.

¹²² The power imbalance between consumers and suppliers is discussed in ch 4 (4 2 & 4 3 2).

3 3 3 3 *The consumer did not notice the standard terms*

The last category mentioned in *Durban's Water Wonderland* concerns situations where a consumer failed to notice the existence of standard terms. In those cases, liability may be based on the doctrine of quasi-mutual assent.¹²³ Deemed consensus will be present if the supplier "was reasonably entitled to assume from [the consumer's] conduct ... that she had assented to the terms of the disclaimer or was prepared to be bound by them without reading them".¹²⁴ This will depend on whether the supplier did "what was reasonably sufficient to give the [consumer] notice of the conditions."¹²⁵ In applying these principles to determine enforceability of standard terms, a distinction can again be drawn between signed and unsigned contracts.

3 3 4 Distinguishing between signed and unsigned standard form contracts

A consumer can manifest consent in one of two ways: either by providing a positive assertion of assent (for example by signing the document) or by way of conduct. In the latter case no unambiguous indication of assent is required (such as in *Durban's Water Wonderland*).¹²⁶ In the context of online contracts, this distinction provides the basis for differentiating between click-wraps, where the consumer clicks as an indication of positive assent, and browse-wraps, where no similar action is required. This is dealt with later.¹²⁷

3 3 4 1 *Principles applicable to signed documents (caveat subscriptor)*

When dealing with a signed document, the *caveat subscriptor* rule plays an important role in establishing liability.¹²⁸ This rule was formulated as follows in *Burger v Central South African Railways*:¹²⁹

¹²³ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A) 991.

¹²⁴ 991.

¹²⁵ *Central South African Railways v McLaren* 1903 TS 727 735. Also see *King's Car Hire (Pty) Ltd v Wakeling* 1970 4 SA 640 (N) 645; *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A) 991.

¹²⁶ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A).

¹²⁷ See 3 4 3 below.

¹²⁸ Bradfield *Christie's Law of Contract* 205; Nortje 2011 SALJ 741; Kahn et al *Contract and Mercantile Law* 32.

¹²⁹ 1903 TS 571.

“It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he has put his hand.”¹³⁰

In *George v Fairmead (Pty) Ltd*¹³¹ the Appeal Court confirmed the *caveat subscriptor* rule and stated that:

“When a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature.”¹³²

In short, it provides that someone who signs a contract thereby signifies that he has either read the terms of the contract or provides blanket assent to the content of the document.¹³³ The signatory will thus be bound to the terms of the contract, regardless of whether he read or understood the content thereof.¹³⁴

The *caveat subscriptor* rule rests on the basic premise that the law expects a signatory to read a contract before affixing his signature to it.¹³⁵ Various policy reasons are advanced for adherence to the principle of *caveat subscriptor*. One of the main justifications for the principle is its commercial necessity,¹³⁶ since non-adherence to it “would open the door to chicanery and fraud”.¹³⁷ It further promotes certainty¹³⁸ and serves to encourage the reading of documents presented for signature.¹³⁹

¹³⁰ 578.

¹³¹ 1958 2 SA 465 (A).

¹³² 472.

¹³³ Bradfield *Christie’s Law of Contract* 205; Nortje 2011 SALJ 741.

¹³⁴ P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 37; *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 4 SA 105 (E); *Mathole v Mothle* 1951 1 SA 256 (T).

¹³⁵ Nortje 2011 SALJ 749.

¹³⁶ See the discussion in ch 5 (5 2 1) regarding the role of commercial necessity.

¹³⁷ PMA Hunt “Caveat Subscriptor” (1963) 80 SALJ 457 459.

¹³⁸ CJ Pretorius “Mistake and Suretyship: Avoiding the Spectre of *Brink v Humphries & Jewell (Pty) Ltd*” (2009) 30 *Obiter* 763 763

¹³⁹ Hunt 1963 SALJ 460.

The basis of this principle is generally accepted to be the doctrine of quasi-mutual assent¹⁴⁰ – by signing a document, the signatory creates the reasonable impression of being bound to the document.¹⁴¹ In other words:

“The reason why the contract assertor’s reliance on the contract is generally reasonable is that she is (as a general rule) entitled to assume that the signatory had read the contract with due care prior to signature. Similarly, the signatory’s mistake is generally *injustus*, because her failure to read the document is regarded as careless or inexcusable.”¹⁴²

Because the *caveat subscriptor* rule is based on the reliance theory, certain defences are available to the contract denier. He could argue that the assertor’s reliance is unreasonable, and hence that the assertor cannot succeed with the doctrine of quasi mutual assent or *Smith v Hughes*. This could be the case where there are special circumstances which should place the contract assertor on guard.¹⁴³ Alternatively, the denier could argue that he made a material mistake which is reasonable or *iustus*, e.g. because the assertor made a misrepresentation to him or because the assertor was not misled by the signature.¹⁴⁴

However, appending a signature to a document creates a rebuttable presumption that the signatory was aware of the terms contained in the document.¹⁴⁵ In the light of this presumption, the presence of a defence (such as *iustus error*) might be difficult to prove

¹⁴⁰ Although other possible theoretical underpinnings include the declaration theory and the risk theory (see CJ Pretorius “The Basis and Underpinnings of the Caveat Subscriptor Rule” (2008) 71 *THRHR* 660 664-668). Despite general academic resistance to an objective approach to contractual liability, Pretorius argues that there is evidence indicating that the historical basis of the *caveat subscriptor* rule is the declaration theory. This would also explain the generally stricter application of the *caveat subscriptor* rule in older case law (see n 147 below).

¹⁴¹ *Brink v Humphries & Jewel (Pty) Ltd* 2005 2 SA 419 (SCA) 421; Bradfield *Christie’s Law of Contract* 206; Van Huyssteen et al *Contract* 41; Joubert *General Principles* 85; Pretorius 2008 *THRHR* 660, 663; Pretorius 2009 *Obiter* 764.

¹⁴² Nortje 2011 *SALJ* 750 (footnotes omitted).

¹⁴³ 754.

¹⁴⁴ Bradfield *Christie’s Law of Contract* 207-208; Joubert *General Principles* 85; Nortje 2011 *SALJ* 749; Van Huyssteen et al *Contract* 43; Aronstam *Consumer Protection* 37.

¹⁴⁵ *Graaff-Reinet Municipality v Jansen* 1917 CPD 604 610: “A man who puts his signature to a document must be held to know what the document contains unless he rebuts the presumption.”; *Trans-Drakensberg Bank Ltd v Guy* 1964 1 SA 790 (D) 794; *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd* 1979 3 SA 210 (T) 215; Nortje 2011 *SALJ* 749.

for the signatory.¹⁴⁶ This is illustrated particularly by earlier case law, which generally followed a stricter application of the *caveat subscriptor* rule by emphasising the duty to read.¹⁴⁷ For example, in *George v Fairmead (Pty) Ltd*¹⁴⁸ the hotel receptionist did not draw the appellant's attention to contractual terms contained in a hotel register he was asked to sign. In holding the appellant bound to the terms, the court said:

“he knew that he was assenting to something ... If he chose not to read what that additional something was, he was, with his open eyes, taking the risk of being bound by it. He cannot then be heard to say that his ignorance of what was in it was a *justus error*.”¹⁴⁹

A more recent example includes *Blue Chip Consultants (Pty) Ltd v Shamrock*,¹⁵⁰ where Spilg AJ stated that:

“I do not understand our case law to hold that a person will escape the consequences of his signature if it can be shown that he had not read the document in question. That would be a startling proposition. One is expected to read what one signs.”¹⁵¹

A strict application of the *caveat subscriptor* rule can have a harsh effect on consumers, and other decisions reflect a more lenient approach to the rule. For example, it was recognised in *Home Fires Transvaal CC v Van Wyk*¹⁵² that:

¹⁴⁶ *Diners Club SA (Pty) Ltd v Thorburn* 1990 2 SA 870 (C) 874: “a party who puts his signature to a document containing contractual terms has a very limited scope for escaping liability by saying that he did not know or understand the terms of the document”; *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd* 1979 3 SA 210 (T) 214; M Nortje “Of Reliance, Self-Reliance and Caveat Subscriptor” (2012) 129 SALJ 132 133; Pretorius 2008 *THRHR* 661, 667; Pretorius 2009 *Obiter* 764: “the signatory will not lightly be relieved from liability under a contract to which she apparently assented in this manner”.

¹⁴⁷ See for example *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 4 SA 105 (E); *Mathole v Mothle* 1951 1 SA 256 (T). Also see Hutchison “Traps for the Unwary” in *Essays* 41-44; Pretorius 2009 *Obiter* 764.

¹⁴⁸ 1958 2 SA 465 (A).

¹⁴⁹ 472-473.

¹⁵⁰ 2002 3 SA 231 (W).

¹⁵¹ 239. Also see *Hartley v Pyramid Freight t/a Sun Couriers* 2007 2 SA 599 (SCA), where it was stated (at para 9) that: “the question is not whether [the one party, the ‘contract assessor’] knew or ought to have known that the [other party, the ‘contract denier’] was *unaware* of the exclusionary clauses. The question is whether she knew or ought to have known that the [other party] was labouring under a *mistake*” (own emphasis).

¹⁵² 2002 2 SA 375 (W).

“A party will not be held bound by his signature to a contract which he has not read, where the other party knew that he had not done so, was not misled by the signature and only had himself to blame for the other’s ignorance of the contents of the document.”¹⁵³

Vulnerable consumers, for example someone that is illiterate,¹⁵⁴ could especially be disadvantaged by the *caveat subscriptor* rule. This was illustrated in the case of *Standard Bank of South Africa Ltd v Dlamini*.¹⁵⁵ In that case, the defendant, Mr Dlamini, was a “functionally illiterate” 52-year old who only completed schooling up to Grade 3 and could not understand English.¹⁵⁶ He purchased a second-hand vehicle from the plaintiff, Standard Bank. The dealer did not explain the standard terms of the purchase agreement to Mr Dlamini,¹⁵⁷ and the court had to determine whether he could be held to the terms. After considering case law in this regard, Pillay J stated that:

“Applying the common-law principles of caveat subscriptor and quasi-mutual assent, the Bank cannot hold Mr Dlamini bound to the agreement. The unpalatable form and get-up of the agreement would have been immaterial to Mr Dlamini because of his illiteracy. That was all the more reason why the Bank should have ensured that its agent explained the material terms to Mr Dlamini. As Mr Dlamini was ignorant of the prescribed notice requirements of the agreement, there was not mutual consent as regards this term.”¹⁵⁸

This conclusion can be criticised, especially to the extent that it does not specify whether the supplier must have knowledge of the consumer’s vulnerability. It is settled that there is no general duty on a contracting party to explain the terms of a written

¹⁵³ 381. Also see *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA) para 16; *Davids v ABSA Bank Bpk* 2005 3 SA 361 (C) 368-371; *Van Wyk v Otten* 1963 1 SA 415 (O) 419; *Payne v Minister of Transport* 1995 4 SA 153 (C) 160. Further see *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 3 SA 234 (A) 240-241 (although it did not deal with the signing of standard terms); Bradfield *Christie’s Law of Contract* 206: “The true basis of the principle is the doctrine of quasi-mutual assent, the question being simply whether the other party is reasonably entitled to assume that the signatory, by signing the document, was signifying his or her intention to be bound by it.”

¹⁵⁴ Eiselen *Standaardbedinge* 122 confirmed that a consumer will be bound to a document he has signed, even where he is illiterate or could not understand the language in which the document was drafted.

¹⁵⁵ 2013 1 SA 219 (KZD).

¹⁵⁶ Para 23.

¹⁵⁷ Para 21, 26.

¹⁵⁸ *Standard Bank of South Africa Ltd v Dlamini* 2013 1 SA 219 (KZD) para 64.

agreement to the other party,¹⁵⁹ except in specific circumstances, for instance where he is aware that the other party is mistaken,¹⁶⁰ where prior conduct or statements by him were misleading¹⁶¹ or where the terms are potentially unexpected or surprising.¹⁶² Accepting such a general duty to disclose would negate the basic premise of the *caveat subscriptor* principle, namely that by signing the document without reading it, the signatory creates the reasonable impression that he is willing to be bound to all the terms reasonably expected in that type of contract.¹⁶³

However, there is a less drastic method employed by courts to protect signatories from possible adverse terms contained in unread standard forms. This entails accepting that where a document is signed by a consumer, but contains surprising or unexpected terms, the consumer cannot be held to those terms, unless his attention was specifically drawn to the relevant provisions.¹⁶⁴ For example, in *Brink v Humphries & Jewel (Pty) Ltd*¹⁶⁵ the court accepted that even where the consumer had ample opportunity to read the terms and failed to do so,

“[i]t is not reasonable for a party who has induced a justifiable mistake in a signatory as to the contents of a document to assert that the signatory would not have been misled had he

¹⁵⁹ R Sharrock & L Steyn "The Problem of the Illiterate Signatory: *Standard Bank of South Africa Ltd v Dlamini*" (2014) 26 *SA Merc LJ* 150 157. Also see *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA) para 19; *Hartley v Pyramid Freight t/a Sun Couriers* 2007 2 SA 599 (SCA) para 9 ("To hold otherwise would introduce a degree of paternalism in our law of contract at odds with the *caveat subscriptor* rule"); *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 4 SA 72 (SCA) para 12.

¹⁶⁰ Pretorius "Mistake" in *The Law of Contract* 104.

¹⁶¹ See *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A) 905-906; Pretorius "Mistake" in *The Law of Contract* 104-105; D Hutchison "Improperly Obtained Consensus" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 117 139.

¹⁶² See n 164 below. Also see *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 4 SA 72 (SCA) para 12: "A contracting party is generally not bound to inform the other party of the terms of the proposed agreement. He must do so, however, where there are terms that could not reasonably have been expected in the contract."

¹⁶³ Sharrock & Steyn 2014 *SA Merc LJ* 157; M Nortje "Informational Duties of Credit Providers and Mistake: *Standard Bank of South Africa Ltd v Dlamini* 2013 1 SA 219 (KZD)" 2014 *TSAR* 212 217.

¹⁶⁴ *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 4 SA 72 (SCA) para 12; *Fourie NO v Hansen* 2001 2 SA 823 (W) 832; Bradfield *Christie's Law of Contract* 210; Naudé 2006 *Stell LR* 365; Nortje 2014 *TSAR* 218. Also see *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA), discussed at 3 4 6 below.

¹⁶⁵ 2005 2 SA 419 (SCA).

read the document carefully; and such a party cannot accordingly rely on the doctrine of quasi-mutual assent.”¹⁶⁶

This can be viewed as an application of the *iustus error* principle: it is reasonable for the consumer to err in respect of a term which the average consumer would not expect in that type of contract.¹⁶⁷ Conversely, it can be said that the supplier’s reliance on the appearance of assent created by the consumer’s signature is unreasonable, and thus no liability can be established in terms of the reliance theory.¹⁶⁸

Ultimately, the court thus has to decide whether the supplier is reasonable in relying on the appearance of consensus; stated differently, whether the consumer’s mistake regarding the content of standard terms was reasonable, taking into account the fact that it could have been corrected by reading the document signed by him. Courts that subscribe to a strict application of the *caveat subscriptor* rule will rely on the presumption that a signatory is familiar with the content of a signed document to find his mistake unreasonable, whereas courts which accept that signatories do not read standard form contracts will not enforce unexpected terms.¹⁶⁹

3 3 4 2 Principles applicable to unsigned documents (ticket cases)

Parties who are presented with standard terms are often not required to sign to indicate assent.¹⁷⁰ In the so-called ticket cases, the consumer is bound to terms displayed in a notice or on a ticket due to continuing with particular conduct, for example entering

¹⁶⁶ 426. See a discussion of the case in CJ Pretorius “*Caveat Subscriptor* and *Iustus Error*: Brink v Humphries & Jewell (Pty) Ltd 2005 2 SA 419 (SCA)” (2009) 69 *THRHR* 675; Pretorius 2009 *Obiter* 763, 766-768.

¹⁶⁷ Nortje 2012 *SALJ* 139-140 indicates that courts fail to explicitly acknowledge that standard form contracts receive special treatment, but that all of the “unexpected terms” jurisprudence relates to standard form contracts. Also see C Maxwell “Obligations and Terms” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 243 249; Bradfield *Christie’s Law of Contract* 209-210.

¹⁶⁸ *Davids v ABSA Bank Bpk* 2005 3 SA 361 (C) para 21: “Soos reeds gemeld, is die werklike vraag egter of [die kontrak afdwinger] deur die apellante se voormelde wanvoorstelling mislei was en of ’n redelike persoon in die posisie van [die kontrak afdwinger] daardeur mislei sou gewees het”. (“As mentioned before, the true question is whether [the contract assessor] was misled by the appellant’s previously mentioned misrepresentation and whether the reasonable person in the position of [the contract assessor] would have been so misled” (own translation)).

¹⁶⁹ See Nortje 2011 *SALJ* 751.

¹⁷⁰ Bradfield *Christie’s Law of Contract* 211.

the premises of the supplier where the terms are displayed.¹⁷¹ The rules governing these cases developed to cover instances where it would be impractical to obtain the signature of the consumer, for example when purchasing a ticket for a performance.

Ideally in these cases, the consumer has noticed, read and understood the printed terms, and actual consent is given by continuing with the conduct.¹⁷² In the absence of such consent, it is possible that the consumer either noticed the terms but failed to read them or was ignorant of the existence of contractual terms. A sequence of questions has emerged from case law, most notably the *Durban's Water Wonderland* judgment, in order to determine enforceability of unsigned terms.¹⁷³ These questions are: (i) was the consumer aware of the existence of writing and (ii) did he know that the writing contained contractual terms? If both are answered positively, the consumer is bound, because consensus is deemed to exist.¹⁷⁴ However, if the consumer was unaware of the writing or that it contained contractual terms, a third question is posed, namely (iii) did the supplier take steps reasonably sufficient to direct the attention of the consumer to the terms?¹⁷⁵ If the supplier took such steps, the consumer would be bound as well.¹⁷⁶

Thus, in the absence of liability based on a consumer's knowledge that the writing contained terms, the supplier can still reasonably assume that consent is given where it took sufficient steps to draw the attention of the reasonable consumer to the terms.¹⁷⁷ Because the basis for liability remains the reliance theory, the same defence regarding unexpected terms discussed above is available to a consumer who consented to

¹⁷¹ 211.

¹⁷² See 3 3 3 1 above.

¹⁷³ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991.

¹⁷⁴ See the discussion at 3 3 3 2 above.

¹⁷⁵ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A) 991.

¹⁷⁶ Maxwell "Obligations" in *The Law of Contract* 250; Eiselen *Standaardbedinge* 128-129.

¹⁷⁷ Bradfield *Christie's Law of Contract* 212. It has previously been suggested that the contract assessor must do everything in his power to bring the terms to the attention of the other party (see Joubert *General Principles* 87), but it seems that this is no longer the case (see Bradfield *Christie's Law of Contract* 212).

unsigned terms:¹⁷⁸ it is not reasonable for the supplier to assume that consent is given to terms which the consumer would not reasonably expect in the type of contract.¹⁷⁹

Whether the steps taken were reasonable will depend on the circumstances of the case, but case law provides some guidance. It has been said that:

“The more contractually obscure or incidental the document, the less likely it is to expect it to contain contractual provisions and the more specific and positive must the steps be which are taken to bring to the attention of the other party. *Per contra* in the case of carriage tickets and bills of lading, where long established usage has created a situation where a contracting party, even an ordinary member of the public, will be taken to be aware of the existence of such provisions on the relevant document, or at least a reference thereto, and to have knowledge thereof.”¹⁸⁰

Context thus plays an important role in determining what steps are required by the supplier to place the consumer on notice of the terms. As discussed below, this is an important factor especially in the case of browse-wraps, because these contracts will most likely be treated as similar to ticket-cases.¹⁸¹

3 3 5 Offer and acceptance as a means of establishing consensus

The discussion above set out the recognised theories of contractual liability in South African law,¹⁸² and considered their application in specific factual situations.¹⁸³ In order for contractual liability to ensue, the presence of consensus or deemed consensus must be proven. Analysing a transaction in terms of a process of offer and acceptance can be a convenient way of determining whether the parties have reached an agreement.¹⁸⁴

Acceptance can either take place after the consumer has read the terms of the contract, which would mean true consensus is present as contemplated in 3 3 3 1 above. Alternatively, acceptance can take place without studying the terms, thus

¹⁷⁸ See 3 3 4 above.

¹⁷⁹ *Central South African Railways v James* 1908 TS 221 226; *Bradfield Christie's Law of Contract* 215.

¹⁸⁰ *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* 1982 2 SA 565 (C) 569E-G.

¹⁸¹ See 3 4 3 3 and 3 4 5 2 2 below.

¹⁸² At 3 3 2.

¹⁸³ At 3 3 3 and 3 3 4.

¹⁸⁴ *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A) 532; *Bradfield Christie's Law of Contract* 36.

suggesting mere general agreement to terms, which would point to deemed consensus as contemplated in 3 3 3 2.¹⁸⁵ However, it is required that acceptance is a conscious response to an offer,¹⁸⁶ and thus this model presumably does not find application where the consumer was unaware of the offered terms (thus 3 3 3 3 above).

In order to establish liability in terms of the will theory, acceptance of an offer requires *animus contrahendi*. Logically, acceptance cannot take place before the offeree becomes aware of the existence of the offer.¹⁸⁷ Acceptance can take any form prescribed by the offeree,¹⁸⁸ although it is only in exceptional circumstance where silence or inaction can be indicated as a valid manner of acceptance.¹⁸⁹ Acceptance of an offer might be inferred from conduct,¹⁹⁰ provided that

“acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can logically be drawn.”¹⁹¹

Generally, communication of that acceptance to the offeror is also required, unless the prescribed method does not entail such communication.¹⁹²

If a transaction is analysed in terms of offer and acceptance, it is necessary to identify who makes the offer and who accepts it. The general rule with regard to

¹⁸⁵ However, see the discussion at 3 3 3 2 above regarding the possibility of this constituting actual consensus.

¹⁸⁶ L Hawthorne & D Hutchison “Offer and Acceptance” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 47 58.

¹⁸⁷ See *Bloom v The American Swiss Watch Co* 1915 AD 100; Bradfield *Christie’s Law of Contract* 73.

¹⁸⁸ *Driftwood Properties (Pty) Ltd v Mclean* 1971 3 SA 591 (A) 597: “It is trite than an offeror can indicate the mode of acceptance whereby a *vinculum juris* will be created, and he can do so expressly or impliedly.” Also see Bradfield *Christie’s Law of Contract* 78-80.

¹⁸⁹ Bradfield *Christie’s Law of Contract* 80; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 422: “Quiescence is not necessarily acquiescence”. Also see *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 3 SA 952 (SCA) 958, referring to *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA) 268. Providing that silence will amount to acceptance is prohibited in the case of consumer transactions by s 31 of the CPA (see 3 3 6 below).

¹⁹⁰ *Timoney and King v King* 1920 AD 133 141; *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 429-430; Bradfield *Christie’s Law of Contract* 97.

¹⁹¹ *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 241.

¹⁹² Bradfield *Christie’s Law of Contract* 82-83.

advertisements is that it is seen as an offer to treat by the advertiser,¹⁹³ although it is a question of fact.¹⁹⁴ Therefore, where a consumer wishes to purchase a product pursuant to an advertisement, he is usually deemed to be the one making an offer, which can be accepted or rejected by the supplier.

As mentioned above, this analysis can assist in determining whether consensus was reached. It can also be useful to determine when a contract was concluded, and as discussed below the offer and acceptance model can provide insight when evaluating the enforceability of PNTL contracts (where the terms are only provided after contract conclusion). However, it must be kept in mind that establishing offer and acceptance is not a requirement for contractual liability. Furthermore, even where an offer is accepted, a mistake might still render the contract void (if it is material and reasonable)¹⁹⁵ or voidable (if it is immaterial or a mistake in motive, induced by misrepresentation).¹⁹⁶

3 3 6 The Consumer Protection Act 68 of 2008

In addition to the common-law principles discussed above, certain provisions of the Consumer Protection Act 68 of 2008 (CPA) could apply to standard term contracts. The provisions of the CPA will apply to any transaction as defined in it.¹⁹⁷

Various provisions of the CPA are aimed at regulating the content of consumer agreements and the manner in which consent is obtained.¹⁹⁸ However, with regard to contract formation and what Naudé terms “incorporation control”,¹⁹⁹ the CPA contains

¹⁹³ See L Ramokanate & W Erlank "Challenging Old Perceptions - The Classification of Website Advertisements according to South African Contract Law" (2016) 37 *Obiter* 508 510; Bradfield *Christie's Law of Contract* 96-97.

¹⁹⁴ Bradfield *Christie's Law of Contract* 94.

¹⁹⁵ See 3 3 2 above.

¹⁹⁶ See ch 4 (4 3).

¹⁹⁷ S 5(1) of the CPA. See the definition of “transaction” in s 1 of the CPA. See ch 4 (4 4 3) for a discussion on the application of the CPA to online transactions which do not involve monetary compensation.

¹⁹⁸ See ch 4 (4 3 2 3, 4 3 3 & 4 4 3).

¹⁹⁹ T Naudé “Introduction to ss 48-52 and reg 44: Structure and Purpose” in T Naudé & S Eiselen *Commentary on the Consumer Protection Act* (2014) 48-1 48-1.

very few provisions. Notably, the CPA does not contain a general provision addressing the issue of assent to standard form contracts.²⁰⁰

Section 49 provides that a supplier must draw the consumer's attention to the "fact, nature and effect"²⁰¹ of terms that would be regarded as surprising,²⁰² It is further required that the consumer indicate assent to these terms

"by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision."²⁰³

Failure to comply with this requirement does not automatically result in invalidity of the term, but section 52 empowers a court to declare the term void. It thus seems as if the provision regarding surprising terms has no extra-judicial effect.²⁰⁴

Section 22 of the CPA, which provides for the consumer's right to information in plain and understandable language, could also play a role in preventing unexpected terms. In *Standard Bank of South Africa Ltd v Dlamini*,²⁰⁵ it was found that sections 63 and 64 of the National Credit Act 34 of 2005 (NCA) also "embody the right of the consumer to be informed by reasonable means of the material terms of the documents he signs."²⁰⁶ Section 63 provides for the consumer's right to information in an official language, whereas section 64 amounts to a direct equivalent of section 22 of the CPA. Pillay J further stated that:

²⁰⁰ Compare Para 2 of the American Law Institute *Restatement of the Law, Consumer Contracts: Tentative Draft* (2019) (the Draft Restatement). No similar provision is found in the CPA.

²⁰¹ S 49(4) of the CPA. This must be done prior to contract conclusion, the commencement of the activity or the provision of consideration, whichever is the earliest (see s 49(4) of the CPA).

²⁰² See s 49(2) of the CPA: "if a provision or notice concerns any activity or facility that is subject to any risk (a) of an unusual character or nature; (b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances". The risk mentioned in subsection (c) (i.e. one "that could result in serious injury or death") is presumably included not due to it being unexpected, but rather because of its seriousness. Also see s 58.

²⁰³ S 49(2) of the CPA.

²⁰⁴ T Naudé "Section 49" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 49-1 49-4.

²⁰⁵ 2013 1 SA 219 (KZD).

²⁰⁶ Para 48.

“What is reasonable and material varies depending on the circumstances of each case... Purposively interpreted, the credit provider bears the onus to prove that it took reasonable measures to inform the consumer of the material terms of the agreement.”²⁰⁷

This interpretation would probably also extend the interpretation of the plain language requirement in the CPA.

Furthermore, section 31 of the CPA prohibits negative option marketing. This means that a consumer cannot be required to reject an offer (including an offer to enter into or modify an agreement for the supply of goods or services)²⁰⁸ to prevent it coming into operation. Such an agreement or modification is void.²⁰⁹

Lastly, the supplier must provide the consumer with a free hard copy or electronic copy of all written contracts²¹⁰ (although only certain agreements must be in writing).²¹¹ However, the Act does not specifically require that this must be provided before contract conclusion, an oversight which has been identified as a shortcoming in the CPA.²¹²

3 3 7 Conclusion

It is apparent from the discussion above that South African law tends to follow a rather permissive approach regarding the formation of standard form contracts: consumers will be bound to the terms of non-negotiated and pre-drafted contracts which they either signed or were given notice of, as if they had read and understood the document, regardless of whether the other party knows this not to be the case. This forms the basis of the *caveat subscriptor* rule, and is also illustrated by the principles set out in *Durban's Water Wonderland*.²¹³ The alternative, in other words insisting that the consumer must read the terms before enforcing standard form contracts, would render their enforcement very unpredictable, which would undermine the benefits offered by

²⁰⁷ Para 48.

²⁰⁸ See s 31(1)(b) of the CPA.

²⁰⁹ Ss 31(2) and 31(3).

²¹⁰ S 50(2).

²¹¹ See s 7 of the CPA (franchise agreements) and s 50 (which enables the Minister to prescribe categories of consumer agreements). However, to date no regulation to this effect has been made.

²¹² Naudé “Section 50” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 50-1 50-3.

²¹³ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991.

these contracts.²¹⁴ However, the supplier must reasonably believe that the consumer is aware of the existence of the terms, and thus it is required that consumers must be notified of the standard terms. This is also illustrated by the offer and acceptance model, in terms of which the offeree must be aware of the offer before he can accept.

Furthermore, even where deemed consensus to a standard form contract can generally be established, the consumer can still escape liability for specific provisions contained therein where he laboured under a reasonable mistake with regard to such provisions (and where the supplier's reliance on consensus in respect of those terms was thus unreasonable). This will be the case where terms are unexpected or surprising.

These principles will now be considered in the online context.

3 4 Applying the general principles of contract formation in South African law to the online environment

3 4 1 Introduction

The previous chapter described the reasons for distinguishing online contracts from traditional hard copy standard form contracts, despite the fact that both contain terms over which consumers have little influence.²¹⁵ In this chapter, the focus thus far has been on general principles relating to the formation of contracts, with particular attention being paid to the rules that are relevant in the context of standard form contracts, such as *caveat subscriptor* and the rules relating to ticket cases. The focus now shifts to how these principles are to be applied in the context of online contracts. A brief overview regarding the enforceability of online contracts has already been provided,²¹⁶ but it is necessary to scrutinise the formation of online contracts more closely.

Case law currently provides little guidance on how the South African law will approach the issue of formation when dealing with online contracts. Against the background of the provisions of the Electronic Communications and Transactions Act 25 of 2002

²¹⁴ See ch 2 (2 3 3).

²¹⁵ See ch 2 (2 4).

²¹⁶ See ch 2 (2 2 2).

(ECTA),²¹⁷ we must consider whether South African courts will differentiate between traditional standard form contracts and those encountered online.

First, the relevant provisions of ECTA will be briefly mentioned. The discussion will then analyse the presence of a reasonable reliance and the application of the *iustus error* doctrine in the context of online contracts. Thereafter, it will be considered when in the online environment consensus can be established in terms of the offer and acceptance model. Once these general aspects regarding consensus have been examined, the remainder of this section will focus on specific issues relating to formation in the online context, such as the question of what will constitute sufficient notice, the principles relating to unexpected terms and the use of hyperlinks to incorporate terms by reference.

3 4 2 The Electronic Communications and Transactions Act 25 of 2002

The relevant provisions of ECTA were referred to in the previous chapter.²¹⁸ Broadly speaking, the Act reinforces the application of common-law principles to determine the validity of online contracts and grants electronic means of contracting the same legal relevance as traditional methods of contract conclusion.²¹⁹

As discussed earlier,²²⁰ ECTA also requires the supplier to make certain information available to the consumer, but the precise manner in which this is to be done is not specified.²²¹ It therefore does not affect the process of contract formation beyond influencing the content of the online contract, but section 43(2) provides that the consumer must have an opportunity “to review the entire electronic transaction; to correct any mistakes; and to withdraw from the transaction, before finally placing an order”. This confirms the common-law position that the terms must be made available before the transaction is completed.²²² However, unlike the common law, the section does not provide for later inclusion of additional terms by agreement between the parties, but instead specifies a fourteen-day cancellation period in favour of the

²¹⁷ See ch 2 (2 2 2 2).

²¹⁸ See ch 2 (2 2 2 2).

²¹⁹ See s 11 of ECTA read with s 3. Also see ch 2 (2 2 2 2).

²²⁰ See ch 2 (2 2 2 2).

²²¹ S 43 of ECTA.

²²² See 3 4 5 3 below.

consumer should the supplier fail to comply with the provision.²²³ As discussed in more detail below, the practical application of this provision is difficult to reconcile with the use of browse-wraps or shrink-wraps, which can in most instances only be accessed after the consumer has engaged in the contract-forming conduct.²²⁴

Furthermore, section 51(1) of ECTA compels a supplier²²⁵ to obtain “the express written permission of the data subject for the collection, collation, processing or disclosure of any personal information on that data subject”.²²⁶ Presumably, this would mean a consumer can only agree to make his personal information available by way of a click-wrap and that a browse-wrap would not suffice, as the latter does not entail written permission by the consumer.

Apart from the sections mentioned above and provisions relating to a manifestation of assent (discussed below),²²⁷ ECTA does not vary the common-law principles relating to contract formation. Thus, the recognised theories of contractual liability, such as the doctrine of quasi-mutual assent, remain the basis for enforcement of online contracts.

3 4 3 Reliance-based liability in the context of online contracts

3 4 3 1 *Introduction*

As with traditional standard form contracts, actual consensus to online contracts seldom exists.²²⁸ Therefore, in most instances South African courts have to determine whether contractual liability can be found in terms of the reliance theory.

The first step is to consider the effect of clicking and browsing in the light of South African principles. In other words: does clicking “I agree” in the context of proposed terms generally mean that the consumer undertakes to be bound to the online terms, in the same manner as a signature indicates assent where the terms appear in paper-

²²³ S 43(3) of ECTA.

²²⁴ See 3 4 5 3 below. Also see the discussion at ch 2 (2 2 2 1).

²²⁵ The section refers to a “data controller”, which is defined in s 1 as “any person who electronically requests, collects, collates, processes or stores personal information from or in respect of a data subject”.

²²⁶ Although this provision will be repealed when POPI comes into effect (see s 110 of POPI, read with the Schedule to POPI).

²²⁷ See 3 4 3 2 and 3 4 3 3 below.

²²⁸ See 3 3 3 1 above.

format; and can browsing give rise to an inference of assent in the same manner as contemplated in ticket-cases? The answer to these questions will determine whether click-wraps are subject to the *caveat subscriptor* rule and whether the enforceability of browse-wraps will be decided in accordance with the steps set out in *Durban's Water Wonderland*.²²⁹

3 4 3 2 *Clicking as a manifestation of assent*

The question is whether South African courts will regard an indication of assent by clicking as equivalent to that of signature, despite evidence suggesting that consumers do not necessarily perceive it in the same manner.²³⁰ In this regard, the provisions of ECTA become relevant. Where signature is prescribed, either by the parties or by law, section 13 of ECTA contains specific requirements for such a signature. Absent such a legal requirement, ECTA does not insist on formalities for signifying consent and any “means from which [a] person’s intent or other statement can be inferred” will suffice.²³¹ ECTA further defines electronic signature as “data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature”.²³²

The Supreme Court of Appeal in *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash*²³³ confirmed that even where the parties agree that their contract must be signed, any method which indicates approval and can reliably identify the person (such as an email message) would be accepted. This

“accords with the practical and non-formalistic way the courts have treated the signature requirement at common law.”²³⁴

For most online contracts, signature is not prescribed. However, the case mentioned above illustrates the pragmatic approach followed by the courts, and it indicates a willingness to put function above form. In the context of traditional standard terms, the

²²⁹ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991.

²³⁰ See 3 2 3 1 above.

²³¹ S 13(5)(a) of ECTA.

²³² S 1 of ECTA.

²³³ 2015 2 SA 118 (SCA) 124-126. See specifically para 26: “They look to whether the method of the signature used fulfils the function of a signature – to authenticate the identity of the signatory – rather than insist on the form of the signature used.”

²³⁴ *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash* 2015 2 SA 118 (SCA) 126.

function of a signature is to serve as an indication of assent. Where the document clearly illustrates that signature amounts to acceptance of the terms contained therein, signature will be construed as acceptance. In a similar fashion, it is to be expected that where the website clearly indicates that by clicking the consumer is accepting the online terms, it is expected that click-wraps will be treated as signed standard form documents,²³⁵ despite the differences between signing and clicking. Further support for this can be found in section 13(5) of ECTA, which directs courts to give legal effect to electronic statement of intent.²³⁶ This means that the *caveat subscriptor* rule should apply to click-wraps.²³⁷

3 4 3 3 *Browsing as a manifestation of assent*

South African courts will in all likelihood apply the rules surrounding the enforceability of unsigned terms (so-called ticket-cases) to determine whether browsing can give rise to an inference of assent. Section 24 of ECTA specifically provides that:

“24. **Expression of intent or other statement.** As between the originator and the addressee of a data message an expression of intent or other statement is not without legal force and effect merely on the grounds that

- (a) it is in the form of a data message; or
- (b) it is not evidenced by an electronic signature but by other means from which such person's intent or other statement can be inferred.”

This means that browsing can be construed as consent to contractual terms, provided the consumer's intention to contract can be inferred from the conduct. Courts will presumably be willing to accept this intent if sufficient notice was provided of the contractual terms.

Despite the different context, it is difficult to justify a court treating the enquiry into the enforceability of terms displayed on a notice board at a store entrance differently to terms displayed on a webpage. The consumer who enters the store probably has just as little transactional awareness as the one who uses an online search engine.

²³⁵ See PGJ Koornhof "The Enforceability of Incorporated Terms in Electronic Agreements" (2012) *Speculum Juris* 41 64-65; T Pistorius "Click-Wrap and Web-Wrap Agreements" (2004) 16 *SA Merc LJ* 568 570.

²³⁶ See ch 2 (2 2 2 2).

²³⁷ Koornhof 2012 *Speculum Juris* 65.

Instead, context should play a role in determining what constitutes sufficient notice: the requirements for the notice board could vary from those required for a hyperlink.

Therefore, the three situations set out in *Durban's Water Wonderland*,²³⁸ which was dealt with earlier, are again relevant.²³⁹ If the supplier can prove that the consumer accessed the hyperlink containing the terms, it is either the first or the second scenario which will apply. In the first scenario there could be actual consensus of the online terms, but this is extremely unlikely. In the second scenario, deemed consensus²⁴⁰ will be present, because it is evident that the consumer noticed the terms and presumably realised that they contained contractual terms. However, it is likely that the third scenario, where the consumer fails to notice the terms, would be the most common.²⁴¹ Enforceability would then depend on whether the terms were made sufficiently conspicuous by the supplier, taking the context into account.²⁴²

3 4 3 4 *When can there be reliance-based assent to online contracts?*

The biggest hurdle to establishing reliance-based liability to online contracts must be the widely-known fact, which suppliers can easily corroborate by analysing online data, that consumers do not read online contracts.²⁴³ Whether suppliers can aver that they are reasonable in their belief that consumers consent to the terms contained in these contracts depends on what the requirement of consent entails. If it is required that a supplier must reasonably believe that the consumer knows and understands all the terms of the online agreement, and that they are therefore *ad idem* with regard to the terms governing their transaction, it is difficult to fathom how liability can be found based on the reliance theory. If the *caveat subscriptor* doctrine is merely an application of the doctrine of quasi-mutual assent, the fact that the suppliers are generally aware of the fact that consumers mostly fail to read online contracts should also prevent them from relying on a consumer's act of clicking as an expression of consensus.

²³⁸ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991.

²³⁹ See 3 3 3 above.

²⁴⁰ See the discussion at 3 3 3 2 above regarding the possibility of this constituting actual consensus.

²⁴¹ This is illustrated by American case law, where generally the consumer professes ignorance of the existence of the terms.

²⁴² See 3 4 5 2 2 below.

²⁴³ See 3 2 2 1 above.

However, as discussed above, there is evidence that consensus will be deemed to be present where the consumer noticed the existence of the online contract, was generally aware that it contains contractual terms, but elected not to read the specific terms.²⁴⁴ Thus, various South African cases confirm that a signatory will be bound if he elects to sign a document he is aware contains terms, but declines to read them (and thus by his signature indicate a willingness to accept the terms without reading them).²⁴⁵

A supplier may accordingly reasonably assume that the consumer consented to the terms if sufficient notice is given in the case of a browse-wrap or where the consumer affirmatively clicked in the case of a click-wrap, provided the design of the website clearly indicated that clicking amounts to assent. This will be the case even though the supplier is aware that the specific terms remain unread. In other words, the consumer is bound, not because he misled the supplier into believing he read the terms and agreed with the content, but because the supplier can reasonably assume that the consumer agreed to be bound to the terms of the online contract despite not reading them.

Context plays an important role in determining whether a supplier's reliance on the appearance of consensus is reasonable.²⁴⁶ Because the facts of each case are crucial to determine whether a particular online contract is binding in terms of the doctrine of quasi-mutual assent, it is impossible to provide a blanket statement on their enforceability. However, certain common features that can be identified from case law may play a role in the analysis.

²⁴⁴ See 3 3 3 2 above. Also see J du Plessis "Lessons from America? A South African Perspective on the Draft Restatement of the Law, Consumer Contracts" (2019) 31 *SA Merc LJ* 189 196, where he states that "this can clearly only be some sort of general reliance on the consumer assenting to the terms, whatever they may be, as opposed to a genuine reliance on the consumer being aware of and assenting to specific terms."

²⁴⁵ See Bradfield *Christie's Law of Contract* 207 and the cases mentioned there. Also see *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd* 1977 2 SA 709 (W) 713-714: "If a person receiving a document knows that there is writing on it and that it contains conditions relative to the contract, he is bound whether he reads them or not; if he knows that there is writing but does not know that it contains conditions relative to the contract, he is not bound, unless the other party has done what is reasonably necessary to bring the conditions to his notice."

²⁴⁶ See, for example, *Steyn v LSA Motors* 1994 1 SA 49 (A), where reliance on an advertisement was deemed unreasonable where it was contrary to the rules of the sport.

Factors that might make the reliance on the consumer's assent to online contracts unreasonable include the unpalatable form and length of online contracts. A short and easily understandable contract is more likely to be found enforceable.²⁴⁷ For example, in *Blue Chip Consultants (Pty) Ltd v Shamrock*²⁴⁸ a suretyship clause in a document headed "Credit application" was found binding, partly due to the short and easy-to-read format of the document.²⁴⁹

The fact that many websites create the illusion of offering their services for free, and many even profess it, also means that suppliers should not always expect consumers to be alert to the possibility of entering into a contract.²⁵⁰ The absence of an unequivocal act indicating assent in both click-wraps and browse-wraps further mitigates against a conclusion that the supplier's reliance is reasonable.²⁵¹ In the case of click-wraps, clicking is ambiguous because, unlike signature, the act of clicking fulfils various purposes and using it to create legal obligations is not its primary role.²⁵² In the case of browse-wraps, use of a website cannot be perceived as a clear statement of contract conclusion.

On the other hand, the ease with which the terms of the contract can be accessed by the consumer operates in favour of suppliers. The fact that online contracts are so ubiquitous might also mean that consumers should expect these terms to govern the use of websites, although their prevalence renders the terms less likely to be read.

²⁴⁷ See *Davids v ABSA Bank Bpk* 2005 3 SA 361 (C), where the court analysed the physical attributes of the document, counting the words used and evaluating whether the consumer would have been able to decipher their meaning in order to determine enforceability of the contract.

²⁴⁸ 2002 3 SA 231 (W).

²⁴⁹ 237.

²⁵⁰ See ch 2 (2 4 3). Also see *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002) 32: "When products are "free" and users are invited to download them in the absence of reasonably conspicuous notice that they are about to bind themselves to contract terms, the transactional circumstances cannot be fully analogized to those in the paper world of arm's length bargaining." Also see ch 4 (4 3 3) for the possibility of this constituting a misrepresentation or deceptive practice.

²⁵¹ See *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 241: "Generally, it can be stated that what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can logically be drawn".

²⁵² See 3 2 3 1 above.

Eventually, a court has to study the design of the website and the manner in which the online contract was presented to the consumer. The court then has to determine whether it was reasonable to expect the consumer to have been aware of the existence of the terms and the fact that they constitute a legal undertaking.

3 4 3 5 *Interim Conclusion*

Imposing liability where the consumer fails to read a standard term contract has long been sanctioned by the common law.²⁵³ South African law thus recognises a form of blanket assent, provided the consumer received sufficient notice of the terms. In the light of this, the established theories of contract formation (such as the doctrine of quasi-mutual assent) provide sufficient grounds for the enforcement of online contracts. The supplier can reasonably rely on consensus where sufficient notice was given (in the case of browse-wraps) or whether the construction of the website made it clear that clicking amounts to acceptance of the terms (in the case of click-wraps), despite the fact that consumers cannot reasonably be expected to read the terms.

The alternative – recognising a duty on suppliers to ensure that consumers understand the terms of the contract (in other words, accepting the *Dlamini* finding) – would have a profound impact on all suppliers.²⁵⁴ However, the effect on online suppliers would be even more burdensome. Because online suppliers do not encounter the consumer face to face, it is difficult to fathom how they should determine whether the consumer understands the terms, and explain them if he lacks understanding. One might argue for more stringent requirements for the formation of online contracts,²⁵⁵ but expecting suppliers to differentiate between individual consumers, especially in the online environment, is simply unrealistic.

However, imposing a duty on the consumer to read the terms or risk being bound to whatever they contain, is rendered more onerous in the online environment, due to the various factors mentioned earlier,²⁵⁶ such as their length and ubiquity. Another aggravating factor, which is discussed below, is the ease with which suppliers can use

²⁵³ See 3 3 6 above.

²⁵⁴ Sharrock & Steyn 2014 *SA Merc LJ* 158-159; Nortje 2014 *TSAR* 217.

²⁵⁵ This will be considered in ch 5 (5 3).

²⁵⁶ See 3 2 2 1 above.

hyperlinks to incorporate various terms into the contract presented to the consumer.²⁵⁷ It must thus be questioned whether South African law should introduce stricter requirements for the formation of online contracts. To this end, the next section engages in a comparative study of American law, where this issue has received both judicial and academic attention.²⁵⁸

Before turning to American law, certain aspects of South African law in the context of online contracts still require consideration. First, it will be examined how the offer and acceptance model could function in the online context and whether there are any benefits to using this construction. Thereafter, the current measures recognised in South African law relating to formation will be explored in more detail to determine to what extent they provide a safeguard to online consumers. Three issues relating to the application of the general principles of contract formation to online contracts call for further discussion, namely (i) what will constitute sufficient notice in the online environment and when the notice should be provided,²⁵⁹ (ii) the provisions relating to surprising or unexpected terms,²⁶⁰ and (iii) the use of hyperlinks to extend the scope of online terms.²⁶¹

3 4 4 Offer and acceptance in the context of online contracts

As explained above, the offer and acceptance model can be used to determine whether the parties have reached agreement.²⁶² We have seen that if a consumer wishes to purchase a product pursuant to an advertisement, the consumer is generally deemed to be making an offer to purchase, which the advertiser/supplier can accept or reject.²⁶³ If this rule is applied to websites, some websites could be compared to a shop front displaying products for purchase, where the supplier only makes an offer to treat.²⁶⁴

²⁵⁷ See 3 4 7 below.

²⁵⁸ See 3 5 and 3 6 below.

²⁵⁹ At 3 4 5 below.

²⁶⁰ At 3 4 6 below.

²⁶¹ At 3 4 7 below.

²⁶² See 3 3 5 above.

²⁶³ See 3 3 5 above.

²⁶⁴ Mik 2016 *Singapore J Leg Stud* 81.

The consumer will thus be the one making the offer,²⁶⁵ which means that his offer has to contain the terms of the online contract.²⁶⁶ Alternatively, if the consumer's offer does not contain the terms, the introduction of these terms by the supplier must be viewed as a counter-offer which the consumer can elect to accept or reject.²⁶⁷

This can be distinguished from situations where a supplier offers a service in the form of access to digital data, for example use of a search engine.²⁶⁸ In such a case an analogy might be drawn with the use of a vending machine, due to the high degree of automation.²⁶⁹ The view is commonly held that because the owner of a vending machine can exercise no choice with regard to the transaction, the display of the goods must be seen as an offer which is accepted by the consumer upon inserting coins.²⁷⁰ Therefore in these cases, the website would contain an offer that is open for acceptance by the consumer.²⁷¹

Regardless of which construction is followed, i.e. whether the consumer makes or accepts an offer, he has to possess the necessary intention to contract based on the terms of the online contract. For purposes of incorporation of the terms of the online contract, it should therefore not make a difference whether the consumer is seen as the offeror or offeree,²⁷² provided he assented to the inclusion of the terms in the

²⁶⁵ See S Eiselen "E-Commerce" in D van der Merwe, A Roos, T Pistorius, S Eiselen & S Nel (eds) *Information and Communications Technology Law 2ed* (2016) 149 166-167; Mik 2016 *Singapore J Leg Stud* 81. However, Judge Easterbrook failed to follow this view, instead viewing the supplier as the offeror inviting acceptance by the consumer (*ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996) 1452. Also see P Kamantauskas "Formation of Click-Wrap and Browse-Wrap Contracts" (2015) 12 *VDU LR* 51 60-61.

²⁶⁶ See JMC Johnson *The Legal Consequences of Internet Contracts* LLM thesis UFS (2003) 79, who indicates that the consumer accepts that these terms form part of the offer made by him.

²⁶⁷ This will be similar to the scenario of a passenger stepping on a bus which displays terms and conditions, as discussed by Bradfield *Christie's Law of Contract* 105.

²⁶⁸ Mik 2016 *Singapore J Leg Stud* 81.

²⁶⁹ 82.

²⁷⁰ Bradfield *Christie's Law of Contract* 104.

²⁷¹ Mik 2016 *Singapore J Leg Stud* 82. Also see Ramokanate & Erlank 2016 *Obiter* 514.

²⁷² It is not necessary to use the offer and acceptance model in all instances. Van den Heever JA confirmed that: "Consensus is normally evidenced by offer and acceptance. But a contract may be concluded without offer and acceptance other than pure fictions imported into the transaction for doctrinal reasons. Nor does every accepted offer constitute a contract." (*Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A) 532).

transaction. Context plays an important role in shaping this intention. Because courts can only judge intention objectively, the same considerations mentioned in the context of reliance-based liability will presumably also feature in this enquiry.²⁷³

Although the offer and acceptance model does not seem to make any contribution when considering whether an online contract was formed based on the supplier's standard terms,²⁷⁴ it can provide guidance when so-called "Pay Now, Terms Later" or shrink-wrap transactions are considered by pinpointing the moment of contract conclusion. This is discussed below.²⁷⁵

3 4 5 Actual or constructive notice of the terms in the online environment

3 4 5 1 Introduction

The main issues relating to notice in the online environment can be divided into two topics, namely (i) the steps which must be taken by the online supplier to place the consumer on notice of the terms; and (ii) the time at which such notice must be given to the consumer. The first issue is key to establishing whether liability can be imposed in the absence of an unambiguous indication of assent, as set out in the *Durban's Water Wonderland* decision.²⁷⁶ This issue has also featured prominently in American case law regarding the enforceability of online terms, as discussed below.²⁷⁷

The second question has practical relevance in the case of browse-wraps, where the consumer is deemed bound by accessing the website, before he had an opportunity to study the terms.²⁷⁸ It is also pertinent in other "pay now, terms later" (PNTL) transactions, such as shrink-wraps, where terms are provided only after completion of

²⁷³ See 3 4 3 4 above.

²⁷⁴ See Mik 2016 *Singapore J Leg Stud* 75, who agrees that the offer and acceptance analysis might be crucial when investigating issues such as the time and place of contract formation, but when "the very existence of a contract is in question, the search is for intention *in general*" (emphasis in the original). It has even been argued – in the American context – that this model should be abolished in modern contract law, because it "tends to obscure the substantive and interpretive questions that underlie contract formation" (S Bayern "Offer and Acceptance in Modern Contract Law: A Needless Concept" (2015) 103 *Cal LR* 67 68).

²⁷⁵ See 3 4 5 3 below.

²⁷⁶ *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 991. Also see 3 3 4 2 above.

²⁷⁷ See 3 5 3 below. Also see Kim *Wrap Contracts* 93-94.

²⁷⁸ Kim *Wrap Contracts* 109: "The offeree may receive notice after undertaking the acts that constitute acceptance."

a transaction. Examples of this in the online environment include software requiring acceptance of terms after it has been downloaded or additional terms enclosed in the packaging of products ordered online.

3 4 5 2 *Sufficient notice in the online environment*

3 4 5 2 1 *Click-wraps*

Like signature, clicking can only be construed as a manifestation of consent if the reasonable user would be on notice that clicking means agreeing to contractual terms. Phrased differently, in terms of the doctrine of quasi-mutual assent, it is only where the design of the website clearly indicates that clicking amounts to acceptance of terms that the supplier can reasonably perceive the consumer's act of clicking as constituting acceptance of the terms.

Traditional instances of click-wraps, where the terms are displayed with an icon requiring acceptance either at the top or bottom of the page (and the sole purpose of the icon is to serve as an indication of assent to contract terms), should generally meet this requirement. Such a display is comparable to requiring signature on the face of a printed document, and the rule set out in *Burger v Central South African Railways*²⁷⁹ and *George v Fairmead (Pty) Ltd*²⁸⁰ – that a party signing a document is assenting to the words appearing on that document – will bind the consumer.²⁸¹

Hybrid forms, such as scroll-wraps, multi-wraps and sign-in wraps,²⁸² will require more scrutiny to determine whether it was made clear to the consumer that by clicking the icon, he is accepting contractual terms. In these cases, clicking the icon does not primarily serve the function of accepting terms, but rather some other purpose such as creating an account. Therefore, clearer notice is required to ensure their enforceability and they are treated more like browse-wraps in American law.²⁸³

²⁷⁹ 1903 TS 571.

²⁸⁰ 1958 2 SA 465 (A).

²⁸¹ See text to nn 130 and 132 above.

²⁸² See ch 2 (2 2 1 1).

²⁸³ See 3 6 2 2 below.

3 4 5 2 2 *Browse-wraps*

As explained above, South African courts base the enforceability of terms in ticket-cases on whether reasonable notice of the terms was given.²⁸⁴ Establishing contractual liability as a result of constructive notice is therefore not foreign to our law. However, it remains to be decided whether, by placing a hyperlink titled “Terms” or something similar at the bottom of a webpage (as illustrated by Figure 1 below), the supplier has satisfied the reasonable notice test as set out in *Durban’s Water Wonderland (Pty) Ltd v Botha*.²⁸⁵

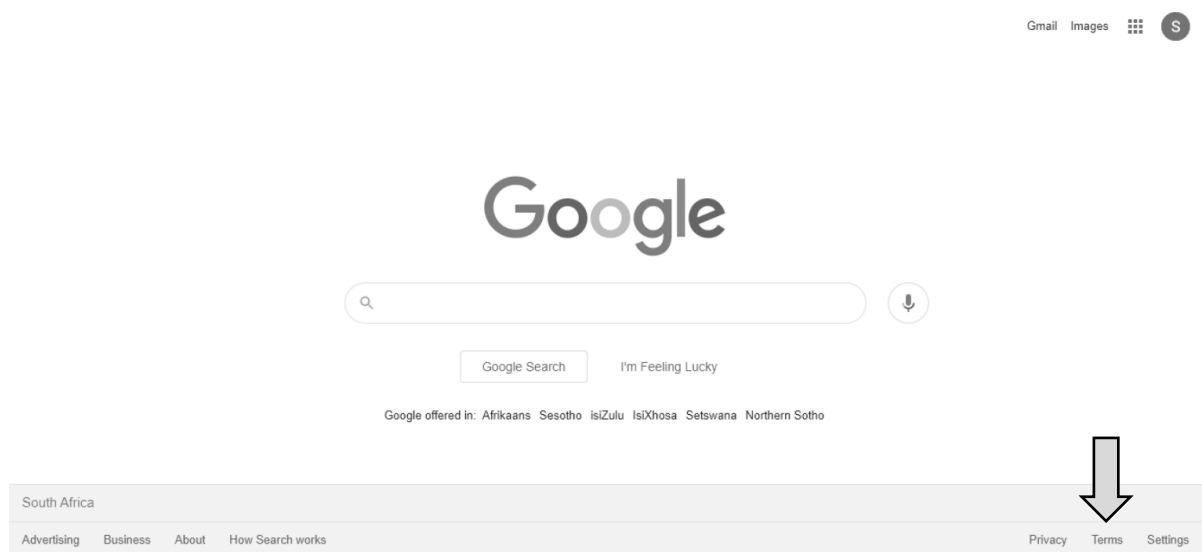


Figure 1²⁸⁶

First, the court must consider whether the consumer was aware that there was writing, and whether he knew it contained contractual terms.²⁸⁷ As these are determined subjectively, it will depend on the particular consumer. Thus, where the supplier has an electronic record of the consumer accessing the hyperlink containing the terms of the online contract, it is expected that the browse-wrap will be enforced.

If the supplier cannot prove actual knowledge of the existence of contractual terms, the question is whether he did “what was reasonably sufficient to give the [consumer]

²⁸⁴ See 3 3 4 2 above.

²⁸⁵ 1999 1 SA 982 (A) 991.

²⁸⁶ Screenshot from www.google.co.za (accessed 29-10-2019) (arrow inserted).

²⁸⁷ See 3 3 4 2 above.

notice of the conditions.”²⁸⁸ Context plays an important role in determining which steps are deemed to be sufficient.²⁸⁹ It is accepted that a consumer will “be justified in ignoring a document that does not appear to [him], as a reasonable person, to be contractual in nature.”²⁹⁰ It must therefore be determined whether the reasonable consumer would know that contractual terms are contained in the hyperlink, even though no document is presented to him and no notice is given other than the appearance of a link.

In light of the fact that courts are willing to enforce contractual terms on notice boards – as illustrated by the *Durban’s Water Wonderland*-case²⁹¹ – a blanket rejection of browse-wraps seems unlikely. Whether a particular website design makes notice of the terms apparent enough is case-dependent, but it is expected that courts will develop general guidelines over time. Decisions relating to traditional ticket-cases,²⁹² as well as American decisions in this regard, will presumably play a role in these determinations.²⁹³

For example, a link at the bottom of a website full of more prominent information and pictures, might be affected by the opinion in *Micor Shipping (Pty) Ltd v Treger Golf and Sports (Pty) Ltd*²⁹⁴ that:

“the note at the foot of the invoices and credit notes, whilst it cannot be described as ‘inconspicuous’, is ... not so prominent as being calculated immediately to attract the attention of the recipient of such documents, who would be ... only concerned with the facts and figures appearing in the body of the documents.”²⁹⁵

²⁸⁸ *Central South African Railways v McLaren* 1903 TS 727 735. Also see *King’s Car Hire (Pty) Ltd v Wakeling* 1970 4 SA 640 (N) 645; *Durban’s Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A) 991.

²⁸⁹ See the text to n 180 above.

²⁹⁰ Bradfield *Christie’s Law of Contract* 214.

²⁹¹ *Durban’s Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A).

²⁹² See Bradfield *Christie’s Law of Contract* 212-215 for a discussion of some of the relevant case law.

²⁹³ See a discussion of the American decisions at 3 6 2 2 below.

²⁹⁴ 1977 2 SA 709 (W).

²⁹⁵ 717.

The Supreme Court of Appeal has also refused to enforce terms of which notice appeared at the bottom of a page, beneath the company description.²⁹⁶ They held that doing so would mean “a party may conceal contractual terms in most unlikely corners of a document which contains contractual matter.”²⁹⁷ The nature of the online environment, such as the fact that browse-wraps are often found in corners of documents hidden behind hyperlinks, might give credence to a consumer’s claim of being unaware of the existence of contractual terms.

Because consumers generally do not view the use of a website as a transaction,²⁹⁸ more may be required to place them on notice. However, it could be argued that virtually all websites are subject to terms, and that consumers consequently should expect contractual terms to apply.

The fact that browse-wraps do not clearly indicate (without requiring the consumer to access the link) what the conduct is that would constitute assent to the terms is problematic. Even if the hyperlink containing the terms of use is conspicuous, the fact that browsing amounts to acceptance of the terms is not necessarily communicated. This is in contrast to the typical notice board which will clearly display that “by entering this premises” or something similar the consumer agrees to be bound to the conditions spelled out on the notice. As discussed below, American courts generally insist on a notice to that effect,²⁹⁹ and South African courts are likely to follow suit.

3 4 5 3 *Timing of the notice: PNTL, browse-wrap and shrink-wrap agreements*

The second issue pertaining to notice of online contracts relates to the time at which notice is given. In this regard, the offer and acceptance model can be useful to determine the time of contract formation, and thus also which terms form part of the contract between the parties.

It is recognised in South African law that terms provided after contract conclusion cannot form part of the transaction,³⁰⁰ unless it can be proven that the contract was

²⁹⁶ *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 5 SA 180 (SCA) para 20.

²⁹⁷ Para 20.

²⁹⁸ See ch 2 (2 4 3).

²⁹⁹ See 3 6 2 2 below.

³⁰⁰ See n 95 above.

amended to include those terms.³⁰¹ An offer must contain all the essential terms of a transaction,³⁰² and once it is accepted a contract is formed.³⁰³ The offeree cannot amend the offer – acceptance has to correspond with the offer, otherwise it will be deemed to be a counter-offer.³⁰⁴ An attempt to introduce terms after contract formation will amount to a variation, and the supplier will have to prove that there was an agreement to vary the document.³⁰⁵

This poses a conundrum for terms which are only provided to the consumer after the core transaction was entered into. In this context, two situations can be distinguished.³⁰⁶ The first is where the consumer is only notified of the existence of the online terms after contract conclusion. The second situation is where the consumer is notified before contract conclusion that further terms are to follow, but these terms are only accessible to the consumer after concluding the main transaction.

The first situation is probably the most common in the context of browse-wraps regulating the use of websites. In most instances, use of the website is also the conduct prescribed for acceptance of the terms, which means that the contract is supposedly concluded the moment the consumer enters the website. This necessarily means that the terms of the browse-wrap are introduced only after contract formation, because the terms can only be accessed after entering and using the website.³⁰⁷ Even if the consumer immediately exits the website after accessing the terms because he does not agree to them, he has already engaged in the contract-forming conduct.

However, where the consumer continues using a website after being notified of the terms and having the opportunity to access them, this might be construed as an agreement to vary the transaction by inclusion of the terms. As previously discussed,

³⁰¹ *W J Lineveldt (Edms) Bpk v Immelman* 1980 2 SA 964 (O) 967; *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 3 SA 952 (SCA).

³⁰² See 3 3 3 above.

³⁰³ *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 241: “a binding contract is as a rule constituted by the acceptance of an offer”; Bradfield *Christie’s Law of Contract* 36.

³⁰⁴ *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 3 SA 952 (SCA); Bradfield *Christie’s Law of Contract* 75-76.

³⁰⁵ *W J Lineveldt (Edms) Bpk v Immelman* 1980 2 SA 964 (O) 967.

³⁰⁶ Also see the discussion of these two possibilities in Du Plessis 2019 *SA Merc LJ* 198-199.

³⁰⁷ See H Schulte-Nölke “Incorporation of Standard Contract Terms on Websites” (2019) 15 *ERCL* 103 114.

inaction will generally not suffice as an indication of assent.³⁰⁸ However, it is possible that the commercial necessity of enforcing browse-wraps might persuade courts to focus on the continued browsing of the website as constituting acceptance, instead of the finding them unenforceable because of the failure to provide them before contract conclusion.³⁰⁹ Thus, provided the supplier can satisfy the last question in *Durban's Water Wonderland*, by showing that sufficient notice was provided, the consumer will be deemed to have agreed to be bound to the terms without reading by continuing with the conduct prescribed for contract formation (i.e. continued browsing).³¹⁰

The second situation is generally the position with shrink-wraps, for example terms included with a product ordered online: the consumer is given notice that further terms will follow, but these are only provided after the core transaction is entered into.³¹¹ Although ostensibly different to the first situation, the legal position does not differ drastically. Even where the consumer received prior notice that further terms will apply, but he could not access the terms before contract conclusion, it will fall foul of the requirement that terms be provided prior to or simultaneously with contract conclusion.³¹² Therefore, terms provided after contract conclusion only become binding if the consumer subsequently assents to those terms, even where he was informed before initial contract conclusion that they will follow.³¹³ This means that again the terms will only become binding if a court is willing to construe the consumer's subsequent conduct (e.g. by continuing with the transaction after receiving the terms) as acceptance of the terms.³¹⁴ However, transactions in which shrink-wraps are used often lack the continued use which might persuade courts to enforce browse-wraps (for example a shrink-wrap provided with the goods in a once-off sale), and their enforcement might therefore be more problematic.

Courts will also have to consider relevant legislation. As discussed above, section 43(2) of ECTA requires that consumers be granted an opportunity to review a

³⁰⁸ See 3 3 5 above.

³⁰⁹ See ch 5 (5 2 1) for a discussion regarding the role of commercial necessity.

³¹⁰ Bradfield *Christie's Law of Contract* 212. Also see 3 3 3 2 above.

³¹¹ See ch 2 (2 2 2 1) above.

³¹² See n 95 above.

³¹³ Du Plessis 2019 *SA Merc LJ* 198.

³¹⁴ 199.

transaction before completion of a transaction.³¹⁵ If the supplier fails to comply with this requirement, the consumer is granted a fourteen-day cancellation period. No other statutory remedy is provided for where the consumer fails to cancel within this period, and provided the supplier can prove their acceptance in terms of the common law, the terms will presumably be binding despite their later introduction.

Practically, this remedy is difficult to reconcile with the function generally performed by browse-wraps. For example, where a browse-wrap authorises online tracking of a consumer, this will commence immediately when the consumer accesses the website. Not only is it unlikely that the consumer will know that he may cancel the contract within fourteen days (or, in fact, that he has consented to tracking), but a mechanism for cancellation is generally not provided by the website.

The practice of introducing terms after contract conclusion which become binding if the consumer fails to object could also be problematic in the light of section 31 of the CPA, which deals with negative option marketing.³¹⁶ This section provides that an agreement or modification is void if a consumer is required to reject the terms to prevent it from coming into operation. However, a supplier might try to circumvent this problem by arguing that it is the act of browsing (or continued browsing) which amounts to consent, and not the consumer's silence. Transactions which lack this element of continuous conduct (as discussed above), might however contravene section 31 of the CPA.

3 4 6 Unexpected or surprising terms

It is recognised in South African law that people are willing to sign standard form contracts without reading because they assume no unexpected terms are contained in the document.³¹⁷ The same applies in ticket-cases, where consumers accept terms without familiarising themselves with their content because they assume their reasonableness.³¹⁸ Therefore, the reasonable person would not believe assent to

³¹⁵ See 3 4 2 above.

³¹⁶ See 3 3 6 above.

³¹⁷ See 3 3 3 above, specifically n 163. Also see Bradfield *Christie's Law of Contract* 210

³¹⁸ See 3 3 4 above, specifically n 179. Also see *Central South African Railways v James* 1908 TS 221 226; Bradfield *Christie's Law of Contract* 215.

unexpected terms to be present and the consumer will not be bound to such terms.³¹⁹ For example, in *Dlovo v Brian Porter Motors Ltd T/A Port Motors Newlands*³²⁰ the court held that an exemption clause was unenforceable, stating that:

“An important consideration underlying the exception to the 'duty to read' rule which is recognised by these cases is that a contracting party does not rely on the other party's signature as manifesting assent, when the first party has reason to believe that the other party would not sign if he were aware that the writing contained a particular term.”³²¹

Whether the consumer would be allowed to escape the operation of unexpected terms, even though his misconception would have been corrected had he read the online contract, will depend on whether the court subscribes to a stricter or more lenient approach to the duty to read.³²² It is submitted that in light of the fact that it is both unreasonable and undesirable to expect consumers to read online contracts,³²³ a lenient approach is called for in these instances.

A consumer cannot be expected to correct a reasonable misperception with regard to the content of an online contract by studying the terms, and thus in the absence of evidence that his attention was specifically drawn to the particular term, his mistake should be *iustus*. This will be the case either because he acted reasonably and without negligence (the second category mentioned above),³²⁴ or because the supplier cannot reasonably rely on consensus in respect of surprising terms (the third category mentioned above).³²⁵ For example, if the consumer reasonably believed that the online terms do not contain a clause authorising the supplier to profit from use of his personal data, he should be able to escape this clause by virtue of the *iustus error* doctrine despite the opportunity to rectify his mistake by acquainting himself with the terms.³²⁶ Or, conversely, it should be recognised that the supplier's reliance on the appearance of consensus regarding terms which a consumer would not reasonably

³¹⁹ See n 164 above.

³²⁰ 1994 2 SA 518 (C).

³²¹ 524-525.

³²² See 3 3 4 above.

³²³ See n 28 above. Also see Ben-Shahar 2009 *ERCL* 7-8.

³²⁴ See 3 3 2 above.

³²⁵ See 3 3 2 above.

³²⁶ See the discussion of *Hartley v Pyramid Freight t/a Sun Couriers* 2007 2 SA 599 (SCA) at 3 3 3 2 above, where the distinction was drawn between ignorance and mistake.

expect to find in the online contract cannot be reasonable. It would further be unreasonable to expect a consumer to correct his misperception regarding such terms by studying the document.

The test is not whether the particular terms were substantively reasonable.³²⁷ It was confirmed in *Burger v Central South African Railways*³²⁸ that

“our law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable.”³²⁹

The focus is rather on whether the reasonable person would have expected the term in the particular contract,³³⁰ and thus whether the consumer’s mistake can be regarded as reasonable (or, expressed differently, whether the supplier’s reliance on the appearance of consensus is reasonable).³³¹

To determine which clauses would be regarded as unexpected or surprising, context, the type of contract, and the nature of a clause will play an important role. For example, in *Constantia Insurance Co Ltd v Compusource (Pty) Ltd*³³² the court was of the opinion that the respondent would not have incurred an obligation which it had no possibility of satisfying, and therefore it was not reasonable to infer that, by merely signing the standard form, the respondent consented to a clause which could have that effect.³³³ Rather, the court opined that the reasonable person in the position of the insurer would have taken steps to determine whether the meaning of the clause was appreciated by the respondent.³³⁴

³²⁷ Bradfield *Christie’s Law of Contract* 210. Although there have been cases where enforcement of unreasonable terms was refused – see *Owens v Ennis & Co* (1889-1890) 3 SAR TS 233 234; Bradfield *Christie’s Law of Contract* 215.

³²⁸ *Burger v Central South African Railways* 1903 TS 571.

³²⁹ 576. Although terms which are “unfair, unreasonable or unjust” are prohibited in terms of s 48(1)(a)(ii) of the CPA.

³³⁰ *Diners Club SA (Pty) Ltd v Thorburn* 1990 2 SA 870 (C) 875.

³³¹ See for example *Dlovo v Brian Porter Motors Ltd T/A Port Motors Newlands* 1994 2 SA 518 (C) 524-525; *Hartley v Pyramid Freight t/a Sun Couriers* 2007 2 SA 599 (SCA) para 9.

³³² 2005 4 SA 345 (SCA).

³³³ *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA) 355-356.

³³⁴ 356.

With regard to online contracts regulating the use of a website, one must consider whether consumers are reasonable in their belief that website services can be used without any compensation.³³⁵ Does the lack of transactional indicators and absence of monetary exchange mean that a consumer is reasonable to expect that nothing has to be given in return for use of a website, or should the reasonable consumer expect provisions regarding use of his data, digital tracking and similar terms to appear in online contracts?³³⁶

A further question which must be considered is whether the inclusion of unexpected terms in an online contract leads to invalidity of the particular clause, or whether it will vitiate the entire contract. The majority of case law either held only the offending clause to be unenforceable,³³⁷ or refrained from addressing the issue.³³⁸ This could be because in most instances, the question before the court only related to enforceability of the particular term and not the contract in its entirety.

The unexpected terms doctrine can provide an important safeguard to consumers who are deemed to consent to online contracts. However, to develop this as an effective and reliable mechanism, courts will have to determine guidelines for establishing the consumer's reasonable expectation in the online context, and also consider whether an online contract should be rendered invalid by virtue of an unexpected term in the standard terms, or whether only the validity of the offending term should be affected. Some suggestions are made below,³³⁹ and the American approach to unexpected terms will also be considered briefly.³⁴⁰

³³⁵ Mik 2016 *Singapore J Leg Stud* 89.

³³⁶ 89.

³³⁷ See *Dlovo v Brian Porter Motors Ltd T/A Port Motors Newlands* 1994 2 SA 518 (C) 527: "It follows in my view that the appellant's error in respect of the exemption clause was *justus* and that such clause is consequently not binding on her"; *Prins v Absa Bank Ltd* 1998 3 SA 904 (C) 911; *Brink v Humphries & Jewel (Pty) Ltd* 2005 2 SA 419 (SCA) 426.

³³⁸ See *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A) 319. Also see *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A) 906, although this involved a term rendered unexpected through a prior misrepresentation.

³³⁹ See 3 4 8 below. Also see the discussion at ch 5 (5 6) regarding the advantages and disadvantages of an approach which would render the entire contract invalid (although the comments are made in the context of unfair terms, a similar rationale applies).

³⁴⁰ See 3 6 4 below.

3 4 7 Incorporation by reference: hyperlinks

A problem unique to online contracts is the use of hyperlinks.³⁴¹ Hyperlinks are used to widen the scope of online contracts, by including the terms of other documents into the contract presented to the consumer.³⁴² It therefore requires the consumer to read the provisions of the particular document, as well as all the documents it refers to. If the document contains a unilateral variation clause, which allows the supplier to amend the terms of the agreement at any time,³⁴³ the consumer has to study all the agreements referred to every time he visits the website. This is due to the possibility of changes in both the document presented to him and the documents incorporated therein.³⁴⁴

The practice of incorporating terms into a contract by reference is well recognised in South African law, and consumers are bound to these terms despite them not appearing in the document.³⁴⁵ ECTA confirms that this is also the case in online contracts.³⁴⁶ It further states that even where the information so incorporated is not in the public domain, it will be binding, provided “a reasonable person would have noticed the reference thereto and incorporation thereof”³⁴⁷ and it is “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 such information is reasonably capable of being reduced to electronic form by the party incorporating it”.³⁴⁸

Based on the above it is clear that where an online contract is found to be enforceable, terms incorporated into the contract (for example by way of a hyperlink) will form part of the contract, as long as the incorporation appears clearly from the document. These terms will therefore be enforceable, subject to the control mechanisms also applicable

³⁴¹ Kim *Wrap Contracts* 63.

³⁴² 67.

³⁴³ See ch 4 (4 2 & 4 7 3 1).

³⁴⁴ Kim *Wrap Contracts* 68.

³⁴⁵ *Industrial Development Corporation of SA (Pty) Ltd v Silver* 2003 1 SA 365 (SCA) para 6; *Central South African Railways v James* 1908 TS 221 226.

³⁴⁶ S 11(2) of ECTA. This section appears in ch 2 (2 2 2 2) above.

³⁴⁷ S 11(3)(a) of ECTA.

³⁴⁸ S 11(3)(b) of ECTA.

to the main agreement, for example where there are unexpected terms in the document.³⁴⁹

3 4 8 Concluding remarks

The South African common law provides sufficient grounds for the enforcement of online contracts, despite a lack of consumer awareness of their terms. This is because actual or deemed knowledge of the existence of terms, but not of their content is generally required. In the case of click-wraps, the *caveat subscriptor* rule renders the reliance of the supplier on the appearance of consensus reasonable. In the case of browse-wraps liability depends on whether sufficient notice is given, as in the ticket cases. The fact that the terms of browse-wraps are only provided after contract conclusion might cause some difficulty, but this can at times be overcome where the consumer continues to use the website. This will not be the case for shrink-wraps, where the terms are only provided after completion of the transaction.

The two approaches by South African courts regarding mistake in the case of apparent agreement (and specifically where the document was signed by the consumer) were discussed above.³⁵⁰ It was shown that older decisions, and some recent ones, preferred the stricter approach which viewed the contract denier as negligent for failing to read the terms, and hence regarded his mistake in respect of the terms as *injustus*. Other cases followed a more lenient view, placing a duty on the supplier to draw the attention of the signatory to unusual terms.

In the case of online contracts, it must be recognised that it is generally unreasonable to expect consumers to study the terms of the contract. Unless a particular term, which the reasonable person would not expect in the specific online contract, is disclosed in a more pertinent manner than merely forming part of the click- or browse-wrap, the consumer cannot be said to be unreasonable where he is mistaken about such a term. In other words, if a term can reasonably be expected, it is binding even if the consumer is mistaken or ignorant of it, since the mistake is *injustus*. If a term cannot reasonably be expected, it should not be binding, since the consumer's ignorance is *iustus*, unless the term is disclosed in a pertinent manner. The fact that a consumer's mistake about

³⁴⁹ See 3 4 6 above.

³⁵⁰ See 3 3 4 1 above.

a surprising or unexpected term in an online contract must almost always be *iustus* (and the supplier's reliance on the appearance of consensus thus unreasonable) should therefore persuade the courts to adhere to the more lenient approach to mistake.

Thus, it is suggested that determining whether the terms of the online contract forms part of the transaction between the supplier and the consumer should only form the first part of a two-fold enquiry into the enforceability of a particular term contained in an online contract. Even though blanket assent to the online terms might be established, and the online contract in general thus is rendered enforceable, it is possible that the consumer may escape being bound to a specific term. This is because the specific term may not have been reasonably expected by the consumer or was surprising. Because it is unreasonable to expect consumers to read the contract, they should be excused from unexpected terms, unless the supplier can show that he specifically drew the consumer's notice to the particular term.

Only enforcing terms which a consumer could reasonably expect or was explicitly made aware of will also encourage suppliers to identify unexpected terms and bring them to the attention of consumers. It is also consistent with the following recommendation by Hutchison to drafters of standard form contracts:

"Make sure that the document is not misleading in any way, and that the signatory understands the nature and effect of the obligations being undertaken. Draw attention to clauses that the signatory might not expect to find in the document and where appropriate explain their purpose and effect. Failure to do so opens the door to a finding that the contract is not binding because there is neither true agreement nor a reasonable belief in the existence of agreement."³⁵¹

Although courts have already incorporated these considerations in their decisions, rephrasing it as a two-fold enquiry which takes into account the particular attributes of online contracts could assist judicial evaluation. The first part of the enquiry should thus focus on whether the consumer was aware or should reasonably have been aware that his online actions are generally subject to contractual terms in order to establish deemed consensus to the online contract. This focuses on whether sufficient notice was given to the consumer of the fact that he agrees to online terms by virtue of clicking

³⁵¹ Hutchison "Traps for the Unwary" in *Essays* 58.

or browsing. The second part of the enquiry considers whether the consumer should reasonably have expected certain terms to form a part of this contract; and thus whether the supplier was reasonable in relying on assent to those terms or whether he should have known the consumer would be surprised by them. The focus here is on the reasonable expectations of consumers and should take into account any steps taken by the supplier to shape those expectations.

This two-step approach can help to protect the reasonable expectations of consumers, but it still means that that online contracts are enforced despite the fact that consumers cannot reasonably be expected to read them. This indicates the importance of other forms of control, such as introducing substantive measures, which will be discussed in the next chapter. However, it also raises the question whether current South African law would be overly accommodating to the formation of online contracts. A comparative evaluation could assist in this assessment, and could also be used to determine whether, in light of the American experience, measures to improve the quality of assent to online contracts can be identified.

3 5 Contract formation in American law

3 5 1 Introduction

The previous chapter provided a brief overview of the approach by American courts to the enforceability of online contracts.³⁵² The focus of this part of the study is specifically on establishing consent to online contracts and how the courts dealt with this issue. The discussion regarding the formation of online contracts has to be viewed in the broader context of the American approach to standard form contracts in general. This section will commence with a brief exposition of these principles before specifically considering formation in the online context.

3 5 2 General approach to the formation of standard form contracts

For a contract to be formed in terms of American law, both consideration and a manifestation of mutual assent are required.³⁵³ The requirement of mutual assent

³⁵² See ch 2 (2 2 2 1).

³⁵³ S 17(1) of the Restatement (Second) of Contracts; *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002) 28-29.

usually takes the form of offer and acceptance,³⁵⁴ although “any manner sufficient to show agreement” will generally be accepted, and this may be in the form of conduct.³⁵⁵ Mutual assent thus refers to the fact that the parties must share an understanding of what is offered and accepted,³⁵⁶ although this is determined objectively,³⁵⁷ with the emphasis on the manifestation of mutual assent rather than on subjective assent.³⁵⁸ The idealistic requirement of a manifestation of mutual assent still persists, despite it being recognised as far back as 1971 that

“[t]he contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.”³⁵⁹

There is evidence in American law of both a wholly objective approach in the form of the declaration theory, and of a reliance-based approach in the form of the reliance theory.³⁶⁰ Traditionally, in terms of the reliance theory, the mutual assent requirement will be satisfied where it is reasonable for one contracting party to perceive the conduct of the other as a manifestation of consent,³⁶¹ and if the former believed assent to be present.³⁶² The requirements for determining whether a reliance on a manifestation of assent is reasonable have been increasingly relaxed, often demanding little more than notice of terms.³⁶³ Further evidence of this relaxation is that the subjective belief in or

³⁵⁴ S 22(1) of the Restatement (Second) of Contracts.

³⁵⁵ Para 2-204 UCC. Also see M Robertson “Is Assent still a Prerequisite for Contract Formation in Today’s E-economy?” (2003) 78 *Wash LR* 265 269.

³⁵⁶ Kim *Wrap Contracts* 7.

³⁵⁷ Robertson 2003 *Wash LR* 271; Moringiello 2005 *Rutgers LR* 1311; EA Farnsworth *Contracts* 3 ed (1999) 117. Also see *Starke v Squaretrade Inc.* 913 F 3d 279 (US App 2019) 289: “Generally, courts look to the basic elements of the offer and the acceptance to determine whether there was an *objective* meeting of the minds” (own emphasis).

³⁵⁸ Zacks 2016 *Wm & Mary Bus LR* 737; Kim *Wrap Contracts* 7.

³⁵⁹ WD Slawson “Standard Form Contracts and Democratic Control of Lawmaking Power” (1971) 84 *Harv LR* 529 529.

³⁶⁰ G Klass *Contract Law in the USA* (2010) 65; CJ Pretorius “The Basis of Contractual Liability in American Law” (2004) 37 *CILSA* 226 235.

³⁶¹ Zacks 2016 *Wm & Mary Bus LR* 746.

³⁶² 737.

³⁶³ See Zacks 2016 *Wm & Mary Bus LR* 737-738. This was also acknowledged by the reporters of the Draft Restatement in the 2017 Discussion Draft (Reporters’ Memorandum 2: “In this environment of lengthy and ubiquitous standard-form contracts that are largely unread by consumers, the application

reliance on the presence of assent on the part of the contract enforcer is not always required,³⁶⁴ thus signifying a move towards the declaration theory.

The so-called “reasonable communicativeness” test, which Illinois courts have developed in the context of cruise-ship tickets,³⁶⁵ also illustrates how the mutual assent requirement has been watered down. This test acts as a substitute for the requirement of mutual assent when dealing with the enforceability of standard form contracts printed on tickets.³⁶⁶ In terms of the reasonable communicativeness test, a combination of reasonable notice of the terms and the opportunity to review will suffice to trigger the duty to read.³⁶⁷

Due to the almost invariable lack of actual mutual assent in standard form contracts,³⁶⁸ American jurists have made various attempts at forming a coherent theory to explain their enforcement.³⁶⁹ One of the most influential theories in the American context is the idea of blanket assent,³⁷⁰ which was pioneered by Llewellyn.³⁷¹ His theory accepts that no specific assent is given by the consumer in respect of standard form contracts, except for a few negotiated terms.³⁷² Instead, he theorised that the consumer consents to the type of transaction and to any terms which are not unreasonable.³⁷³ He

of the common-law assent doctrine imposes only minimal requirements – to notify consumers of the presence of the terms and to provide some window of opportunity to review the terms and to avoid the transaction”), but in line with the change in approach discussed at 3 5 2 2 below, this does not appear in the 2019 Tentative Draft.

³⁶⁴ Zacks 2016 *Wm & Mary Bus LR* 737-738.

³⁶⁵ Moringiello 2005 *Rutgers LR* 1313-1314.

³⁶⁶ *Effron v Sun Line Cruises Inc* 67 F 3d 7 (2nd Cir 1995) 9; Moringiello 2005 *Rutgers LR* 1314.

³⁶⁷ See *Walker v Carnival Cruise Lines Inc*. 889 N E 2d 687 (Ill App 2008) 694: “With respect to notice, a two-part ‘reasonable communicativeness’ test has evolved to evaluate whether the terms of the clause were reasonably communicated and, therefore, binding on the passenger. Under this two-part analysis, the court considers: (1) whether the physical characteristics of the ticket reasonably communicate the existence of the terms and conditions at issue; and (2) whether the circumstances surrounding the passenger's purchase and subsequent retention of the tickets permitted the passenger to become meaningfully informed of its contractual terms”.

³⁶⁸ Moringiello 2005 *Rutgers LR* 1313: “Even the objective theory of contracts is tested by standard-form contracting”.

³⁶⁹ Zacks 2016 *Wm & Mary Bus LR* 738.

³⁷⁰ See Rakoff 1983 *Harv LR* for a discussion of various theories relating to standard form contracts.

³⁷¹ See Rakoff 1983 *Harv LR* 1198-1206.

³⁷² 1199.

³⁷³ 1199-1200.

recognised that this assent could not pertain to contractual provisions which the reasonable consumer would not expect, and thereby laid the groundwork for the doctrine of “reasonable expectations”.³⁷⁴ Llewellyn’s notion of blanket assent is reflected in Section 211 of the Restatement (Second) of Contract, which is set out below.³⁷⁵

This notion of blanket assent also correlates with the “duty to read”, which provides that where a person manifests assent to a contract, he is bound to the terms regardless of whether he read them.³⁷⁶ Like South African law, certain exceptions to this rule are recognised. Thus, despite this duty, a clause in a standard form contract which is unfair or unusual and which was not brought to the attention of a consumer might be deemed unconscionable and therefore unenforceable.³⁷⁷

The unconscionability doctrine plays an important role in protecting consumers against oppressive terms imposed in a contract of adhesion.³⁷⁸ However, to determine whether a contract is unconscionable, courts generally require a combination of procedural and substantive unconscionability.³⁷⁹ Procedural unconscionability refers to the manner in which the contract came into being,³⁸⁰ and aims to prevent “oppression and unfair surprise”.³⁸¹ It thus encompasses both a lack of consent to a certain extent (where terms are surprising) and consent obtained in an improper manner (such as the fact that the consumer lacked bargaining power). Because the two dimensions of unconscionability are closely interrelated and the focus of this

³⁷⁴ Radin *Boilerplate* 84.

³⁷⁵ Zacks 2016 *Wm & Mary Bus LR* 739.

³⁷⁶ Moringiello 2005 *Rutgers LR* 1312; Daiza 2018 *Cal W LR* 211. With regard to the duty to read in general, see JD Calamari “Duty to Read - A Changing Concept” (1974) 43 *Fordham LR* 341.

³⁷⁷ Calamari 1974 *Fordham LR* 353.

³⁷⁸ See Korobkin 2003 *U Chi LR* 1256; Daiza 2018 *Cal W LR* 226.

³⁷⁹ Hillman & Rachlinski 2002 *NYU LR* 457; Radin *Boilerplate* 124-125. Also see Para 5(b) of the Draft Restatement. See G Glover “Section 40 of the Consumer Protection Act in Comparative Perspective” 2013 *TSAR* 689 689-697 for a discussion of the history and role of unconscionability in Anglo-American jurisdictions. He further criticises the South African legislature’s failure to appreciate this aspect of the doctrine when incorporating it into s 40 of the CPA (also see ch 4 (4 3 2 1 n 77) below).

³⁸⁰ Hillman & Rachlinski 2002 *NYU LR* 457; Radin *Boilerplate* 125.

³⁸¹ Official Comment 1 to UCC s 2-302. Also see Canino 2016 *UC Davis LR* 558; CS Winter “The Rap on Clickwrap: How Procedural Unconscionability is Threatening the E-Commerce Marketplace” (2008) 18 *Widener LJ* 249 261.

chapter is on the narrow issue of establishing assent, this doctrine will be discussed more fully in the following chapter.³⁸²

The question whether mutual assent (whether actual or deemed) is present in the case of standard form contracts is also addressed in the Draft Restatement of the Law, Consumer Contracts (the Draft Restatement).³⁸³ The relevant provisions of the Draft Restatement are discussed below.³⁸⁴

3 5 2 1 Section 211 of the Restatement (Second) of Contract

The general approach of American courts to the formation of standard form contracts is set out in section 211 of the Restatement (Second) of Contract. This section pertains to standardised agreements and, as mentioned above, was heavily influenced by Llewellyn's notion of blanket assent.³⁸⁵ It reads as follows:

- “(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
- (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
- (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knows that the writing contained a particular term, the term is not part of the agreement.”

The first two subsections confirm that there is a duty to read on the person signing or otherwise indicating assent to a standard form contract,³⁸⁶ because he cannot after manifesting assent claim that he was not aware of the content of the document because he failed to read it.³⁸⁷ This is in line with the objective theory of assent,³⁸⁸ as

³⁸² See ch 4 (4 5 1).

³⁸³ The American Law Institute *Restatement of the Law, Consumer Contracts: Tentative Draft* (2019).

³⁸⁴ See 3 5 3 2 below.

³⁸⁵ See 3 5 2 above.

³⁸⁶ Rakoff 1983 *Harv LR* 1190; Zacks 2016 *Wm & Mary Bus LR* 754; Winter 2008 *Widener LJ* 284.

³⁸⁷ See Calamari 1974 *Fordham LR* 341: “[A] party who signs an instrument manifests assent to it and may not later complain that he did not read the instrument or that he did not understand its contents.”

³⁸⁸ Kim *Wrap Contracts* 28; Zacks 2016 *Wm & Mary Bus LR* 746.

it renders contract formation dependent on the consumer's conduct (i.e. manifesting assent to writing) instead of his subjective intention.

Consequently, the approach by American courts to the problem of consumers' ignorance of standard form contracts is often answered by motivating suppliers to create an opportunity for the consumer to read the contract.³⁸⁹ This triggers the duty to read, and thus, where the consumer has had sufficient opportunity to read the terms offered to him, the court will find that the contract is binding.³⁹⁰ Assent thus "depends on individuals having a meaningful, precontractual, opportunity to read",³⁹¹ which serves to preserve individual autonomy.³⁹² However, courts sometime disagree on how much opportunity is required: in certain cases courts were willing to enforce contracts presented on a PNTL basis (i.e. when terms follow later),³⁹³ whereas in other cases courts refused enforcement of contracts where the consumer did not have access to the terms before the transaction was concluded.³⁹⁴ As mentioned earlier, the trend has been to accept notice of terms with the opportunity to terminate as a sufficient basis for finding liability.³⁹⁵

Regulation has thus traditionally focused on disclosure: what the consumer should be made aware of and how that should be done.³⁹⁶ This is regardless of the fact that the comments to Section 211 acknowledge that consumers do not normally understand or even read the standard terms.³⁹⁷

³⁸⁹ I Ayres & A Schwartz "The No Reading Problem in Consumer Contract Law" (2014) 66 *Stanford LR* 545-549. Also see *Specht v Netscape Communications Corp* 150 F Supp 2d 585 (SDNY 2001) 596; *TradeComet.com LLC v Google, Inc* 693 F Supp 2d 370-377-378 (SDNY 2010).

³⁹⁰ Zacks 2016 *Wm & Mary Bus LR* 746; Winter 2008 *Widener LJ* 283-284; U Benoliel & SI Becher "The Duty to Read the Unreadable" (2019) 60 *Boston College LR* (Forthcoming) (available at <<https://ssrn.com/abstract=3313837>>) 5.

³⁹¹ Ben-Shahar 2009 *ERCL* 3.

³⁹² 4.

³⁹³ *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996). Also see 3 5 4 below.

³⁹⁴ *Step-Saver Data Systems Inc v Wyse Technology* 939 F 2d 91 (3rd Cir 1991).

³⁹⁵ See ch 2 (2 2 2 1). Also see 3 6 3 below.

³⁹⁶ Ayres & Schwartz 2014 *Stanford LR* 550.

³⁹⁷ Restatement (Second) of Contracts s 211 comment b; Ayres & Schwartz 2014 *Stanford LR* 559; Zacks 2016 *Wm & Mary Bus LR* 754.

An approach focused on disclosure has been widely criticised by academics³⁹⁸ and has been described as “the most common and least successful regulatory technique in American law.”³⁹⁹ They argue that all it achieves is to increase the already overwhelming amount of information confronting the consumer, and it further disregards the undisputable evidence that consumers do not read contractual terms, regardless of the format in which they are presented.⁴⁰⁰ This is also recognised by the reporters of the Draft Restatement, who argue that:

“Since advance disclosure of standard terms generally does not render the assent process any more meaningful, because consumers rarely read the disclosed terms, the ‘opportunity to read’ technique, which courts have embraced, is quite ineffective in consumer contracts. Some observers have even argued that mandated disclosure may ‘backfire’ by creating a false presumption of meaningful assent, thus undercutting the second regulatory technique—ex post scrutiny of abusive terms.”⁴⁰¹

A more thorough discussion of the problems with mandatory disclosure follows later,⁴⁰² but the Draft Restatement (discussed below) seems to suggest a move away from a reliance on disclosure as a means of regulating contractual content.⁴⁰³

The third subsection of Section 211 encapsulates the so-called doctrine of reasonable expectations.⁴⁰⁴ In terms of this doctrine courts deny enforcement of unread terms that the supplier knows a consumer would not have expected in that particular contract, and rather enforce terms which a reasonable consumer would have anticipated.⁴⁰⁵

³⁹⁸ See Bar-Gill *Seduction by Contract* 36; O Ben-Shahar & CE Schneider *More Than You Wanted to Know: A Failure of Mandated Disclosure* (2014); Hillman 2006 *Mich LR* 837; E Mik “The Unimportance of Being ‘Electronic’ or – Popular Misconceptions About ‘Internet Contracting’” (2011) *International Journal of Law and Information Technology* 324 336, Wilkinson-Ryan 2017 *Cornell LR* 120. Also see ch 5 (5 3 3).

³⁹⁹ Ben-Shahar & Schneider *More Than You Wanted to Know* 3.

⁴⁰⁰ Ayres & Schwartz 2014 *Stanford LR* 550.

⁴⁰¹ Reporters’ Introduction to the Draft Restatement 3. A similar criticism is raised by Naudé with regard to the disclosure and assent requirements in s 49 of the CPA (see ch 5 (5 3 3 3 n 105)).

⁴⁰² See ch 5 (5 3 3).

⁴⁰³ The Reporters’ Introduction to the Draft Restatement 2-3. Also see the discussion at 3 5 2 2 below.

⁴⁰⁴ Radin *Boilerplate* 84; Ayres & Schwartz 2014 *Stanford LR* 559.

⁴⁰⁵ See Hillman & Rachlinski 2002 *NYU LR* 459-460, for the doctrine of reasonable expectation in general.

This provides a defence which is broader than the traditional doctrines available to a contract denier disputing contract formation.⁴⁰⁶

However, this provision has attracted a fair amount of criticism. Because the section requires the consumer to show that he would not have manifested assent if he was aware of the term, anticipated rejection of the entire contract is required, although only the offending term will become unenforceable.⁴⁰⁷ In other words, only if the consumer can prove that the supplier knew he would have rejected the entire agreement if he was aware of a specific term, would the offending term become unenforceable.⁴⁰⁸ Not only does it place an onus on the consumer to prove that he would not have consented to the contract if he was aware of the contentious term, it also allows a supplier to enforce the contract where he can show he was unaware of the consumer's state of mind⁴⁰⁹ (i.e. he did not have reason to believe that the consumer would reject the transaction).⁴¹⁰

3 5 2 2 *Draft Restatement of the Law, Consumer Contracts*

The Draft Restatement, which is currently being drafted by the American Law Institute,⁴¹¹ recognises the challenges posed by standard form contracts,⁴¹² such as the irrationality of expecting consumers to study the terms and the potential for abuse by the supplier.⁴¹³ Two possible regulatory techniques are identified for addressing

⁴⁰⁶ Rakoff 1983 *Harv LR* 1190-1191.

⁴⁰⁷ Leib & Eigen 2017 *U Ill LR* 79.

⁴⁰⁸ 79.

⁴⁰⁹ AE Ghirardelli "Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts" (2015) 98 *Oregon LR* 719 749.

⁴¹⁰ However, Hillman and Rachlinski indicate that courts (especially in Arizona) have tended to shift their focus to the expectation of the drafter, rather than the consumer (Hillman & Rachlinski 2002 *NYU LR* 459).

⁴¹¹ See O Ben-Shahar "Consumer Contracts" (10-4-2017) *The ALI Advisor* <<http://www.thealiadviser.org/consumer-contracts/project-feature-consumer-contracts/>> (accessed 7-11-2019); G Klass "The Restatement of Consumer Contracts and Quantitative Caselaw Studies" (27-7-2017) *New Private Law* <<http://blogs.harvard.edu/nplblog/2017/07/27/the-restatement-of-consumer-contracts-and-quantitative-caselaw-studies-greg-klass/>> (accessed 7-11-2019).

⁴¹² Reporters' Introduction to the Draft Restatement 1.

⁴¹³ Reporters' Introduction to the Draft Restatement 1; Reporters' Note to Para 2 of the Draft Restatement 35.

these issues, namely the requirement of mutual assent and restricting the substantive effect of the contract.⁴¹⁴

It was initially indicated by the reporters of the Draft Restatement that these two do not operate in isolation, but rather form

“a unified hydraulic framework, whereby shifts within the one doctrine inform the scope of the other.”⁴¹⁵

In terms of what was previously referred to as a “grand bargain”,⁴¹⁶ the reporters preferred to follow the trend of courts to relax the assent requirement, but then place more emphasis on the *ex post* scrutiny of contractual terms.⁴¹⁷ This terminology was removed from the 2019 Tentative Draft of the Draft Restatement, presumably in response to criticism.⁴¹⁸ Instead, the relaxation of the assent requirement is now referred to in terms of Llewellyn’s approach of blanket assent.⁴¹⁹

Despite this ostensible change in approach, the black letter provisions of the Draft Restatement have remained substantially unchanged. The reporters further continue to acknowledge the ineffectiveness of assent-related measures in the form of disclosure.⁴²⁰ It can thus be argued that the fundamental approach has remained the same (i.e. fairly lenient formation requirements, supposedly offset by heightened substantive scrutiny). This is however much less explicit than in previous drafts.

In terms of the Draft Restatement, standard form terms will be enforceable where the consumer indicates assent after he has received reasonable notice of both the existence of the terms and the intention to incorporate them into the transaction, and

⁴¹⁴ Reporters’ Introduction to the Draft Restatement 2.

⁴¹⁵ The 2017 Discussion Draft of the Draft Restatement (Reporters’ Memorandum 3; Reporters’ Note to Para 2).

⁴¹⁶ See 2017 Discussion Draft of the Draft Restatement (Reporters’ Memorandum 2-4).

⁴¹⁷ Reporters’ Introduction to the Draft Restatement 5.

⁴¹⁸ See n 426 below. Also see AJ Levitin, NS Kim, CL Kunz, P Linzer, PA McCoy, JM Moringiello, E Renuart & LE Willis “The Faulty Foundation of the Draft Restatement of Consumer Contracts” (2019) 36 *Yale Journal on Regulation* 447 453, where it is stated that this constitutes a normative statement instead of a reflection of the prevailing legal position; the latter being the aim of a restatement.

⁴¹⁹ See Reporters’ Introduction to the Draft Restatement 5. See the discussion of Llewellyn’s notion of blanket assent at 3 5 2 above.

⁴²⁰ See for example Reporters’ Introduction to the Draft Restatement 2-5; Reporters’ Notes to Para 2 of the Draft Restatement 35-37).

has had a meaningful opportunity to review them.⁴²¹ Terms received by the consumer after he has assented to the transaction will be adopted if the consumer had reasonable notice of the terms prior to transacting and is granted an opportunity to terminate the transaction once he has had an opportunity to review the terms.⁴²²

The provisions of the Draft Restatement have received a lot of criticism, and its fate still hangs in the balance.⁴²³ Two main points of contention have been raised, amongst other criticism:⁴²⁴ the legitimacy of the empirical studies underlying the formulation of the Draft Restatement have been questioned in two recent articles⁴²⁵ and, more importantly from a comparative perspective, both legal scholars and consumer associations have expressed concerns about the lenient formation requirements contained in the Draft Restatement.⁴²⁶ Commentators have also stated that the

⁴²¹ Para 2(a) of the Draft Restatement.

⁴²² Para 2(b) of the Draft Restatement.

⁴²³ At the most recent annual meeting of the ALI membership (on 21 May 2019), members could only reach agreement on adoption of Para 1 of the Draft Restatement, and the decision relating to adoption of the remainder of the Draft Restatement was postponed (see D Fisher “Consumer Advocates, Business Interests form rare Alliance to Block American Law Institute Project” (21-5-2019) *PennRecord* <<https://pennrecord.com/stories/512511439-consumer-advocates-business-interests-form-rare-alliance-to-block-american-law-institute-project>> (accessed 7-11-2019)).

⁴²⁴ For further criticism, see, for example, the joint letter by various business institutions to the ALI Council dated 15-1-2019 (available at <<https://www.aba.com/Advocacy/commentletters/Documents/Joint-Ltr-ALI-Consumer-Contracts20190115.pdf>> (accessed 7-11-2019)) which criticises the Draft Restatement’s reliance on consumer protection statutes to formulate common-law principles and the creation of a separate set of principles for consumer contracts.

⁴²⁵ See G Klass “Empiricism and Privacy Policies in the Restatement of Consumer Contract Law” (2019) 36 *Yale Journal on Regulation* (2019) 45; Levitin et al 2019 *Yale Journal on Regulation*. Also see M Ertman “Properly Restating the Law of Consumer Contracting” (10-5-2019) *JOTWELL* <<https://contracts.jotwell.com/properly-restating-the-law-of-consumer-contracting>> (accessed 7-11-2019).

⁴²⁶ See the letter by 23 state attorneys general to the members of ALI dated 14-5-2019 (available at <https://ag.ny.gov/sites/default/files/letter_to_ali_members.pdf> (accessed 7-11-2019)); M Eisenberg “The Proposed Restatement of Consumer Contracts, if Adopted, Would Drive a Dagger through Consumers’ Rights” (20-3-2019) *Yale Journal on Regulation: Notice & Comment* <<http://yalejreg.com/nc/the-proposed-restatement-of-consumer-contracts-if-adopted-would-drive-a-dagger-through-consumers-rights-by-melvin-eisenberg/>> (accessed 7-11-2019); letter by Senator Warren to President of ALI dated 11-12-2017 (available at <https://www.creditslips.org/files/warren_-_consumer_contracts_-_dec_11_2017.pdf> (accessed 7-11-2019)).

provisions relating to unconscionability do not adequately compensate for the lenient formation requirements.⁴²⁷

The reporters have made various attempts at refuting the criticism.⁴²⁸ As mentioned above, they have also reformulated their approach as set out in the Draft Restatement. Notably, despite criticism, workable solutions to the lack of meaningful assent to standard form contracts are rarely proposed by critics of the Draft Restatement. Furthermore, the assent-related rules reflected in the Draft Restatement do not seem to deviate from the position established by the courts, who do not insist on actual knowledge or a true meeting of the minds.⁴²⁹ Instead, the general view of critics seems to be that the Restatement is premature and that a more organic development of the law should be allowed.⁴³⁰

⁴²⁷ See Eisenberg “The Proposed Restatement of Consumer Contracts, if Adopted, Would Drive a Dagger through Consumers’ Rights” *Yale Journal on Regulation: Notice & Comment*; Letter of the State Attorneys General to ALI 6.

⁴²⁸ O Bar-Gill, O Ben-Shahar & F Marotta-Wurgler “Re: State AG’s Letter re the Tentative Draft of Restatement of the Law, Consumer Contracts” (16-5-2019) *The ALI Advisor* <<http://www.thealiadviser.org/consumer-contracts/re-state-ags-letter-re-the-tentative-draft-of-restatement-of-the-law-consumer-contracts/>> (accessed 7-11-2019); O Bar-Gill, O Ben-Shahar & F Marotta-Wurgler “Reporters’ Statement Concerning Research Methods” (28-3-2019) *Yale Journal on Regulation: Notice & Comment* <<http://yalejreg.com/nc/reporters-statement-concerning-research-methods-by-oren-bar-gill-omri-ben-shahar-and-florenzia-marotta-wurgler/>> (accessed 7-11-2019); SO Weise “The Draft Restatement of the Law, Consumer Contracts Follows the Law” (5-4-2019) *The ALI Advisor* <<http://www.thealiadviser.org/consumer-contracts/the-draft-restatement-of-the-law-consumer-contracts-follows-the-law/>> (accessed 7-11-2019); SO Weise “Empiricism and Privacy Policies in the Restatement of Consumer Contract Law and The Faulty Foundation of the Draft Restatement of Consumer Contracts” (22-3-2019) *Yale Journal on Regulation: Notice & Comment* <<http://yalejreg.com/nc/empiricism-and-privacy-policies-in-the-restatement-of-consumer-contract-law-and-the-faulty-foundation-of-the-draft-restatement-of-consumer-contracts-by-steven-o-weise/>> (accessed 7-11-2019).

⁴²⁹ See D McGowan “Consumer Contracts and the Restatement Project” (2-9-2019) *SSRN* <<https://ssrn.com/abstract=3446802>> (accessed 4-11-2019) 5-10.

⁴³⁰ See, for example, N Kim “The Controversy over the Restatement of Consumer Contracts” (7-5-2019) *ContractsProf Blog* <https://lawprofessors.typepad.com/contractsprof_blog/2019/05/the-controversy-over-the-restatement-of-consumer-contracts.html> (accessed 7-11-2019): “Instead of helping courts make sense of the evolving law, it would cement law that is incoherent and inconsistent”.

3 5 3 General approach to the formation of online contracts

3 5 3 1 Overview of the judicial approach

Whereas the focus thus far was on the formation of standard form contracts in American law in general, it now shifts to the online environment, where use of such terms is common practice. In American law, both the Uniform Electronic Transaction Act (UETA)⁴³¹ and the Electronic Signatures in Global and National Commerce Act (E-Sign)⁴³² contain provisions similar to section 11 of ECTA,⁴³³ which provide that transactions should not be denied legal effect solely because they are in electronic form.⁴³⁴ American courts have repeatedly emphasised that online contracts should be treated no differently to their paper equivalent,⁴³⁵ and the act of clicking is equated with signing a document.⁴³⁶ Therefore, in the case of traditional click-wraps where the icon serves the sole purpose of indicating acceptance, American courts have consistently validated their enforcement⁴³⁷ and accept that in such instances sufficient notice was

⁴³¹ (1999), 7A(I) U.L.A. 225 (2002).

⁴³² Pub. L. 106-229, 114 Stat. 464 (codified at 15 U.S.C.A §§ 7001-7006).

⁴³³ See ch 2 (2 2 2 2).

⁴³⁴ See UETA s 7(b): "(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation"; and E-Sign s 101(a)(1): "a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form".

⁴³⁵ *Register.com v Verio Inc* 356 F 3d 393 (2nd Cir 2004) 403: "While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." Also see *Fteja v Facebook Inc* 841 F Supp 2d 829 (SDNY 2012) 839; *Cullinane v Uber Technologies Inc* 2016 U.S. Dist. LEXIS 89540 17; *Feldman v Google Inc* 513 F Supp 2d 229 (ED Pa 2007) 236.

⁴³⁶ See *Meyer v Uber Technologies Inc* 868 F 3d 66 (2nd Cir 2017) 75, quoting *Sgouros v TransUnion Corp* 817 F 3d 1029 (7th Cir 2016) 1033-34: "Courts around the country have recognized that [an] electronic 'click' can suffice to signify the acceptance of a contract," and that "[t]here is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement"; *Groff v American Online Inc* 1998 WL 307001 (RI Super Ct 1998) 5: "Here, plaintiff effectively 'signed' the agreement by clicking 'I agree' not once but twice".

⁴³⁷ See, e.g. *Feldman v Google Inc* 513 F Supp 2d 229 (ED Pa 2007) 236; *i.Lan Systems Inc v Netscout Service Level Corp* 183 F Supp 2d 328 (D Mass 2002) 336-338. Also see Reporters' Note to Para 2 of the Draft Restatement 46; Moringiello 2005 *Rutgers LR* 1323; Canino 2016 *UC Davis LR* 539; NJ Davis "Presumed Assent: The Judicial Acceptance of Clickwrap" (2007) 22 *Berkeley Tech LJ* 577 579, 582. Further see WJ Condon "Electronic Assent to Online Contracts: Do Courts

provided.⁴³⁸ In the absence of other impediments such as fraud or unconscionability, click-wraps are deemed effective.⁴³⁹ Clicking triggers the duty to read, and consumers will be held bound to the terms despite their ignorance of the content thereof.

However, the definition of signature in both the mentioned acts requires the consumer to click with the intention of signing a contract.⁴⁴⁰ It must thus be clearly indicated that clicking amounts to consent.⁴⁴¹ American courts will not construe clicking as a manifestation of assent where the terms are not clearly indicated and the act of clicking seems to relate to another activity.⁴⁴² For example, in *Sgouros v TransUnion Corporation*⁴⁴³ the court confirmed that a click will only suffice as a manifestation of assent where “the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.”⁴⁴⁴ Hybrid forms of online contracts, for example sign-in wraps, are scrutinised more carefully to determine whether the design made it clear that clicking constitutes agreement to the terms. Despite requiring an affirmative click, they are treated more similar to browse-wraps because of the ambiguity created where the click does not serve the primary function of indicating assent to the online contract.⁴⁴⁵

Consistently Enforce Clickwrap Agreements?" (2004) 16 *Regent U LR* 433 440-453 for an overview of early click-wrap decisions.

⁴³⁸ Moringiello 2005 *Rutgers LR* 1320.

⁴³⁹ Comments to Para 2 of the Draft Restatement 44.

⁴⁴⁰ See UETA s 2(8): “Electronic signature’ means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record” and E-Sign s 106(5): “The term ‘electronic signature’ means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record”. Also see Moringiello 2005 *Rutgers LR* 1316.

⁴⁴¹ See *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002) 29-30: “a consumer’s clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms”. Also see S Feldman “Actual Agreement, Shared Meaning Analysis, and the Invalidity of Boilerplate: A Response to Professors Kar and Radin” 14-2-2019 *SSNR* <<https://ssrn.com/abstract=3336377>> (accessed 7-11-2019) 57-58.

⁴⁴² Kim *Wrap Contracts* 108.

⁴⁴³ 817 F 3d 1029 (7th Cir 2016).

⁴⁴⁴ 1033-1034.

⁴⁴⁵ See, for example, *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002) and *Nicosia v Amazon.com* 834 F 3d 220 (2d Cir 2016), discussed below (at 3 6 2 2).

The main question that American courts have had to decide regarding the enforceability of browse-wraps is whether an unambiguous manifestation of assent is required for contract formation. Especially the early browse-wrap decisions contradicted each other: while enforcement of the browse-wrap was refused in *Specht v Netscape Communications Corp*⁴⁴⁶ due the absence of an unambiguous manifestation of assent, the same was not required in *Register.com v Verio Inc.*⁴⁴⁷ The second school of thought, which only requires notice or constructive notice of the terms and regard browsing as a sufficient indication of consent, seems to have prevailed and browse-wraps are thus recognised as a valid method of contract conclusion.⁴⁴⁸

Early American case law also refused to enforce the terms of browse-wraps because they found the terms to be so obscure that the reasonable user would not have noticed their existence.⁴⁴⁹ In more recent cases, however, they have generally been enforced where a hyperlink was visible on the screen without scrolling and was labelled in a way that prompted the consumer to review the terms.⁴⁵⁰ According to American law, mutual assent or a reasonable reliance on the appearance thereof can only be present in the online environment if the consumer had actual or constructive notice⁴⁵¹ of the terms of the proposed contract.⁴⁵² The enforceability of browse-wraps thus hinges on the

⁴⁴⁶ 306 F 3d 17 (2nd Cir 2002).

⁴⁴⁷ 356 F 3d 393 (2nd Cir 2004).

⁴⁴⁸ See the Reporters' Notes to Para 2 of the Draft Restatement 46-49.

⁴⁴⁹ See ch 2 (2.2.2.1). Also see *Tompkins v 23andMe Inc.* 2014 WL 2903752 (ND Cal 2014); *Van Tassel v United Marketing Group LLC* 795 F Supp 2d 770 (ND Ill 2011); *Hoffman v Supplements Togo Management LLC* 18 A 3d 210 (NJ Super App Div 2011); *Hines v Overstock.com Inc* 668 F Supp 2d 362 (EDNY 2009) affirmed 380 Fed Appx 22 (end Cir June 03, 2010), as discussed in Kim *Wrap Contracts* 97-100.

⁴⁵⁰ See, for example, *Fteja v Facebook Inc* 841 F Supp 2d 829 (SDNY 2012); *Meyer v Uber Technologies Inc* 868 F 3d 66 (2nd Cir 2017); *Nguyen v Barnes & Noble Inc* 763 F 3d 1171 (9th Cir 2014). Also see Kim *Wrap Contracts* 107.

⁴⁵¹ The concept of constructive notice refers to situations where no actual notice was given, but the consumer had "a legitimate opportunity to learn the terms." (Canino 2016 *UC Davis LR* 574). Also see *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002) 30; *Schnabel v Trilegiant Corporation* 697 F 3d 110 (2d Cir 2012) 20. This is also often referred to as inquiry notice (see *Starke v Squaretrade Inc.* 913 F 3d 279 (US App 2019) 289); *Arnaud v Doctor's Associates Inc* 2019 U.S. Dist. LEXIS 153868 (NY Dist 2019) 14).

⁴⁵² Canino 2016 *UC Davis LR* 574.

question of what constitutes sufficient notice,⁴⁵³ to the extent that it has been argued that the requirement of mutual assent has instead devolved into a requirement of constructive notice.⁴⁵⁴

American courts have not always been consistent in the way in which sufficient notice is determined in the case of browse-wraps or hybrid forms of online contracts.⁴⁵⁵ Slight differences in display of the terms or in the wording of the notice have also led to opposite decisions, and Daiza indicates that this makes it difficult to predict the enforceability of a browse-wrap beforehand.⁴⁵⁶

For example, in *Fteja v Facebook Inc*⁴⁵⁷ the court found that a Facebook user was “informed of the consequences of his assenting click” because a notice stating “By clicking Sign Up, you are indicating that you have read and agree to the Terms and Service” appeared immediately below the “Sign Up” button.⁴⁵⁸ A recent version of the Facebook sign-up page is illustrated in Figure 2 below. Also in *Meyer v Uber Technologies Inc*,⁴⁵⁹ the court enforced terms where the button to register was followed by a notice stating: “By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY”,⁴⁶⁰ as illustrated in Figure 3 below.

⁴⁵³ *Southwest Airlines Co v BoardFirst LLC* 3:06-CV-0891-B 2007 WL 4823761 (ND Tex 2007) 5: “the validity of a browsewrap licence turns on whether a website user has actual or constructive knowledge of a site’s terms and conditions prior to using the site.” Also see Kim *Wrap Contracts* 93-95.

⁴⁵⁴ See the discussion at 3 5 4 below. Also see Daiza 2018 *Cal W LR* 211; Kim *Wrap Contracts* 127.

⁴⁵⁵ Moringiello 2005 *Rutgers LR* 1320.

⁴⁵⁶ Daiza 2018 *Cal W LR* 218.

⁴⁵⁷ 841 F Supp 2d 829 (SDNY 2012) 837.

⁴⁵⁸ 835.

⁴⁵⁹ 868 F 3d 66 (2nd Cir 2017).

⁴⁶⁰ 78. See Figure 3 below.

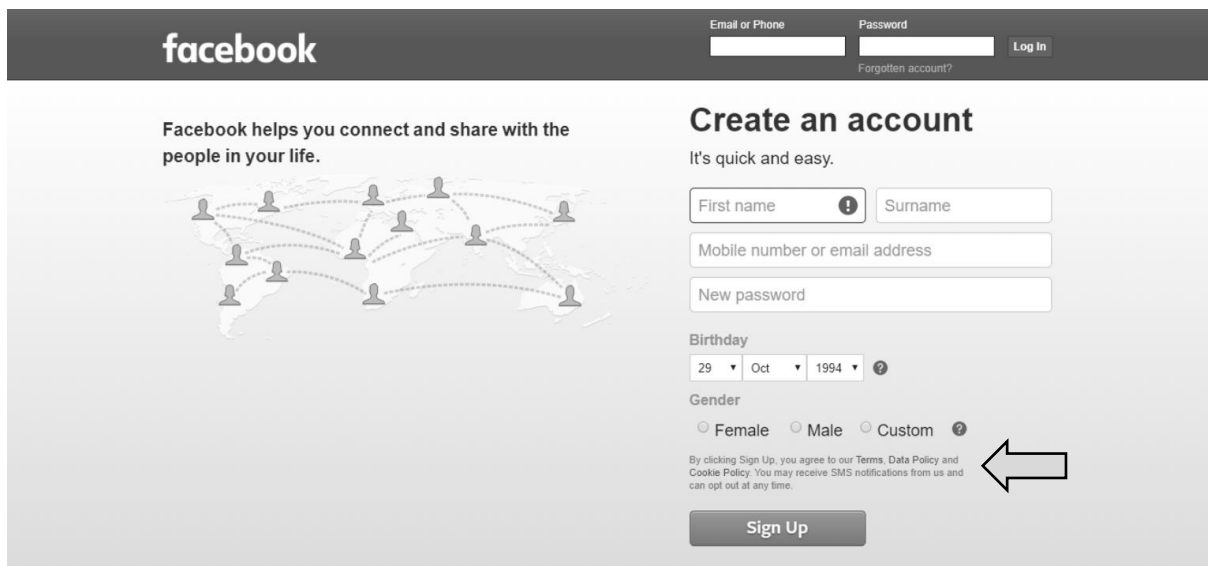


Figure 2⁴⁶¹

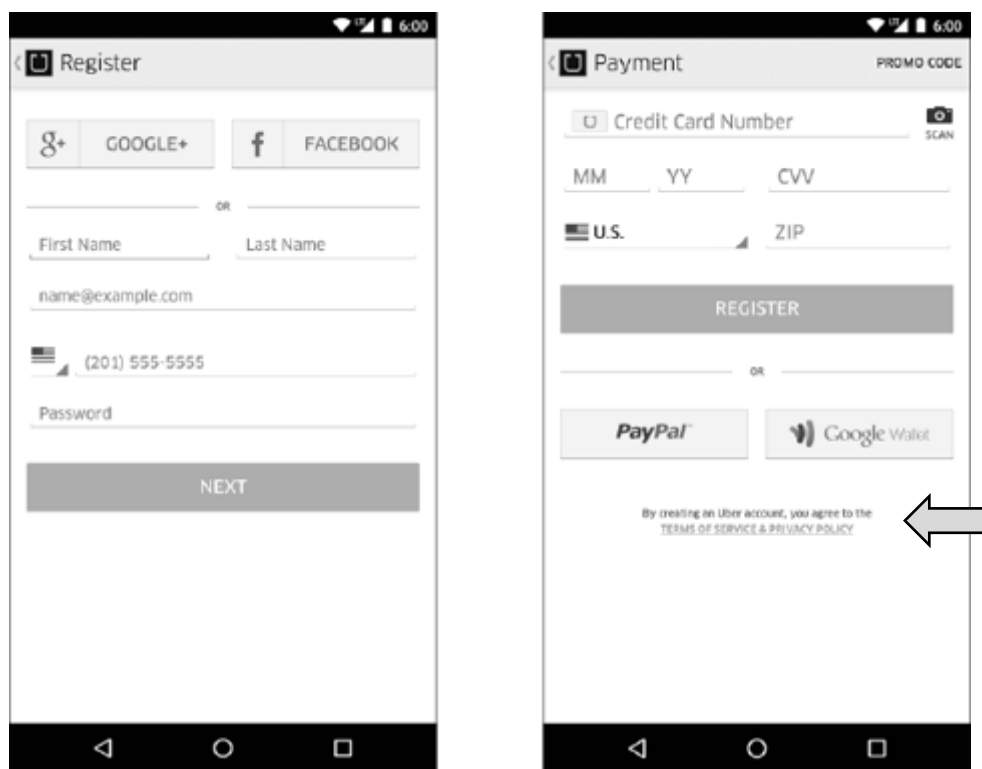


Figure 3⁴⁶²

⁴⁶¹ Screenshot from www.facebook.com (accessed 29-10-2019) (arrow inserted). The fine print (indicated by the arrow) reads as follows: “By clicking Sign Up, you agree to our Terms, Data Policy and Cookie Policy. You may receive SMS notifications from us and can opt out at any time.”

⁴⁶² Image contained in Addendum B to *Meyer v Uber Technologies Inc* 868 F 3d 66 (2nd Cir 2017) 82 (arrow inserted).

This can be contrasted with *Berkson v Gogo LLC*.⁴⁶³ There the button was labelled “Sign in”, and it was indicated that clicking the button requires acceptance of the supplier’s terms. Nonetheless, the court deemed it insufficient, because “[t]he hyperlink to the ‘terms of use’ was not in large font, all caps, or in bold”.⁴⁶⁴ In *Nicosia v Amazon.com*⁴⁶⁵ enforcement of terms was also refused because the warning “By placing your order, you agree to Amazon.com's privacy notice and conditions of use” appeared at the top of the webpage and not in close proximity to the “Place your order” button.⁴⁶⁶

The court in *Starke v Squaretrade Inc*⁴⁶⁷ has recently highlighted the importance of the design and interface of website in determining enforceability. It further tried to unify previous decisions by identifying some design features which played a role in *Nicosia v Amazon.com*⁴⁶⁸ and *Meyer v Uber Technologies Inc*⁴⁶⁹ in determining whether constructive notice was given and thus whether the respective online contracts were enforceable.⁴⁷⁰

Furthermore, in *Nguyen v Barnes & Noble Inc*⁴⁷¹ the court held that where

“a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.”⁴⁷²

It thus seems that the minimum requirements generally set by courts for enforcement of the terms of hybrid forms of online contracts are that there must be a conspicuous statement clearly indicating that clicking the icon amounts to acceptance of terms, and

⁴⁶³ 97 F Supp 3d 359 (EDNY 2015).

⁴⁶⁴ 404.

⁴⁶⁵ 834 F 3d 220 (2d Cir 2016).

⁴⁶⁶ 30.

⁴⁶⁷ 913 F 3d 279 (US App 2019) 289.

⁴⁶⁸ 834 F 3d 220 (2d Cir 2016).

⁴⁶⁹ 868 F 3d 66 (2nd Cir 2017).

⁴⁷⁰ *Starke v Squaretrade Inc* 913 F 3d 279 (US App 2019) 200-293. These factors were also repeated in *Arnaud v Doctor's Associates Inc* 2019 U.S. Dist. LEXIS 153868 (NY Dist 2019) 15-19.

⁴⁷¹ 763 F 3d 1171 (9th Cir 2014).

⁴⁷² 1179.

that this statement must preferably be in close proximity to the icon the consumer is required to click on and presented on an uncluttered interface.

By this standard, traditional browse-wraps (where the consumer is bound merely by virtue of browsing the website) should fall short because it generally does not contain a conspicuous notice indicating what will constitute acceptance.⁴⁷³ Yet, some courts have nevertheless accepted that a contract can be formed by browsing where this action is prescribed for contract formation, despite the absence of a clear statement to that effect.⁴⁷⁴ However, other courts still seem to insist on a notice (either on the home page or last page) directing the consumer to review the terms.⁴⁷⁵ They have hesitated to accept that the mere use of a hyperlink stating “Terms of Service” or something similar is sufficient to give notice to consumers that a contract is concluded, if no notice is provided to that effect.⁴⁷⁶ For example, in *In re Zappos.com Inc. Customer Data Security Breach Litigation*⁴⁷⁷ the court refused to enforce a browse-wrap because:

“The Terms of Use is inconspicuous, buried in the middle to bottom of every Zappos.com webpage among many other links, and the website never directs a user to the Terms of Use. No reasonable user would have reason to click on the Terms of Use”.⁴⁷⁸

As indicated below, this uncertainty is not resolved by the Draft Restatement.⁴⁷⁹

3 5 3 2 Overview of the proposals contained in the Draft Restatement of the Law, Consumer Contracts

As mentioned above, the reporters of the Draft Restatement acknowledge that the length and complexity of standard form contracts render informed consent implausible,

⁴⁷³ See for example Figure 1 (at n 286) above.

⁴⁷⁴ See *Ticketmaster Corp v Tickets.com Inc* 2003 WL 21406289 (CD Cal 2003); *Hubert v Dell Corp* 835 N E 2d 113 117–18 (Ill App Ct 2005). In *Arnaud v Doctor's Associates Inc* 2019 U.S. Dist. LEXIS 153868 (NY Dist 2019) 17-18, the absence of this notice was merely regarded as a factor which weighed against a finding that there was a manifestation of assent by the consumer.

⁴⁷⁵ Such a notice was present in all three of the cases mentioned in n 450 above. The reporters of the Draft Restatement also recognise this judicial uncertainty (see Reporters’ Notes to Para 2 of the Draft Restatement 47). Also see the discussion at 3 5 3 2 below.

⁴⁷⁶ See *Hines v Overstock.com Inc* 668 F Supp 2d 362 (E D New York 2009); *In re Zappos.com Inc., Customer Data Security Breach Litigation* 2012 WL 4466660 (D Nev 2012).

⁴⁷⁷ 2003 U.S. Dist. Lexis 6483 (C.D. CA., March 7, 2003).

⁴⁷⁸ 8.

⁴⁷⁹ See 3 5 3 2 below.

and that the effectiveness of assent as a method of regulating terms is thus limited.⁴⁸⁰ Consequently – although this approach has been somewhat downplayed in the recent draft⁴⁸¹ – they elected to follow the lenient adoption process generally accepted by courts, and only set minimum requirements for finding mutual assent to online contracts, namely reasonable notice (of both the existence of the terms and of the supplier's intention to incorporate them into the transaction) and opportunity to review.⁴⁸²

The comments to the Draft Restatement illustrate how low it sets the bar for the adoption of online terms. Click-wraps will generally meet the criteria for adoption of standard terms.⁴⁸³ The exact form of the click-wrap seems to be of lesser importance, as long as the terms are presented in a way that indicates that clicking amounts to acceptance.⁴⁸⁴ It is not required that the consumer must have actual knowledge of the terms, only that he clicked after he had reasonable notice of the terms and reasonable opportunity to review them, and the enforceability of the terms is also not dependent on the supplier's belief that the consumer intended to consent to the terms.

Browse-wraps are also enforceable, provided that the link to the terms is conspicuous or the consumer is sufficiently notified that his conduct constitutes acceptance.⁴⁸⁵ There seem to be uncertainty whether both prominent posting of a hyperlink and prominent notice is required, and case law is divided.⁴⁸⁶ Despite initially prescribing to the view that a mere hyperlink will suffice to place the consumer on notice with regard to the browse-wrap,⁴⁸⁷ explicit endorsement of this approach no longer appears in the Draft Restatement and the current position is less clear.⁴⁸⁸ However, the requirement

⁴⁸⁰ See n 420 above.

⁴⁸¹ See the discussion at 3 5 2 2 above.

⁴⁸² Para 2(a) of the Draft Restatement.

⁴⁸³ Comment 3 and Illustrations 2 and 3 to Para 2 of the Draft Restatement.

⁴⁸⁴ Reporters' Note to Para 2 of the Draft Restatement 46: "[Click-wraps] were enforced when clear terms were presented above or next to an 'I Agree' box, when they were available via hyperlink next to the 'I Agree' box, and when they were incorporated by reference in a clickwrap".

⁴⁸⁵ Illustration 10 to Para 2 of the Draft Restatement.

⁴⁸⁶ Reporters' Note to Para 2 of the Draft Restatement 47. Also see 3 5 3 1 above.

⁴⁸⁷ See illustration 11 to Para 2 of the 2017 Discussion Draft of the Draft Restatement.

⁴⁸⁸ See illustration 10 to Para 2 of the Draft Restatement, which was amended to require a notice informing the consumer that continued browsing constitutes acceptance. However, the Reporters'

that the consumer must receive “reasonable notice ... of the intent to include the term as part of the consumer contract”⁴⁸⁹ might suggest that a mere hyperlink (without a notice informing the consumer that browsing amounts to assent) might be insufficient.

If the browse-wrap pertains to use of the website, so that it can only be accessed after the consumer entered the site, the terms are deemed to be adopted if the consumer continues use of the website after having an opportunity to review the terms.⁴⁹⁰ The notice requirement features prominently, because courts insist on conspicuous notice,⁴⁹¹ despite the previous recognition by the reporters that:

“Notice provides only limited protection if consumers rarely read terms.”⁴⁹²

Regarding hybrid forms of wrap contracts, the reporters indicate that instead of strict classification, the focus should be on the manner in which the terms were presented.⁴⁹³ Thus, where there was reasonable notice of the terms and of the supplier’s intention to incorporate the terms into the transaction, and the consumer had reasonable opportunity to review the terms, they will be binding.⁴⁹⁴ The illustrations indicate that they will be enforced provided a link to the terms is clearly displayed close to the icon required for completion of the transaction.⁴⁹⁵

The Draft Restatement further confirms the post-affirmation adoption of standard terms, which was initially sanctioned in *ProCD Inc v Zeidenberg*.⁴⁹⁶ It is only required that the consumer received prior notice of the terms and has the opportunity to terminate, without unreasonable cost or burden, after receiving an opportunity to review the terms.⁴⁹⁷ Thus, shrink-wraps will also be acceptable in terms of the Draft

Notes to Para 2 of the Draft Restatement 47 does not seem to preclude the possibility of a conspicuous hyperlink constituting sufficient notice.

⁴⁸⁹ Para 2(a)(1) of the Draft Restatement.

⁴⁹⁰ Comment 6 to Para 2 of the Draft Restatement.

⁴⁹¹ See 3 4 5 2 2 above.

⁴⁹² Reporters’ Note to Para 2 of the 2017 Discussion Draft of the Draft Restatement 9.

⁴⁹³ Reporters’ Note to Para 2 of the Draft Restatement 52.

⁴⁹⁴ 52.

⁴⁹⁵ See Illustration 5 to Para 2 of the Draft Restatement.

⁴⁹⁶ 86 F 3d 1447 (7th Cir 1996). Also see ch 2 (2 2 2 1).

⁴⁹⁷ Para 2(b) of the Draft Restatement. Also see Comment 5 to Para 2.

Restatement. Granting the consumer an opportunity to terminate upon receipt of the terms is seen as a substitute for the pre-contractual opportunity to review them.⁴⁹⁸

As mentioned, the reporters justify this lenient approach to the assent requirement by recognising the fact that standard terms are generally unread, and they point to the tendency of courts to rather focus on *ex post* scrutiny of the terms. This approach was more explicit in the previous draft of the Draft Restatement, where it was recognised that this calls for a “fundament tradeoff”:⁴⁹⁹ reducing the importance of mutual assent must be compensated by a heightened emphasis on fundamental fairness.⁵⁰⁰ It was further recognised that:

“The increasing necessity for and presence of highly permissive adoption rules punctuate the importance of the remaining regulatory safeguard in consumer contracts—mandatory restrictions over permissible contracting. At the center of this technique stand rules that strike down unconscionable terms and provisions that undermine consumers’ benefit of the bargain. If consumers are not expected to scrutinize the legal terms up front, courts would scrutinize them *ex post*.”⁵⁰¹

This approach towards assent has been somewhat adapted in response to criticism. Regardless, Kim still states that

“the proposed Restatement ignores the problems created by form and digitization and does nothing to address the problems created by ubiquitous digital contracts”.⁵⁰²

Substantive measures of control, for example the doctrine of unconscionability, are discussed in the following chapter.

⁴⁹⁸ Reporters’ Note to Para 2 of the Draft Restatement 42-43: “A right to terminate the transaction guarantees that consumers are only bound to terms they have a reasonable opportunity to review. In effect, the business’s prerogative to present the terms post assent comes at a cost: the contract is not finalized until the termination period expires, and consumers have the option during that period to undo an undesirable transaction”.

⁴⁹⁹ Reporters’ Memorandum to the 2017 Discussion Draft of the Draft Restatement 3.

⁵⁰⁰ See 3 5 2 2 above.

⁵⁰¹ 3.

⁵⁰² Kim “The Controversy over the Restatement of Consumer Contracts” *ContractsProf Blog*.

3 5 3 3 Overview of the American academic debates regarding the formation of online contracts

As mentioned before, the judicial approach to the formation of online contracts in America has received extensive academic criticism. The main point of criticism stems from the argument that the courts deviate from the established legal rules relating to contract formation in the case of online contracts, and especially the rules on the requirement of mutual assent,⁵⁰³ despite professing to apply the same approach to both online contracts and traditional contracts.⁵⁰⁴ One of the main protagonists in this school of thought, Kim, argues that the development of online contracts attests to the fact that their validity “was not foreordained or obvious”, but required “doctrinal adjustments to traditional contract law.”⁵⁰⁵ This sentiment is echoed by Radin, who contends that “[t]raditional theory has been manipulated and stretched to cover new phenomena.”⁵⁰⁶

Traditionally, mutual assent is still required for contract formation⁵⁰⁷ and silence does not constitute acceptance.⁵⁰⁸ However, in the online environment, the requirement of mutual assent has morphed into a requirement of sufficient notice.⁵⁰⁹ Courts are willing to assume consent exists if there was constructive notice of the terms,⁵¹⁰ and if the consumer does not actively reject the terms.⁵¹¹ Consequently, Radin states that:

⁵⁰³ Ghirardelli 2015 *Oregon LR* 729: “Browse-wrap agreements further reduced the already thin relevance of consumers’ assent in contract formation and increase the lack of actual notice of contractual terms to consumers.”

⁵⁰⁴ Kim *Wrap Contracts* 109-111.

⁵⁰⁵ 93.

⁵⁰⁶ Radin 2017 *OJLS* 506.

⁵⁰⁷ See 3 5 2 above.

⁵⁰⁸ Kim *Wrap Contracts* 110; Daiza 2018 *Cal W LR* 217.

⁵⁰⁹ Zacks 2016 *Wm & Mary Bus LR* 748-749: “the traditional requirements for formation have eroded with respect to online contract. Instead of assessing whether the consumer has made a manifestation of assent that can be reasonably understood as such, the primary focus for online contracts has been whether the consumer has notice that contractual terms exist, as the consumer’s manifestation of assent can be satisfied ‘by acting in a way that does not clearly indicate intent to accept the terms,’ (Kim *Wrap Contracts* 109) including by not actively rejecting the terms”.

⁵¹⁰ Radin 2017 *OJLS* 522.

⁵¹¹ Daiza 2018 *Cal W LR* 216.

“the court will treat terms as if seen and, when so treated as seen, the court will treat them as if agreed to.”⁵¹²

Kim explains that:

“The requirements of manifestation of consent seems to be subsumed in wrap contract cases with the issue of notice. In other words, what courts mean when they talk about manifestation of consent in online contracting scenarios is really presumptive notice – the manifested act which supposedly indicates consent really only indicates that the offeree received actual or constructive notice. The affirmative act of clicking, rather than being an act of assent, is a mechanistic act that signals that notice was given – and only because courts have designated it as such. Where there is no affirmative act required to manifest consent (i.e., with shrinkwraps or browserwraps), courts may *construct* the manifestation of consent if there is notice. In other words, the manifestation of consent requirement has been swallowed up by notice so that if the drafter can show notice, the nondrafting party will be deemed to have assented to the wrap contract.”⁵¹³

The judicial treatment of online contracts in American law has also been criticised by adherents of the reliance theory, because these contracts are enforced despite it being recognised that the consumer’s conduct cannot reasonably be construed as a manifestation of mutual assent.⁵¹⁴ Because it is well known that online contracts are not read or understood, suppliers cannot reasonably infer that consent is given.⁵¹⁵ According to Radin, suppliers cannot reasonably believe there is consent on the part of a consumer who clicks “I agree”,⁵¹⁶ because the act of clicking can have different meanings and suppliers should be aware of the heuristic biases of consumers.⁵¹⁷ Similarly, she contends that it would be unreasonable for suppliers to conclude that consumers signal consent to unseen browse-wrap contracts merely because consumers fail to object to the terms.⁵¹⁸ In terms of the reliance theory, a party will not be bound by his outward manifestation of will where the other party does not

⁵¹² Radin 2017 *OJLS* 522.

⁵¹³ Kim *Wrap Contracts* 128 (emphasis in the original).

⁵¹⁴ DL Kidd & WH Daughtrey "Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions" (2000) 26 *Rutgers Computer & Tech LJ* 215 243.

⁵¹⁵ Radin 2017 *OJLS* 520; Zacks 2016 *Wm & Mary Bus LR* 748; Mik 2016 *Singapore J Leg Stud* 80.

⁵¹⁶ Radin *Boilerplate* 89.

⁵¹⁷ 90.

⁵¹⁸ 87.

reasonably believe that he has the intention to be bound.⁵¹⁹ If suppliers are therefore aware that consumers do not intend to accept online terms through clicking or continued browsing, contract law provides little justification for enforcing such terms.⁵²⁰ This is because the reliance theory aims to protect the reasonable reliance of one contracting party, and therefore has no function where such reliance is absent. Although the supplier may reasonably believe that the consumer intends to contract on the salient terms, i.e. goods and price, it is not reasonable to believe that the consumer intends to be bound by the fine print.

The decline of the assent requirement is further illustrated by the enforceability of shrink-wraps. Ghirardelli credits the decision in *ProCD Inc v Zeidenberg*⁵²¹ for supporting the idea that implied assent can be given by way of conduct, even where the consumer is unaware that the particular conduct amounts to assent.⁵²² By allowing terms to be imposed where they could only be accessed by the consumer after conclusion of the transaction,⁵²³ the court in *ProCD* also by implication validated the idea that terms could be adopted based on the consumer's failure to reject them.

Furthermore, Kim argues that Llewellyn's notion of blanket assent does not provide justification for wrap contracts, because online contracts involve a less deliberate act by the consumer (either clicking or merely browsing)⁵²⁴ than signing a document and instead of being presented with the terms, only notice of the terms (contained in a hyperlink) is provided to the consumer.⁵²⁵ Blanket assent requires that the consumer should have an awareness of the type of transaction and the fact that terms apply, although he does not need an awareness of the content of the terms.⁵²⁶ Kim seems

⁵¹⁹ See 3 3 3 2 above. Also see Mik 2016 *Singapore J Leg Stud* 80; Zacks 2016 *Wm & Mary Bus LR* 745 n 26: "Modern approaches to the objective theory emphasize that it must be reasonable for the party perceiving the manifestation to understand it as communicating assent."

⁵²⁰ Zacks 2016 *Wm & Mary Bus LR* 780: "If the drafting party knows that consumers do not read terms and conditions on a website and do not anticipate being bound by a written contract or particular terms just because they clicked their agreement, then the drafting party may have little justification for relying on such manifestations of assent."

⁵²¹ 86 F 3d 1447 (7th Cir 1996).

⁵²² Ghirardelli 2015 *Oregon LR* 727.

⁵²³ See ch 2 (2 2 2 1).

⁵²⁴ See 3 2 3 above.

⁵²⁵ Kim *Wrap Contracts* 63, 130.

⁵²⁶ See 3 5 2 above.

to reason that these basic conditions are absent in the case of online contracts because consumers are ignorant of the existence of online contracts.

To substantiate this averment, Kim compares traditional theory pertaining to contracts of adhesion – as contained in the seven characteristics of a “model contract of adhesion” identified by Rakoff⁵²⁷ – to online contracts. According to her, although the first four characteristics are shared by online contracts,⁵²⁸ the last three characteristics of adhesion contracts do not hold true in the case of online contracts.⁵²⁹ These are:

- “(5) After the parties have dickered over whatever terms are open to bargaining, the document is signed by the adherent.
- (6) The adhering party enters into few transactions of the type represented by the form - few, at least, in comparison with the drafting party.
- (7) The principal obligation of the adhering party in the transaction considered as a whole is the payment of money.”⁵³⁰

Online contracts are not signed; at most, they require the consumer to click to indicate acceptance, and consumers conclude these contracts daily, and often multiple times a day.⁵³¹ Additionally, monetary compensation typically does not constitute the principal obligation.⁵³² These differences impact on consumer perception, and although commentators regularly recognise that the demise of meaningful assent in standard form contracts has preceded the internet era,⁵³³ Kim argues that “online, the problem is even worse than the consumer not reading the contract – the consumer is often not even aware there is a contract.”⁵³⁴ Barnhizer also avers that:

⁵²⁷ See Rakoff 1983 *Harv LR* 1177.

⁵²⁸ These four common characteristics are, in short: (1) an ostensible contract in printed form containing numerous terms; (2) the form is drafted by, or on behalf of, one of the transacting parties; (2) the drafting party routinely enters into these transactions; and (4) the form is presented on a take-it-or-leave-it basis (see Rakoff 1983 *Harv LR* 1177, Kim *Wrap Contracts* 53-54).

⁵²⁹ Kim *Wrap Contracts* 54.

⁵³⁰ Rakoff 1983 *Harv LR* 1177.

⁵³¹ Kim *Wrap Contracts* 54.

⁵³² 54.

⁵³³ See Leib & Eigen 2017 *U Ill LR* 66-76, who discuss the “death of contract” which was already proclaimed in 1995; Barnhizer 2014 *Southwestern LR* 217.

⁵³⁴ Kim *Wrap Contracts* 54. Also see Moringiello 2005 *Rutgers LR* 1319.

“In the online world, adherents barely even register that they are engaging in a contract. The judicial model of the reasonable party who has the opportunity to read the contract terms breaks down completely in that electronic context.”⁵³⁵

The primary reason for this shift is the absence of consumer awareness, which can be attributed to the impact of form on consumer perception, as discussed in the previous paragraph. This correlates with the main argument advanced by Moringiello, who focuses on the signalling function of signatures.⁵³⁶ She argues that courts fail to recognise the differences between the manner in which consumers perceive electronic contracts compared to the paper variety, and that case law lacks a proper analysis of the way in which the terms are presented.⁵³⁷ Instead, she avers that a misplaced reliance by courts on *Carnival Cruise Lines Inc v Shute*,⁵³⁸ a case pertaining to standard terms printed on a cruise ship ticket, but where no lack of notice was averred,⁵³⁹ caused courts to adopt a too lenient requirement regarding what will constitute sufficient notice.⁵⁴⁰

Some suggestions have been made to improve the quality of assent in online contracts, for example Balloon’s suggestion that consumers should be required to type their initials in a designated box in order to conclude an online contract, instead of just clicking, because “initialing makes contracting more intentional.”⁵⁴¹ Kim’s suggestion is that specific assent must be required for specific clauses,⁵⁴² whereas Preston

⁵³⁵ Barnhizer 2014 *Southwestern LR* 217.

⁵³⁶ Moringiello 2005 *Rutgers LR* 1307

⁵³⁷ 1320.

⁵³⁸ 499 US 585 (1991).

⁵³⁹ 590.

⁵⁴⁰ See Moringiello 2005 *Rutgers LR* 1320-1323. See, for example, *Caspi v Microsoft Network LLC* 732 A2d 528 (NJ Super Ct App Div 1999) 532: “The scenario presented here is different because of the medium used, electronic versus printed; but, in any sense that matters, there is no significant distinction. The plaintiffs in *Carnival* could have perused all the fine-print provisions of their travel contract if they wished before accepting the terms by purchasing their cruise ticket. The plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement.”

⁵⁴¹ AM Balloon "From Wax Seals to Hypertext: Electronic Signatures, Contract Formation and a New Model for Consumer Protection in Internet Transactions" (2001) 50 *Emory LJ* 905 933.

⁵⁴² See Kim *Wrap Contracts* 196-197.

propose a “calorie and content” box for online contracts.⁵⁴³ The necessity of these suggestions must be viewed together with other measures of control over online terms (which will be discussed in chapter 4). In other words, before they can be properly evaluated, it should first be considered whether lenient formation requirements can be counterbalanced by instead relying on stricter substantive control.⁵⁴⁴ Therefore, the viability of these suggestions will be considered in chapter 5.

3 5 4 Conclusion

The discussion above focused on the narrow question relating to assent to online contracts. Faced with the reality that “the hoped-for readership [is] neither physically possible nor desirable”,⁵⁴⁵ American courts have elected to manipulate the assent requirement in order to ensure the enforceability of online contracts. This lenient approach to the formation of online contracts has raised the ire of commentators, who argue that the requirement of mutual assent has been stretched beyond recognition.

Part of the difficulty courts are faced with lies in the fact that assent is an all or nothing proposition. In other words:

“A finding of assent leads to a finding of contract formation; on the other hand, a finding of no assent means that no contract was formed.”⁵⁴⁶

Insisting on unrealistic formation requirements means that only the salient terms of the transaction (in respect of which actual agreement can be found), would be enforceable, a solution which is generally regarded as contrary to business interests.⁵⁴⁷ Instead, as pointed out by the reporters of the Draft Restatement, courts have elected to rather employ substantive measures of control to prevent supplier overreach.

⁵⁴³ CB Preston “Please Note: You Have Waived Everything!: Can Notice Redeem Online Contracts?” (2015) 64 *Am U LR* 535 580-582.

⁵⁴⁴ This is in essence the “grand bargain” previously proposed by the Draft Restatement, as discussed at 3 5 2 2 above.

⁵⁴⁵ Wilkinson-Ryan 2017 *Cornell LR* 127.

⁵⁴⁶ Kim *Wrap Contracts* 193.

⁵⁴⁷ Davis 2007 *Berkeley Tech LJ* 579.

Various academics agree with this position, and point out that focusing on improving assent is costly and generally has limited benefits.⁵⁴⁸ To evaluate this proposition, it is necessary to analyse the suggestions made for improving assent in online contracts. However, this cannot be done in isolation, and the substantive measures of control available must also be considered to determine to what extent they can compensate for the lack of informed consent. This will be done in the following two chapters.

Courts can avoid confusion and criticism by explicitly acknowledging the doctrinal adjustment required in the case of online contracts, and the reasons for such an approach. It is for these reasons that the change in approach by the reporters of the Draft Restatement could be seen as somewhat regrettable: by explaining the grand bargain and describing the necessary trade-off between assent and substantive control, their initial position made it clear that the quality of assent will influence the measure of *ex post* scrutiny the terms should be subjected to.

3 6 Comparative evaluation

3 6 1 Introduction

The discussion above provided a brief overview of the manner in which American law treats the formation of online contracts, as well as a discussion on how South African courts are likely to view their enforceability. This section will focus on specific aspects relating to the formation of online contracts and provide a comparative evaluation between the American and South African approach. Ultimately, the aim is to identify what insights South African lawyers can gain through studying the American experience.

3 6 2 Establishing assent to online contracts

Both legal systems face the same question when establishing assent to online contracts: can consumers be bound to terms which they have not read and cannot

⁵⁴⁸ See Barnhizer 2014 *Southwestern LR*, who argues that “policing the quality of assent in the wrap context is a low value strategy unlikely to yield better results than adherents already get from drafters” (216) and that “even the best quality assent likely will not improve the quality of the resulting contract” (219); Davis 2007 *Berkeley Tech LJ*, who similarly argues that “alternative doctrines, rather than a more rigorous assent analysis, provide an acceptable way of adjudicating the enforceability of [online] terms while allowing the realization of the recognized benefits of standard form contracting in the electronic environment.” (580).

reasonably be expected to read?⁵⁴⁹ If it is accepted that it is irrational and improbable for consumers to study the terms,⁵⁵⁰ courts must decide either to find grounds for enforcement of online contracts despite an absence of informed consent, or to regard online contracts as unenforceable.⁵⁵¹ In other words, should the law accept what could be described as “uninformed consent” as a valid basis for contract conclusion in order to accommodate online contracts? It has been said that:

“To support a general presumption of the enforceability of [standard] form terms, one must instead begin with the assumption that a party is entitled to rely on a signature as a manifestation of assent, even if the reliance is not reasonable in the circumstances.”⁵⁵²

In America, the notion of blanket assent provides a basis for enforcing online contracts despite consumer ignorance. Where the consumer manifests assent to the terms, he has a duty to read them.⁵⁵³ Thus, in terms of the objective theory followed in American law, online terms will be valid regardless of whether it was read by the consumer, provided there was a manifestation of assent. The application of the latter requirement in the context of online contracts has sparked controversy in American literature, because commentators believe courts adopt too lenient an approach in determining whether a consumer manifested assent.⁵⁵⁴ In this regard, courts distinguish between click-wraps and browse-wraps. Therefore, an evaluation of the manner in which courts determine assent in each instance will be undertaken separately below.

Although South African law professes to apply the reliance theory as a corrective to the subjective will theory,⁵⁵⁵ it has been shown that a form of blanket assent is also

⁵⁴⁹ See the problem identification at 3 2 above.

⁵⁵⁰ See, for example, Wilkinson-Ryan 2017 *Cornell LR* 127; Daiza 2018 *Cal WLR* 217: “the reasonable person does not read the terms, nor do they have the legal background necessary to understand [them]”.

⁵⁵¹ See Korobkin 2003 *U Chi LR* 1205: “given the complexity of modern commerce, the alternative to form contracts is almost certainly not the resurgence of fully dickered, obligationally complete contracts, but rather law-imposed default terms invoked to fill gaps in the contract the parties negotiate. Actual assent to each contract term in a transaction of any complexity simply is not possible; if terms are not imposed on one party by the other, some terms will almost certainly be imposed on both parties by the government.”

⁵⁵² Rakoff 1983 *Harv LR* 1187.

⁵⁵³ See 3 5 2 above. Also see Rakoff 1983 *Harv LR* 1186; Zacks 2016 *Wm & Mary Bus LR* 746.

⁵⁵⁴ See 3 5 3 2 above.

⁵⁵⁵ See 3 3 2 above.

recognised.⁵⁵⁶ Thus, online contracts can be enforced where it could reasonably be concluded that the consumer was generally aware of the terms, even where expecting him to read the specific terms is unreasonable.⁵⁵⁷ Where the consumer manifests assent – through clicking or other prescribed conduct such as browsing for example – he will be bound to the terms either based on the *caveat subscriptor* rule or in terms of the rules developed for ticket cases.

Although the problem with regard to the formation of online contracts is approached from slightly different angles in the two jurisdictions – with South African law recognising the will theory as the primary basis for ascribing liability, and American law subscribing to an objective theory – a similar conclusion is reached. Where a consumer manifests assent to terms, he has a duty to read them and carries the risk of adverse terms. Whether it is reasonable to expect the consumer actually to read the document is irrelevant; the focus is whether the consumer could reasonably be expected to be aware of the terms and to have manifested assent to them.

Rakoff argues that an approach which recognises a duty to read would be defensible if the majority of signed documents were understood and agreed to⁵⁵⁸ – a condition that is generally accepted to be false in the context of online contracts. Placing a duty to read voluminous contracts on consumers is unreasonable because of their length, prevalence and the fact that the terms are generally beyond the comprehension of consumers.⁵⁵⁹ Merely having a small hyperlink in the corner of a website titled “Terms and Conditions” or something similar triggers the duty to read a multi-page contract.⁵⁶⁰ Furthermore, consumers gain little benefit from studying the terms – not only can they not influence the content of the contractual terms, they generally also cannot understand the meaning or effect thereof. It has been said that:

“The duty to read, however, is better understood as a convention based upon particular contracting practices in a time where contracts were not ubiquitous... It should never have

⁵⁵⁶ See 3 3 3 and 3 3 4 above.

⁵⁵⁷ See 3 4 3 4 above.

⁵⁵⁸ Rakoff 1983 *Harv LR* 1188.

⁵⁵⁹ Leib & Eigen 2017 *U III LR* 98; Ben-Shahar 2009 *ERCL* 7-8; Benoliel & Becher 2019 *Boston College LR* (Forthcoming) 3.

⁵⁶⁰ Kim *Wrap Contracts* 65.

evolved into permission for the drafting party to rely unreasonably on any manifestation of assent to the contract.”⁵⁶¹

Recognising a duty to read in online contracts thus requires courts to deliberately ignore the realities of online contracting. Arguably, the commercial necessity of enforcing these terms⁵⁶² has persuaded American courts to relax the assent requirement⁵⁶³ and instead rely on other measures to protect consumers.

The potentially harsh operation of the duty to read can also be mitigated by a lenient application of the rules surrounding unexpected or surprising terms. This was discussed above in the South African context,⁵⁶⁴ but will also briefly be considered below.⁵⁶⁵

As mentioned previously, the duty to read in both American and South African law is only triggered where the consumer manifests assent to the terms. In this regard, a distinction is usually drawn between click-wraps and browse-wraps.

3 6 2 1 *The enforceability of click-wraps*

American law equates the act of clicking (where acceptance of contractual terms is the only function served by that click) with signing a legal document.⁵⁶⁶ This is similar to the expected treatment of click-wraps in South African law, where it was shown that indicating acceptance by clicking will probably be seen as analogous to indicating it by way of signature.⁵⁶⁷ In the South African context, it will mean the *caveat subscriptor* rule applies, and the consumer will be bound to the terms regardless of whether he was familiar with the content thereof. This is similar to the duty to read in American law, which will be triggered when the consumer manifests assent to the terms of the online contract.

⁵⁶¹ Zacks 2016 *Wm & Mary Bus LR* 767-678.

⁵⁶² Ch 2 (2 3 3). Also see Kim *Wrap Contracts* 27: “A failure to recognize contracts of adhesion would mean slowing down and perhaps even stifling the growth of a valuable industry”.

⁵⁶³ Zacks 2016 *Wm & Mary Bus LR* 773; Kim *Wrap Contracts* 27: “Assent in the context of adhesive contracts thus became construed to mean acquiescence rather than active agreement”.

⁵⁶⁴ See 3 4 6 and 3 4 8 above.

⁵⁶⁵ See 3 6 4 below.

⁵⁶⁶ See 3 5 3 1 above

⁵⁶⁷ See 3 4 3 2 above.

As discussed above, consumers do not necessarily view clicking and signature in the same manner.⁵⁶⁸ Relatively early in the history of online contracts, Moringiello cautioned that

“the act of clicking an ‘I agree’ icon always signifies assent to the terms that lie beyond that icon, regardless of the label given to the icon and the ease of finding the terms to which the offeree is allegedly agreeing. In holding that a click equals assent, courts appear to follow, perhaps too literally, the rule set forth in the various electronic contracting statutes that a contract will not be denied enforcement solely because it is in electronic form.”⁵⁶⁹

She further warned that:

“Placing electronic and paper records on an equal legal plane, however, is not the same as saying that there is no difference between electronic and paper records”.⁵⁷⁰

This argument bears a resemblance to Kim’s contention that consumers lack awareness of online terms, and that their enforcement can thus not be justified in terms of the notion of blanket assent.⁵⁷¹ However, courts can only judge intention from its outward manifestations. Unless a consumer can show that the act of clicking could objectively not be construed as a manifestation of assent, his subjective state of mind will not prevent enforcement. Doing so would mean clicking could never be regarded as a valid method of contract formation, and would hinder internet commerce.

Thus, although there might be truth to the argument that consumers do not view clicking in the same way as signature, it must be questioned what the alternative is. If courts cannot assume a consumer assents to terms where he clicks an icon clearly marked as an indication of acceptance, what measures should be put in place by suppliers to ensure enforceability of terms? Alternative suggestions, such as those mentioned above (e.g. requiring multiple clicks or initials instead of merely a click),⁵⁷² will be considered in chapter 5, where it can be evaluated in conjunction with substantive measures. An important consideration must be whether such measures will succeed in creating true consumer awareness of the terms, without proving

⁵⁶⁸ See 3 2 3 1 above.

⁵⁶⁹ Moringiello 2005 *Rutgers LR* 1330.

⁵⁷⁰ 1340.

⁵⁷¹ See 3 5 3 2 above.

⁵⁷² See 3 5 3 3 above.

detrimental to online transacting. Imposing more onerous requirements for the formation of click-wraps will serve no purpose if it does not affect consumer behaviour.

Unless the law is developed to implement stricter requirements for the formation of click-wraps, courts in America and probably also South Africa will enforce click-wraps despite the concerns regarding consent. However, if these concerns are judicially recognised, it can provide impetus for increased reliance on other forms of control of online terms. Thus, even where clicking is viewed as valid assent for purposes of contract formation, courts should not fail to recognise that consumers are mostly only aware of the core terms, and perhaps the fact that some further terms apply.

3 6 2 2 *The enforceability of browse-wraps*

As mentioned above, American courts will enforce browse-wraps if the consumer was actually aware of the terms, or if conspicuous notice of the existence of the terms was given.⁵⁷³ This is also the requirement for hybrid forms of online contracts such as sign-in wraps. For example, in *Specht v Netscape Communications Corp*⁵⁷⁴ the download button appeared with the following statement: "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software."⁵⁷⁵ Even though the consumer had to click an icon and thereby indicated assent, it was treated as a browse-wrap because the icon did not primarily serve the purpose of acceptance of terms.

The position in American law regarding browse-wraps is similar to the expected approach in South African law, where in accordance with the principles developed for ticket-cases, courts are likely to require reasonably sufficient notice to enforce the terms if actual knowledge thereof cannot be proven.⁵⁷⁶ The timing of the notice (i.e.

⁵⁷³ See *Meyer v Uber Technologies Inc* 868 F 3d 66 (2nd Cir 2017) 75; *In re Zappos.com Inc., Customer Data Security Breach Litigation* 2012 WL 4466660 (D Nev 2012); *Nguyen v Barnes & Noble Inc* 763 F 3d 1171 (9th Cir 2014) 1177; *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000) 981-982; *Register.com v Verio Inc* 356 F 3d 393 (2nd Cir 2004) 403; T Zynda "Ticketmaster Corp. v Tickets.com, Inc: Preserving Minimum Requirements of Contract on the Internet" (2004) 19 *Berkley Tech LJ* 495 507; Mik 2016 *Singapore J Leg Stud* 73; MA Lemley "Terms of Use" (2006) 91 *Minn LR* 459 477: "Courts may be willing to overlook the utter absence of assent only when there are reasons to believe that the [consumer] is aware of the [supplier's] terms."

⁵⁷⁴ 306 F 3d 17 (2nd Cir 2002).

⁵⁷⁵ 23.

⁵⁷⁶ See 3 4 3 3 and 3 4 5 2 2 above.

that the consumer has to indicate assent before he is able to access the terms of the browse-wrap) might prove problematic in the South African context, but this is discussed below.⁵⁷⁷

The question in both jurisdictions is thus what the requirements are for sufficient notice. The Draft Restatement mentions some examples: a hyperlink in a small font that can only be accessed by scrolling down does not constitute sufficient notice, whereas a prominent notice containing a hyperlink to the terms, which is positioned in the centre of the page in a large, clearly visible font will suffice.⁵⁷⁸ American case law also provides guidance, as discussed above.⁵⁷⁹

In light of the reservations expressed by American courts in respect of browse-wraps that do not contain a conspicuous notice alerting the consumer to the contractual terms, it is doubtful whether South African courts will be willing to accept that in such a case sufficient notice was provided.⁵⁸⁰ However, if a conspicuous notice is provided, which indicates that browsing will lead to contract formation, it is expected that South African courts will be willing to enforce browse-wraps. This will also be the case for hybrid forms of online contracts which comply with the two requirements identified above, namely a conspicuous statement placed near the relevant icon.

It could be asked whether emphasising the manner in which terms are displayed is a sensible approach, in light of the fact that the terms are seldom read.⁵⁸¹ However, requiring a supplier to display the terms in a manner which will alert the reasonable consumer to their existence is not a costly exercise, provided clear guidelines are developed to enable suppliers to accurately predict the enforceability of their terms. It can thus provide a minimum level of protection, by giving the consumer the opportunity to study the terms, without hindering commerce. It is important, however, that like with click-wraps, courts should not feign ignorance regarding the fact that consumers

⁵⁷⁷ See 3 6 3 below

⁵⁷⁸ Illustration 15 to Para 2 of the Draft Restatement.

⁵⁷⁹ See 3 5 3 1. See specifically the factors mentioned in *Starke v Squaretrade Inc.* 913 F 3d 279 (US App 2019) 200-293 (and also repeated in *Arnaud v Doctor's Associates Inc* 2019 U.S. Dist. LEXIS 153868 (NY Dist 2019) 15-19), with reference to *Nicosia v Amazon.com* 834 F 3d 220 (2d Cir 2016) and *Meyer v Uber Technologies Inc* 868 F 3d 66 (2nd Cir 2017).

⁵⁸⁰ See the case law mentioned in 3 4 3 3 above.

⁵⁸¹ See text to n 642 below.

generally remain unaware of the terms of online contracts regardless of whether proper notice was provided.

3 6 3 Timing of the notice: PNTL, browse-wrap and shrink-wrap agreements

One of the problems American jurists have identified with wrap contracts is the enforcement of terms provided after conclusion of a transaction, known as rolling contracts or “pay now, terms later” (PNTL). An example of these type of terms is shrink-wraps,⁵⁸² although browse-wraps could also fall in this category (depending on when their terms are made available to the consumer).⁵⁸³

Initially, American courts refused to enforce terms provided only after contract formation,⁵⁸⁴ but this approach was altered radically pursuant to the decision in *ProCD Inc v Zeidenberg*.⁵⁸⁵ In *ProCD*, the court had to consider the enforceability of shrink-wraps.⁵⁸⁶ Judge Easterbrook by implication sanctioned acceptance by performance even where the terms are only accessible after contract formation, provided there was prior notice that further terms will apply and an opportunity to reject the transaction upon receipt of the terms.⁵⁸⁷ By failing to return the product, the consumer is deemed to accept the terms.⁵⁸⁸ The Draft Restatement also endorses the approach followed in *ProCD*.⁵⁸⁹ The reporters indicate that despite academic resistance, this approach is dominant in case law.⁵⁹⁰

⁵⁸² See ch 2 (2 2 2 1).

⁵⁸³ See 3 4 5 3 above.

⁵⁸⁴ *Schnabel v Trilegiant Corporation* 697 F 3d 110 (2d Cir 2012). Also see Kim *Wrap Contracts* 97.

⁵⁸⁵ 86 F 3d 1447 (7th Cir 1996). See F Marotta-Wurgler "Are 'Pay Now, Terms Later' Contracts Worse for Buyers? Evidence from Software License Agreements" (2009) 38 *J Leg Stud* 309 309-311; Ghirardelli 2015 *Oregon LR* 724-725.

⁵⁸⁶ See the discussion of the case in ch 2 (2 2 2 1).

⁵⁸⁷ *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996) 1450-1452. Also see Ghirardelli 2015 *Oregon LR* 727, who state that the judgement “endorsed the idea that acceptance by performance of unilateral contracts applies to cases in which consumers do not have notice of the entirety of the contractual terms at the time of purchase”.

⁵⁸⁸ *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996) 1452. Also see Radin 2017 *OJLS* 517.

⁵⁸⁹ Para 2(b) of the Draft Restatement.

⁵⁹⁰ Reporters' Note to Para 2 of the Draft Restatement 42-44, 49-52.

The criticism levied against *ProCD* was previously discussed,⁵⁹¹ and commentators have stated that the reasoning in *ProCD* provides an illustration of American courts' willingness to sacrifice adherence to contract law principles to further commercial purposes.⁵⁹² This acceptance of shrink-wraps gave judicial recognition to the acceptance of unseen terms,⁵⁹³ and thereby created the necessary foothold for the recognition of browse-wrap contracts by American courts.

Generally, for conduct to constitute acceptance of terms, it is logical to require that the person whose conduct leads to the conclusion of a contract must be aware that acting in a certain manner will result in binding obligations. Therefore, in traditional contract law a contracting party must be informed what actions will lead to contract formation prior to the act of assent.⁵⁹⁴ It was recognised in *Specht v Netscape Communications Corp*⁵⁹⁵ that

“a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms ... [and] '[w]hen the offeree does not know that a proposal has been made to him this objective standard does not apply.’”⁵⁹⁶

In the case of some browse-wraps (typically those regulating use of a website), the consumer has no way of knowing that his conduct constitutes acceptance, and thus it cannot be construed as a manifestation of consent.⁵⁹⁷ However, American courts do not seem to insist on this requirement for browse-wraps, where the consumer is deemed bound by accessing the website, before he had an opportunity to study the terms and learn that browsing amounts to acceptance.⁵⁹⁸ This is similar to undertaking a journey, and after the train has left the station being informed that by boarding the train you have given up certain rights.

⁵⁹¹ See ch 2 (2 2 2 1).

⁵⁹² Radin 2017 *OJLS* 517-518.

⁵⁹³ See ch 2 (2 2 2 1).

⁵⁹⁴ Kim *Wrap Contracts* 109. Also see 3 3 1 above.

⁵⁹⁵ 306 F 3d 17 (2nd Cir 2002).

⁵⁹⁶ 30-31, quoting from *Windsor Mills, Inc. v. Collins & Aikman Corp.* 101 Cal Rptr 347 (Cal Ct App 1972) 351.

⁵⁹⁷ See Moringiello 2005 *Rutgers LR* 1319.

⁵⁹⁸ Kim *Wrap Contracts* 109: “The offeree may receive notice after undertaking the acts that constitute acceptance.”

Adoption of these browse-wraps is allowed by the Draft Restatement in terms of the section dealing with adoption of terms only made available after contract formation.⁵⁹⁹ The reporters accept that “the manifestation of assent to the transaction and the adoption of the terms occur upon the continued use of the proprietary environment and the receipt of its benefits”, although “reasonable opportunity to exit without being bound to the terms” after review must be provided.⁶⁰⁰ Although an opportunity to terminate is thus required, the Draft Restatement does not specify the practical implications of this in the context of browse-wraps.

Because no precedent similar to that of *ProCD*⁶⁰¹ exists in South African law, there is no authority for enforcing terms that the consumer could not access before contract formation.⁶⁰² If a court wants to follow the example of its American counterparts in recognising these terms, it will involve a similar “doctrinal distortion”.⁶⁰³ It will further trigger the fourteen-day cancellation period provided for in section 43(3) of ECTA, because the consumer is not given the opportunity “to review the entire electronic transaction” before completing the transaction.⁶⁰⁴ Furthermore, it will require courts to circumvent the provision in the CPA regarding negative option marketing.⁶⁰⁵ As indicated, this will depend on the willingness of courts to rely on the ongoing conduct of the consumer as an indication of assent, instead of the initial act of accessing the website.⁶⁰⁶ Like in the case of *ProCD*, it is possible that the courts’ analysis might be influenced by commercial considerations.⁶⁰⁷

It is also interesting to note the position in the European Union. In terms of Item (i) of the Annex to the Unfair Contract Terms Directive,⁶⁰⁸ terms which have the object or effect of “irrevocably bind[ing] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract” are

⁵⁹⁹ See 3 5 3 2 above.

⁶⁰⁰ Comment 6 to Para 2 of the Draft Restatement.

⁶⁰¹ *ProCD Inc v Zeidenberg* 86 F 3d 1447 (7th Cir 1996).

⁶⁰² See 3 4 5 3 above.

⁶⁰³ Radin 2017 *OJLS* 517.

⁶⁰⁴ S 43(2) of ECTA. Also see 3 4 2 above.

⁶⁰⁵ See 3 3 6 above.

⁶⁰⁶ See 3 4 5 3 above.

⁶⁰⁷ See ch 5 (5 2 1) for a further discussion of the role of commercial necessity.

⁶⁰⁸ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

regarded as presumptively unfair. There is no general acceptance of the notion of post-transaction consent with the opportunity to cancel.⁶⁰⁹ However, EU courts have not considered the enforceability of browse-wraps, and it is therefore possible that they might also construe continued browsing as acceptance.⁶¹⁰

With regard to shrink-wraps, the element of continued use is usually absent. Therefore, they are unlikely to be enforced in South African law.⁶¹¹ There is also little justification for their enforcement: the online context provides an easy medium for suppliers to make the terms available prior to contract formation, unlike the example of telephonic contracts mentioned by Judge Easterbrook in *Hill v Gateway2000 Inc.*⁶¹² Suppliers can thus easily overcome the problem of unenforceable shrink-wraps by utilising either click- or browse-wraps.

3 6 4 Unexpected or surprising terms

Online contracts tend to contain invasive and unexpected terms which are often unrelated to the primary transaction forming the subject of the contract.⁶¹³ Two types of clauses have been identified in this regard, namely terms that erode a consumer's privacy, and those regulating the property rights of user-generated content.⁶¹⁴

American law has had difficulty dealing with the issue of unexpected or surprising terms.⁶¹⁵ The unconscionability doctrine will only protect consumers against unexpected terms in extreme circumstances, and courts apply a stringent test for a

⁶⁰⁹ S Grundmann "A Modern Standard Contract Terms Law from Reasonable Assent to Enhanced Fairness Control" (2019) 15 *ERCL* 148 154-155; Schulte-Nölke 2019 *ERCL* 108. Some jurisdictions, such as Dutch law, make provision for this form of adoption in certain situations (Schulte-Nölke 2019 *ERCL* 118).

⁶¹⁰ See in general MacDonald 2011 *International Journal of Law and Information Technology*.

⁶¹¹ See 3 4 5 3 above.

⁶¹² 150 F 3d 1147 (7th Cir 1997).

⁶¹³ Ghirardelli 2015 *Oregon LR* 737.

⁶¹⁴ 737.

⁶¹⁵ RL Oakley "Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts" (2005) 42 *Houston LR* 1041 1065.

finding of unconscionability.⁶¹⁶ Because substantive unconscionability is so hard to prove, it has only been applied in a relatively small number of cases.⁶¹⁷

The doctrine of reasonable expectations also allows courts to overturn express contract language if it contradicts the consumer's reasonable expectations.⁶¹⁸ This doctrine places a duty on the supplier to draw the consumer's attention to unexpected and unreasonable terms, but it has mostly only been applied in insurance cases.⁶¹⁹ A similar doctrine exists in Tennessee, known as the circle of assent doctrine,⁶²⁰ but it has not received much attention outside of that state.⁶²¹ A similar doctrine is reflected in section 211 of the Restatement (Second) of Contracts.⁶²² However, as explained above, this section requires the consumer to prove both the supplier's state of mind (i.e. whether the supplier had reason to believe the consumer's assent is lacking) and that he would not have entered into the agreement at all if he was aware of the term.⁶²³ Consequently, Oakley avers that American law does not provide a proper mechanism to protect consumers against unexpected and unreasonable terms in an online contract.⁶²⁴

The Draft Restatement also contains no provisions with regard to surprising terms,⁶²⁵ except in so far as it forms part of procedural unconscionability⁶²⁶ or where such a term is the result of a deceptive act.⁶²⁷ A surprising term is regarded as a defect in the

⁶¹⁶ Ghirardelli 2015 *Oregon LR* 745; Canino 2016 *UC Davis LR* 561-562; Oakley 2005 *Houston LR* 1064; Preston 2015 *Am U LR* 546.

⁶¹⁷ Oakley 2005 *Houston LR* 1064.

⁶¹⁸ Hillman & Rachlinski 2002 *NYU LR* 459; Ayres & Schwartz 2014 *Stanford LR* 559.

⁶¹⁹ Oakley 2005 *Houston LR* 1065; RB Kar & MH Radin "Pseudo-Contract and Shared Meaning Analysis" (2019) 132 *Harv LR* 1135 1201.

⁶²⁰ RM Lloyd "The Circle of Assent Doctrine: An Important Innovation in Contract Law" (2006) 7 *Transactions: Tenn J of Bus Law* 237 244.

⁶²¹ 238.

⁶²² 1065.

⁶²³ See 3 5 2 1 above.

⁶²⁴ Oakley 2005 *Houston LR* 1065.

⁶²⁵ Eisenberg criticises the absence of a provision similar to s 211 of the Restatement (Second) of Contracts in the Draft Restatement ("The Proposed Restatement of Consumer Contracts, if Adopted, Would Drive a Dagger through Consumers' Rights" *Yale Journal on Regulation: Notice & Comment*).

⁶²⁶ Para 5(b)(2) of the Draft Restatement. Also see 3 5 2 2 above.

⁶²⁷ Para 6(a) of the Draft Restatement. This is discussed in ch 4 (4 3 3).

bargaining process which may satisfy the procedural prong of the test for unconscionability.⁶²⁸ It is recognised that:

“Because of the length, complexity, and accumulation of standard form contracts, an enhanced-format disclosure of a term does not guarantee that consumers will not be surprised and thus does not guarantee meaningful choice. The harsh effect of the standard terms can continue to be hidden even in full daylight, given that consumers rarely read those terms and, even if they do, often may not understand or appreciate their effect at the time of contracting.”⁶²⁹

However, the reporters emphasise the substantive prong of the unconscionability enquiry.⁶³⁰ The fact that a term is unexpected or surprising will therefore rarely be enough in itself to avoid its operation in American law.

This is different from the position in South African law, where the rules surrounding unexpected terms pertain only to the assent requirement, and the substantive effect of the offending term is irrelevant.⁶³¹ In this regard, South African law thus allows for more protection of the reasonable expectations of consumers. Invalidating terms which would not be expected by the reasonable consumer in the specific contract can also encourage suppliers to refrain from inserting such terms in an online contract, or to take steps to bring them to the attention of consumers. The manner in which this doctrine can be developed in the online context in South African law was discussed previously.⁶³²

Whether a clause will be deemed surprising will depend on the particular circumstances, and various factors can play a role in shaping a consumer’s expectation. For example, when dealing with a clause authorising use of consumer information, one factor in determining the expectation of the consumer is the manner in which the information was obtained: where the consumer is prompted to provide personal information to the supplier, for example during the log-in process, it can be argued that a consumer should be aware that his data will be used. This can be

⁶²⁸ Comment 6(b) to Para 5 of the Draft Restatement.

⁶²⁹ Comment 7(b) to Para 5 of the Draft Restatement.

⁶³⁰ See the Reporters’ Note to Para 5 of the Draft Restatement 97: “Courts have used the ‘sliding scale’ approach to minimize the procedural-unconscionability requirement and emphasize the substantive-unconscionability requirement”.

⁶³¹ See 3 3 3 and 3 4 6 above.

⁶³² See 3 4 6 and 3 4 8 above.

contrasted with an instance where the consumer accesses a website without actively providing information, for example by performing a search on Google. A reasonable consumer will most likely be surprised that he is thereby authorising Google to collect information regarding all his browsing activity (for example by online tracking).⁶³³ The scope of authorised use can also play a role: it is expected that the supplier will use the information for purposes relating to the service provided, but it is less clear whether a clause authorising more extensive use of the data, such as monetisation thereof by allowing targeted advertisements, is expected. Other factors, such as the fact that no other form of compensation is provided for use of a service, may also influence consumer expectation.⁶³⁴ Although this doctrine can thus serve as an important method of protecting consumer expectations, it can also create uncertainty which only an accumulation of judicial experience over time will be able to alleviate.

3 6 5 Incorporation by reference: hyperlinks

As mentioned above, the scope of an online contract can be significantly extended by inserting a hyperlink or hyperlinks in the contract presented to the consumer, which incorporate further online terms.⁶³⁵ In both American and South African law, such a hyperlink in an online agreement of which there is constructive or actual notice will suffice to incorporate the terms in the contract.⁶³⁶

The impact this has on the consumer's duty to read the document cannot be ignored. It has been found that hyperlinks impair the reading performance of consumers because it divides their attention.⁶³⁷ Because the terms are longer and have to be recovered from yet another place, an additional burden is also placed on the consumer. Arguably, this should be taken into account when determining whether the supplier could reasonably expect the consumer to read the online contract, thus rendering a mistake regarding the content of the online contract reasonable.⁶³⁸

⁶³³ See Ghirardelli 2015 *Oregon LR* 738-739.

⁶³⁴ See ch 2 (2 4 3) and 3 4 6 (nn 335 & 336) above.

⁶³⁵ See 3 4 7 above. Also see Kim *Wrap Contracts* 67-68.

⁶³⁶ For American law, see *Durick v eBay, Inc* 2006 WL 2672795 (Oho Ct App 2006); Reporters' Notes to Para 2 of the Draft Restatement 40. For SA law, see 3 4 7 above.

⁶³⁷ Canino 2016 *UC Davis LR* 557.

⁶³⁸ See 3 6 4 above.

However, if it is acknowledged that ultimately, consumers do not read online contracts regardless of their length, the fact that extra documents are incorporated should not make a difference. It is only where a solution for improving the quality of assent by encouraging readership can be found that regulating the use of hyperlinks will have an effect.

3 7 Concluding observations

The enforcement of standard form contracts has always been contentious, but the features of online contracts demand a reconsideration of certain of the rules relating to standard terms to cater for the online environment. One of the main considerations pertaining to the establishment of assent to online contracts is that it is unreasonable and unrealistic to expect consumers to read their terms. There are various reasons for this, including their length, ubiquity, incomprehensibility, the cost of reading and the lack of benefit in reading due to the adhesive nature of online contracts.

Some American scholars have thus suggested that assent should be disregarded entirely as a requirement, instead just focusing on the fairness of terms.⁶³⁹ The argument is that because it is both improbable and undesirable for consumers to read online contracts,⁶⁴⁰ it makes no sense to analyse how terms are presented in an attempt to establish whether there was assent.⁶⁴¹ They criticise the fact that courts still

“ask whether particular parties have ‘sufficient notice’ that terms exist or a reasonable opportunity to read them ‘to his heart’s content’? In their written opinions, judges seriously explore the question, for example, of whether the casual user of a website should have known that there were terms of use and whether that user could have learned those terms without too much hassle. This is surely all but theoretical in a world in which terms are always expected and never read; in fact, most people recognize that changing the placement of the link or the size of the font or the leisure with which consumers may peruse the fine print has no practical effect on the (sic) either the likelihood or the benefit of reading.”⁶⁴²

⁶³⁹ Wilkinson-Ryan 2017 *Cornell LR* 173; Zacks 2016 *Wm & Mary Bus LR* 741. Also see ch 5 (5 3 2).

⁶⁴⁰ Wilkinson-Ryan 2017 *Cornell LR* 128.

⁶⁴¹ 128: “consumer contracts are unreadable all the time, no matter how close or how far the link to the ‘Privacy Policy’ is to the ‘Checkout’ button.”

⁶⁴² 125-126 (footnotes omitted).

However, “it is the concept of assent that gives contracts legitimacy and distinguishes them from private legislation.”⁶⁴³ If ensuring adequate assent is not costly, little can be gained by removing the assent requirement. As long as the guidelines for valid contract formation are clearly formulated and consistently applied, and those guidelines are lenient enough that internet commerce is not hampered by them, the benefit obtained by a continued reliance on consent is outweighed by its cost.

Additionally, it has been shown how the rules regarding unexpected terms in the South African context might help to protect the reasonable reliance of consumers where it is not plausible to expect them to read the terms of online contracts. In this regard, it was suggested that courts should first consider whether sufficient notice has been given of the proposed online contract as a whole. Only if this is answered positively, should they consider whether the reasonable consumer would have expected a certain term in the contract. The first enquiry determines whether actual or deemed consent to the online contract in general is established, for example by clicking or browsing. The second enquiry recognises the unreasonableness of expecting that the consumer should have familiarised himself with the content of each of the terms, while still taking cognisance of any steps the supplier took to bring a specific term to the attention of the consumer.

Adequate notice of the terms further means that consumers have the opportunity to study the terms of various websites. This allows for consumer activism to play a role⁶⁴⁴ and may influence suppliers to amend their contracts for fear of the reputational risk.⁶⁴⁵ Although rare, there are examples in the online environment of consumer outrage resulting in an amendment to a supplier’s terms.⁶⁴⁶ Instead of abandoning assent as

⁶⁴³ Lemley 2006 *Minn LR* 465.

⁶⁴⁴ Barnhizer 2014 *Southwestern LR* 224.

⁶⁴⁵ SI Becher & TZ Zarsky “Online Consumer Contracts: No One Reads, but Does Anyone Care?” (2015) 12 *Jrslm Rev Legal Stud* 105 120.

⁶⁴⁶ See for example T Geron “After Backlash, Instagram Changes Back To Original Terms Of Service” (20-12-2012) *Forbes* <<https://www.forbes.com/sites/tomiogeron/2012/12/20/after-backlash-instagram-changes-back-to-original-terms-of-service/#50e8a65f2ede>> (accessed 7-11-2019); S Gallagher “Backlash prompts Eventbrite to drop demand to crash events, record them” (23-4-2018) *Ars Technica* <<https://arstechnica.com/information-technology/2018/04/eventbrite-rolls-back-policy-that-would-have-given-it-right-to-record-events/>> (accessed 7-11-2019); A Hern & J Rankin “Spotify’s chief executive apologises after user backlash over new privacy policy” (21-8-2015) *The*

a requirement, it should rather be recognised that the protection provided to consumers by this requirement is very limited. Despite the fact that the common law is sufficiently flexible to cater for the formation of online contracts, it is beneficial to recognise that their enforcement is based largely on considerations of business necessity.⁶⁴⁷ This can justify the introduction of stricter substantive control of the terms, as illustrated by the unconscionability doctrine in American law, to ensure that:

“the law ... create[s] a deeply-rooted confidence of consumers that they will be protected by the state, by the courts, and by other mechanisms from any unfair disadvantage that comes from all standard contract terms under such a link on a website labelled ‘Terms’ or something similar.”⁶⁴⁸

In order to properly evaluate whether the formation requirement of online contracts must be adapted, other measures of control relevant to online contracts must first be discussed. These include substantive measures and provisions relating to improperly obtained consent, which will form the focus of the next chapter.

Guardian <<https://www.theguardian.com/technology/2015/aug/21/spotify-faces-user-backlash-over-new-privacy-policy>> (accessed 7-11-2019). Also see RB Taylor “Consumer-Driven Changes to Online Form Contracts” (2011) 67 *NYU Ann Surv Am L* 371.

⁶⁴⁷ The function of business necessity as a contractual value and its relationship with *pacta servanda sunt* will be considered in chapter 5.

⁶⁴⁸ Schulte-Nölke 2019 *ERCL* 122.

CHAPTER 4: THE CONTENT OF ONLINE CONTRACTS – SUBSTANTIVE PROBLEMS AND RELATED PROCEDURAL ISSUES IN THE ONLINE CONTEXT

4.1 Introduction

The pivotal question in this chapter is whether existing rules sufficiently protect consumers against unfair or abusive provisions in online contracts, or whether development of the law is required to cater specifically for online contracts. In other words, the concern here is mainly with the content or substance of these contracts, in contrast to the previous chapter, which considered the problems with establishing whether there was assent and thus whether a valid contract is formed.

However, the focus is not purely on substance. Because it is argued that fairness of a term generally cannot be determined in the abstract, without due regard to the process of its formation, the chapter also considers certain procedural problems. For example, where a term allocates the risk of a defective product to the buyer, it may be fair to enforce it between two business partners who negotiated on equal footing, but unfair to do so against a consumer who was not aware of the term and powerless to change it. Similarly, terms in online contracts which would otherwise be acceptable – such as those relating to use of a consumer's personal information or content created by him – become problematic where a consumer has no control over or knowledge of the term. When evaluating the substance of these terms, courts thus also have to consider the manner in which consent was obtained.

If these procedural problems are severe enough, it is generally recognised that the law should provide relief without considering the substance of the resultant contract, even if a contract is not void due to the absence of consent (a question answered in the previous chapter). Traditionally, the most prominent examples of these forms of improperly obtained consensus in South African law are where a misrepresentation by one party induces the other to make a non-material mistake (i.e. a mistake in motive), or where the contract is concluded as a result of duress or undue influence.¹ In these circumstances, a valid contract is concluded, but because consent was obtained

¹ D Hutchison "Improperly Obtained Consensus" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 117-118.

improperly the contract is voidable and the innocent party can elect to have the contract set aside.²

It is also possible that the procedural defects are not of a sufficiently serious nature to warrant a remedy based solely on their existence. Instead, these defects can be a factor when considering the fairness of the eventual bargain, as explained above. For instance, the inequality of bargaining power between a consumer and a supplier will generally not suffice as a sufficient ground to have the contract set aside, but might affect the court's evaluation of whether a term should be unenforceable due to its substantive fairness.

Finally, a term can be so unfair that it will be deemed *per se* unenforceable, without having regard to the process of its formation. These terms can thus be regarded as unfair regardless of the context of which they appear, and are generally the type of terms which will be included in a so-called black list.³

Most (although not all) of the differences between online and traditional standard form contracts pertain to the process of their formation, and differences in their content which can be ascribed to these procedural differences.⁴ Terms which therefore require specific consideration in the context of online contracts are especially those which are neither so substantively unfair that they are *per se* unenforceable, nor the result of a process of formation which is so tainted that they are deemed voidable.

It must be noted at the outset that the subject matter discussed in this chapter is vast, and a comprehensive study of these issues cannot feasibly be undertaken here. The discussion will thus centre around and be limited mainly to the issues flowing from the specific attributes and risks inherent in online contracts which might result in unfair contract terms. The chapter thus commences by identifying these issues.⁵ Once this is established, it will be considered when the procedural issues which have been identified will render an online contract voidable.⁶ The focus then shifts to the

² 118.

³ As found in s 51 of the CPA, for example.

⁴ See ch 2 (2 4) and 4 2 below.

⁵ At 4 2.

⁶ At 4 3.

substance of contract terms. Measures aimed at ensuring fairness in South African,⁷ American⁸ and EU⁹ law are briefly discussed, before these measures are evaluated specifically in the context of online contracts.¹⁰ This is done by analysing the problematic categories of terms in online contracts identified in the initial problem identification contained in this chapter.

4 2 Identifying risks which are unique to, or especially problematic in the context of, online contracts

The online environment poses specific risks that consumers do not necessarily experience when contracting offline.¹¹ It can also exacerbate risks found in traditional standard form contracts. These risks can be attributed to five characteristics of online contracts. It must again be emphasised that the question here is not whether assent is excluded because of these risks, but rather whether the law should censure the manner in which assent was obtained or should scrutinise the substantive effect of terms more closely as a result of these characteristics.

First, online contracts are characterised by an extreme power imbalance between suppliers and consumers.¹² Online contracts, like most other standard form contracts, are almost invariably offered to consumers on a take-it-or-leave-it basis, offering no opportunity for negotiation of the terms drafted by and for the benefit of the supplier.¹³ Consumers have little influence over the terms – even if they had the opportunity to negotiate, the same transaction might have resulted.¹⁴ This could allow online suppliers to include one-sided terms which would not have appeared in the contract if the consumer had more influence over the terms.

⁷ At 4 4.

⁸ At 4 5.

⁹ At 4 6.

¹⁰ At 4 7.

¹¹ See the discussion at ch 2 (2 4) above. Also see W Jacobs "The Electronic Communications and Transactions Act: Consumer Protection and Internet Contracts" (2004) 16 *SA Merc LJ* 556 556.

¹² See JR Maxeiner "Standard-Terms Contracting in the Global Electronic Age: European Alternatives" (2003) 28 *The Yale Journal of International Law* 109 113.

¹³ AE Ghirardelli "Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts" (2015) 98 *Oregon LR* 719 723.

¹⁴ EJ Leib & ZJ Eigen "Consumer Form Contracting in the Age of Mechanical Reproduction: The Unread and the Undead" 2017 *U III LR* 65 96.

This risk is not unique to online contracts, but it has previously been discussed how the online environment exacerbates the inequality between suppliers and consumers by enabling suppliers to amass vast quantities of information about consumers, while rendering it impractical for the consumer to inform himself of the content of an online contract to which he becomes bound.¹⁵ It has thus been said that

“Despite lengthy and growing terms of service and privacy, consumers enter into trade with online firms with practically no information meaningful enough to provide the consumer with ex ante or ex post bargaining power.”¹⁶

The problem of consumer ignorance of online contracts identified in the previous chapter¹⁷ can be partly attributed to the superior bargaining power enjoyed by suppliers: consumers cannot obtain a benefit by reading the terms of the online contract, and thus remain ignorant of the terms to which they supposedly agree.¹⁸ Thus, even if the online terms were not ‘masked’,¹⁹ the consumer in any event has little or no influence over them. The consumer’s lack of bargaining power, coupled with the length of online contracts and their pervasiveness, further means that the consumer has no true freedom of choice in respect of the contract terms: he cannot negotiate the terms, and comparing terms of various suppliers is impractical. This lack of choice raises the question of whether consent to online contracts is truly voluntary even if deemed consent can be established.

This ties in with a second characteristic of online contracts, namely their lack of transparency. This can be attributed mainly to their prevalence and the manner in which online terms are presented. The fact that consumers often fail to notice the presence of terms online, together with high number of terms consumers are expected

¹⁵ See ch 2 (2 4 4).

¹⁶ CJ Hoofnagle & J Whittington "Free: Accounting for the Cost of the Internet's most popular Price" (2014) 61 *UCLA LR* 606 640.

¹⁷ See ch 3 (3 2 2).

¹⁸ See A Hern “I read all the small print on the internet and it made me want to die” (15-6-2015) *The Guardian* <<https://www.theguardian.com/technology/2015/jun/15/i-read-all-the-small-print-on-the-internet>> (accessed 7-11-2019): “The problem is that reading the terms and conditions simply doesn’t help. Sure, you find out how pitifully small your rights are compared to those that even a medium-sized company will reserve when you use its product. But the issue isn’t just one of obscurity: it’s also a problem with the power relationship. With no negotiating power, it ends up being mostly depressing reading.”

¹⁹ See ch 3 (3 2 2).

to agree to, means that it is easier for suppliers to deceive consumers. Terms can be hidden in plain sight, because suppliers know that no rational consumer will notice a term in the online contract.²⁰ An example of possible deception in the online context is where services and downloads are advertised as free, but where the online contract requires a consumer to relinquish personal information in return for use of the service.²¹ It has become evident that consumer data has monetary value, and a supplier can therefore monetise this data by selling or using the personal information of consumers.²²

Thirdly, as Kim indicates, the scope of terms found in online contracts tends to be far broader than those in traditional standard form contracts.²³ She draws a distinction between what she refers to as shield, sword and crook terms.²⁴ The first two categories include terms which limit the rights of consumers in order to reduce the business risk faced by suppliers, either by preventing consumer action and thus protecting the drafting party (shield terms), such as excluding a claim for damages, or eliminating consumer rights (sword terms), for example an arbitration clause which prevents the consumer from approaching a court. Crook terms, on the other hand, she defines as

“a company’s stealthy appropriation (via a nonnegotiated agreement) of benefits ancillary or unrelated to the consideration that is the subject of the transaction.”²⁵

According to Kim, traditional standard form contracts generally contain only shield and sword terms, by seeking to regulate rights and obligations which form part of the primary transaction.²⁶ She argues that

²⁰ Comment 7(b) to Para 5 of the American Law Institute *Restatement of the Law, Consumer Contracts: Tentative Draft* (2019) (the Draft Restatement): “The harsh effect of the standard terms can continue to be hidden even in full daylight, given that consumers rarely read these terms and, even if they do, often may not understand or appreciate their effect at the time of contracting.”

²¹ See ch 2 (2 4 3). Also see Hoofnagle & Whittington 2014 *UCLA LR* 606.

²² See G Malgieri & B Custers “Pricing Privacy – the Right to Know the Value of your Personal Data” (2018) 34 *Computer Law & Security Review* 289 289.

²³ Also see Ghirardelli 2015 *Oregon LR* 737.

²⁴ See N Kim *Wrap Contracts: Foundations and Ramifications* (2013) ch 5.

²⁵ 50.

²⁶ 50-51.

“[w]ith the judicial validation of the clickwrap and browsewrap forms, however, companies further expanded the reach of their contractual clauses. They began to use contracts to extract from consumers additional benefits that were unrelated to the transaction.”²⁷

This is especially true when dealing with the collection of data and privacy issues, online tracking and copyright over user-generated content.²⁸ For example, Facebook’s terms of service provides that it may use any information provided by the consumer (including his name and picture) for purposes of advertising (so-called “sponsored stories”).²⁹ Most users will be surprised to find out that:

“This means, for example, that you permit a business or other entity to pay [Facebook] to display your name and/or profile picture with your content or information, without any compensation to you.”³⁰

This clarification was contained in a previous version of the terms. It now reads that Facebook “may show your friends that you are interested in an advertised event or have liked a Page created by a brand that has paid [Facebook] to display its ads on Facebook”,³¹ but the effect remains comparable.

Online terms which authorise the supplier to receive compensation for use of consumers’ information is not limited to international websites. The privacy policy of Travelstart (a South African travel website) provides that:

“In the process of various activities recorded in this policy we may receive a fee or compensation from third parties and you expressly consent and approve our engagement in those activities.”³²

²⁷ 51.

²⁸ Kim *Wrap Contracts* 74; Ghirardelli 2015 *Oregon LR* 737.

²⁹ Facebook “Terms of Service” (31-7-2019) *Facebook* <<https://www.facebook.com/legal/terms>> (accessed 7-11-2019) clause 3(3)(2). Also see the discussion in Kim *Wrap Contracts* 156-157; Ghirardelli 2015 *Oregon LR* 740-741.

³⁰ This was contained in Facebook’s terms dated 30 January 2015 (Facebook “Statement of Rights and Responsibilities” (30-1-2015) *Facebook* <<https://www.facebook.com/legal/terms>> (accessed 29-9-2016) clause 9(1)).

³¹ Facebook “Terms of Service” *Facebook* clause 3(3)(2).

³² Travelstart Online Travel Operations (Pty) Ltd (date of publication unknown) “Travelstart Privacy Policy” *Travelstart* <<https://www.travelstart.co.za/lp/privacy>> (accessed 10-2-2020) clause 8.2.

These activities include providing targeted advertisements to consumers³³ or sharing consumers' personal information with third parties "to guide decisions about their products, services and communications."³⁴ Although the actual implementation of these provisions might be rather benign, they undoubtedly grant the supplier far-reaching power and are open to abuse.

Online tracking, which allows websites to monitor a consumer's online activity, provides another illustration of problematic terms in online contracts which do not occur in traditional contracts. MacLean uses the following example to demonstrate the unlikely real-world equivalent to this common term in online contracts:

"Imagine a customer, upon entering a brick-and-mortar retail store, is approached by a clerk and told, 'I will let you look around our store and even buy an item or two. However, this access only comes if you agree to disclose to us every website you visit for the next several years along with your physical locations in real time, your friends' identities and photographs, and all online purchases you make during that same time period. Further, you must let me sell all that information about you to whomever I wish for any purpose at all.'"³⁵

Issues of copyright over material posted by a consumer on a website might also prove problematic, as online contracts often contain terms giving the supplier who owns the website a broad licence to user-generated content.³⁶ For instance, some websites "claim a perpetual license to user-generated content."³⁷ Others may go even further and claim ownership to any creative works that a consumer posts to the website.³⁸ All these provisions serve to eliminate consumer rights which are ancillary to the main subject of the transaction.

A fourth characteristic of online contract which might give rise to unique risks is that, due to the rapidly changing nature of technology, most online providers offer a product

³³ Clause 7.2.

³⁴ Clause 8.1.

³⁵ CE MacLean "It Depends: Recasting Internet Clickwrap, Browsewrap, 'I Agree,' and Click-Through Privacy Clauses as Waivers of Adhesion" (2017) 65 *Clev St LR* 43 44.

³⁶ CB Preston & EW McCann "Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse" (2011) 26 *BYU J Pub L* 1 26-27; Kim *Wrap Contracts* 70-71; Ghirardelli 2015 *Oregon LR* 737.

³⁷ Kim *Wrap Contracts* 71; EJ Toa "A Picture's Worth: The Future of Copyright Protection of User-Generated Images on Social Media" (2017) 24 *Indiana Journal of Global Legal Studies* 617 625.

³⁸ Kim *Wrap Contracts* 71.

or service with some ongoing element to their service, which effectively locks in the consumer and creates the risk of abuse of power. Therefore, if you purchase an iPhone, Apple will continue to provide updates for the software required to use the device, each of which requires accepting an online contract. Using a Sony PlayStation requires acceptance of three separate sets of terms and conditions.³⁹ These terms provide that:

“We reserve the right to remove any content and communication from [Playstation™ Network] Services at our sole discretion without notice and to terminate any Account through which violations of the Community Code of Conduct occur. We may also take steps on behalf of its device platform partners to disable permanently or temporarily any device on which you receive PSN Services and through use of which you violate the Community Code of Conduct. We have no liability for any violation of this agreement by you or by any other PSN Service user.”⁴⁰

A failure to adhere to any of these generally unread terms thus allows Sony “to turn your £350 console into a brick.”⁴¹ Other suppliers, such as Facebook or Dropbox, provide services which the consumer is willing to invest time in because he relies on the continued provision thereof.

This relationship of continued dependency by the consumer on the supplier’s services places the supplier in a position of monopoly power over the consumer. It thus creates the risk of a supplier abusing a clause authorising unilateral variation of the online terms, because consumers are locked in to the transaction.⁴² It further means a clause authorising unilateral cancellation by the supplier is detrimental to the interests of the consumer, as any investment by him of time or money in the service is dependent on continuation of the service.⁴³

³⁹ Hern “I read all the small print on the internet and it made me want to die” *The Guardian*.

⁴⁰ Sony Interactive Entertainment LLC “Terms of Service and User Agreement” (1-4-2019) *PlayStation Network* <<https://www.playstation.com/en-us/network/legal/terms-of-service/>> (accessed 7-11-2019).

⁴¹ Hern “I read all the small print on the internet and it made me want to die” *The Guardian*.

⁴² See Kim *Wrap Contract* 79-80. Also see Comment 1 to Para 3 of the Draft Restatement.

⁴³ This can be illustrated by the American cases of *Young v Facebook* 90 F Supp 2d 1110 (2011) and *Fteja v Facebook Inc* 841 F Supp 2d 829 (SDNY 2012). In both these cases the relevant consumer was willing to incur the legal costs of suing Facebook to invalidate termination of a user account, instead of simply switching to another social media site. In *Fteja*, it was stated that: “Facebook has

Finally, the global nature of online transactions renders clauses relating to choice of law and forum potentially more onerous than transactions between parties of the same nationality. Although transborder trade obviously existed before the internet, the process of globalisation occasioned by widespread internet use has facilitated the ease with which consumers can conclude transborder transactions.⁴⁴ Most South African internet users make regular use of international service providers (such as Google, Facebook and Twitter), and are thus required to accept their terms of service and privacy policies. Provisions in online contracts subjecting any subsequent dispute to a foreign jurisdiction or appointing a foreign legal system as the applicable law can thus frustrate the consumer protection measures recognised or developed in South African law.

The scenarios above clearly illustrate that consumers face unique risks online. The first two characteristics of online contracts, namely the disparity of bargaining power and the overload of information which leads to less transparency and possible deception, relate to procedural issues; whereas the other three characteristics affect specific clauses contained in online contracts. However, it is argued that these issues are interrelated: the root of the problem of unfairness in online contracts can be traced to imperfect (albeit not necessarily absent) assent and a lack of bargaining power on the part of the consumer, but it results in the inclusion of substantive terms in these contracts which are detrimental to consumers. Thus, even though the first two characteristics pertain more to procedural issues, they cannot be separated from the characteristics affecting the contents or substance of online contracts.

The discussion below will thus first consider the procedural issues which may influence the quality of consent in the online context.⁴⁵ Although these issues will not lead to an absence of assent (and thus render the contract void), it must be determined whether these aspects will (or should) fall within the category of procedural issues which taint

become a very important means of communication,” and that “being denied access to the world’s largest social networking site caused Fteja ‘harm in all his personal relationships and the ability to communicate’”. See Kim *Wrap Contracts* 169-172 for a discussion of the *Young* case (although her discussion focuses on the unreasonableness of the termination clause).

⁴⁴ See S Eiselen “E-Commerce” in D van der Merwe, A Roos, T Pistorius, S Eiselen & S Nel (eds) *Information and Communications Technology Law 2ed* (2016) 149 182.

⁴⁵ See 4 3 below.

consent to such an extent that this could provide sufficient justification for voiding the contract. If not, the possibility remains that these aspects might still be relevant when the substantive fairness of contract terms is evaluated.

After considering current legal measures aimed at ensuring contractual fairness (in South Africa,⁴⁶ American⁴⁷ and the EU⁴⁸), specific clauses in online contract that are affected by the last three characteristics will be discussed.⁴⁹ While it is impossible to identify all the clauses in online contracts which might be problematic, the study identifies specific clauses that are affected by these characteristics. These include clauses relating to the use of personal information and consumer-generated content,⁵⁰ clauses affected by the ongoing nature of online contracts (such as unilateral variation and unilateral termination clauses)⁵¹ and clauses affected by the global nature of online contracts (such as choice-of-law and choice-of-forum clauses).⁵²

4 3 Exploitation of bargaining power and deceptive practices in online contracts

4 3 1 Introduction

The discussion in the previous chapter focused on whether the parties reached actual or deemed consent in respect of an online contract; if they did not, the contract is void due to not meeting the requirement of agreement or consensus. However, as mentioned above, it is possible that a contract can be voidable where such consent was present, but was obtained in an improper manner.⁵³ In this regard, two aspects regarding the process of formation must be considered in the context of online contracts: (i) the adhesive nature of online contracts and weak bargaining position of consumers, which results in consumers lacking meaningful choice in respect of contractual terms;⁵⁴ and (ii) the effect of the lack of transparency and possible

⁴⁶ See 4 4 below.

⁴⁷ See 4 5 below.

⁴⁸ See 4 6 below.

⁴⁹ See 4 7 below.

⁵⁰ See 4 7 2 below.

⁵¹ See 4 7 3 below.

⁵² See 4 7 4 below.

⁵³ See 4 1 above.

⁵⁴ At 4 3 2 below.

deceptive practices by online suppliers.⁵⁵ As stated above, the focus of this analysis is two-fold: it asks whether these issues will (or should) render an online contract voidable, and it determines what the effect of these issues on the evaluation of the substantive fairness of the resulting contracts will be.

4 3 2 Lack of choice and inequality of bargaining power

As mentioned above, the adhesive nature of online contracts means that consumers have no option but to contract on the supplier's terms if they wish to transact online. In light of the fact that online consumers are not able to influence the terms to which they are ultimately bound,⁵⁶ it can be questioned whether their consent to these terms, although valid, is truly voluntary. There are various ways of responding to this challenge.

4 3 2 1 *Expanding the definition of duress*

First, according to Kim, the definition of duress⁵⁷ should at times be expanded to also apply in situations where consumers have no choice but to accept the terms of an online contract.⁵⁸ She proposes the following three requirements for this defence, which she terms "situational duress":

"(1) a drafting company uses an electronic contract to block consumer access to a product or service; (2) the consumer has a "vested interest" in that product or service; and (3) the consumer accepts the terms because she was blocked from the product or service after attempting to reject or decline them."⁵⁹

According to Kim, the vested interest requirement will be satisfied where a consumer has already paid for the product (thus in the case of a "pay now, terms later" contract) or where the service is used to store consumer content, such as email providers or social media sites.⁶⁰ This proposed solution is thus very limited in scope: it only applies in electronic contracting scenarios and only where the consumer has already invested

⁵⁵ At 4 3 3 below.

⁵⁶ See 4 2 above.

⁵⁷ The American notion of duress is contained in the Restatement (Second) of Contract paras 174-175. Also see EA Farnsworth *Contracts* 3 ed (1999) 264-273.

⁵⁸ NS Kim "Situational Duress and the Aberrance of Electronic Contracts" (2014) 89 *Chicago-Kent LR* 265.

⁵⁹ 279.

⁶⁰ 279.

time or money in the product or service offered by the supplier. Because of the consumer's sunk costs, terminating the relationship does not offer a viable alternative to the consumer, who is consequently forced to accept the terms. Thus, even though the supplier can lawfully terminate the contract,

“[t]he wrongfulness of [his] conduct derives from the fact that the threatened party was forced to accept the contract, not from any inherent wrongfulness of the act threatened. Thus, a coercer's threats may be wrongful, even though the threatened action would have been legal”.⁶¹

It is difficult to reconcile a defence of situational duress, as proposed by Kim, with the reluctance displayed by South African courts to accept that consent was given under duress. In terms of South African law, a contract might be set aside based on duress if a party gives his consent due to a reasonable fear of imminent or inevitable evil.⁶² The threat of harm must also be unlawful.⁶³ The requirements are strict,⁶⁴ and the defence has only succeeded as a cause of action in a limited number of cases.⁶⁵ Although the possibility of economic duress has been recognised in South African law,⁶⁶ the Supreme Court of Appeal has held that

“hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more - which is absent in this case - would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress.”⁶⁷

⁶¹ 281.

⁶² See *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 5 SA 339 (SCA) para 6; *Broodryk v Smuts NO* 1942 TPD 47 53; *Arend v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C) 305-306; G Glover “The Test for Duress in the South African Law of Contract” (2006) 123 SALJ 98.

⁶³ See *Broodryk v Smuts NO* 1942 TPD 47 51-52; J du Plessis “Section 40” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 40-1 40-7.

⁶⁴ For the requirements of duress, see *BOE Bank Bpk v Van Zyl* 2002 5 SA 165 (C) para 36; *Arend v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C) 306. For the requirements of undue influence, see *BOE Bank Bpk v Van Zyl* 2002 5 SA 165 (C) para 37; *Patel v Grobbelaar* 1974 1 SA 532 (A) 534.

⁶⁵ Glover 2006 SALJ 99.

⁶⁶ *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 5 SA 339 (SCA).

⁶⁷ Para 18.

In a later case, the court found a threat to withhold payment where the one party was aware of the financial pressure experienced by the other could amount to an unconscionable exercise of influence.⁶⁸ However, the judge added that:

“I have no doubt that it is entirely permissible for one party to exploit the economic weakness of the other when a genuine settlement of a disputed indebtedness is involved, but it is quite another thing when an economically powerful party withholds what is admittedly owing to an economically weaker party, in order to seek commercial advantage.”⁶⁹

These cases indicate that although the possibility exists for recognising economic duress in our law as a ground for setting aside a contract,⁷⁰ more will be needed than some form of exploitation or taking advantage of unequal (and even grossly uneven) bargaining power. There has to be an unlawful threat of harm, or exploitation of weakness where a person’s will is pliable and he is in a situation of dependence. It is unlikely that these requirements will be satisfied in the normal online contracting situation, where the threat of termination relates to the lawful exercise of the supplier’s right, and the element of *contra bonos mores* required in terms of the common law will therefore also generally be lacking.⁷¹ However, where a supplier threatens to breach a contract in order to force the consumer to agree to a variation of the agreement, this might be construed as an unlawful threat and could qualify as duress if the consumer can show why termination of the agreement was not possible.⁷²

The common-law position relating to duress is not explicitly altered by the Consumer Protection Act 68 of 2008 (CPA). Section 40(1) of the CPA prohibits “unconscionable

⁶⁸ *Gerolomou Constructions (Pty) Ltd v Van Wyk* 2011 4 SA 500 (GNP) para 18-24. It has been averred that although the case refers to undue influence, the true basis is rather economic duress (Hutchison “Improperly Obtained Consensus” in *The Law of Contract* 145 n 202).

⁶⁹ Para 24.

⁷⁰ See G Glover “Developing a Test for Economic Duress in the South African Law of Contract: A Comparative Perspective” (2006) 123 *SALJ* 285 285-314 for a discussion regarding the possible development of the South African law pertaining to economic duress.

⁷¹ See Glover 2006 *SALJ* 289, who indicates that threats of an economic nature have not explicitly been recognised as *contra bonos mores* in South African law. The online contracting situation described above would also not fit into either of the categories identified by him, i.e. threats of dismissal, strikes and lock-outs or threats to commit breach (290).

⁷² Du Plessis “Section 40” in *Commentary on the CPA* 40-8. Also see the discussion at 4 7 3 2 below.

conduct”.⁷³ Unconscionable conduct is described as conduct which is “unethical or improper to a degree that would shock the conscience of a reasonable person”,⁷⁴ and means a supplier may not “use physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct”.⁷⁵ Unlike the American doctrine of unconscionability, which has both a procedural and substantive component,⁷⁶ section 40(1) of the CPA is concerned primarily with procedural unfairness.⁷⁷ Although the list contained in that section is broader than the two grounds recognised in the common law, it does not specifically include economic duress. Bradfield argues that depending on the interpretation of this clause, it might not substantially alter the common-law position.⁷⁸ This might be due partly to the fact that lawyers are prone to interpret the terminology in accordance with established and familiar concepts.⁷⁹

The introduction of a defence in South African law similar to Kim’s idea of situational duress will thus require a rather drastic adaptation of the common law, or alternatively legislative intervention. In light of the fact that South African courts are hesitant to expand the ambit of economic duress, a common-law development of this idea of situational duress is doubtful.

4 3 2 2 *Bargaining power as a factor to determine substantive fairness*

Secondly, in terms of American law, there is the possibility that depriving a consumer of a meaningful choice due to the inequality of bargaining power could amount to

⁷³ S 40(1) of the CPA, read with s 1. Also see the discussion of s 40(2) and its interaction with s 52 later in this section.

⁷⁴ S 1 of the CPA.

⁷⁵ S 40(1) of the CPA. See Du Plessis “Section 40” in *Commentary on the CPA* 40-4 - 40-9 for a detailed discussion of each of these terms.

⁷⁶ See ch 3 (3 5 2 n 379) above, as well as 4 5 1 below.

⁷⁷ See Du Plessis “Section 40” in *Commentary on the CPA* 40-1; G Glover “Section 40 of the Consumer Protection Act in Comparative Perspective” 2013 *TSAR* 689 694.

⁷⁸ GB Bradfield *Christie’s Law of Contract* 7ed (2016) 24.

⁷⁹ 24-25.

procedural unconscionability.⁸⁰ The aim of the unconscionability doctrine is to protect an unwitting consumer⁸¹ in a weak bargaining position,⁸² and

“[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. ... In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.”⁸³

Courts will thus consider whether the signatory could make a meaningful choice, taking into account the bargaining positions of the parties.⁸⁴ As discussed in more detail below, procedural unconscionability is merely one dimension of the unconscionability doctrine; a court still needs to consider substantive unconscionability.⁸⁵ These “two elements operate on a sliding scale such that the more significant one is, the less significant the other need be.”⁸⁶ This means that a procedurally unconscionable contract or clause can still be enforced if the terms are not substantively unconscionable, unless it meets the requirements for another doctrine such as misrepresentation or duress.⁸⁷ Courts will thus generally not find a contract unenforceable due to the consumer’s lack of bargaining power, but the extent to which courts will allow unfair bargains will depend on the measure of choice enjoyed by the party against whom the clause operates.⁸⁸

⁸⁰ CS Winter "The Rap on Clickwrap: How Procedural Unconscionability is Threatening the E-Commerce Marketplace" (2008) 18 *Widener LJ* 249 261.

⁸¹ 261-262.

⁸² E Canino "The Electronic 'Sign-in-Wrap' Contract: Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability" (2016) 50 *UC Davis LR* 535 559.

⁸³ *Williams v Walker-Thomas Furniture Co* 350 F 2d 445 (DC Cir 1965) 449-450.

⁸⁴ Winter 2008 *Widener LJ* 261.

⁸⁵ See 4 5 1 below.

⁸⁶ *Comb v PayPal Inc* 218 F Supp 2d 1165 (ND Cal 2002) 1172. Also see H Daiza "Wrap Contracts: How They Can Work Better for Businesses and Consumers" (2018) 54 *Cal W LR* 202 226-228; Para 5(a) of the Draft Restatement: "In determining that a contract or a term is unconscionable, a greater degree of one of the elements in this subsection means that a lesser degree of the other element is sufficient to establish unconscionability".

⁸⁷ *Comb v PayPal Inc* 218 F Supp 2d 1165 (ND Cal 2002) 1172; *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 392; Farnsworth *Contract* 312; Comment 3 to Para 5 of the Draft Restatement.

⁸⁸ See 4 5 1 below. Also see RL Dickens "Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases" (2007) 11 *Marq Intell Prop LR* 379 403.

In terms of South African law, unequal bargaining power in itself will similarly not constitute grounds for setting aside a contract. Case law indicates that something more is required than superior bargaining power,⁸⁹ and it is difficult to conceive that this additional element will generally be present in online contracts. If a contract could be set aside based solely on the fact that one party enjoyed very little bargaining power, it would render almost all contracts concluded between suppliers and consumers voidable.⁹⁰ However, unequal bargaining power can play an indirect role in analysing the enforceability of a clause, for example by factoring into a court's determination of whether a term or the enforcement thereof is contrary to public policy.⁹¹ This enquiry does not only take into account the reasonableness of the term, but also the circumstances of its formation.⁹² In *Afrox Healthcare Bpk v Strydom*,⁹³ the court regarded it as self-evident that:

“ongelykheid in die bedingingsmag van die party tot 'n kontrak op sigself nie die afleiding regverdig dat 'n kontrakbeding wat tot voordeel van die 'sterkter' party is, noodwendig teen die openbare belang sal wees nie. Terselfdertyd moet aanvaar word dat ongelyke bedingingsmag wel 'n faktor is wat, tesame met ander faktore, by die oorweging van die openbare belang 'n rol kan speel.”⁹⁴

In *Barkhuizen v Napier*,⁹⁵ the Constitutional Court also confirmed that:

“If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties. In *Afrox* the Supreme Court of Appeal recognised that unequal bargaining power is indeed a factor that together with other

⁸⁹ See n 67 above.

⁹⁰ See L Hawthorne "The Principle of Equality in the Law of Contract" (1995) *THRHR* 157 170.

⁹¹ The role of public policy is discussed below at 4 4 2.

⁹² *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 35, 65; Bradfield *Christie's Law of Contract* 14.

⁹³ 2002 6 SA 21 (SCA).

⁹⁴ Para 12: “inequality in the bargaining power of the parties to a contract in itself does not justify the inference that the contractual provision which is to the benefit of the 'stronger' party, will necessarily be against public interest. At the same time it must be accepted that unequal bargaining power is a factor which, together with other factors, can play a role in considering public interest.” (own translation).

⁹⁵ 2007 5 SA 323 (CC).

factors plays a role in the consideration of public policy. This is a recognition of the potential injustice that may be caused by inequality of bargaining power.”⁹⁶

Although the South African common law has not developed quite to the extent reflected in the sliding scale approach found in American law,⁹⁷ courts recognise that where the contract rests on a procedural foundation weakened by a consumer’s lack of bargaining power, more substantive scrutiny of the terms are called for.⁹⁸

4 3 2 3 *The provisions of the Consumer Protection Act 68 of 2008*

A final consideration relating to the lack of bargaining power enjoyed by online consumers, is whether a supplier will fall foul of the provisions of the CPA by taking advantage of this weakness. Section 40(2) of the CPA, deals with situations where the consumer is unable to protect his interests due to a pre-existing weakness, and a supplier knowingly takes advantage of that weakness.⁹⁹ It reads as follows:

“In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that a consumer was substantially unable to protect the consumer’s own interests because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.”

In the typical online contracting situation, the consumer’s possible ignorance regarding the terms is the only factor from the list mentioned in section 40(2) that could feasibly apply. It can be argued that based on common human experience, the supplier should be aware of the consumer’s ignorance of the terms and that the supplier can thus try to take advantage of this ignorance. However, section 40(2) requires actual knowledge by the supplier, and does not pertain to situations where the supplier should reasonably have known of a pre-existing weakness of the consumer.¹⁰⁰ The section is further

⁹⁶ Para 59.

⁹⁷ See J du Plessis “Lessons from America? A South African Perspective on the Draft Restatement of the Law, Consumer Contracts” (2019) 31 *SA Merc LJ* 189 207.

⁹⁸ Also see *Basson v Chilwan* 1993 3 SA 742 (A) 762-763, where the majority remarked that: “Where parties to an agreement in restraint of trade contract on a basis of equality of bargaining power, without one party being inhibited by what might be regarded as a position of inferiority as against the other party, Courts, it has been held, will be less inclined to find that a clause, which may be considered to work unreasonably *inter partes*, is contrary to public policy and therefore unenforceable, than in the case where one of the parties may well be considered to have contracted from a position of inferiority.”

⁹⁹ See Du Plessis “Section 40” in *Commentary on the CPA* 40-3.

¹⁰⁰ 40-13.

aimed at deliberate conduct, and there is no duty on the supplier to enquire whether the consumer is, for example, illiterate.¹⁰¹ A online supplier cannot reasonably be expected to be aware of personal characteristics of a specific consumer, due to the lack of personal interaction between the consumer and supplier.

Even if it can be shown that the supplier knew of the consumer's ignorance, it is still required that he took advantage of that fact. Presumably, in this context "taking advantage of" means that the supplier uses the consumer's ignorance to include oppressive terms in the online contract. Although the section does not specifically require that unfair or unreasonable contract terms must be provided, it is difficult to fathom how a supplier can be said to take advantage of a consumer's ignorance of the online contract where he offers fair terms. Therefore, it is submitted that this section cannot find application if the contractual terms are not substantively unfair.

If it is alleged that a contractual term is unconscionable in terms of section 40, section 52 of the CPA provides that a court must consider *inter alia* the relationship between the parties (including their bargaining position)¹⁰² and the extent of negotiations between them¹⁰³ to make a finding. The same applies for terms which are alleged to be deceptive (in terms of section 41) or unfair, unreasonable or unjust (in terms of section 48); these provisions are discussed in more detail later.¹⁰⁴ In a sense, section 52 does not radically alter the common-law position: where a consumer lacked the power to negotiate the terms of a contract, the court will be more inclined to refuse enforcement and scrutinise the substantive fairness of the terms (and specifically whether it could be deemed unconscionable, unfair, unreasonable or unjust) more closely. However, the CPA grants courts a wider power than the common law where a contract is found to be unconscionable, unjust, unreasonable or unfair; in those circumstances a court may make any order it considers just and reasonable.¹⁰⁵

¹⁰¹ T Naudé & E de Stadler "The Consumer Protection Act 68 of 2008" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 443 461.

¹⁰² S 52(2)(b) of the CPA.

¹⁰³ S 52(2)(e) of the CPA.

¹⁰⁴ At 4 3 3 and 4 4 3 respectively.

¹⁰⁵ S 51(3) of the CPA.

4 3 3 Misrepresentation and deceptive practices

Suppliers also take advantage of the omnipresent nature of online contracts and the fact that it is impractical for consumers to study lengthy contract terms through deceiving consumers by “hiding” terms in online contracts. Situations where terms are surprising and give rise to a material error were considered in the previous chapter.¹⁰⁶ If the deception takes the form of false advertising inducing a (mere) mistake in motive, this could constitute a misrepresentation.¹⁰⁷ This is similar to the offline situation, and it is thus not necessary to reconsider the general principles regarding a misrepresentation specifically in the context of online contracts. However, a notable exception is where suppliers advertise their services for free, but require consumers to authorise use of their personal information in return for access to the service. This scenario will be discussed below.

The main consideration in this context is whether a lack of transparency¹⁰⁸ or deceptive practice that does not fall within the recognised doctrines of mistake or misrepresentation will have any effect on the court’s evaluation of a term’s fairness. In other words, the question is whether courts faced with determining the substantive fairness of a term will take into account the fact that consumers cannot reasonably be expected to read online contracts, and that this provides an opportunity for online suppliers to unobtrusively include adverse terms. For example, if a court has to determine whether a term allowing the supplier (such as Google) to track a consumer’s online activity is enforceable, should the court consider the fact that the website gave no indication that this authorisation is required and that a consumer will have to study various documents to find this authorisation unobtrusively hidden in the terms?

American law again deals with this as part of the enquiry into procedural unconscionability. This enquiry is generally said to consist of prongs: oppression or

¹⁰⁶ See ch 3 (3 4 6 and 3 6 4).

¹⁰⁷ See *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A) 905-906; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A) 316-317, where the court discusses *Shepherd v Farrell's Estate Agency* 1921 TPD 62; *Janowski v Fourie* 1978 3 SA 16 (O) 22.

¹⁰⁸ See PN Stoop "The Consumer Protection Act 68 of 2008 and Procedural Fairness in Consumer Contracts" (2015) 18 *PELJ* 1092 1094-1097 for a discussion on transparency.

lack of meaningful choice (which was discussed above),¹⁰⁹ and unfair surprise.¹¹⁰ The second prong, that of unfair surprise, considers whether the terms are apparent to consumers.¹¹¹ It thus “involves the extent to which the supposedly agreed terms were hidden from the party seeking to avoid enforcement of the agreement.”¹¹² Like unequal bargaining power, the fact that a term is surprising will therefore be taken into account when determining whether a term is unenforceable because it is unconscionable.¹¹³

The South African common law does not provide a similar basis for considering whether a consumer should have been aware of a term when evaluating the substance thereof; instead unexpected terms are treated as a formation problem.¹¹⁴ However, the position under the CPA might be different. The factors listed in section 52(2), which a court must consider to determine whether a contract is unconscionable, unreasonable, unjust or unfair, include the extent to which the supplier used plain and understandable language as contemplated in section 22,¹¹⁵ and “whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement”.¹¹⁶ A term which is obscure – either due to the use of “[u]nintelligible language and small print”¹¹⁷ or because of the supplier’s failure to draw the consumer’s attention to a surprising term – is thus more likely to be deemed unfair in terms of the CPA.¹¹⁸

We now turn to the factual situation mentioned above, which could constitute a possible misrepresentation. This is where services and downloads are advertised for free, but

¹⁰⁹ See 4 3 2 above.

¹¹⁰ See Official Comment 1 to UCC s 2-302; Para 5(b)(2) of the Draft Restatement. Also see Canino 2016 *UC Davis LR* 558; Winter 2008 *Widener LJ* 261.

¹¹¹ Canino 2016 *UC Davis LR* 560.

¹¹² *Motsinger v Lithia Rose-FT Inc* 156 P 3d 156 (Or Ct App 2007) 160 (also quoted in *Chalk v T-Mobile USA Inc* 560 F 3d 1087 (9th Cir 2009) 1093-1094).

¹¹³ Also see 4 5 1 below.

¹¹⁴ See ch 3 (3 4 6).

¹¹⁵ S 52(2)(g) of the CPA.

¹¹⁶ S 52(2)(h) of the CPA.

¹¹⁷ RD Sharrock “Judicial Control of Unfair Contract Terms: The Implications of Consumer Protection Act” (2010) 22 *SA Merc LJ* 295 313.

¹¹⁸ T Naudé “Section 52” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 52-1 52-17; Sharrock 2010 *SA Merc LJ* 313.

the online contract provides that the user relinquishes data in return for its use.¹¹⁹ It can be argued that the term “free” means nothing has to be given in return.¹²⁰ If the offer then depends on performance by the consumer by allowing use of his personal data, this reference to something being “free” could amount to a misrepresentation.¹²¹

The view that access to personal information constitutes a form of consideration or *quid pro quo* enjoys academic support in America¹²² and also seems to be accepted in EU law.¹²³ However, American courts have not been willing to view personal data as a form of payment.¹²⁴ Furthermore, despite regulating offers advertised as free,¹²⁵ the American Federal Trade Commission allows use of the term “free” by sites such as Facebook.¹²⁶ Although American law recognises the common-law doctrine of misrepresentation,¹²⁷ the failure to recognise relinquishing rights to use of data as a form of compensation indicate that American courts are unlikely to view the advertising of an online service as free as constituting a misrepresentation.

This position might possibly be changed by the Draft Restatement, which provides that a contract or term could be unenforceable where it results from a deceptive act or practice by the supplier.¹²⁸ Two acts are listed as deceptive: making a representation

¹¹⁹ See ch 2 (2 4 3). Also see Hoofnagle & Whittington 2014 *UCLA LR* 606.

¹²⁰ See DA Friedman “Free Offers: A New Look” (2008) 38 *New Mexico LR* 49.

¹²¹ 49.

¹²² See Hoofnagle & Whittington 2014 *UCLA LR*; M Loos & J Luzak “Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers” (2016) 39 *Journal of Consumer Policy* 63 67; Leib & Eigen 2017 *U Ill LR* 96; E Mik 2016 *Singapore J Leg Stud* 70 77.

¹²³ See Art 3(1) and Recodal 24 of Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain Aspects concerning Contracts for the Supply of Digital Content and Digital Services (the Directive for the Supply of Digital Content). Also see n 300 below. See further, in general, G Malgieri “‘User-Provided Personal Content’ in the EU: Digital Currency between Data Protection and Intellectual Property” (2018) 32 *International Review of Law, Computers & Technology* 118.

¹²⁴ *In Re Facebook Privacy Litigation* 791 F Supp 2d 705 (N D Cal 2011). Also see Hoofnagle & Whittington 2014 *UCLA LR* 658.

¹²⁵ Federal Trade Commission *Guide Concerning Use of the Word ‘Free’ and Similar Representations* (1971) Part 251.

¹²⁶ Hoofnagle & Whittington 2014 *UCLA LR* 656.

¹²⁷ See Farnsworth *Contracts* 241-276. This is also contained in Para 164 of the Restatement (Second) of Contract.

¹²⁸ Para 6(a) of the Draft Restatement, read with para 9.

inconsistent with standard terms or obscuring a charge.¹²⁹ Deception is, however, not limited to these acts and the reporters' notes to Paragraph 6 indicate that:

"Deception should be understood broadly to encompass not only outright fraud, but any act or practice that is likely to mislead the reasonable consumer."¹³⁰

The section is thus closely related to misrepresentation. The main difference identified by the reporters is that a deceptive act does not necessarily render the entire contract voidable, but depending on the circumstances could only invalidate the specific clause.¹³¹

The reporters to the Draft Restatement further state that:

"A business is acting deceptively when it induces consumers to enter a contract and accept an obligation to pay without their knowledge. Such is the case when consumers receive unsolicited products that are reasonably perceived to be provided for free, and when the obligation to pay for these products appears only in the standard contract terms."¹³²

However, it is not indicated whether the reference to payment only applies to monetary payment, or also compensation by way of relinquishing other rights. Thus, the Draft Restatement gives no clear answer on whether this form of advertising will be recognised as deceptive.

Whether South African courts will be willing to view this practice as a misrepresentation is uncertain. A misrepresentation can be described as a false statement of past or present fact relating to the subject matter or circumstances of an envisioned contract, made by one contracting party to the other at or before the time of contracting conclusion.¹³³ In terms of South African law, the contract may be voidable if it causes an error in motive and the requirements for a misrepresentation are met;¹³⁴ whereas a material (and reasonable) mistake may render the contract void.¹³⁵ In the former case

¹²⁹ Para 6(b) of the Draft Restatement.

¹³⁰ Reporters' Notes to Para 6 of the Draft Restatement 106.

¹³¹ Comment 8(a) to Para 6 of the Draft Restatement.

¹³² Reporters' Notes to Para 6 of the Draft Restatement 106.

¹³³ See *Feinsten v Niggli* 1981 2 SA 684 (A) 695; Hutchison "Improperly Obtained Consensus" in *The Law of Contract* 120.

¹³⁴ Hutchison "Improperly Obtained Consensus" in *The Law of Contract* 118. The requirements are set out in *Novick v Comair Holdings Ltd* 1979 2 SA 116 (W) 149-150.

¹³⁵ This was discussed in ch 3 (3 3).

the consumer's claim may be thwarted if the online contract contains a no representations clause, but if the CPA applies such a clause will be invalid.¹³⁶

However, even where the advertising of online services or downloads as "free" where it requires the consumer to pay with information instead of money does not qualify as a misrepresentation in terms of the common law, it must be considered whether this practice nonetheless falls foul of the provisions in the CPA. Section 29 of the CPA provides that a supplier must not market any goods or services:

- “(a) in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services, as contemplated in section 41; or
- (b) in a manner that is misleading, fraudulent or deceptive in any way, including in respect of
 - (i) the nature, properties, advantages or uses of the goods or services;
 - (ii) the manner in or conditions on which those goods or services may be supplied;
 - (iii) the price at which the goods may be supplied, or the existence of, or relationship of the price to, any previous price or competitor's price for comparable or similar goods or services;”¹³⁷

Section 41 deals with false, misleading or deceptive representations and provides that supplier must not:

- “(a) directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
- (b) use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
- (c) fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation, or permit or require any other person to do so on behalf of the supplier.”¹³⁸

¹³⁶ S 51(1)(g) of the CPA precludes a term which “falsely expresses an acknowledgement by the consumer that before the agreement was made, no representations or warranties were made in connection with the agreement by the supplier or a person on behalf of the supplier”.

¹³⁷ Subsections (iv) and (v) have been omitted because they are irrelevant to the discussion.

¹³⁸ S 41(1) of the CPA.

Sections 29 and 41 seem to require stricter disclosure by the supplier than common-law rules relating to misrepresentation. For example, statements by a supplier which amount to mere praise or commendation of his goods (puffery) do not constitute a misrepresentation under the common law,¹³⁹ but might be described as using “exaggeration” and would thus be deceptive in terms of section 41 of the CPA.¹⁴⁰ However, this is qualified by the requirement that the exaggeration must be in respect of a material fact.¹⁴¹ Because the provisions of the CPA regarding deceptive practices are broader than the common-law notion of a misrepresentation, it is possible that despite not amounting to a misrepresentation, the practice might still not meet the general standard prescribed by the CPA for the marketing of goods and services. The form of marketing can possibly be regarded as being misleading or deceptive in respect of the conditions on which the goods or services are supplied;¹⁴² or be considered deceptive due to the ambiguity in the manner it is advertised.¹⁴³ As mentioned above, the court must take into account the factors set out in section 52(2), such as the disparity of bargaining power and lack of negotiations to make this determination.¹⁴⁴ However, this is still dependent on courts recognising that data can constitute a valid form of compensation.

A false, misleading or deceptive representation can also be considered unfair, unreasonable or unjust in terms of section 48(2)(c) of the CPA if the consumer relied upon it to his detriment. However, the legislature does not make it clear what the role of this traditionally procedural issue is in a clause dealing with substantive fairness, or how this clause interacts with section 41 (which deals with false, misleading or deceptive representations).¹⁴⁵

¹³⁹ *Phame v Paizes* 1973 3 SA 397 (A) 418.

¹⁴⁰ See Naudé & De Stadler “The Consumer Protection Act” in *Law of Contract* 461; Stoop 2016 *PELJ* 1100.

¹⁴¹ J du Plessis “Section 41” in in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 41-1 41-7.

¹⁴² See s 29(b)(ii) of the CPA.

¹⁴³ See s 41(1)(b) of the CPA.

¹⁴⁴ See 4 3 2 above.

¹⁴⁵ See T Naudé “Section 48” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 48-13 48-19.

4 3 4 Conclusion

It is evident from the discussion above that online contracts lend themselves to more subtle forms of procedural irregularities than traditional instances of improperly obtained consent. Instead of making a false statement, an online supplier could deceive a consumer by taking advantage of his failure to understand the monetary value attached to his personal information,¹⁴⁶ or use the lack of transparency inherent in online contracts to insert terms which are detrimental to the interests of the consumer. And instead of exerting pressure by establishing a personal relationship of dependence, a supplier can exploit the consumer's desire to use online services and his inability to influence or meaningfully compare the terms of online contracts.

The subtler forms of procedural irregularities identified in the online context will generally not cause a contract to be voidable in terms of the traditional rules regarding improperly obtained consensus. It is also not argued here that this should be the case, for if unequal bargaining power in itself was sufficient grounds for setting aside a contract, consumers would be virtually unable to contract with suppliers.

The main concern with regard to the consumer's lack of negotiating power and his ignorance surrounding contractual terms is that it provides suppliers with the opportunity to exploit consumers' dependence by inserting oppressive and one-sided clauses in the contract.¹⁴⁷ It can thus lead to substantively unfair terms. Therefore,

“[i]t is probably fair to say that unfairness in the making of a contract is generally related to the problem of inequality of bargaining power, which is a problem that has long troubled contract lawyers throughout the world because it often seems unfair to enforce a contract when it is obvious that the one party was in such a weak bargaining position that consent, even if genuine, was at best reluctant.”¹⁴⁸

It is not unequal bargaining power in itself that is the problem, but rather the abuse of it by the supplier. Recognising the lack of negotiations and consumer ignorance inherent in online contracts can provide justification for courts to interfere in the contractual relationship between the parties to ensure fairness – a notion that is given

¹⁴⁶ See Daiza 2018 *Cal W LR* 212: “Consumers’ confidential information is a proprietary interest that they usually and unknowingly forfeit”.

¹⁴⁷ Kim *Wrap Contracts* 28.

¹⁴⁸ Bradfield *Christie’s Law of Contract* 14.

effect to in American law through the “sliding scale” approach to unconscionability. It is also accepted in South African law that the balance of power can play a role in considering substantive fairness, although this idea is not as well developed as the American position. This idea is also reflected in the provisions of the CPA relating to unfair, unreasonable or unjust contract terms, although the CPA does not expressly provide for a sliding scale.¹⁴⁹ An obscure term is also more likely to be regarded as unfair in terms of the CPA than one pertinently brought to the attention of the consumer.

4 4 The South African approach to control over substantively unfair contract terms

4 4 1 Introduction

The previous section dealt with the control mechanisms that aim to ensure consent to online contracts is obtained in a proper manner, and with the effect that procedural irregularities might have on the substantive evaluation of contractual terms. The focus in this section is on the content of the eventual contract, and the extent to which courts may intervene if the terms of a contract are unfair towards the consumer.

It is recognised in the South African common law that terms could be contrary to public policy if their content or enforcement is substantively unfair.¹⁵⁰ In addition to this rule, legislation protects consumers against unfair and unreasonable terms.¹⁵¹ The most important legislation in this regard is the CPA, which *inter alia* shields consumers from unfair contract terms and practices, such as those found in standard form contracts.¹⁵²

Common-law rules and legislation regulating the enforcement of potentially unfair contract terms are not the only legal mechanisms that can protect consumers from harsh standard terms. Other common-law rules, like the rules of interpretation, also

¹⁴⁹ Also see Du Plessis 2019 *SA Merc LJ* 207.

¹⁵⁰ See *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).

¹⁵¹ T Naudé “Unfair Contract Terms Legislation: The Implications of Why We Need It for Its Formulation and Application” (2006) 17 *Stell LR* 371.

¹⁵² See specifically ss 48 and 51 of the CPA, together with reg 44 of the Regulations to the Consumer Protection Act 68 of 2008 in GN R293 in *GG 34180* of 2011-04-01 (CPA Regulations).

fulfil this function to a certain extent.¹⁵³ Terms which deprive consumers of their common-law rights are generally construed narrowly.¹⁵⁴ Furthermore, the *contra proferentem* rule holds that where a term in a contract is ambiguous, it should be interpreted against the drafter of the contract.¹⁵⁵ This rule aims to ensure that the supplier cannot hide unfair terms by couching them in ambiguous language¹⁵⁶ and thus functions as an indirect method of consumer protection.¹⁵⁷ The purpose of interpretation, and the extent to which it can serve as a vehicle to ensure fairness, has been the subject of some debate.¹⁵⁸ Although it is not denied that in some circumstances interpretation can play an important role in ensuring a fair outcome for consumers, an in-depth discussion of the rules of interpretation falls outside of the ambit of this chapter, where the focus is on the extent to which the law polices the content of terms based on their procedural and substantive unfairness.

Some specific issues which commonly arise in the context of online contracts, such as the protection of personal information, have also been recognised by the legislature. For example, the Protection of Personal Information Act 4 of 2013 (POPI) and the Electronic Communications and Transactions Act 25 of 2002 (ECTA)¹⁵⁹ both contain provisions aimed at the protection of consumers' personal information. They will thus

¹⁵³ E Kahn, C Lewis & C Visser *Contract and Mercantile Law: A Source Book 1 - General Principles of Contract; Agency and Representation 2* ed (1988) 34.

¹⁵⁴ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 9. Also see P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 34; JH Braun *Policing Standard Form Contracts in Germany and South Africa: A Comparison* LLM thesis University of Cape Town (2005) 37.

¹⁵⁵ Kahn et al *Contract and Mercantile Law* 34; Aronstam *Consumer Protection* 35; Braun *Policing Standard Form Contracts* 37.

¹⁵⁶ Aronstam *Consumer Protection* 35.

¹⁵⁷ H Kötz "Controlling Unfair Contract Terms: Options for Legislative Reform" (1986) 103 *SALJ* 405 407. Also see *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 (SA) 323 (SCA) 30-32.

¹⁵⁸ See F Myburgh "Thomas Kuhn's Structure of Scientific Revolutions, Paradigm Shifts, and Crises: Analysing Recent Changes in the Approach to Contractual Interpretation in South African Law" (2017) 134 *SALJ* 514; M Wallis "What's in a Word? Interpretation Through the Eyes of Ordinary Readers" (2010) 127 *SALJ* 673; C Lewis "The Demise of the *Exceptio Doli*: Is there another Route to Contractual Equity?" (1990) 107 *SALJ* 26 (these views are also repeated in C Lewis "The Uneven Journey to Certainty in Contract" (2013) 76 *THRHR* 80 90).

¹⁵⁹ See s 51 of ECTA, although this will be repealed when POPI comes into effect (see s 110 read with Schedule to POPI).

be discussed in the context of online contracts to the extent that they apply to specific problematic terms.¹⁶⁰

4 4 2 The role of good faith and public policy

South African courts are reluctant to interfere with contractual relationships, due to the importance attached to the principles of freedom of contract and *pacta servanda sunt*.¹⁶¹ Although these are two distinct principles – the first relating to the freedom to decide whether to contract, with whom and on what terms; and the latter to the sanctity of the resulting contract¹⁶² – they are interrelated and often used interchangeably.¹⁶³ Because the distinction is not pertinent to the discussion at hand, the term “freedom of contract” will be used below as an umbrella term incorporating both notions.

However, courts have acknowledged the need to intervene where a contract is harsh and oppressive.¹⁶⁴ Two common-law principles could form the basis of this intervention: either the principle of good faith or that of public policy.¹⁶⁵

Although good faith plays an important role in South African contract law,¹⁶⁶ it does not operate as a “free-floating” principle, but rather serves as an underlying value which

¹⁶⁰ See 4 7 below.

¹⁶¹ See the case law at n 185 below. Also see G Glover “Contract, Good Faith, the Constitution and Duress: Contextualising the Doctrine” in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 101 110; HC Tembe *Problems regarding Exemption Clauses in Consumer Contracts: The Search for Equitable Jurisprudence in the South African Constitutional Realm* LLD thesis University of Pretoria (2017) 7.

¹⁶² D Hutchison “The Nature and Basis of Contract” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 3 24.

¹⁶³ See for example *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 32: “public policy requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken (freedom of contract doctrine or *pacta sunt servanda*”.

¹⁶⁴ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51.

¹⁶⁵ For a general exposition of the role of good faith and public policy in South African contract law, see Hutchison “Nature and Basis of Contract” in *Law of Contract* 27-34.

¹⁶⁶ See *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 22; J du Plessis “Giving Practical Effect to Good Faith in the Law of Contract” (2018) 29 *Stell LR* 379 379; Bradfield *Christie’s Law of Contract* 12-23; Hutchison “Nature and Basis of Contract” in *Law of Contract* 29-31; T Floyd “Legality” in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3ed (2017) 181 191-193.

informs the specific rules and principles in the law of contract.¹⁶⁷ Good faith can therefore not be relied on directly by a court as a rule or standard to impugn a contractual provision, but it rather “perform(s) a creative, informative and controlling [function] through established rules of contract law”.¹⁶⁸ Cameron AJ confirmed that

“neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.”¹⁶⁹

Public policy or the *boni mores*, on the other hand, can serve as a basis for setting aside an unfair contract.¹⁷⁰ This is given effect to through the requirement of legality: a contract of which the terms or enforcement is contrary to public policy is regarded as illegal, and thus unenforceable.¹⁷¹ Public policy imports notions of “fairness, justice and reasonableness”¹⁷² and will thus prevent the enforcement of contractual terms “which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience”.¹⁷³ The majority in *Barkhuizen v Napier*¹⁷⁴ envisioned a two-step enquiry to determine the legality of a

¹⁶⁷ *Brisley v Drotksy* 2002 4 SA 1 (SCA) para 22; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 32. Also see *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.

¹⁶⁸ *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) 339. Also see FDJ Brand “The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution” (2009) 126 *SALJ* 71 81.

¹⁶⁹ *Brisley v Drotksy* 2002 4 SA 1 (SCA) para 93.

¹⁷⁰ *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 8; Bradfield *Christie’s Law of Contract* 18; R Sharrock & L Steyn “The Problem of the Illiterate Signatory: *Standard Bank of South Africa Ltd v Dlamini*” (2014) 26 *SA Merc LJ* 150 159; Brand 2009 *SALJ* 74; PJ Sutherland “Ensuring Contractual Fairness in Consumer Contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC) - Part 1” (2008) 19 *Stell LR* 390 411. For a recent exposition of the SCA’s approach to public policy, see *AB v Pridwin Preparatory School* 2019 1 SA 327 (SCA) para 27.

¹⁷¹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891; Brand 2009 *SALJ* 75. For a list of cases where a contract or term was regarded as contrary to public policy, see ADJ van Rensburg, JG Lotz, TAR van Rhijn & RD Sharrock “Contract” in WA Joubert & JA Faris (eds) *LAWSA* 93 ed (2014) para 336 n 7.

¹⁷² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 73.

¹⁷³ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 8. Also see *Brisley v Drotksy* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC); *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 617.

¹⁷⁴ 2007 5 SA 323 (CC).

particular contractual clause: it must first be established whether the clause itself is, on the face of it, so unreasonable as to contravene public policy, and secondly, if it is not so unreasonable, whether enforcing the clause in the particular circumstances would be inconsistent with public policy.¹⁷⁵

Public policy is said to be an expression of society's interest,¹⁷⁶ which is now informed by the Constitution of the Republic of South Africa, 1996 (the Constitution).¹⁷⁷ Consequently, Brand avers that in order to avoid a contractual obligation on constitutional grounds, the usual method is to aver infringement of a specific constitutional guarantee.¹⁷⁸ For example, a time-bar clause can be challenged based on the right of access to a court found in section 34 of the Constitution.¹⁷⁹

Historically, courts have been circumspect in exercising this power,¹⁸⁰ and courts will not refuse enforcement merely because the provision is onerous or unfair.¹⁸¹ In *Sasfin (Pty) Ltd v Beukes*¹⁸² the court cautioned that:

“The power to declare contracts contrary to public policy should be ... exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power.”¹⁸³

The Supreme Court of Appeal has remained steadfast in its view that “[t]he fact that a term in a contract is unfair or may operate harshly does not by itself lead to the

¹⁷⁵ Paras 56-59.

¹⁷⁶ See *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Brisley v Drotksy* 2002 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).

¹⁷⁷ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 7; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 30; *Brisley v Drotksy* 2002 4 SA 1 (SCA) 163.

¹⁷⁸ Brand 2009 SALJ 84. Also see *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 28: “when the validity of a contractual term is challenged on the basis that it is contrary to public policy one needs to make that determination by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights.”

¹⁷⁹ See *Barkhuizen v Napier* 2007 5 SA 323 (CC).

¹⁸⁰ See Hawthorne 1995 *THRHR* 173.

¹⁸¹ *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) paras 50-51, 53; *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (C) 827.

¹⁸² 1989 1 SA 1 (A).

¹⁸³ 9 (also quoted in *Basson v Chilwan* 1993 3 SA 742 (A) 762).

conclusion that it offends the values of the Constitution or is against public policy”.¹⁸⁴ Its reluctance to interfere in a contract between the parties, whether negotiated or not, stems from the court’s commitment to the principle of freedom of contract.¹⁸⁵

The Constitutional Court has also recognised that freedom of contract forms an essential part of the constitutional values of freedom and dignity.¹⁸⁶ Nevertheless, this Court is more amenable to allowing equitable considerations to override the principle of freedom of contract than the Supreme Court of Appeal.¹⁸⁷ For example, the majority in *Botha v Rich*¹⁸⁸ asked whether the enforcement of a cancellation clause would be “fair and thus constitutionally compliant.”¹⁸⁹ As a result of this “apparent disjuncture between the approaches of the two top courts”,¹⁹⁰ there is uncertainty with regard to the enforcement of terms which are either perceived as unfair *per se* or where the

¹⁸⁴ *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA) para 30. Also see *AB v Pridwin Preparatory School* 2019 1 SA 327 (SCA) para 27; *Oregon Trust v BEADICA* 231 CC 2019 4 SA 517 (SCA) para 33.

¹⁸⁵ *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 32; *Wells v South African Alumenite Company* 1927 AD 69 73: “[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.’ (Per Jessel MR in *Printing & Numerical Registering Company v Sampson* (1875) L.R. 19 Eq at p. 465.)”; *SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A) 767: “die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word” (“the elementary and foundational principle that contracts concluded freely and seriously by competent parties should be enforced in the public interest” (own translation)); *Sasfin v Beukes* 1989 1 SA 1 (A) 9: “public policy generally favours the utmost freedom of contract”; Hutchison “Nature and Basis of Contract” in *Law of Contract* 23..

¹⁸⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57. Also see *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 22-23; *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 94.

¹⁸⁷ See *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 51, 73; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) paras 22-24, 71-72; *Botha v Rich* 2014 4 SA 124 (CC) paras 24, 45-46. See further the discussion of these conflicting approaches in D Hutchison “From *Bona Fides* to Ubuntu: The Quest for Fairness in the South African Law of Contract” 2019 *Acta Juridica* 99 110-123.

¹⁸⁸ 2014 4 SA 124 (CC).

¹⁸⁹ Para 24. Despite such general statements, it has been argued that the case should be understood within its specific legislative framework (see L Boonzaier “Rereading *Botha v Rich*” (2020) 137 *SALJ* (forthcoming) 6-10).

¹⁹⁰ Hutchison 2019 *Acta Juridica* 121.

circumstances render their enforcement unduly harsh or unreasonable.¹⁹¹ It thus remains to be seen how courts will balance freedom of contract with substantive fairness.

Although a detailed comparison of these divergent approaches falls outside the ambit of this dissertation, it can be questioned whether freedom of contract, especially on the part of the consumer, truly exists in the case of standard form contracts.¹⁹² In *Barkhuizen v Napier*,¹⁹³ Sachs J acknowledged that:

“Prolix standard-form contracts undermine rather than support the integrity of what was actually concluded between the parties. It may be said that far from promoting autonomy, they induce automatism.”¹⁹⁴

He also emphasised the increased role of the state in ensuring fairness and equity, even where it requires interference in private contractual relationships.¹⁹⁵

Sutherland agrees that:

“the importance of sanctity of contract has often been overstated in South Africa. The time is ripe to reconsider this principle against the backdrop of the Constitution, the importance of the state in the regulation of the economy and the need for consumer protection.”¹⁹⁶

To this list can be added the reality of standard form contracts, and more specific to the current discussion, the lack of consumer awareness and bargaining power inherent in online contracts. Yet, despite these concerns, courts have not adapted the public

¹⁹¹ 123.

¹⁹² K Hopkins "Standard-Form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice Versus Natural Justice" 2003 *TSAR* 150 156: “the inequality of society and the disparity of wealth that exists in South Africa render the liberty of all contractants something of a fallacy.” Also see Hutchison “Nature and Basis of Contract” in *Law of Contract* 25: “none [of the recent developments] has done more to undermine genuine freedom of contract than the emergence of the standard-form contract”.

¹⁹³ 2007 5 SA 323 (CC).

¹⁹⁴ Para 155.

¹⁹⁵ Para 154. Also see PJ Sutherland “Ensuring Contractual Fairness in Consumer Contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC) - Part 2” (2009) 20 *Stell LR* 50 53.

¹⁹⁶ Sutherland 2009 *Stell LR* 53.

policy test when dealing with standard form contracts,¹⁹⁷ apart from recognising that bargaining power plays a role in establishing the extent to which the consumer could exercise true freedom of contract.¹⁹⁸

Public policy can thus serve to protect a variety of interests, if the contract is “inimical to a constitutional value or principle, or otherwise contrary to public policy”¹⁹⁹ and the “harm to the public is substantially incontestable”.²⁰⁰ Some of these interests have particular relevance in the online environment, for example the right to privacy or access to courts, and will be discussed in that context below.²⁰¹ However, to evaluate the approach of South African courts to these issues – specifically the link between substantial and procedural factors, and the interests which require substantive protection in the context of online contracts – a comparative perspective may be of value and will thus be undertaken below.²⁰² But first, the extent to which consumer legislation provides protection to a South African consumer contracting on standard form will be considered.

4 4 3 Consumer legislation

Section 48 of the CPA prohibits suppliers from offering terms that are “unfair, unjust or unreasonable”. These concepts are not explicitly defined in the CPA,²⁰³ but the CPA

¹⁹⁷ Eiselen already opined in 1988 that “howe as gevolg van oormatige en eensydige beklemtoning van die kontrakteervryheidsleer nie gewillig sal wees om die [geoorloofdheids]reëls met betrekking tot die beperking van die handelsvryheid uit te brei na gevalle waar standaardbedinge misbruik word nie” (*Standaardbedinge* 165: “courts would be unwilling to extend the [legality] rules relating to the restraint of trade to cases involving abuse of standard terms due to excessive and one-sided emphasis of the freedom of contract doctrine” (own translation)).

¹⁹⁸ See 4 3 2 2 above. Also see Sharrock & Steyn 2014 *SA Merc LJ* 160: “It is well established that inequality of bargaining power is a material factor when determining whether a contract or its enforcement is contrary to public policy”, with reference to *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) 35; *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57, 59 ; *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 5 SA 205 (WCC) para 33: “There is no doubt in my mind that in determining the weight to be attached to the values of freedom and dignity and equality the extent to which the contract was freely and voluntarily concluded will be a vital factor”.

¹⁹⁹ *AB v Pridwin Preparatory School* 2019 1 SA 327 (SCA) para 27.

²⁰⁰ Para 27.

²⁰¹ See 4 7 below.

²⁰² See 4 7 below.

²⁰³ Bradfield *Christie’s Law of Contract* 362-363.

provides that an agreement or term will be unfair, unreasonable or unjust if, amongst other things, it is “excessively one-sided in favour of any person other than the consumer” or its terms are “so adverse to the consumer as to be inequitable”.²⁰⁴ It has been argued that

“Although the legislature tried to give some indication as to their meaning of ‘unfair’, ‘unreasonable’ and ‘unjust’, it failed not only to clearly and comprehensively define the words, but also to provide a guideline regarding the interpretation of these concepts.”²⁰⁵

As mentioned above, section 52(2) provides a list of factors that a court must consider when determining whether a clause is unfair, unreasonable or unjust.²⁰⁶ These factors focus mainly on procedural issues,²⁰⁷ such as the relationship between the parties (including their relative bargaining positions)²⁰⁸ and whether the term was reasonably expected,²⁰⁹ both of which were discussed above. The extent to which the term was negotiated is also listed as one of the factors that courts must consider when determining the unfairness of a term.²¹⁰ Although the provisions in the CPA aimed at preventing unfair terms are not limited to non-negotiated provisions,²¹¹ courts might intuitively distinguish between negotiated and non-negotiated terms, and apply a stricter test to invalidate the former.²¹²

The CPA thus seems to accept that the procedural background of a term should influence its substantive evaluation. However, it is not clear what the importance of

²⁰⁴ S 48(2) read with s 49(1) of the CPA. Naudé notes that the first guideline (“excessively one-sided”) aids in the understanding of what is meant by unfairness by indicating to a lack of reciprocity; whereas the second (“inequitable”) is no more than a synonym for unfair (Naudé “Section 48” in *Commentary on the CPA* 48-18 – 48-19).

²⁰⁵ Y Mupangavanhu “Fairness a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008” (2015) *DJ* 116 131. Also see Bradfield *Christie’s Law of Contract* 25; T Naudé “The Consumer’s Rights to Fair, Reasonable and Just Terms under the new Consumer Protection Act in Comparative Perspective” (2009) 126 *SALJ* 505 516; Sharrock 2010 *SA Merc LJ* 308.

²⁰⁶ See 4 3 2 and 4 3 3 above.

²⁰⁷ Naudé “Section 52” in *Commentary on the CPA* 52-6–52-7.

²⁰⁸ S 52(2)(c) of the CPA. Also see the discussion at 4 3 2 above.

²⁰⁹ S 52(2)(h) of the CPA. Also see the discussion at 4 3 3 above.

²¹⁰ S 52(2)(e) of the CPA.

²¹¹ T Naudé “Introduction to S 48-52 and Reg 44” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 48-1 48-2.

²¹² Naudé “Introduction to S 48-52 and Reg 44” in *Commentary on the CPA* 48-3-48-4.

these procedural considerations are, and a “sliding scale” approach in terms of which a higher degree of procedural unfairness requires heightened substantive scrutiny of the terms is not expressly endorsed.²¹³ Although the CPA gives courts the power to declare terms invalid based purely on their unfairness, a standard which is not unequivocally accepted under the common law,²¹⁴ it remains to be seen how courts will apply these terms and to what extent they will be hamstrung by the historic importance placed on freedom of contract.²¹⁵

The CPA also contains a so-called black list of prohibited clauses in section 51, and the regulations to the CPA contain a grey list of terms which are presumptively unfair, but must still be tested in terms of the general clause.²¹⁶ A court enjoys wide powers under the CPA to order relief to the consumer where it declares a term to be unfair, unreasonable or unjust.²¹⁷

Lastly, the CPA provides that ambiguous terms must be interpreted in a manner that promotes consumer rights.²¹⁸ Practically in the case of standard form contracts, this would mean the terms are interpreted against the supplier. This provision should thus have a similar effect to the *contra proferentem* rule referred to above.²¹⁹ Unlike the common-law rule, however, the effect of this provision cannot be contractually excluded.²²⁰

An interesting question, which is particularly relevant in practice, is whether the CPA will also apply to online transactions where the exchange of money does not take place. This question will arise where the online terms give permission to harvest the user’s data as the only compensation for use of the online services, for example the use of Facebook’s “free” services. As mentioned above, the American Federal Court found that users of free online services do not qualify as “consumers” as contemplated in Californian consumer protection laws, and thus do not enjoy the protection afforded

²¹³ See Du Plessis 2019 *SA Merc LJ* 207.

²¹⁴ See 4 4 2 above. Also see Naudé “Section 48” in *Commentary on the CPA* 48-30.

²¹⁵ See 4 4 2 above, and specifically n 185.

²¹⁶ Reg 44 of the CPA Regulations.

²¹⁷ S 52(3) of the CPA.

²¹⁸ S 4(3) of the CPA.

²¹⁹ See 4 4 1 above.

²²⁰ S 51(1)(b)(i) of the CPA.

by those laws.²²¹ However, the European Commission seems to recognise that compensation can include providing personal information to the supplier.²²²

In terms of the CPA, a “transaction” requires the supply of goods or services in exchange for consideration.²²³ Consideration is defined as:

“anything of value given and accepted in exchange for goods or services, including

- (a) money, property, a cheque or other negotiable instrument, a token, a ticket, electronic credit, credit, debit or electronic chip or similar object;
- (b) labour, barter or other goods or services;
- (c) loyalty credit or award, coupon or other right to assert a claim; or
- (d) any other thing, undertaking, promise, agreement or assurance,

irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly, or involves only the supplier and consumer or other parties in addition to the supplier and consumer”.²²⁴

This definition is very broad, and subsection (d) seems intended as a catch-all provision. The CPA further provides that its provisions must be interpreted in a manner that gives effect to its purposes,²²⁵ which includes the promotion of fair business practices,²²⁶ and protecting consumers from “unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices”²²⁷ and “deceptive, misleading, unfair or fraudulent conduct”.²²⁸ It is thus likely that a court will include an online transaction within the ambit of CPA where, instead of monetary compensation, the consumer relinquishes rights or data.²²⁹

²²¹ See 4 3 3 above. Also see *In Re Facebook Privacy Litigation* 791 F Supp 2d 705 (N D Cal 2011); Hoofnagle & Whittington 2014 *UCLA LR* 658.

²²² See n 123 above.

²²³ See the definition of “transaction” in s 1 of the CPA.

²²⁴ S 1 of the CPA.

²²⁵ S 2(1) of the CPA.

²²⁶ S 3(1)(c) of the CPA.

²²⁷ S 3(1)(d)(i) of the CPA.

²²⁸ S 3(1)(d)(ii) of the CPA.

²²⁹ See Loos & Luzak 2016 *Journal of Consumer Policy* 67, who suggests that the European Consumer Rights Directive will also apply to providers of “free” online services.

4 4 4 Concluding remarks

The need to protect consumers against unfair terms in standard form contracts is, to some extent at least, recognised and addressed in our law. However, both the common-law rules and legislation, with the exception of ECTA, are not specifically aimed at the online environment, or even at standard terms in general. It is thus necessary to analyse these measures in the context of online contracts to identify the areas where they fall short, and may require remedial action. This will be done below by way of comparative evaluation.²³⁰ A brief overview of the American and EU provisions relating to unfair contract terms will thus first be provided.

4 5 The American approach to control over substantively unfair contract terms

4 5 1 The doctrine of unconscionability

The doctrine of unconscionability serves as the primary mechanism employed by American courts to police potentially unfair terms.²³¹ It was originally adopted in Section 2-302 of the Uniform Commercial Code (UCC), which reads as follows:

“§ 2–302. Unconscionable Contract or Clause.

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.”

To determine whether a contract is unconscionable, courts generally require a combination of procedural and substantive unconscionability.²³² The former relates to

²³⁰ See 4 7 below.

²³¹ R Korobkin "Bounded Rationality, Standard Form Contracts and Unconscionability" (2003) 70 U Chi LR 1203 1256.

²³² RA Hillman & JJ Rachlinski "Standard-Form Contracting in the Electronic Age" (2002) 77 NYU LR 429 457; MJ Radin *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013) 124-125. Also see Para 5(b) of the Draft Restatement.

the manner in which agreement was reached, whereas the latter is concerned with the content of the terms itself, and thus considers the substantive effect of the term.²³³ The two elements of the unconscionability doctrine – namely procedural and substantive unconscionability – are closely interrelated and a court will usually consider both in order to invalidate a contract because of its unconscionability.²³⁴ In the case which pioneered the unconscionability doctrine, it was stated that:

“Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.”²³⁵

In other words, where two parties negotiate on equal footing, they are free to agree to a very one-sided deal.²³⁶ In those instances, freedom of contract should triumph over substantive fairness. However, if one of the parties possesses little to no bargaining power, there is much less justification for enforcing extremely unfair terms.

The doctrine of unconscionability is also incorporated in the Draft Restatement. The Draft Restatement indicates that a term might be deemed procedurally unconscionable if it amounts to unfair surprise or if the consumer was deprived of meaningful choice.²³⁷ It is unclear whether these terms provide an exhaustive definition, or whether they are only intended to serve as examples of procedural unconscionability.²³⁸ It is also uncertain how these terms relate to the notion of salience (discussed below), which the reporters of the Draft Restatement emphasise as an important consideration in

²³³ See for example Ghirardelli 2015 *Oregon LR* 743-744.

²³⁴ See n 86 above. Also see Hillman & Rachlinski 2002 *NYU LR* 457; Radin *Boilerplate* 125.

²³⁵ *Williams v Walker-Thomas Furniture Co* 350 F 2d 445 (DC Cir 1965) 449-450.

²³⁶ Reporters' Notes to Para 5 of the Draft Restatement 89.

²³⁷ Para 5(b)(2) of the Draft Restatement: “A contract or a term is unconscionable if at the time the contract is made it is ... [p]rocedurally unconscionable, because it results in unfair surprise or results from the absence of meaningful choice on the part of the consumer”.

²³⁸ Du Plessis points out that comment 6(a) to Para 5 of the Draft Restatement states that procedural unconscionability entails defects in the bargaining process “like a surprising and unexpected term, or lack of meaningful choice” (2019 *SA Merc LJ* 205).

determining procedural unconscionability. However, they reflect the main aim of the unconscionability doctrine as stated in the Official Comment to the UCC, namely the prevention of “oppression and unfair surprise”.²³⁹

A contract may be deemed procedurally oppressive where there is no real negotiation due to the unequal bargaining power of the parties.²⁴⁰ The nature of online contracts implies that this will almost always be the case.²⁴¹ The surprise element will be satisfied if a term is not apparent to the consumer.²⁴² This will be the case where contract terms are deceptively arranged (which includes situations where their arrangement obscures the fact that the consumer is concluding a contract, a typical problem with online contracts)²⁴³ or deviate from the dominant purpose of the contract.²⁴⁴ Generally, both oppression and surprise must be shown to render a contract procedurally unconscionable, although some states merely require one element to be present.²⁴⁵

Balancing the protection afforded to an uninformed consumer with the duty to read that is generally imposed on contracting parties²⁴⁶ has led to contradictory case law regarding the requirements for procedural unconscionability. Some courts view all adhesion contracts as procedurally unconscionable,²⁴⁷ whereas others consider

²³⁹ Official Comment 1 to UCC s 2-302. Also see Canino 2016 *UC Davis LR* 558; Winter 2008 *Widener LJ* 261.

²⁴⁰ Canino 2016 *UC Davis LR* 559. Also see *Motsinger v Lithia Rose-FT Inc* 156 P 3d 156 (Or Ct App 2007) 160: “Oppression arises when there is inequality in bargaining power between the parties to a contract, resulting in no real opportunity to negotiate the terms of the contract and the absence of meaningful choice.” (Quoted in *Chalk v T-Mobile USA Inc* 560 F 3d 1087 (9th Cir 2009) 1093-1094). Also see 4 3 2 above.

²⁴¹ Canino 2016 *UC Davis LR* 560.

²⁴² See text to nn 111 and 112 above.

²⁴³ AM Balloon “From Wax Seals to Hypertext: Electronic Signatures, Contract Formation and a New Model for Consumer Protection in Internet Transactions” (2001) 50 *Emory LJ* 905 914; Canino 2016 *UC Davis LR* 560.

²⁴⁴ Balloon 2001 *Emory LJ* 914.

²⁴⁵ Canino 2016 *UC Davis LR* 560.

²⁴⁶ See ch 3 (3 5 2). Also see M Robertson “Is Assent still a Prerequisite for Contract Formation in Today’s E-economy?” (2003) 78 *Wash LR* 265 273.

²⁴⁷ *Comb v PayPal Inc* 218 F Supp 2d 1165 (ND Cal 2002) 1172: “The procedural component is satisfied by the existence of unequal bargaining positions and hidden terms common in the context of adhesion contracts. The substantive component is satisfied by overly harsh or one-sided results that

factors such as the consumer's sophistication, the availability of market alternatives and how much notice was given to the consumer to determine whether a standard form contract is procedurally unconscionable.²⁴⁸ In an earlier draft, the reporters of the Draft Restatement specifically provided that the fact that a term is non-negotiable does not in itself satisfy the test for procedural unconscionability;²⁴⁹ but have subsequently refined their position by indicating that:

"A finding of procedural unconscionability based solely on the fact that a term was presented in standard, non-negotiable form, without more, constitutes the lowest quantum of procedural unconscionability and would have to be matched with a high degree of substantive unconscionability to render the contract or term unenforceable."²⁵⁰

The reporters of the Draft Restatement advocate the use of "salience" as an underlying test to determine procedural unconscionability – i.e. whether a reasonable consumer would be aware of or expect the term in the contract, to the extent that it would affect his contracting decision.²⁵¹ The reason for excluding salient terms from heightened scrutiny is that:

"When a contract term is salient to purchasers, the market can be trusted to provide an efficient version of the term: Absent fraud, duress, or significant third-party externalities, no judicial intervention is necessary. When a contract term is non-salient to most purchasers, the market check on seller overreaching is absent, and courts should be suspicious of the resulting term."²⁵²

In other words, the underlying idea is that a substantial number of consumers base their contracting decisions on salient terms and therefore competition and market forces provide sufficient regulation in respect of salient terms. This form of regulation fails in the case of non-salient terms, and thus courts need to police the term by

'shock the conscience'; *Bragg v Linden Research Inc* 487 F Supp 2d 593 (ED Pa 2007); Winter 2008 *Widener LJ* 272.

²⁴⁸ *Feldman v Google Inc* 513 F Supp 2d 229 (ED Pa 2007) 240-241; Winter 2008 *Widener LJ* 272; Farnsworth *Contract* 312.

²⁴⁹ See Comment 6 to Para 5 of the 2017 Discussion Draft of the Draft Restatement.

²⁵⁰ Comment 6(a) to Para 5 of the Draft Restatement.

²⁵¹ Comment 6(b) to Para 5 of the Draft Restatement; Reporters' Notes to Para 5 of the Draft Restatement 97.

²⁵² Korobkin 2003 *U Chi LR* 1207. Also see HG Beh "Curing the Infirmities of the Unconscionability Doctrine" (2015) 66 *Hastings LJ* 1011 1038.

deeming it procedurally unconscionable.²⁵³ The subjective knowledge of the particular consumer is irrelevant for determining salience,²⁵⁴ instead it entails an objective test which aims to determine to what extent the market regulates a term.²⁵⁵

Certain factors can assist a court in determining whether a term can be deemed salient. Core terms, such as the price, will generally be salient.²⁵⁶ Boilerplate terms, on the other hand, are less likely to come to the consumer's attention.²⁵⁷ Disclosing a term in a prominent manner can assist in rendering it salient: a provision hidden in the fine-print of an online contract is less likely to affect contracting decisions than one prominently displayed in a banner on the supplier's website. However, salience requires more than mere disclosure,²⁵⁸ and it must be shown that the term affected the contracting decision of a significant number of consumers.

Relying on salience can circumvent some of the problems experienced with more subjective measures typically used to determine lack of meaningful choice and surprise, especially those arising from the duty to read. For example, whether the consumer could obtain the product from other suppliers is a factor which plays a role in determining a lack of meaningful choice, and thus procedural unconscionability.²⁵⁹ Consequently, it has been said that the supplier can defeat a claim of unconscionability

²⁵³ Reporters' Notes to Para 5 of the Draft Restatement 97. Also see the discussion below at 4 5 1.

²⁵⁴ See Korobkin 2003 *U Chi LR* 1234.

²⁵⁵ Comment 7(a) to Para 5 of the Draft Restatement. The 2017 Discussion Draft was more assertive in this regard, and stated that: "The procedural-unconscionability test, as it relates to consumers' knowledge of the term, is an objective test: did the term, in the market context in which it was presented, affect the contracting decisions of a substantial number of consumers?" (Comment 7 to Para 5). This has been watered down in the 2019 Tentative Draft to merely indicate that a consumer's subjective knowledge of a terms will not preclude a finding of procedural unconscionability.

²⁵⁶ Maxeiner 2003 *The Yale Journal of International Law* 174.

²⁵⁷ The 2017 Discussion Draft of the Draft Restatement indicated a presumption of non-salience in the case of standard terms (Comment 6 to Para 5). The 2019 Tentative Draft merely states that non-core standard contract terms will ordinarily not affect the contracting decisions of a large percentage of consumers (Comment 6(c) to Para 5 of the Draft Restatement). Also see Korobkin 2003 *U Chi LR* 1229.

²⁵⁸ Reporters' Notes to Para 5 of the Draft Restatement 97-98.

²⁵⁹ Dickens 2007 *Marq Intell Prop LR* 403.

where the product was also available to the consumer through other suppliers.²⁶⁰ However, this fails to take into account that expecting consumers to compare the online terms of various suppliers could be unreasonable, for the same reasons that expecting the consumer to read the terms are unreasonable.²⁶¹ If salience is used as a criterion instead, only terms which influence the contracting decisions of consumers and thus lend themselves to proper comparison can be rendered procedurally fair based on the availability of market alternatives.

Although there might be benefits in relying on salience, the reporters do not point to any case law which have applied this test. Its practical operation is thus still uncertain and the market's effectiveness in preventing unfair terms has been questioned.²⁶²

As mentioned above, procedural unconscionability by itself will not be sufficient to render a contract unconscionable; substantive unconscionability is also required. Courts apply a high standard for substantive unconscionability, requiring that the term must be so appalling that it "shock[s] the conscience".²⁶³ Consequently, the doctrine has only found application in a relatively small number of cases²⁶⁴ and is often not successful in achieving fairness.²⁶⁵ Kim points out that courts are generally reluctant

²⁶⁰ See *Brower v Gateway 2000 Inc* 676 NYS 2d 569 (NY App Div 1998) 572: "Although the parties clearly do not possess equal bargaining power, this factor alone does not invalidate the contract as one of adhesion ... with the ability to make the purchase elsewhere and the express option to return the goods, the consumer is not in a 'take it or leave it' position at all". Also see Dickens 2007 *Marq Intell Prop LR* 403.

²⁶¹ See ch 3 (specifically 3 2 2 1 and 3 6 4).

²⁶² See the criticism against the use of salience in the letter by 23 state attorneys general to the members of ALI dated 14-5-2019 (available at <https://ag.ny.gov/sites/default/files/letter_to_ali_members.pdf> (accessed 7-11-2019)) 6-7; and the letter by 26 consumer organisations to the ALI Council dated 10-1-2018 (available at <<https://www.nclc.org/images/pdf/udap/26-ali-comments-council-draft-4.pdf>> (accessed 7-11-2019)).

²⁶³ *Wayne v Staples Inc*. 37 Cal Rptr 3d 544 (Cal Ct App 2006) 555; Hillman & Rachlinski 2002 *NYU LR* 461; Daiza 2018 *Cal W LR* 227.

²⁶⁴ Some studies estimate the number to be only 14 cases in a ten-year period (Maxeiner 2003 *The Yale Journal of International Law* 121). Also see RL Oakley "Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts" (2005) 42 *Houston LR* 1041 1064.

²⁶⁵ Oakley 2005 *Houston LR* 1062.

to declare contractual terms unenforceable where the consumer had notice of the terms and the opportunity to read them.²⁶⁶ Lloyd also states that

“unconscionability is a blunt instrument. It is designed to deal with terms so egregious that a court cannot in good conscience enforce them. It does not deal with the much larger universe of terms that are merely unfair.”²⁶⁷

The Draft Restatement provides that a contract or term is substantively unconscionable if it is “fundamentally unfair or unreasonably one-sided”²⁶⁸ or falls within a specified list of terms.²⁶⁹ Although the reference to unfairness seems to contemplate a somewhat lower threshold than the current standard for substantive unconscionability (which requires more than unfairness),²⁷⁰ the comment to the Draft Restatement indicates that the doctrine is only meant to prevent extreme one-sidedness.²⁷¹ A term will only be unconscionable if the supplier cannot show reasonable justification for its inclusion or that the harsh effect of the term is matched by countervailing benefit to the consumer.²⁷² Concerns have been raised that the test for substantive unconscionability in the Draft Restatement “sets an overly high standard”²⁷³ and that the doctrine will consequently fail to provide sufficient protection to consumers.

²⁶⁶ Kim *Wrap Contracts* 88.

²⁶⁷ RM Lloyd “The Circle of Assent Doctrine: An Important Innovation in Contract Law” (2006) 7 *Transactions: Tenn J of Bus Law* 237 263 (footnotes omitted).

²⁶⁸ Para 5(b)(1) of the Draft Restatement.

²⁶⁹ Para 5(c) of the Draft Restatement.

²⁷⁰ Maxeiner 2003 *The Yale Journal of International Law* 119; T Tasker & D Pakcyk “Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements” (2008) 18 *Albany LJ of Sci & Tech* 79 123.

²⁷¹ Comment 3 to Para 5 of the Draft Restatement.

²⁷² Comment 3 to Para 5 of the Draft Restatement.

²⁷³ The letter by 26 consumer organisations to the ALI Council dated 10-1-2018. Also see the letter by the Consumers Union to the Reporters of the Draft Restatement dated 10-10-2018 (available at <<https://advocacy.consumerreports.org/wp-content/uploads/2019/02/CU-letter-to-ALI-consumer-contracts-project-10-10-18-FINAL.pdf>> (accessed 7-11-2019)); the letter by 13 consumer associations to ALI dated 10-1-2018 (available at <https://www.creditslips.org/files/13_national_and_state_organizations_letter_re_council_draft_no_4.pdf> (accessed 7-11-2019)); M Eisenberg “The Proposed Restatement of Consumer Contracts, if adopted, would drive a Dagger through Consumers’ Rights” (20-3-2019) *Yale Journal on Regulation: Notice & Comment* <<http://yalejreg.com/nc/the-proposed-restatement-of-consumer-contracts-if-adopted-would-drive-a-dagger-through-consumers-rights-by-melvin-eisenberg/>> (accessed 7-11-2019).

The consumer generally carries the burden of proving both procedural and substantive unconscionability. The previous version of the Draft Restatement indicated that if substantive unconscionability is proven, the onus falls on the supplier to show that the term is not procedurally unconscionable.²⁷⁴ However, the current draft is silent on the matter.

4 5 2 Good faith and public policy

Paragraph 205 of the Restatement (Second) of Contract imposes “a duty of good faith and fair dealing” in the performance and enforcement of contracts. A similar provision is also contained in the UCC.²⁷⁵ However, it does not relate to the negotiation stage of the contract.²⁷⁶ It thus fails to prevent the inclusion of unfair clauses in consumer contracts, but merely affects the manner in which terms are enforced.²⁷⁷

A contract can also be unenforceable if it contravenes public policy,²⁷⁸ although courts are extremely hesitant to declare contractual terms against public policy.²⁷⁹ Public policy encompasses a wide variety of policy considerations.²⁸⁰ It manifests mostly in policies developed by courts and those derived from legislation.²⁸¹ The broad spectrum of policy considerations cannot all be discussed here, but will be referred to below in so far as they relate to specific problematic aspects of online contracts.²⁸²

²⁷⁴ Comment 10 to Para 5 of the Draft Restatement (2017 Discussion Draft).

²⁷⁵ UCC § 1-304: “Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.”

²⁷⁶ Comment c to para 205 of the Restatement (Second) of Contract. Also see E Houh “The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?” (2005) *Utah LR* 1 3, C Perry “Good Faith in English and US Contract Law: Divergent Theories, Practical Similarities” (2016) 17 *Bus L Int* 27 29.

²⁷⁷ Houh 2005 *Utah LR* 3-4.

²⁷⁸ See Farnsworth *Contracts* 321-322. See Tasker & Pakcyk 2008 *Albany LJ of Sci & Tech* 125-126 for examples of provisions in online contracts which might contravene public policy.

²⁷⁹ F Kessler “Contracts of Adhesion - Some Thoughts About Freedom of Contract” (1943) 43 *Columbia LR* 629 631.

²⁸⁰ See Tasker & Pakcyk 2008 *Albany LJ of Sci & Tech* 126.

²⁸¹ See Farnsworth *Contracts* 326, 343; F Ghodoosi “The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements” (2016) 94 *Nebraska LR* 685 700.

²⁸² See 4 7 below.

These mostly relate to access to justice considerations, such as forum selection clauses and mandatory arbitration clauses.²⁸³

Terms that are manifestly unjust to the extent that they contravene public policy, will generally also be substantively unconscionable.²⁸⁴ It might be for this reason that public policy seldom features as a primary doctrine used to protect consumers against unfair contract terms,²⁸⁵ and Oakley consequently indicates that in most cases courts only consider unconscionability.²⁸⁶ This is also reflected in judgments concerning online contracts: although the judicial decisions often revolve around the question of unconscionability, public policy is rarely mentioned, except where the issue pertains to access to justice.²⁸⁷ From a comparative perspective, a detailed discussion regarding good faith and public policy is thus not required to evaluate the regulation of online contracts.

4 6 The European approach to control over substantively unfair contract terms

The Council of the European Union has been very pro-active in promoting legislation aimed at consumer protection in its Member States. Discrepancies exist in the way Council Directives and Regulations are implemented by different Member States, and the discussion below is only intended to provide a brief overview of the approach prescribed at Council level.

²⁸³ See RC Anderson “Enforcement of Contractual Terms in Clickwrap Agreements” (2007) 3 *Shidler J L Com & Tech* para 15 <<http://digital.law.washington.edu/dspace-law/handle/1773.1/395?show=full>> (accessed 13-11-2019).

²⁸⁴ Hillman & Rachlinski 2002 *NYU LR* 457. Beh describes unconscionability as “a doctrine steeped in public policy and intended as a judicial tool to root out the evil results of naughty bargaining” (2015 *Hastings LJ* 1041).

²⁸⁵ See Oakley 2005 *Houston LR* 1062, who describe the three primary doctrines as unconscionability, s 211(3) of the Restatement (Second) of Contracts and the doctrine of reasonable expectations. Also see Hillman & Rachlinski 2002 *NYU LR* 456.

²⁸⁶ Oakley 2005 *Houston LR* 1062.

²⁸⁷ See 4 7 4 1 below.

The EU favours a more interventionist approach than America, as demonstrated by various directives aimed at consumer protection.²⁸⁸ The most pertinent of these include the Unfair Contract Terms Directive,²⁸⁹ Consumer Rights Directive,²⁹⁰ Unfair Commercial Practices Directive²⁹¹ and Directive for the Sale of Goods.²⁹² Various other directives and proposed directives also have an impact on specific clauses in online contracts.²⁹³ With regard to protection of personal information of consumers, the General Data Protection Regulation (GDPR)²⁹⁴ was adopted and amendments to the Directive on Privacy and Electronic Communications (ePrivacy Directive)²⁹⁵ were

²⁸⁸ For an overview of all the current and planned measures by the EU aimed at consumer protection see European Legal Studies Institute, Osnabrück University *Contribution to Growth: Legal Aspects of Protecting European Consumers* (2019).

²⁸⁹ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (the Unfair Contract Terms Directive). Also see Oakley 2005 *Houston LR* 1066.

²⁹⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

²⁹¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

²⁹² Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning Contracts for the Sale of Goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

²⁹³ These will be considered below (see 4.7), and include the Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain Aspects concerning Contracts for the Supply of Digital Content and Digital Services (the Directive for the Supply of Digital Content); and Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and related Rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (the Copyright Directive).

²⁹⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and repealing Directive 95/46/EC (General Data Protection Regulation) (GDPR).

²⁹⁵ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, as amended by Directive 2009/136/E of the European Parliament and of the Council of 25 November 2009 (Directive on Privacy and Electronic Communications) (ePrivacy Directive).

proposed to ensure protection of personal data, particularly in the online environment.²⁹⁶

Although most of the regulations and directives aimed at the online environment are adopted under the umbrella of the Digital Single Market strategy,²⁹⁷ the EU follows a rather fragmented approach in which potentially problematic aspects stemming from online transactions are addressed separately. For example, the Directive for the Sale of Goods seeks to ensure that goods are provided in conformity with the contract and are fit for their purpose.²⁹⁸ The Consumer Rights Directive provides for mandatory pre-contractual disclosure and grants consumers the right to withdraw from a transaction.²⁹⁹ Notably, amendments to this directive have recently been suggested, which would subject digital services (for example cloud storage or webmail services), for which the consumer has to provide personal information instead of monetary compensation, to its provisions.³⁰⁰

Ensuring contractual fairness in general, including in online contracts, remains the function on the Unfair Contract Terms Directive. This Directive, which predates the

²⁹⁶ See Cybersecurity & Digital Privacy Policy (Unit H.2) “Digital Privacy” (25-9-2019) *European Commission* <<https://ec.europa.eu/digital-single-market/en/online-privacy>> (accessed 7-11-2019). The provisions of the GDPR and ePrivacy Directive will be discussed below (see 4 7 2 1).

²⁹⁷ For more information on the Digital Single Market, see Digital Policy Development and Coordination (Unit F.1) “Shaping the Digital Single Market” (4-7-2019) *European Commission* <<https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market>> (accessed 7-11-2019). For an overview of the historic development of this project, see A Savin “Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context” (2019) *Copenhagen Business School, CBS LAW Research Paper No. 19-35* 2-6 (available at <<https://ssrn.com/abstract=3474289>>).

²⁹⁸ See arts 6 and 7 of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning Contracts for the Sale of Goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (Directive for the Sale of Goods).

²⁹⁹ Arts 5, 6, 9-16.

³⁰⁰ Art 2(1) of the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better Enforcement and Modernisation of EU Consumer Protection Rules COM(2018) 185 final. Also see Recitals 21, 22 and 24.

age of online contracts, primarily serves to control the content of standard terms.³⁰¹ It sets a minimum standard, and Member States can thus choose to adopt stricter provisions.³⁰² The provisions of the Directive pertain to non-negotiated terms in a contract,³⁰³ and it does not regulate core terms such as the subject matter or price of a transaction.³⁰⁴ It provides for a general clause,³⁰⁵ as well as a list of clauses that are presumptively unfair (a so-called grey list).³⁰⁶ Certain jurisdictions, for example German law, also include a black list of terms that are prohibited without the possibility of review.³⁰⁷

Article 6 of the Unfair Contract Terms Directive provides that unfair terms are unenforceable. To determine the unfairness of a clause in a standard form contract, a court will first establish whether the suspect term is prohibited by the black list. Thereafter, it will be tested in terms of the grey list and, if not prohibited in terms of either these lists, a court will consider whether the general clause will bar its enforcement.³⁰⁸ This general clause reads as follows:

“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”³⁰⁹

It is generally accepted that EU regulation of unfair contract terms is much stricter than the American doctrine of unconscionability.³¹⁰ Yet, the goal of the Unfair Contract Terms Directive is not too different from the unconscionability doctrine:³¹¹ at its core lies the notion that consumers require protection against the risk of suppliers abusing

³⁰¹ Maxeiner 2003 *The Yale Journal of International Law* 134.

³⁰² Art 8 of the Unfair Contract Terms Directive; Maxeiner 2003 *The Yale Journal of International Law* 133-134.

³⁰³ Art 3(1) of the Unfair Contract Terms Directive.

³⁰⁴ Art 4(2) of the Unfair Contract Terms Directive. Also see Oakley 2005 *Houston LR* 1067.

³⁰⁵ Art 3(1) of the Unfair Contract Terms Directive.

³⁰⁶ Art 3(3) read with Annex 1.

³⁰⁷ See s 309 of the Bürgerliches Gesetzbuch (BGB).

³⁰⁸ Maxeiner 2003 *The Yale Journal of International Law* 152.

³⁰⁹ Art 3(1) of the Unfair Contract Terms Directive.

³¹⁰ JK Winn & M Webber “The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants” (2006) 62 *Bus Lawyer* 209 210; Kim *Wrap Contracts* 91-92.

³¹¹ See A Sibony “European Unfairness and American Unconscionability: A Letter from a European Lawyer to American Friends” (2019) 15 *ERCL* 195 198.

their superior bargaining position to include one-sided terms in pre-formulated contracts.³¹² In terms of the Unfair Contract Terms Directive, procedural issues can affect the determination of unfairness in more than one way. First, the requirement of good faith referred to in Article 3(1) imports considerations relating to the bargaining process into the fairness evaluation, such as the relative bargaining positions of the parties.³¹³ Secondly, as Sibony indicates, the transparency standard contained in Articles 4(2) and 5,

“does not only play a role in identifying contract terms whose fairness can be reviewed in all Member States ... [i]t also forms part of the harmonised substantive fairness assessment for all reviewable terms.”³¹⁴

The EU Court of Justice confirmed that

“in the assessment of the ‘unfair’ nature of a term, within the meaning of Article 3 of the Directive, the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the [relevant standard contract terms]³¹⁵ with regard to the fees connected to the service to be provided is of fundamental importance.”³¹⁶

The fact that unfairness is not determined entirely in the abstract (i.e. only with reference to substance) is also supported by Article 4(1), which provides that “the unfairness of a contractual term shall be assessed ... by referring, at the time of

³¹² See Recital 9 of the Unfair Contract Terms Directive; *Océano Grupo Editorial SA v Roció Murciano Quintero* (Joined Cases C-240/98 to C-244/98) 2000 ECR I-4941 para 25 (“the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms”); *Á. Kásler, H. Káslerné Rábai v OTP Jelzálogbank Zrt* (C-26/13) 2014 (CJEU) ECLI:EU:C:2014:282 para 39. Also see Sibony 2019 *ERCL* 198-200.

³¹³ See Recital 16 of the Unfair Contract Terms Directive. Also see Sibony 2019 *ERCL* 205-206.

³¹⁴ Sibony 2019 *ERCL* 218. Also see J Rutgers “Business First. A Comment on the Adoption of Standard Terms under the American Restatement of the Law Consumer Contracts from a European Union Perspective” (2019) 15 *ERCL* 130 134.

³¹⁵ See MBM Loos “Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law” (2015) 23 *ERCL* 179 185.

³¹⁶ *NFH v Invitel Távközlési Zrt* (C-472/10) 2012 (CJEU) ECLI:EU:C:2012:242 (own emphasis).

conclusion of the contract, to all the circumstances attending the conclusion of the contract".³¹⁷

However, as Sibony concedes, the interaction between procedural and substantive elements in terms of Unfair Contract Terms Directive are less pronounced than the clear two-prong approach followed in American law to determine unconscionability, and the role performed by the transparency requirement is not as clear as the American concept of procedural unconscionability.³¹⁸ Whereas it is evident that core terms which are not transparent become susceptible to a fairness review, the consequences for other terms are not specified in the Directive and

“the consequences of a lack of transparency will depend on national law and/or an overall assessment taking all other aspects of unfairness into account.”³¹⁹

In a sense, the enquiry can be said to resemble the South African common-law position more closely than the American approach: although procedural issues can affect the determination of unfairness, procedural and substantive unfairness are not viewed on a sliding scale. It must be kept in mind, however, that unlike either the American or South African position, the Unfair Contract Terms Directive only applies to non-negotiated and non-core terms and thus presupposes at least some measure of procedural unfairness.³²⁰

The Council recognised the possibility of the protection measures contained in the Unfair Terms Directive being contractually excluded in cross-border transactions by way of choice-of-law provisions, and thus enshrined the protection against such clauses for consumers who have “a close connection” with the EU.³²¹

Despite the comparatively high level of protection accorded to EU consumers in terms of the Unfair Contract Terms Directive, the pro-active and interventionist approach followed by EU law in respect of the online environment means that online consumers will not have to resort to its general fairness standard for many of the most pressing

³¹⁷ Art 4(1) the Unfair Contract Terms Directive.

³¹⁸ Sibony 2019 *ERCL* 218.

³¹⁹ Sibony 2019 *ERCL* 218. Also see Loos 2015 *ERCL* 180-181, 185-186.

³²⁰ See Sibony 2019 *ERCL* 204: “the Directive only applies where the minimum quantum of procedural unconscionability required under the Draft Restatement is in any event met.”

³²¹ Art 6(2) of the Unfair Contract Terms Directive.

issues arising from online contracts (such as those related to use of data and online tracking). Instead, these issues will be evaluated in terms of the specific legislative instruments referred to above. This will become apparent in the comparative study below, where the application of the various directives will be considered.

4 7 Comparative evaluation of the control over substantively unfair contract terms in online contracts

4 7 1 Introduction

The discussion above³²² provided a brief overview of the measures recognised in the relevant jurisdictions to ensure substantively fair contract terms. This section will consider their effectiveness in ensuring fairness specifically in the context of online contracts. This will be done by focusing on certain clauses that are commonly inserted in online contracts and that are affected by the characteristics of online contracts identified above.³²³ The first two of these characteristics, namely the inequality of bargaining power and the manner in which the terms are presented, relate to the process of obtaining consensus and have been discussed above.³²⁴ The remaining three characteristics, which relate to creating or increasing the risk of unfairness in online contracts, will be considered here.

The first risk created by online contracts relates to the scope of the terms found in these contracts, and specifically to the inclusion of terms transferring rights to the supplier which are ancillary to the main transaction, and which under the default rules would have been enjoyed by consumer. For lack of a better term, Kim's terminology will be used by referring to these terms as *crook terms*.³²⁵ This is a broad category and may include various terms in online contracts. The discussion will focus on two of the most common issues in this category, namely terms relating to privacy and those regulating the use of consumer-generated content. Secondly, the ongoing relationship between the consumer and the suppliers could render clauses relating to unilateral variation and unilateral termination more onerous. Finally, the global nature of online contracts increases the risk of terms relating to choice-of-law and choice-of-forum

³²² In 4 4 to 4 6 above.

³²³ See 4 2 above.

³²⁴ See 4 3 above.

³²⁵ See Kim *Wrap Contracts* 50-51.

either excluding the remedies available to the consumer or rendering the enforcement of those remedies more difficult.

It is readily conceded that this is not a closed list of clauses affected by the online environment, and the rapidly-changing nature of the internet means any list will in any event require constant updating. The clauses discussed below are also by no means the only problematic ones found in online contracts. For example, clauses excluding or limiting liability appear in the majority of online contracts³²⁶ and can also impact harshly on consumers.³²⁷ However, these clauses are also regularly included in traditional standard form contracts and consequently may already be addressed by consumer legislation.³²⁸ No attributes of the internet have been identified which require special consideration of these clauses in general in the online environment (although there might be isolated exceptions, such as clauses limiting liability to some multiple of the service fees paid by the consumer, whose operation may be affected where non-pecuniary compensation is provided by a consumer, for example in the form of data).³²⁹ They therefore fall outside of the ambit of this discussion.

This is also the position in regard to mandatory arbitration clauses. Despite the fact that a large body of judicial decisions in America regarding online contracts deal with enforcement of mandatory arbitration clauses,³³⁰ no new policy considerations

³²⁶ See CP Marks “Online and ‘As Is’” (2017) 46 *Pepp LR* 1 38-39, who studied the terms of 113 online retailers and found that 85% use some form of implied warranty disclaimer and 94% included a clause limiting liability.

³²⁷ See Loos & Luzak 2015 *Journal of Consumer Policy* 79.

³²⁸ See s 51(1)(c)(i) of the CPA, which prohibits clauses which “limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier”. Also see in general PN Stoop “The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract” (2008) 20 *SA Merc LJ* 496; Y Mupangavanhu “Exemption Clauses and the Consumer Protection Act 68 of 2008: An Assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)” (2014) 17 *PELJ* 1167.

³²⁹ See S Bradshaw, C Millard & I Walden “Contracts for Clouds: Comparison and Analysis of the Terms and Conditions of Cloud Computing Services” (2011) 19 *International Journal of Law and Information Technology* 187 211.

³³⁰ See, for example, *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002); *Bragg v Linden Research Inc* 487 F Supp 2d 593 (ED Pa 2007); *Comb v PayPal Inc* 218 F Supp 2d 1165 (ND Cal 2002); *Harris v Blockbuster* 622 F Supp 2d 396 (ND Tex 2009); *Cullinane v Uber*

regarding their substantive effect specifically pertaining to the online context have been raised. Considerations in respect of allowing or refusing these clauses, such as access to justice, will arise in traditional standard form contracts as well, and the rationale for allowing or denying their enforcement will apply equally in the case of online contracts.³³¹ Again there might be an exception: the global nature of online contracts could result in a foreign forum being selected for arbitration, rendering it impractical for the consumer to pursue a claim. This means that the discussion below regarding choice-of-forum clauses can also apply with regard to arbitrations.³³²

4 7 2 Problematic clauses relating to appropriation of ancillary rights (crook terms)

Let us then now consider the first risk, relating to the scope of online contract, which deals with the exclusion of ancillary rights. Terms that seek to “appropriate” rights for the supplier beyond the scope of the transaction have been particularly problematic in the online environment.³³³ In other words, rights which consumers would otherwise enjoy and do not form part of the core transaction are granted to suppliers through generally unread provisions in online contracts. Kim avers that these terms are not aimed at protecting the supplier, but are “simply an attempt to sneak an entitlement from the user without payment”.³³⁴ She further attributes their frequent inclusion in online contracts to the weightlessness of online contracts, which means that consumers are not deterred by their length.³³⁵ Consequently, there is little to prevent a supplier from adding an ever-increasing number of terms to the contract.

Technologies Inc 2016 U.S. Dist. LEXIS 89540; *Starke v Squaretrade Inc.* 913 F 3d 279 (US App 2019). Also see AW Haynes "Online Privacy Policies: Contracting away Control over Personal Information" (2007) 111 *Penn St LR* 587 620, and the case law mentioned there (at n 120).

³³¹ See, in general, s 3 of the Arbitration Act 42 of 1965 which confirms the binding effect of arbitration agreements; and reg 44(3)(x) of the CPA Regulations, which renders a clause “excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, including by requiring the consumer to take disputes exclusively to arbitration not covered by the Act or other legislation” presumptively unfair.

³³² At 4 7 4 1.

³³³ Kim describes the inclusion of crook terms as “[p]erhaps the most significant difference between digital and paper contracts” (*Wrap Contracts* 70).

³³⁴ 51.

³³⁵ Kim *Wrap Contracts* 51. Also see ch 2 (2 4 2).

One of the main problems identified in America with unconscionability in its current form is that it allows suppliers to get away with these so-called crook terms.³³⁶ In other words, despite the fact that these terms are invasive and unrelated to the primary aim of the contract, they generally do not satisfy the criteria for unconscionability, and particularly the high threshold required for substantive unconscionability.³³⁷

To illustrate the inadequacy of current measures to deal with the specific risks posed by online contract, two of the most common examples of these types of terms in the online context will be considered, namely terms relating to the privacy of consumers, and those providing for use of consumer-generated content.³³⁸

4 7 2 1 *Privacy, use of personal data and online tracking*

One of the central consumer-related issues in the internet age is that of privacy and use of personal data.³³⁹ Privacy is a broad subject, but the focus here is specifically on the role of online contracts in enabling or preventing the misuse of consumer information.

Generally, consumers are free to consent to use of their personal data by any valid manner of contract conclusion. Haynes indicates that in America

“[n]o law prevents a website operator from sharing or selling personal information it has lawfully been given, although a website can be held liable for failing to notify its customers of its practice of selling or sharing such information. As long as they comply with the disclosure requirement, websites are free to state in their privacy policies that they will treat a visitor's personal information virtually any way they wish, arguably immunizing themselves from liability for such treatment.”³⁴⁰

This means that click-wraps or browse-wraps can be used to authorise far-reaching use or collection of consumer data, including selling consumer data, tracking the online

³³⁶ See 4 2 above.

³³⁷ See Ghirardelli 2015 *Oregon LR* 737.

³³⁸ Ghirardelli also identifies these two types of terms as a good illustration of invasive and unexpected terms (2015 *Oregon LR* 737).

³³⁹ See in general MacLean 2017 *Clev St LR*; Haynes 2007 *Penn St LR*; M Sundquist "Online Privacy Protection: Protecting Privacy, the Social Contract, and the Rule of Law in the Virtual World" (2012-2013) 25 *Regent U LR* 153.

³⁴⁰ Haynes 2007 *Penn St LR* 597-598.

activities of consumers by way of cookies³⁴¹ or tracking their location (a common feature of smartphone apps).³⁴² It is likely that consumers are unaware of consenting to such practices.³⁴³

The dangers of making personal information available was recently illustrated by the Facebook-Cambridge Analytica data scandal. Investigations revealed that Cambridge Analytica, a political consulting firm, harvested the data of 87 million Facebook users to provide targeted political advertising to them.³⁴⁴ Consumers supposedly agreed to collection of their data by using an app made available by Cambridge Analytica, and thus the information from those users at least was lawfully obtained.³⁴⁵

In the modern world, it is almost impossible for consumers to avoid making data available to online suppliers, and consumers cannot reasonably be expected to study the privacy policy of each supplier they interact with in order to consider whether they would want to assent thereto.³⁴⁶ This begs the question whether the common law provides sufficient protection to prevent overreaching clauses in online contracts

³⁴¹ See ch 2 (2 2 2 3 n 158) above on the definition and function of cookies.

³⁴² See Unknown "Every Step You Take" (27-11-2018) *Norwegian Consumer Council* <<https://fil.forbrukerradet.no/wp-content/uploads/2018/11/27-11-18-every-step-you-take.pdf>> (accessed 7-11-2019).

³⁴³ JP Nehf "Shopping for Privacy Online: Consumer Decision-Making Strategies and the Emerging Market for Information Privacy" (2005) *University of Illinois Journal of Law, Technology & Policy* 1 11: "In a study of adult Internet users who were asked to evaluate the credibility of Web sites, less than one percent of respondents even noticed privacy policies."

³⁴⁴ See A Romano "The Facebook data breach wasn't a hack. It was a wake-up call." (20-3-2018) *Vox* <<https://www.vox.com/2018/3/20/17138756/facebook-data-breach-cambridge-analytica-explained>> (accessed 7-11-2019); C Cadwalladr & E Graham-Harrison "Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach" (17-3-2015) *The Guardian* <<https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>> (accessed 7-11-2019).

³⁴⁵ Cadwalladr & Graham-Harrison "Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach" *The Guardian*; P Grewal "Suspending Cambridge Analytica and SCL Group from Facebook" (17-3-2018) *Facebook* <<https://newsroom.fb.com/news/2018/03/suspending-cambridge-analytica/>> (accessed 7-11-2019). The app also collected information of the users' Facebook friends, thus significantly extending the data pool (Romano "The Facebook data breach wasn't a hack. It was a wake-up call." *Vox*; Cadwalladr & Graham-Harrison "Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach" *The Guardian*), but the focus of this discussion is on the use of data sanctioned by contractual provisions.

³⁴⁶ See ch 3 (3 2 2).

authorising the use of consumer data. Two common-law defences are available to a consumer who supposedly agreed to use of his personal data: he can either argue that a clause authorising use of his information is invalid to the extent that it exceeds his reasonable expectation (a challenge related to whether there was some form of assent),³⁴⁷ or attempt to invalidate the clause based on its alleged unfairness (a challenge related to the substance of the contract).

South African consumers are more likely to succeed with the argument that the clause is surprising and thus unenforceable than their American counterparts. However, as discussed previously,³⁴⁸ while it is clear that the unexpected terms doctrine can provide some protection to consumers in this regard, the lack of jurisprudence means that the extent of protection is still uncertain. The doctrine is also not aimed at ensuring substantive fairness, but rather at protecting the reasonable expectations of a consumer.³⁴⁹ Thus, even an unfair clause will be enforceable if it was reasonably expected by the consumer.

The second possible ground for escaping such a clause is to attack it on substantive grounds. To invalidate the clause because it is unfair an American consumer will have to prove that it is unconscionable,³⁵⁰ and a South African consumer will have to show that it is against public policy.³⁵¹ However, as discussed above, courts in both jurisdictions are reluctant to accept these respective defences.³⁵² Although the South African Constitution guarantees the right to privacy,³⁵³ this does not preclude voluntary disclosure of information. As such, it can be questioned whether the right to privacy is breached where the consumer volunteers his information and consents to its use,

³⁴⁷ See ch 3 (3 4 6).

³⁴⁸ See ch 3 (3 6 4).

³⁴⁹ See ch 3 (3 4 6).

³⁵⁰ See 4 5 1 above.

³⁵¹ See 4 4 2 and 4 4 4 above.

³⁵² Haynes indicates that consumers could possibly challenge the terms where they contravene the FTC fair information practices (2007 *Penn St LR* 622). However, as support for this he refers to JM Moringiello & WL Reynolds "From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting" (2013) 72 *Maryland LR* 452 435, who indicate that courts generally only enquire whether sufficient notice was provided to the consumer and do not scrutinise the substance of the terms.

³⁵³ S 14 of the Constitution.

except in the most extreme cases. Arguably, providing targeted advertising will not generally satisfy the criteria of harming the interests of the community.

As far as protection under the CPA is concerned, it is less clear whether a term authorising use of personal information can also be said to be “excessively one-sided” or its terms “so adverse to the consumer as to be inequitable”.³⁵⁴ A supplier could allege that due to the benefit obtained by the consumer from the contract, requiring use of his data is not excessively one-sided or inequitable. As will be shown shortly, the EU regarded it as necessary to introduce further control over these terms, despite the existence of provisions prohibiting unfair terms.³⁵⁵

In light of the general lack of consumer awareness regarding the terms of online contracts,³⁵⁶ and as illustrated by the Facebook-Cambridge Analytica example mentioned above, more is needed to protect consumers from invasive terms in online contracts authorising appropriation of their data. In the absence of legislative intervention or possible development of the common law, suppliers have extensive abilities to collect and use consumer information, merely because the consumer clicked on an “I agree” icon or browsed a website.

There is thus clearly a need for heightened scrutiny of these terms. One possibility is to develop a general standard which grants courts more authority to scrutinise unfair or one-sided terms in general; or to require heightened scrutiny of terms relating to use of personal information in particular.³⁵⁷ A second possible solution is legislative intervention specifically aimed at addressing the privacy issue. In this regard, the EU has established itself as an international leader. It has actively sought to protect the data of its subjects by adopting the GDPR and ePrivacy Regulation.³⁵⁸ The EU approach reflects the international trend to ensure privacy by way of legislation.³⁵⁹ This stands in contrast to the American approach, where most of the legislation relating to

³⁵⁴ See s 48(2) read with s 49, and 4 4 3 above.

³⁵⁵ See 4 6 above.

³⁵⁶ See ch 3 (3 2 2 & 3 2 3). Also see Ghirardelli 2015 *Oregon LR* 737.

³⁵⁷ Suggested approaches along these lines are considered in ch 5 (5 4 2 & 5 5 1).

³⁵⁸ Art 7(1) GDPR.

³⁵⁹ See KA Houser & WG Voss "GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy?" (2018) 25 *Richmond Journal of Law & Technology* 1 10 n 23.

privacy predates widespread personal internet use.³⁶⁰ Thus, it is generally only where American firms breach their own online privacy policies that they face possible sanctions.³⁶¹

The GDPR covers a range of privacy issues, but especially important for present purposes are the provisions relating to consent. Although this is essentially a formation issue (which was the focus of the previous chapter), consent in this context is used by the legislature to address a specific substantive problem arising from online contracts. It will thus be discussed here, despite the fact that it is not a form of substantive regulation.

In terms of the GDPR, consent is required for the processing of personal data, in the absence of another lawful basis.³⁶² Recital 32 of the GDPR sets out the following requirements for consent:

“Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement. This could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data. Silence, pre-ticked boxes or inactivity should not therefore constitute consent. Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, consent should be given for all of them. If the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided.”

The GDPR thus requires that consent should be given freely³⁶³ and stipulates certain features of this consent. To determine whether consent was given freely, a court must take into account whether “the performance of a contract, including the provision of a

³⁶⁰ 17.

³⁶¹ Houser & Voss 2018 *Richmond Journal of Law & Technology* 18; Haynes 2007 *Penn St LR* 603. It must be noted, however, that the American Law Institute has undertaken a project to formulate principles relating to the law of data privacy (J Morinigo “Principles of the Law, Data Privacy Is Approved” (23-5-2019) *The ALI Advisor* <<http://www.thealiadviser.org/data-privacy/principles-of-the-law-data-privacy-is-approved/>> (accessed 7-11-2019)). Although the Tentative Draft has been approved, it is not yet publicly available.

³⁶² Art 6 (1) GDPR. Also see Recital 42.

³⁶³ Art 4(11) of the GDPR.

service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract”.³⁶⁴ It is further required that, if written consent to the processing of data is contained in a declaration which also includes other matters, it must be clearly distinguishable from the rest.³⁶⁵ In this regard, AG Szpunar clarified that:

“For consent to be ‘freely given’ and ‘informed’, it must not only be active, but also separate. The activity a user pursues on the internet (reading a webpage, participating in a lottery, watching a video, etc.) and the giving of consent cannot form part of the same act. In particular, from the perspective of the user, the giving of consent cannot appear to be of an ancillary nature to the participation in the lottery.”³⁶⁶

Furthermore, the consumer has the right to withdraw his consent at any time.³⁶⁷

These provisions have the following practical consequences for online contracts: (i) consent to processing of personal data cannot be contained in a browse-wrap, but needs to be provided by an affirmative action such as a click; (ii) it is not sufficient merely to include consent as one of the terms of a click-wrap, the consumer must consent to use of his information as a separate act which should not take the form of a pre-ticked box;³⁶⁸ (iii) the terms must clearly stipulate the purposes for which the data will be used;³⁶⁹ and (iv) a consumer cannot be precluded from use of the service due to the absence of consent if such consent is not essential to use of the service.³⁷⁰

In addition to the GDPR, the ePrivacy Directive also addresses online privacy issues, such as online tracking. Article 5(3) of the Directive (which was amended by the so-

³⁶⁴ Art 7(4) of the GDPR.

³⁶⁵ Art 7(2) of the GDPR.

³⁶⁶ AG Szpunar’s Opinion in Case C-673/17 *Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (21 March 2019) para 66.

³⁶⁷ Art 7(4) of the GDPR.

³⁶⁸ See AG Szpunar’s Opinion in Case C-673/17 *Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (21 March 2019) para 88. This was confirmed by the Grand Chamber’s ruling in this case (*Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (Case C-673/17) 2019 paras 55, 57, 63).

³⁶⁹ Recital 43 of the GDPR.

³⁷⁰ Art 7(2) and Recital 43 of the GDPR.

called Cookie Directive)³⁷¹ provides that a consumer must be notified clearly if cookies are stored on his computer, and he must give consent, except in very specific circumstances. Consent must be given in accordance with Directive 95/46/EC, the predecessor of the GDPR, which defines it as “any freely given specific and informed indication of [the data subject’s] wishes by which the data subject signifies his agreement to personal data relating to him being processed”.³⁷² It has subsequently been interpreted to carry a meaning mostly similar to consent in terms of the GDPR.³⁷³ Thus, before the amendment, it was sufficient if consumer had the opportunity to opt-out of data processing by way of cookies (if he was informed of the right to refuse), but the amendment “replaced the easier to satisfy informed opt-out system with an informed opt-in system.”³⁷⁴ Amendments to this provision have been proposed, to clarify that consent is not required where cookies are only used to collect non-personal

³⁷¹ Directive 2009/136/E of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on Universal Service and Users’ Rights Relating to Electronic Communications Networks and Services, Directive 2002/58/EC concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector and Regulation (EC) No 2006/2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws.

³⁷² Art 2(h) of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data.

³⁷³ AG Szpunar’s Opinion in Case C-673/17 *Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (21 March 2019) para 83: “the requirements for consent do not greatly differ as regards cookies and, more generally, processing of personal data”. Also see para 60 of the court’s finding in *Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (Case C-673/17) 2019.

³⁷⁴ AG Szpunar’s Opinion in Case C-673/17 *Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (21 March 2019) para 54.

data, for example, items placed by a consumer in his virtual shopping cart.³⁷⁵ However, currently it covers all data collected by way of cookies.³⁷⁶

South Africa also followed the EU example of legislating protection of personal information, by enacting POPI, which aims to give effect to the Constitutional right to privacy.³⁷⁷ Like the GDPR, POPI recognises consent as a valid basis for processing personal information³⁷⁸ and provides that the consumer may withdraw his consent at any time.³⁷⁹ However, POPI differs from the GDPR and ePrivacy Directive in three crucial aspects. First, the GDPR indicates that consent to processing of information is not freely given if use of the service is conditional upon it, unless such processing is essential for making the product or service available. No similar provision is found in POPI, which means a supplier can restrict a consumer's access to the service if he refuses to consent to non-essential use of his information.

Secondly, unlike the GDPR, POPI does not require separate consent to processing of consumer data. Therefore, a supplier can include the authorisation for use of information as one of the terms of an online contract to which blanket assent is given. Although consent is defined as "any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information",³⁸⁰ these terms are not defined and there is no indication that more is needed than the inclusion of a term containing the prescribed information³⁸¹ in a standard form contract. As mentioned before, ECTA requires express written provision for collecting or

³⁷⁵ See Data Policy and Innovation (Unit G.1) "Proposal for an ePrivacy Regulation" (19-6-2019) *European Commission* <<https://ec.europa.eu/digital-single-market/en/proposal-eprivacy-regulation>> (accessed 7-11-2019). Also see H Adler "The Definitive Guide to GDPR" (30-4-2018) *DMN* <<https://www.dmnews.com/ebooks/ebook/13104774/the-definitive-guide-to-gdpr>> (accessed 7-11-2019) 9.

³⁷⁶ *Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (Case C-673/17) 2019 para 71.

³⁷⁷ S 14 of the Constitution.

³⁷⁸ S 11(1)(a) of POPI.

³⁷⁹ S 11(2)(b) of POPI.

³⁸⁰ S 1 definition of "consent".

³⁸¹ See s 18(1) of POPI, which contains a list of information which must be contained in the notification to the data subject. However, the section does not specify the manner in which the notice must be given.

processing personal information,³⁸² which presumably means the consumer has to click in order to signify consent.³⁸³ This precludes the use of a browse-wrap, but again does not prevent a supplier from lawfully exploiting the personal information of a consumer based on a term hidden in a multi-page click-wrap. This provision will be repealed when POPI comes into operation.³⁸⁴

Thirdly, online contracts are not the main focus of POPI. It thus contains no provisions regulating online tracking and the use of cookies.³⁸⁵

In light of the foregoing, it can be argued that POPI relies too much on disclosure in order to ensure privacy, and fails to take into account that consumers generally neglect to read online contracts. Privacy regulation in South African law will need to be re-evaluated to prevent undesirable privacy practices being validated by hidden terms in online contracts, as both common law measures and legislation are unlikely to provide satisfactory control over these types of crook terms.

4 7 2 2 Copyright over or licence to use consumer-generated content

A second example of crook terms commonly found in online contracts are terms which grant suppliers a wide licence to use consumer-generated content.³⁸⁶ This could authorise them, for example, to use photos uploaded by a user on a social media site, as part of an advertising campaign.³⁸⁷ This is a consequence most users fail to realise. Or, as mentioned by Hetcher,

³⁸² S 51(1) of ECTA.

³⁸³ See ch 3 (3 4 2).

³⁸⁴ See s 110 of POPI, read with the Schedule.

³⁸⁵ Notably, South African internet suppliers often inform consumers in their online contracts of the possibility of using certain browser features to disable cookies, despite it not being mandated by legislation (see, for example, Takealot Online (RF) (Proprietary) Limited “T&Cs” (date of publication unknown) <<https://www.takealot.com/help/terms-and-conditions>> *Takealot.com* (accessed 10-2-2020) clause 15.15; Travelstart Online Travel Operations (Pty) Ltd (date of publication unknown) “Travelstart Privacy Policy” *Travelstart* clause 6.5). However, this is an opt-out system, and consumers might be unaware of this if they fail to read the online terms. It further requires consumers to change certain browser settings, which requires technical know-how that some consumers might lack.

³⁸⁶ See 4 2 above.

³⁸⁷ See the discussion of Facebook’s sponsored stories at 4 2 above.

“the vast majority of Facebook users would be extremely surprised to learn that the only thing stopping Facebook from legally sublicensing their creative and personal content to porno.com or anyone else is the fact that the site currently does not perceive such activity to be in its interest.”³⁸⁸

The potential danger of copyright provisions in online contracts was illustrated in an American case, in which Virgin Mobile used a photograph of a sixteen-year-old girl (Alison Chang) as part of a billboard advertising campaign without her knowledge or consent.³⁸⁹ The photograph was uploaded on the Flickr account of the photographer, who was unaware that the online licence agreement regulating the account permitted the commercial use of any photographs. Because a photograph could constitute both personal information of the subject of the photo (as discussed in 4.7.2.1 above) and consumer generated content, the plaintiffs sued for both invasion of privacy and infringement of copyright.³⁹⁰ Although the case was decided on a different ground (the lack of jurisdiction), it illustrates the potential prejudice which can result from provisions in online agreements.

The case further illustrates that the provisions authorising suppliers to exploit these online risks do not always fall within the typical description of unfair or unreasonable provisions, or meet the requirements for substantive unconscionability in American law.³⁹¹ A clause authorising use of material published by a consumer on an electronic platform can generally not be said to “shock the conscience”. Hetcher argues that the licence Facebook claims over user-generated content³⁹² is unconscionable.³⁹³ However, his argument is based mainly on procedural unconscionability, such as the

³⁸⁸ S Hetcher “User-Generated Content and the Future of Copyright: Part Two - Agreements between Users and Mega-Sites” (2008) 24 *Santa Clara High Technology LJ* 829 848.

³⁸⁹ *Chang v Virgin Mobile USA*, LCC 2009 U.S. Dist. LEXIS 3051. Also see Kim *Wrap Contracts* 168.

³⁹⁰ *Chang v Virgin Mobile USA*, LCC 2009 U.S. Dist. LEXIS 3051 3052.

³⁹¹ Ghirardelli 2015 *Oregon LR* 737.

³⁹² Facebook’s terms of service have been amended since Hetcher published his article. However, the newer version still provides that the consumer grants Facebook: “a non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content”. (Facebook “Terms of Service” *Facebook* clause 3(1)).

³⁹³ Hetcher 2008 *Santa Clara High Technology LJ* 842.

fact that it is surprising³⁹⁴ and that the terms are deceptively arranged.³⁹⁵ Despite the fact that most American courts require both procedural and substantive unconscionability, he does not address the issue of substantive unconscionability.

The same principles regarding whether the term could be said to be surprising or against public policy discussed above in the context of privacy also apply in this regard.³⁹⁶ Three possible constitutional rights could conceivably be relied on by the consumer in this instance. The first is the right to property,³⁹⁷ but agreeing to allow use of the content does not deprive the consumer of copyright over the content – it merely allows the supplier to exploit the content, while the consumer retains copyright. Secondly, depending on the nature of the content (whether it concerns personal information, for example a photo of the consumer) and the manner in which it is used, the consumer could invoke the right to privacy³⁹⁸ or the right to dignity.³⁹⁹ These might assist the consumer if the supplier exploits his personality rights pursuant to contractual assent, but without showing compelling interests warranting it, for example if the consumer finds his photo used in the manner experienced by Alison Chang.⁴⁰⁰ But again, the high threshold for finding the clause against public policy in terms of South African law will only provide relief in extreme cases. The fact that clauses are regularly agreed to which could (in theory at least) authorise such wide-ranging exploitation of consumers is worrisome.

The EU has instituted or proposed various directives and regulations which could apply to user-generated content, although few are directly relevant to the discussion at hand. Article 17 of the Copyright Directive,⁴⁰¹ which deals with user-generated content, does not aim to protect users uploading content, but rather to ensure that the holders of copyright in respect of that content is protected. In other words, it is not concerned

³⁹⁴ 848: “This is a clear instance of the deceptive and surprising terms that the Bragg court focused on in finding unconscionability.”

³⁹⁵ 849-850.

³⁹⁶ See 4 7 2 1 above.

³⁹⁷ S 25 of the Constitution. Intellectual property is also protected by the property clause (see AJ van der Walt & RM Shay “Constitutional Analysis of Intellectual Property” (2014) 17 *PELJ* 52).

³⁹⁸ S 14 of the Constitution.

³⁹⁹ S 10 of the Constitution.

⁴⁰⁰ See n 389 above.

⁴⁰¹ This much-debated provision was numbered Article 13 in previous draft.

with the agreement between the website and its user, but rather tries to prevent content from being uploaded if it would breach copyright.⁴⁰² It has been criticised precisely because it fails to protect the rights of consumers.⁴⁰³ The Directive for the Supply of Digital Content serves to confirm that the contract between the supplier and consumer must be implemented in accordance with its provisions.⁴⁰⁴ However, it does require suppliers to cease use of any consumer-generated content provided by the consumer upon termination of the agreement.⁴⁰⁵

Where the content also falls in the definition of personal data contained in the GDPR,⁴⁰⁶ it will enjoy similar protection to other consumer data.⁴⁰⁷ This seems to be the only EU regulation pertaining specifically to the issue of contractual terms authorising the use of user-generated content, but only to the extent that the content uploaded by consumers also constitute personal information, for example photographs of that person. The relevant provisions were discussed above.⁴⁰⁸

The biggest concern is that online contracts enable suppliers to circumvent the default rules pertaining to copyright. A detailed discussion and evaluation of these rules falls outside of the ambit of this study,⁴⁰⁹ but the default copyright rules were developed

⁴⁰² See Recital 61 of the Copyright Directive.

⁴⁰³ BEUC “EU Copyright Reform: Proposal for a Directive on Copyright in the Digital Single Market – BEUC demands” (12-7-2017) *BEUC* <https://www.beuc.eu/publications/beuc-x-2017-081_eu_copyright_reform.pdf> (accessed 26-11-2019); European Legal Studies Institute, Osnabrück University *Protecting European Consumers* (2019) 57.

⁴⁰⁴ See Art 7.

⁴⁰⁵ See Art 16(2) and (3) of the Directive for the Supply of Digital Content.

⁴⁰⁶ See Art 4(1) of the GDPR, which defines personal data as: “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”.

⁴⁰⁷ This is confirmed in Art 28 of the Copyright Directive. Malgieri classifies this type of information as user-provided personal content, because it is a combination of personal data and intellectual property (2018 *International Review of Law, Computers & Technology* 119).

⁴⁰⁸ See 4 7 2 1 above.

⁴⁰⁹ See in general Toa 2017 *Indiana Journal of Global Legal Studies*; AG Monteleone “User-Generated Content and Copyright: The European Union Approach” (2016) WIPO Academy, University of Turin and ITC-ILO - Master of Laws in IP - Research Papers Collection - 2015-2016 (available at <<https://ssrn.com/abstract=2922225>>); W Clark “Copyright, Ownership, and Control of User-

over many years,⁴¹⁰ and serve to carefully balance the interests of both parties, whereas the provisions found in online contracts are mostly aimed at benefiting the supplier.⁴¹¹ It can be argued that suppliers should not be allowed to overrule an entire body of law in this regard by a provision in an unread contract. It is recognised that social media sites are built upon consumers sharing content with other users, and thus the nature of the service requires suppliers of these sites to have the right to make this content available at least to other users.⁴¹² However, measures are required to limit the use of the content which is authorised in terms of online contracts. These measures will be considered in the next chapter.

4 7 2 3 *Concluding remarks*

A major problem with crook terms in online contracts is that they allow suppliers to appropriate rights which consumers would otherwise enjoy, without consumers being aware thereof or having a meaningful ability to avoid them. They are typical examples of terms which are not *per se* unfair; in a negotiated contract they would not have been problematic, but it is their substantive effect viewed in conjunction with the procedural issues tainting their formation that renders them unfair.

As illustrated above, these terms generally do not meet the criteria for unfairness, unconscionability or contravention of public policy required in terms of the common law and legislation to escape their operation. Despite acknowledging that bargaining power can play a role in assessing whether an oppressive term is against public policy, South African courts still give effect to the notion of freedom of contract even where a consumer enjoys very little influence over or knowledge of the terms. Courts are further constrained by the fact that contravention of a Constitutional right or value is required in order to find a term contrary to public policy.

Generated Content on Social Media Websites” *Kent Law* <<http://www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/Jerry%20clark%20final%20Copyright,%20Ownership,%20and%20Control%20of%20User-Generated%20Content%20on%20Social%20Media%20Websites.pdf>> (accessed 7-11-2019). For a South African perspective, see S Mudau *The Copyright Protection of Online User-Generated Content* LLM thesis University of Cape Town (2014).

⁴¹⁰ Oakley 2005 *Houston LR* 1091.

⁴¹¹ 1092.

⁴¹² Tao 2017 *Indiana Journal of Global Legal Studies* 634.

The CPA provides courts with a broader power to declare terms unfair, but with regard to crook terms the provisions of the CPA can be both over- and under-inclusive. They are over-inclusive in the sense that they do not distinguish between negotiated and non-negotiated terms.⁴¹³ The provisions thus apply to both salient terms (for example the product price) and those hidden in the online contract. The provisions of the CPA can also be under-inclusive, because crook terms might fall outside of the ambit of what courts regard as “unfair, unreasonable and unjust”. Because of the lack of definitive guidelines regarding these terms, it is not clear how courts will interpret them.⁴¹⁴ Even though courts may require less unfairness to invalidate non-negotiated terms than in terms of the common law,⁴¹⁵ they might still be constrained by the requirement of excessive one-sidedness and the weight traditionally attached to the notion of freedom of contract.

The unconscionability standard in America has also proven insufficient in this regard, because the substantive leg of the enquiry is too strict. It can be seen from the examples mentioned above – such as the Cambridge Analytica-Facebook scandal – that American law has not found a satisfactory solution to these terms.

The application of general legislation in the EU regulating unfair contract terms has not been tested in the context of so-called crook terms. It is further difficult to make a general statement regarding the application of this standard, because of differences between various Member States. However, the Council deemed it necessary to adopt specific directives relating to the issues identified above, thus suggesting that they do not regard the general standard as sufficient.

South Africa has at least three options with regard to unnoticed terms eroding consumer rights in online transactions. These options are (i) to adopt a “wait and see” approach in order to establish the interpretation of the provisions of the CPA and their application in respect of these terms, or to see whether the unexpected terms doctrine will prevent their enforcement; (ii) to follow the example of the EU in adopting specific legislation in respect of each of these problematic terms as they arise; or (iii) to develop

⁴¹³ Naudé “Introduction to S 48-52 and Reg 44” in *Commentary on the CPA* 48-2.

⁴¹⁴ See 4 4 3 above. Also see Bradfield *Christie’s Law of Contract* 25-26.

⁴¹⁵ Especially in light of the fact that s 52(2)(e) of the CPA requires courts to take the extent of negotiations into account when determining fairness.

a single, general legislative standard which is tailored towards non-negotiated terms in online contracts.

For the reasons set out above, and specifically the misguided value attached to freedom of contract which poses an impediment to judicial interference in contracts, it is argued that, rather than following option (i) above, a pro-active approach is required to prevent suppliers from eroding consumer rights by using online contracts. This means either (ii) or (iii), or a combination of both, is suggested as the most appropriate solution. Properly analysing the specifics with regard such an approach requires a holistic view, which takes into account considerations with respect to both formation and substantive control. This proposal will be discussed in more detail in the following chapter.

4 7 3 Problematic clauses relating to a relationship of continued dependency

The focus now shifts to the second main category of circumstances that create particular risks of unfairness in the online environment. Online services take many forms, such as the provision of a social media platform (for example Facebook and Twitter), a search engine (for example Google), an email service (for example Gmail or Yahoo! Mail) or a cloud storage service (for example Dropbox). A common feature of many of these services have is that they entail an ongoing relationship between the consumer and the supplier. Consumers invest time in the use of the service by uploading photos and documents, or by familiarising themselves with use of the services. Often it also requires an investment of money, for example where consumers purchase products which require regular software updates or the use of online services for continued use.⁴¹⁶ As discussed above, this results in the consumer being locked-in to the transaction with the supplier.⁴¹⁷ Many of the service providers also enjoy a near-monopoly,⁴¹⁸ which compounds the difficulty the consumer faces in switching to an alternative service provider.

⁴¹⁶ See the examples mentioned in 4 2 above.

⁴¹⁷ See 4 2 above.

⁴¹⁸ Google's search engine enjoyed a market share of over 95% in South Africa in 2018 (<<http://gs.statcounter.com/search-engine-market-share/all/south-africa/2019>>). Rutgers indicates that Facebook dominates the social media app market with a share of 72.3% of the EU market in 2018 (2019 *ERCL* 131).

This continued dependence by the consumer on the services of the supplier renders two clauses commonly included in online agreements particularly problematic, namely clauses authorising unilateral variation of the online terms by the supplier and clauses authorising unilateral termination by the supplier.

4 7 3 1 *Contractual discretions enabling unilateral variation*

As mentioned previously, the electronic nature of online contracts means that they are easy to amend.⁴¹⁹ Online contracts often provide that terms can be modified at any time by posting the revised version on the website of the suppliers, with or without notification to the consumer.⁴²⁰ For example, Apple's terms of service state that:

"Apple reserves the right at any time to modify this Agreement and to add new or additional terms or conditions on your use of the Services. Such modifications and additional terms and conditions will be effective immediately and incorporated into this Agreement. Your continued use of the Services will be deemed acceptance thereof."⁴²¹

Two problems relating to contractual powers to effect unilateral variation arise in the context of online agreements.

⁴¹⁹ See ch 2 (2 4 2).

⁴²⁰ Kim *Wrap Contracts* 54, 66; Preston & McCann 2011 *BYU J Pub L* 23; D Wijayasriwardena "Consent in Online Contracts - Mindless or Mindful?" (2016) *Queen Mary University of London, School of Law Legal Studies Research Paper No. 234/2016* 33 (available at <<https://ssrn.com/abstract=2783793>>); Kim 2014 *Chicago-Kent LR* 271; Moringiello & Reynolds 2013 *Maryland LR* 471; Loos & Luzak 2016 *Journal of Consumer Policy* 67.

⁴²¹ Apple "Apple Media Services Terms and Conditions" (13-5-2019) *Apple* <<https://www.apple.com/legal/internet-services/itunes/us/terms.html>> (accessed 7-11-2019). South African websites contain similar terms (see Takealot Online (RF) (Proprietary) Limited "T&Cs" *Takealot.com* clause 16.1: "Takealot may, in its sole discretion, change any of these Terms and Conditions at any time. It is your responsibility to regularly check these Terms and Conditions and make sure that you are satisfied with the changes. Should you not be satisfied, you must not place any further orders on, or in any other way use, the Website."; Travelstart Online Travel Operations (Pty) Ltd "Terms and Conditions" (date of publication unknown) *Travelstart* <<https://www.travelstart.co.za/lp/embed/terms-and-conditions>> (accessed 10-2-2020): "Travelstart may make future changes, deletions or modifications to the Online Conditions, information, graphics, products, features, functionality, services, and links at any time without notice and the Client's subsequent viewing or use of the Sites and/or the conclusion of a transaction with Travelstart will CONSTITUTE THE CLIENT'S AGREEMENT to such changes, deletions and modifications, as the case may be. The CLIENT AGREES TO ACCEPT AND BE BOUND BY the Online Conditions and notices which are in effect at the time of the Client's use of the Sites and facilities.").

The first concerns giving notice of the variation to the consumer. In the absence of clear guidelines regarding the notification of amendments to the contract, suppliers are free to stipulate the manner of notification in the online contract. Most stipulate that any amendment will take effect when the updated terms are posted. This means that the consumer should access the online terms each time he uses a website and scrutinise the document to see whether any of the terms contained in multiple pages have been amended. There is also no obligation on the supplier to indicate which terms have been varied. This duty on the consumer is so onerous that it negates the purpose of the notice requirement.⁴²²

This problem can at least be partly mitigated without unduly burdening the supplier by insisting that suppliers post a notice of amendment of the terms on their websites, which should include a summary of the terms that have been affected. Of course, it is not suggested that this will be sufficient to ensure that the amended terms are fair, and it is acknowledged that in all likelihood a majority of consumers will accept the notice of amendment without reading the terms. Yet, such a notice can at least bring the amendment to the notice of the consumer, with the impact on the supplier being negligible. The notice requirement could also possibly deter suppliers from amending their terms too often, because they want to avoid inconveniencing consumers.

The second problem is that consumers are often “locked-in” and therefore unwilling to stop using a service, even if the terms are changed to their detriment.⁴²³ Thus, not only might consumers not realise that a new contract is governing their relationship with the supplier due to a lack of notice, but consumers might find it difficult to stop using the service for various reasons, such as the fact that data might be lost, or due to familiarity with a specific web service. The online contract might also relate to use of a product purchased by the consumer, for example an Apple iPhone. In such a case, the consumer will generally be barred from continued use of the product if he

⁴²² See Loos & Luzak 2016 *Journal of Consumer Policy* 70: “while consumers in theory have a right to terminate the contract after having been informed about the changes, the lack of notification of these changes reduces the effectiveness of the right to terminate the contract.”

⁴²³ See nn 42 and 43 above.

refuses to accept the modified terms.⁴²⁴ Thus, the consumer is placed in a hostage situation: he must either accept the terms or lose his investment in the product.

In South African law, the right of one party to determine contractual terms is usually regarded as a problem in terms of the certainty requirement.⁴²⁵ A discretion to determine the content of one's own performance is invalid,⁴²⁶ unless it is subject to an objective standard.⁴²⁷ A contractual discretion to determine or vary the other party's performance is not invalid *per se*, but it is recognised that due to the risk of abuse inherent in awarding this discretion, public policy considerations have an important role to play.⁴²⁸ At least in some contexts, this discretion may be exercised subject to a reasonableness standard. It has not been settled in South African law whether a party can enjoy an *unfettered* unilateral contractual discretion to vary the other party's obligations.⁴²⁹ The question was left unanswered in *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd*,⁴³⁰ where the Supreme Court of Appeal stated that:

"In sum I am of the view that, save, perhaps, where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable."⁴³¹

However, the court qualified this by adding:

"It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri*".⁴³²

⁴²⁴ Also see the example of a Sony PlayStation mentioned at 4 2 above.

⁴²⁵ *Erasmus v Senwes Ltd* 2006 3 SA 529 (T) 537; Van Huyssteen et al *Contract* 228-229.

⁴²⁶ *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 4 SA 928 (SCA) para 24; J du Plessis "Possibility and Certainty" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 213 223; Van Huyssteen et al *Contract* 231.

⁴²⁷ *Erasmus v Senwes Ltd* 2006 3 SA 529 (T) 538.

⁴²⁸ Van Huyssteen et al *Contract* 230.

⁴²⁹ 236-237.

⁴³⁰ 1999 4 SA 928 (SCA).

⁴³¹ Para 24.

⁴³² Para 25. Also see *Engen Petroleum Ltd v Kommandonek (Pty) Ltd* 2001 2 SA 170 (W) 174.

By insisting on a discretion to be exercised reasonably and further preventing a party from determining his own performance, the common law imposes limits on the discretionary powers of a party. Van Huyssteen and others state that the common law further requires the other party to be notified of the amended terms.⁴³³ However, there is little authority for this, and the two cases referred to by the authors do not seem to provide direct authority for this requirement. In *Engen Petroleum Ltd v Kommandonek (Pty) Ltd*⁴³⁴ the particular clause granting the discretion provided that notice must be given, and in *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd*⁴³⁵ the court stated that: "All that is required is that the creditor should exercise its right to determine the content of the debtor's obligation to pay interest" without stipulating how the right should be exercised.⁴³⁶ This uncertainty should be resolved: for the reasons discussed above, notice should be recognised as a requirement for amending an online contract.⁴³⁷

The CPA provides that a clause "enabling the supplier to unilaterally alter the terms of the agreement" is deemed to be unfair or is greylisted.⁴³⁸ However, this presumption does not apply if the clause requires immediate notification to the consumer of the variation and the consumer has the right to dissolve the agreement if he is dissatisfied with the proposed amendment.⁴³⁹

Although several American courts have refused to enforce these amended terms,⁴⁴⁰ other courts have found that the power to vary terms unilaterally is not unconscionable. It has even been stated that the consumer "should have monitored to determine

⁴³³ Van Huyssteen et al *Contract* 234.

⁴³⁴ 2001 2 SA 170 (W).

⁴³⁵ 1988 4 SA 73 (N).

⁴³⁶ 75.

⁴³⁷ See the suggested legislative amendment at ch 5 (5 5 3).

⁴³⁸ Reg 44(3)(i) of the CPA Regulations.

⁴³⁹ Reg 44(4)(c)(iv) of the CPA Regulations.

⁴⁴⁰ See for example *Harris v Blockbuster* 622 F Supp 2d 396 (ND Tex 2009); *Douglas v U.S. District Court* 495 F 3d 1062 (9th Cir 2007) 1066: "Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side". Also see the case law discussed in J Moringiello & J Ottaviani "Online Contracts: We May Modify These Terms at Any Time, Right?" 2016 *Bus L Today* 1 1-3.

whether any amendments had been posted.”⁴⁴¹ Courts recognise that an unfettered right to vary terms might be problematic, but mandating prior notice and granting the consumer the right to reject the amendments by cancelling the service are viewed as sufficient control mechanisms.⁴⁴²

Two other doctrines in American law serve as a method of protecting a weaker party where the other party varies the terms. The first is the doctrine of consideration: where the one party amends the rights of the other without offering something in return, a court may refuse to enforce the modification.⁴⁴³ The second doctrine that could protect a consumer against a clause authorising unilateral variation of contract terms relates to illusory terms. A contract will be illusory where it appears to impose no true obligation on the one party, for example if the contract states that A will pay B R10, and in return B will give him as much ice cream as he (B) wants to,⁴⁴⁴ or if performance is conditioned on an event completely within the control of that party.⁴⁴⁵ Where one party enjoys an unfettered right to modify contract terms, he can use that power to eliminate his performance responsibility. Furthermore, if a variation clause does not expressly deny retroactive operation, it will render any terms which could be affected by the clause illusory and thus unenforceable.⁴⁴⁶ A Texas court has found an arbitration clause in an online contract illusory and unenforceable because a clause in the contract allowed the supplier to amend the clause with immediate effect, and nothing prevented it from applying retrospectively.⁴⁴⁷ The supplier thus has the right

⁴⁴¹ *Margae v Clear Link Technologies LLC* 2008 WL 2465450 (D Utah 2008) 5, also referred to in Kim *Wrap Contracts* 88-89. Also see *Vernon v Qwest Communications International Inc* 857 F Supp 2d 1135 (D Colo 2012).

⁴⁴² *Vernon v Qwest Communications International Inc* 857 F Supp 2d 1135 (D Colo 2012) 1156.

⁴⁴³ Farnsworth *Contract* 276-277.

⁴⁴⁴ Farnsworth *Contract* 75. It has also been said that “[a] promise is illusory when it fails to bind the promisor, who retains the option of discontinuing performance.” (*In re C & H News Co.* 133 S W 3d 642 (2003 Tex App)) and will be “deemed illusory only where it lacks both consideration and mutuality of obligation” (*Defontes v Dell Computers Corp* 2004 WL 253560 (RI Super 2004)).

⁴⁴⁵ Farnsworth *Contract* 75.

⁴⁴⁶ See *Harris v Blockbuster* 622 F Supp 2d 396 (ND Tex 2009) 398-399; *Morrison v Amway Corp* 517 F 3d 248 (5th Cir 2008); *JM Davidson Inc. v Webster* 128 SW 3d 223 (Tex Supreme Court 2003). Also see Tasker & Pakcyk 2008 *Albany LJ of Sci & Tech* 125.

⁴⁴⁷ *Harris v Blockbuster* 622 F Supp 2d 396 (ND Tex 2009) 398-400.

to dictate whether arbitration should occur even in respect of disputes which have already arisen.⁴⁴⁸

The Draft Restatement provides that for modification of standard terms, a consumer must receive reasonable notice of the modified terms⁴⁴⁹ and be granted a reasonable opportunity to reject these terms and continue the relationship with the supplier on existing terms,⁴⁵⁰ or to terminate the contract.⁴⁵¹ The modification will take effect if the consumer either manifests assent to the modified term or continues the relationship without rejecting the modification.⁴⁵² Because of the concern of businesses making “self-serving, opportunistic modifications, once consumers are already locked into the service”,⁴⁵³ the Draft Restatement further requires that modifications must be made in good faith and must not undermine any affirmation or promise forming part of the original bargain.⁴⁵⁴ The comments to the Draft Restatement indicate that the same requirements are imposed where a unilateral variation clause is included in the contract,⁴⁵⁵ although the Draft Restatement contains a separate paragraph imposing a requirement of good faith on terms which grant a supplier the discretion to determine its own rights and obligations.⁴⁵⁶

Good faith is defined as:

⁴⁴⁸ Also see *Morrison v Amway Corp* 517 F 3d 248 (5th Cir 2008).

⁴⁴⁹ Para 3(a)(1) of the Draft Restatement. Concern has been raised about the empirical study underlying this aspect of the Draft Restatement (see AJ Levitin, NS Kim, CL Kunz, P Linzer, PA McCoy, JM Moringiello, E Renuart & LE Willis “The Faulty Foundation of the Draft Restatement of Consumer Contracts” (2019) 36 *Yale Journal on Regulation* 447), but an analysis of this issue falls outside of the ambit of this dissertation.

⁴⁵⁰ Para 3(a)(2) of the Draft Restatement.

⁴⁵¹ Para 3(b) of the Draft Restatement.

⁴⁵² Para 3(a)(3) of the Draft Restatement.

⁴⁵³ Comment 1 to Para 3 of the Draft Restatement.

⁴⁵⁴ Para 3(c) of the Draft Restatement.

⁴⁵⁵ Comment 6 to Para 3 of the Draft Restatement. The 2017 Discussion Draft stated it more clearly, in the same comment (“The Section does not preclude a business from reserving, in the initial standard contract, the right to modify the standard contract terms at any time and for any reason, as long as the modification satisfies the requirements of reasonable notice and opportunity to reject (subsection (a)) and is made in good faith (subsection (b))”).

⁴⁵⁶ Para 4 of the Draft Restatement.

“honesty in fact and the observance of reasonable commercial standards of fair dealing.”⁴⁵⁷

It is aimed at preventing opportunistic behaviour by a supplier and ensuring that he acts in accordance with the justified expectations of the consumer.⁴⁵⁸ This standard does not seem to vary drastically from the reasonableness requirement imposed in terms of South African law.⁴⁵⁹

It is submitted that requiring modification to be done reasonably or in good faith is essential in the context of online contracts, regardless of whether this modification is done pursuant to a discretion granted in the contract, or by first giving notice of the amendment, which is then accepted by the consumer through non-termination or continued use. The good faith or reasonableness requirement is crucial even where the consumer has the right to terminate the agreement. There are two reasons for this. First, because of the lock-in problem highlighted above, consumers will not easily discontinue use of a service where terms are modified to their detriment. Secondly, the right to terminate a contract upon variation only offers a satisfactory remedy where the consumer is aware of the amendment. Effective exercise of this right thus requires the consumer to compare the terms to determine what amendments have been effected and further presupposes that the consumer can properly evaluate the effect of the amendments. The reasons why this is unlikely – such as the heuristic bias suffered by consumers – have previously been discussed.⁴⁶⁰

Another possible approach is Kim’s notion of situational duress, discussed above.⁴⁶¹ A consumer who already has a contractual relationship with a supplier will generally have a vested interest as required by Kim, and would thus meet the requirements for her definition of duress. This would mean that a supplier cannot oblige a consumer to agree to modification of the terms of an online contract. Kim argues that the effect of recognising such a defence will be that:

“Instead of the unrestrained power to unilaterally impose terms, businesses will have to think of more appropriate ways to entice consumers to accept modified terms. For example, a company might offer support services or bonus add-ons if a product has already been

⁴⁵⁷ Para 1(a)(7) of the Draft Restatement.

⁴⁵⁸ Comment 7 to Para 1 of the Draft Restatement.

⁴⁵⁹ See Du Plessis 2019 *SA Merc LJ* 199 n 37.

⁴⁶⁰ See ch 3 (3 2 2 2).

⁴⁶¹ See 4 3 2 above.

purchased. In the content hostage scenario, the company can offer 'new and improved' services to those who accept new terms while continuing to offer existing services to those who decline terms.

In the alternative, to defend against a situational duress claim and still implement new terms, a company could offer a rescission remedy. This 'reasonable alternative' to accepting the terms of the modified agreement would allow the parties to rescind the initial contract between the parties and, to the extent possible, undo the transaction."⁴⁶²

However, there are two problems with this suggested approach. First, as explained previously, it does not fit comfortably with the common-law understanding of duress in terms of South African law.⁴⁶³ It is doubtful whether requiring acceptance of the amended terms as a condition for continued use of the service can be viewed as an unlawful threat of harm, especially in light of the hesitation by South African courts to provide relief in instances of economic duress.

Secondly, such a drastic approach seems to disregard the fact that the rapidly changing nature of technology requires that online suppliers enjoy the freedom to update their terms from time to time, due to changing operational needs or legislative requirements. At the very least, an exception should be recognised for reasonable variations to the online contract resulting from these circumstances.

Suppliers can be required to stipulate the circumstances under which they can exercise the right to vary the contractual terms in the contract. This is the approach suggested in the EU, where Article 19 of the Directive for the Supply of Digital Content provides that:

- "1. Where the contract provides that the digital content or digital service is to be supplied or made accessible to the consumer over a period of time, the trader may modify the digital content or digital service beyond what is necessary to maintain the digital content or digital service in conformity in accordance with Articles 7 and 8, if the following conditions are met:
 - (a) the contract allows, and provides a valid reason for, such a modification;
 - (b) such a modification is made without additional cost to the consumer;

⁴⁶² Kim 2014 *Chicago-Kent LR* 285-286.

⁴⁶³ See 4 3 2 above.

- (c) the consumer is informed in a clear and comprehensible manner of the modification; and
 - (d) in the cases referred to in paragraph 2, the consumer is informed reasonably in advance on a durable medium of the features and time of the modification and of the right to terminate the contract in accordance with paragraph 2, or of the possibility to maintain the digital content or digital service without such a modification in accordance with paragraph 4.
2. The consumer shall be entitled to terminate the contract if the modification negatively impacts the consumer's access to or use of the digital content or digital service, unless such negative impact is only minor. In that case, the consumer shall be entitled to terminate the contract free of charge within 30 days of the receipt of the information or of the time when the digital content or digital service has been modified by the trader, whichever is later.
 3. Where the consumer terminates the contract in accordance with paragraph 2 of this Article, Articles 15 to 18 shall apply accordingly.⁴⁶⁴
 4. Paragraphs 2 and 3 of this Article shall not apply if the trader has enabled the consumer to maintain without additional cost the digital content or digital service without the modification, and the digital content or digital service remains in conformity.”

Although these provisions will only apply in respect of contracts for the supply of digital content, the following observations can be made regarding a supplier's right to unilaterally vary the terms of an online contract in general: (i) effective notification of an amendment, which includes a summary of the terms which have been modified, should be required; (ii) the right to vary must be exercised reasonably, and only for reasons stipulated in the contract; and (iii) allowing a consumer to terminate the contract pursuant to an amendment of the terms does not in itself provide sufficient protection to consumers, although this mechanism can be used in conjunction with the notification and reasonableness requirements. If the consumer chooses to terminate, the considerations discussed in the next section will apply. The amended terms will also be subject to the same substantive control measures which apply to originally adopted online terms.

⁴⁶⁴ See 4 7 3 2 below regarding the provision relating to termination.

4 7 3 2 *Unilateral termination clauses*

A contractual clause authorising the unilateral termination of a service, including a “free”⁴⁶⁵ service, by the supplier might also be detrimental to an online consumer.⁴⁶⁶ A consumer who stores important data on a website, such as Dropbox, may experience significant losses if the supplier decides to “suspend or end the Services at any time at [their] discretion and without notice.” This clause was contained in an older version of the Dropbox Terms of Service,⁴⁶⁷ and has since been updated to a much fairer clause, which stipulates specific instances when the right to terminate can be exercised and provides for a reasonable notice period.⁴⁶⁸ Consumers enter into online contracts on the expectation of continuation of the service; allowing termination by the supplier at any time and for any reason undermines this expectation.⁴⁶⁹

A clause granting a supplier the discretion to terminate an open-ended contract⁴⁷⁰ without notice (except in the case of a material breach)⁴⁷¹ or without the same right being afforded to the consumer is recognised as presumptively unfair in terms of both

⁴⁶⁵ It is alleged that these services are not truly free – although the consumer does not pay in money, he compensates the supplier by making personal data available (see Loos & Luzak 2016 *Journal of Consumer Policy* 67).

⁴⁶⁶ 74.

⁴⁶⁷ Dated 04-11-2015.

⁴⁶⁸ Dropbox “Dropbox Terms of Service” (25-7-2019) *Dropbox* <<https://www.dropbox.com/privacy#terms>> (accessed 7-11-2019): “We reserve the right to suspend or terminate your access to the Services with notice to you if: (a) you’re in breach of these Terms, (b) your use of the Services would cause a real risk of harm or loss to us or other users, or (c) you don’t have a Paid Account and haven’t accessed our Services for 12 consecutive months. We’ll provide you with reasonable advance notice via the email address associated with your account to remedy the activity that prompted us to contact you and give you the opportunity to export Your Stuff from our Services. If after such notice you fail to take the steps we ask of you, we’ll terminate or suspend your access to the Services”.

⁴⁶⁹ Loos & Luzak 2015 *Journal of Consumer Policy* 74.

⁴⁷⁰ Fixed-term contracts fall under s 14 of the CPA, which provides that “the supplier may cancel the agreement 20 business days after giving written notice to the consumer of a material failure by the consumer to comply with the agreement, unless the consumer has rectified the failure within that time” (s 14(2)(b)(ii)). Also see T Naudé “Regulation 44: The Grey List of Presumptively Unfair Terms” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) reg 44-1 reg 44-44.

⁴⁷¹ The EU provision refers to “serious grounds” instead of material breach (Unfair Contract Terms Directive, Annex 1 para 1(g)).

South Africa⁴⁷² and EU legislation.⁴⁷³ Affording a reciprocal right of termination does not avoid the problem identified above (undermining consumer expectation regarding continued use of the service), and does not automatically result in fairness.⁴⁷⁴ Furthermore, this provision does not affect a clause which allows termination for minor breaches.⁴⁷⁵

In terms of the South African common law, the manner in which the right to terminate can be exercised can be restricted in certain circumstances, even where the termination clause does not limit the discretion.⁴⁷⁶ These include interpreting the clause restrictively,⁴⁷⁷ reading in an implied term⁴⁷⁸ or proving a tacit term,⁴⁷⁹ which may qualify the grounds on which the contract can be terminated. Unfairness in itself however is not a sufficient basis for any of these grounds.

There is no general requirement in the common law that a contractual right to terminate must be exercised reasonably.⁴⁸⁰ However, exercising the right to terminate in circumstances which would be grossly unfair could be regarded as contrary to public policy.⁴⁸¹ This is in line with the second step of the enquiry set out in *Barkhuizen v Napier*,⁴⁸² where it is recognised that while a cancellation clause *per se* may not be

⁴⁷² Reg 44(3)(l) of the CPA Regulations (requiring notice) and Reg 44(3)(k) (requiring a reciprocal right). These items are based on the EU Unfair Contract Terms Directive (Naudé “Regulation 44” in *Commentary on the CPA* reg 44-42).

⁴⁷³ Unfair Contract Terms Directive, Annex 1 para 1(g) (requiring notice) and para 1(f) (requiring a reciprocal right).

⁴⁷⁴ See Naudé “Regulation 44” in *Commentary on the CPA* reg 44-43; Loos & Luzak 2015 *Journal of Consumer Policy* 75.

⁴⁷⁵ Naudé “Regulation 44” in *Commentary on the CPA* reg 44-42.

⁴⁷⁶ See Du Plessis 2018 *Stell LR* 399-406.

⁴⁷⁷ 401.

⁴⁷⁸ 401.

⁴⁷⁹ 401.

⁴⁸⁰ See *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA) para 30; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) para 23.

⁴⁸¹ See *Botha v Rich* 2014 4 SA 124 (CC) para 51; *Combined Developers v Arun Holdings* 2015 3 SA 215 (WCC) para 42; and the minority decision by Vally J in *Atlantis Property Holdings CC v Atlantis Exel Service Station CC* 2019 5 SA 443 (GP). However, see Boonzaier 2020 *SALJ* (forthcoming) (also referred to in n 189 above) who questions whether *Botha v Rich* 2014 4 SA 124 (CC) provides authority for such a general fairness standard, arguing instead that the case should be interpreted as having been decided based on the application of specific legislative provisions.

⁴⁸² 2007 5 SA 323 (CC) para 56-59. Also see 4 4 2 above.

unreasonable, its enforcement in the particular circumstances may be contrary to public policy. It has thus been suggested that where the interests of the person exercising the right to terminate are insignificant compared to those of the other party, it could render the exercise of the right contrary to public policy. But, in line with its hesitant approach to declaring a contractual term unenforceable based on considerations of fairness or reasonableness,⁴⁸³ the Supreme Court of Appeal has generally rejected this notion and the position is far from certain.⁴⁸⁴

Although a supplier might be forced to discontinue a service due to changed circumstances,⁴⁸⁵ requiring that a consumer be given notice of termination and that the supplier must grant the consumer a reasonable period to extract data might prevent injury to the consumer in the form of data loss.⁴⁸⁶ For this reason, the Directive for the Supply of Digital Content states that:

“The consumer could be discouraged from exercising remedies for a lack of conformity of digital content or a digital service if the consumer is deprived of access to content other than personal data, which the consumer provided or created through the use of the digital content or digital service. In order to ensure that the consumer benefits from effective protection in relation to the right to terminate the contract, the trader should therefore, at the request of the consumer, make such content available to the consumer following the termination of the contract.”⁴⁸⁷

The Directive further dictates that the supplier must cease using any content provided or created by the consumer when the contract is terminated, unless it meets certain

⁴⁸³ See n 184 above.

⁴⁸⁴ In *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) the court rejected this argument, because “[r]easonableness and fairness are not freestanding requirements for the exercise of a contractual right” (para 23). This judgement was overturned on appeal, but based on the provisions of the Rental Housing Act 50 of 1999 (*Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC)). The court in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA) followed a similar approach by allowing termination despite unfairness. Also see the discussion of these cases in Du Plessis 2018 *Stell LR* 404-406.

⁴⁸⁵ Loos & Luzak 2015 *Journal of Consumer Policy* 75.

⁴⁸⁶ See Bradshaw et al 2011 *International Journal of Law and Information Technology* 204; Loos & Luzak 2015 *Journal of Consumer Policy* 75.

⁴⁸⁷ Recodal 70 of the Directive for the Supply of Digital Content. This is given effect to in Art 16(4) (see text at n 492 below). Also see Recodal 71, where some further conditions and limitations are stipulated.

conditions.⁴⁸⁸ Personal information provided by the supplier will be regulated by the GDPR;⁴⁸⁹ presumably termination of the contract for the provision of digital content or services also serves as withdrawal of consent as contemplated in Art 7(3) of the GDPR.

In addition to the general requirements for a termination clause (for example that the right to terminate should be a reciprocal right afforded to both the consumer and the supplier),⁴⁹⁰ the following proposals can be made regarding the right to terminate online contracts in particular:

- (a) The supplier must be required to give the consumer sufficient notification before effecting termination⁴⁹¹ and also afford the consumer the opportunity to extract any content or data uploaded by the consumer.⁴⁹²
- (b) The supplier must refrain from using any data or information provided by the consumer subsequent to cancellation.⁴⁹³ Although section 24(1)(b) of POPI grants the consumer the right to request deletion of such data, this should rather be in the form of an obligation on the supplier.

⁴⁸⁸ Art 16(3) of the Directive for the Supply of Digital Content. See text at n 493 below.

⁴⁸⁹ Art 16(2) of the Directive for the Supply of Digital Content.

⁴⁹⁰ As required in terms of Reg 44(3)(k) of the CPA Regulations and Annex 1 para 1(f) of the Unfair Contract Terms Directive.

⁴⁹¹ Loos & Luzak 2015 *Journal of Consumer Policy* 76.

⁴⁹² See Art 16(4) of the Directive for the Supply of Digital Content: "Except in the situations referred to in point (a), (b) or (c) of paragraph 3, the trader shall, at the request of the consumer, make available to the consumer any content other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader. The consumer shall be entitled to retrieve that digital content free of charge, without hindrance from the trader, within a reasonable time and in a commonly used and machine-readable format".

⁴⁹³ See Arts 16(2) and (3) of the Directive for the Supply of Digital Content. Art 16(2) provides that the provisions of the GDPR will regulate the use of personal data after termination of the contract, whereas art 16(3) reads as follows: "The trader shall refrain from using any content other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader, except where such content: (a) has no utility outside the context of the digital content or digital service supplied by the trader; (b) only relates to the consumer's activity when using the digital content or digital service supplied by the trader; (c) has been aggregated with other data by the trader and cannot be disaggregated or only with disproportionate efforts; or (d) has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content".

- (c) A supplier should not be allowed to insert a clause granting it an unlimited discretion to terminate the contract. Despite the absence of monetary payment for use of a service, a supplier has received counter performance in the form of consumer data and should only be allowed to terminate the service for legitimate reasons. It should preferably be required that grounds for exercising the right be specified in the contract. In effect, it can be argued that this could amount to a statutory mechanism aimed at promoting good faith in contract, through preventing the supplier from exercising a right in a manner which fails to display sufficient concern for the interests of the consumer.⁴⁹⁴

Recognising these conditions on the supplier's right to terminate the online contract unilaterally can mitigate the impact on consumers.

4 7 4 Problematic clauses relating to the global nature of online contracts

We now reach the third and final category of problematic circumstances and terms in the online environment. South African consumers regularly access international websites,⁴⁹⁵ and thus become subject to the terms and conditions imposed by these websites. As Eiselen points out, despite the fact that the parties to the agreement might not be aware of the existence of physical borders, geographical borders are highly relevant when determining the jurisdiction of courts and the legal system which applies to the contract.⁴⁹⁶ The global nature of online transactions is thus relevant when considering the impact of two clauses commonly included in online contracts, namely choice-of-jurisdiction and choice-of-law clauses. These clauses are also regularly found in traditional standard form contracts, but the international element introduced by online contracts can render them particularly onerous to a local consumer.⁴⁹⁷

⁴⁹⁴ See n 484 above.

⁴⁹⁵ For example, a 2015 report indicated that approximately 22% of the South African population uses Facebook (Anonymous "Facebook bridges SA gender divide" (4-11-2014) *World Wide Worx* <<http://www.worldwideworx.com/facebook/>> (accessed 7-11-2019)).

⁴⁹⁶ Eiselen "E-Commerce" in Van der Merwe et al *Technology Law* 182.

⁴⁹⁷ See O Sibanda "The Strict Approach to Party Autonomy and Choice of Law in E-Contracts in South Africa: Does the Approach render South Africa an unacceptable Jurisdiction?" (2008) 41 *DJ* 320 324, who points out that choice-of-law provisions in the context of web-based contracts were identified as a problem as early as the 1980s.

This dissertation does not allow for a full exposition of the principles underlying conflict of laws (or private international law),⁴⁹⁸ but is limited to the narrower issue of ensuring adequate protection for consumers deprived of legal remedies due to the inclusion of these clauses in online contracts.

4 7 4 1 *Choice-of-jurisdiction clauses*

The online contracts of many suppliers, such as Dropbox⁴⁹⁹ and Twitter,⁵⁰⁰ include clauses awarding exclusive jurisdiction to American federal courts or Californian state courts in respect of disputes arising from use of their services (although special provision is made in both these online contracts for EU consumers who enjoy mandatory protection, as discussed below).⁵⁰¹ The effect of choice-of-jurisdiction (or forum selection) clauses is that a foreign consumer is expected to litigate against a multi-million-dollar international supplier at the supplier's place of business, which significantly disadvantages the consumer. In most cases the costs involved will dissuade a consumer from approaching a court and enforcing his rights.⁵⁰²

Consequently, enforcing these clauses can effectively remove the consumer's access to courts. American courts initially regarded choice-of-forum clauses as against public policy, because they exclude the jurisdictions of courts.⁵⁰³ A New York court has described these clauses as

⁴⁹⁸ For a comprehensive study on the topic, see CF Forsyth *Private International Law: The modern Roman-Dutch Law including the Jurisdiction of the High Courts* 5 ed (2012). For a consideration of these provisions in the context of the CPA and ECTA, see MRH De Villiers "Limitations on party autonomy in the context of cross-border consumer contracts: The South African position" 2013 *TSAR* 478; Sibanda 2008 *DJ*; JL Neels "Consumer Protection Legislation and Private International Law" (2010) 31 *Obiter* 121; LJ Kent *The Consumer Protection Act (CPA) and Conflict of Laws: Does the CPA provide Mandatory Minimum Protections in an International Commercial Transaction?* LLM thesis University of Cape Town (2014).

⁴⁹⁹ Dropbox "Dropbox Terms of Service" (25-7-2019) *Dropbox*.

⁵⁰⁰ Twitter "Twitter Terms of Service" (25-5-2018) *Twitter* <<https://twitter.com/en/tos#intlTerms>> (accessed 7-11-2019).

⁵⁰¹ See Loos & Luzak 2015 *Journal of Consumer Policy* 83. Marks (2017 *Pepp LR* 39) indicates that 57% of suppliers studied include a forum selection clause.

⁵⁰² Oakley 2005 *Houston LR* 1087; De Villiers 2013 *TSAR* 482.

⁵⁰³ *The Bremen v Zapata Off-Shore Co* 407 US 1 (1972) 6, 9; with reference to *Carbon Black Export Inc v The Monrosa* 254 F 2d 297 (CA5 1958) 300-301. Also see Preston 2015 *Am U LR* 541.

“among the most onerous and overreaching of all clauses that may appear in consumer contracts. The impact of these clauses is substantial and can effectively extinguish legitimate consumer claims... since the cost of retaining an attorney... and traveling... would far exceed recoverable damages.”⁵⁰⁴

However, in *The Bremen v Zapata Off-Shore Co*,⁵⁰⁵ the US Supreme Court confirmed that where a

“choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.”⁵⁰⁶

Although this decision pertained to a “freely negotiated ... agreement, unaffected by fraud, undue influence, or overweening bargaining power”,⁵⁰⁷ its application was subsequently extended to an adhesion contract in *Carnival Cruise Lines Inc v Shute*.⁵⁰⁸ Despite being heavily criticised,⁵⁰⁹ this decision meant that forum selection clauses are now routinely upheld by American courts, including in online contracts,⁵¹⁰ if the contract is validly concluded, “unless some dramatic and extraordinary hardship is shown.”⁵¹¹

Interestingly, one American court, faced with establishing jurisdiction over an online contract in the absence of a forum selection clause, distinguished between what it referred to as active and passive website.⁵¹² The former supposedly actively solicits business and interacts with the consumer, whereas passive websites merely provide

⁵⁰⁴ *Oxman v Amoroso* 659 NYS 2d 963 (NY City Ct 1997) 967, as quoted in Oakley 2005 *Houston LR* 1086.

⁵⁰⁵ 407 US 1 (1972).

⁵⁰⁶ *The Bremen v Zapata Off-Shore Co* 407 US 1 (1972) 12.

⁵⁰⁷ 12.

⁵⁰⁸ 499 US 585 (1991).

⁵⁰⁹ Mullenix describes it as “the worst non-obvious, non-constitutional Supreme Court decision ever” (LS Mullenix “*Carnival Cruise Lines, Inc. v. Shute: The Titanic of Worst Decisions*” (2012) 12 *Nevada LJ* 549 549). Also see CL Knapp “Contract Law walks the Plank: *Carnival Cruise Lines, Inc. v. Shute*” (2012) 12 *Nevada LJ* 553.

⁵¹⁰ See, for example, *Forrest v Verizon Communications Inc.* 805 A2d 1007 (DC 2002); *Caspi v Microsoft Network LLC* 732 A2d 528 (NJ Super Ct App Div 1999); *Groff v American Online Inc* 1998 WL 307001 (RI Super Ct 1998); *Feldman v Google Inc* 513 F Supp 2d 229 (ED Pa 2007).

⁵¹¹ Preston 2015 *Am U LR* 541.

⁵¹² *Maritz Inc v Cybergold Inc* 947 F Supp 1328 (E D Mo 1996). Also see BK Epps “*Maritz, Inc. v. Cybergold, Inc.: The Expansion of Personal Jurisdiction in the Modern Age of Internet Advertising*” (1997) 32 *Georgia LR* 237; Eiselen “E-Commerce” in Van der Merwe et al *Technology Law* 190.

information. However, in determining that the particularly website actively targeted consumers, the court said that:

“CyberGold automatically and indiscriminately responds to each and every internet user who accesses its website. Through its website, CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally. Thus, CyberGold's contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over defendant.”⁵¹³

Based on this reasoning, almost any court will have jurisdiction over an online supplier, because websites generally have a global reach.⁵¹⁴ This might explain the frequent inclusion of forum selection clauses in online contracts.

In South African law, dictating that a foreign jurisdiction should have exclusive jurisdiction could be challenged based on public policy considerations by relying on section 34 of the Constitution, which guarantees access to courts.⁵¹⁵ Regulation 44(3)(x) of the CPA also renders a clause which might hinder a consumer's right to take legal action presumptively unfair.⁵¹⁶ This is similar to the provision contained in Item (q) of Annex 1 to the Unfair Contract Terms Directive, which has been held to invalidate forum selection clauses in consumer contracts.⁵¹⁷ A consumer might thus have success if challenging a choice-of-forum clause, but a concern is that the mere presence of such a clause in an online contract might discourage South African consumers from approaching a local court.

A further concern is that even where the choice-of-jurisdiction clause is held to be invalid, a South African court will not automatically have jurisdiction over the dispute. In the absence of such a clause, jurisdiction over a dispute can be established by a

⁵¹³ *Maritz Inc v Cybergold Inc* 947 F Supp 1328 (E D Mo 1996) 1333.

⁵¹⁴ Epps 1997 *Georgia LR* 241.

⁵¹⁵ In *Barkhuizen v Napier* 2007 5 SA 323 (CC), which dealt with a time-limitation clause but also concerned the issue of access to courts, it was said (at para 72) that: “if a court finds that a time-limitation clause does not afford a contracting party a reasonable and fair opportunity to approach a court, it will declare it to be contrary to public policy and therefore invalid”.

⁵¹⁶ See n 331 above.

⁵¹⁷ *Océano Grupo Editorial SA v Roció Murciano Quintero* (Joined Cases C-240/98 to C-244/98) 2000 ECR I-4941 paras 22-24. Also see Oakley 2005 *Houston LR* 1036; Maxeiner 2003 *The Yale Journal of International Law* 136.

court *inter alia* where the cause of action arose within the court's area of jurisdiction.⁵¹⁸ This includes where the contract is concluded in the court's area of jurisdiction.⁵¹⁹ The information theory is generally followed in South African law, which holds that a contract comes into existence where and when the offeror learns of the acceptance of his offer.⁵²⁰ However, in the case of electronic contracts, ECTA provides that an agreement is concluded when the acceptance enters the offeror's information system and at his usual place of business.⁵²¹ As explained previously, establishing who the offeror is in the online environment can be problematic, and the answer might depend on whether it is a transactional website or a website where the service offered is use of digital data.⁵²² It is thus uncertain whether an online contract will be deemed to be concluded where the website is accessed by the consumer, or where the supplier's principal place of business situated.

Even if it is found that the contract was concluded in South Africa, another ground such as submission or attachment is required to found jurisdiction where the defendant is a foreign *peregrinus* and thus not domiciled or resident in South Africa.⁵²³ In the case of online consumers, this could prove problematic, because international online suppliers (especially of internet services such as social media sites) generally do not need to maintain infrastructure or keep goods in South Africa. Thus, merely holding that choice-of-jurisdiction clauses are unenforceable will not necessarily aid a consumer, because he might still have difficulty establishing the jurisdiction of South African courts.

If the offensive conduct amounts to a transgression of ECTA, a South African court will *inter alia* have jurisdiction if:

- “(a) the offence was committed in the Republic;
- (b) any act of preparation towards the offence or any part of the offence was committed in the Republic, or where any result of the offence has had an effect in the Republic;

⁵¹⁸ Eiselen “E-Commerce” in Van der Merwe et al *Technology Law* 186.

⁵¹⁹ 186.

⁵²⁰ *Reid v Jeffreys Bay Property Holdings (Pty) Ltd* 1976 3 SA 134 (C).

⁵²¹ S 22(2) of ECTA, read with s 23(b) and (c).

⁵²² See ch 3 (3 4 4).

⁵²³ Eiselen “E-Commerce” in Van der Merwe et al *Technology Law* 186.

- (c) the offence was committed by a South African citizen or a person with permanent residence in the Republic or by a person carrying on business in the Republic”.⁵²⁴

Thus, for procedural issues regarding contract formation and insufficient disclosure in respect of an online contract, a consumer should be able to approach a South African court. However, ECTA does not address substantive issues of fairness.⁵²⁵ This provision will thus not assist a consumer questioning for example whether a supplier is allowed to track their online activity, provided the supplier disclosed the practice in line with the requirements of ECTA.

Oakley indicates that allowing a consumer to approach a convenient local jurisdiction is generally the better policy, because the supplier – who is already conducting business in that jurisdiction – is better situated to travel.⁵²⁶ This is the approach in the EU with regard to consumer contracts, where article 16(2) of the Brussels I-Regulations provides that a claim against a consumer may only be brought in the Member State where the consumer is domiciled if certain requirements are met.⁵²⁷ It is recognised that this creates the risk of exposing small business to near-universal liability based purely on the fact that they maintain a website, and the Commission has indicated that

“the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts”.⁵²⁸

This dissertation does not allow for a full analysis of these issues, and it is acknowledged that there might be opposing policy considerations not considered here,

⁵²⁴ S 90(a)-(c) of ECTA.

⁵²⁵ See ch 2 (2 2 2 2).

⁵²⁶ Oakley 2005 *Houston LR* 1087.

⁵²⁷ This protection will be enjoyed provided article 15 of the Brussels I-Regulations apply, which includes the requirement that “the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities” (art 15(1)(c)). For the interpretation of this requirement in the online context, see ZS Tang “Consumer Contracts and the Internet in EU Private International Law” in A Savin & J Trzaskowski (eds) *Research Handbook on EU Internet Law* (2014) 254 267-275.

⁵²⁸ The European Council and the Commission “Statement on Articles 15 and 73” *European Commission* <http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf> (accessed 7-11-2019). Also see Tang “EU Private International Law” in *EU Internet Law* 271.

which might explain why the CPA does not explicitly oblige a supplier to follow the consumer to his jurisdiction. For example, De Villiers indicates that

“[a]lthough unfettered party autonomy may very well disadvantage those few consumers who do litigate, the increase in cost and decrease in product availability resulting from the added burden on the supplier when party autonomy is limited is to the disadvantage of a much larger group.”⁵²⁹

Nonetheless, it is clear that, in order to provide online consumers with effective access to courts, at least suppliers who target⁵³⁰ local consumers should be obliged to follow the consumer to his forum, despite contractual terms to the contrary and without having to resort to common-law grounds.

4 7 4 2 *Choice-of-law clauses*

Typically, online contracts specify that they are governed by the law of the supplier’s principal place of business.⁵³¹ This might be problematic where the consumer’s domestic law provides better protection to the consumer than that of the supplier.⁵³² Thus, should South African courts implement stricter control over terms of online contracts, a supplier can thwart those protection measures if choice-of-law clauses are allowed.

⁵²⁹ De Villiers 2013 *TSAR* 482.

⁵³⁰ Determining when a website can be said to target a specific group of consumers can be challenging (see Tang “EU Private International Law” in *EU Internet Law* 257: “The concept of ‘targeting’, however, is particularly troublesome on the Internet”).

⁵³¹ Bradshaw et al 2011 *International Journal of Law and Information Technology* 198. Marks found that 81% of online contracts studied included a choice-of-law clause (2017 *Pepp LR* 39).

⁵³² See De Villiers 2013 *TSAR* 481-482: “Providing suppliers an unfettered ability to choose an applicable legal system may very well deprive consumers of even the minimum level of consumer protection”.

Generally, South African courts give effect to choice-of-law clauses.⁵³³ Thus, if the proper law⁵³⁴ of the contract is deemed to be South African law, a choice-of-law clause will be enforced.

Whether selecting a foreign legal system will also exclude the operation of the CPA from an online contract concluded by a South African consumer is uncertain. The CPA provides that it applies to “every transaction occurring within the Republic”, unless specifically exempted.⁵³⁵ A term which deprives the consumer of the rights contained in the CPA is prohibited.⁵³⁶ Furthermore, in terms of the CPA, a contract term will be presumptively unfair where it provides that

“a law other than that of the Republic applies to a consumer agreement concluded and implemented in the Republic, where the consumer was residing in the Republic at the time when the agreement was concluded.”⁵³⁷

Whether an online contract is “concluded and implemented” in South African depends on whether the supplier or the consumer is regarded as the offeror,⁵³⁸ because (as discussed above) an electronic contract is deemed to be concluded where acceptance is received by the offeror.⁵³⁹ It is also uncertain whether an online contract, for example the contract a consumer has with Facebook, is implemented at the place where the consumer uses the service or at the place where the supplier’s infrastructure for providing the service is situated. Consequently, it is not clear whether the provisions of the CPA will apply despite a foreign jurisdiction being appointed in an online contract, and might depend on whether it is transactional website or not. This is clearly an unsatisfactory situation.

⁵³³ AB Edwards (updated by E Kahn) “Conflict of Laws” in WA Joubert (ed) *LAWSA* 2 2 ed (2003) para 329. There are exceptions to this rule: when the matter to be determined relates to contractual capacity, formal validity or legality, the selection of the parties will have no effect on the legal system which is applied (Edwards “Conflict” in *LAWSA* para 329).

⁵³⁴ The proper law of a contract “is the law of the country which the parties have agreed or intended or are presumed to have intended will govern it” (Edwards “Conflict” in *LAWSA* para 328).

⁵³⁵ S 5(1)(a) of the CPA.

⁵³⁶ S 51(1)(b)(i) of the CPA.

⁵³⁷ Reg 44(3)(bb) of the CPA.

⁵³⁸ See ch 3 (3 4 4).

⁵³⁹ See 4 7 4 1 above.

In the EU, Article 3(1) of the Rome I-Regulations⁵⁴⁰ allows contracting parties to choose the law applicable to their contract, provided the choice is “expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.” However, Loos and Luzak regard a term in an online contract insufficient to indicate an express or clear choice as contemplated in the Rome I-Regulations, unless the consumer’s attention has specifically been drawn to that term by the supplier.⁵⁴¹ Furthermore, the consumer may not be deprived of protection offered to him by mandatory law in the place he is domiciled.⁵⁴² The Unfair Contract Terms Directive also offers this protection in respect of the provisions set out therein.⁵⁴³

The uncertainty created by focusing on the place where a contract is concluded or implemented can be avoided if the consumer’s place of residence or domicile is used to establish applicable law or at least the minimum level of protection which a consumer should enjoy. This is the approach ostensibly followed in ECTA,⁵⁴⁴ and for consumer protection measures in respect of online contracts to be effective, any legislation providing such protection will have to follow suit. However, it is again acknowledged that countervailing policy considerations might apply.⁵⁴⁵

4 8 Conclusion

It was found in the previous chapter that South African law has fairly generous rules pertaining to the formation of online contracts. The American experience shows that

⁵⁴⁰ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law applicable to Contractual Obligations (Rome I-Regulations).

⁵⁴¹ Loos & Luzak 2015 *Journal of Consumer Policy* 84.

⁵⁴² See Art 6(2) of the Rome I-Regulations.

⁵⁴³ See Art 6(2), discussed above at 4 6.

⁵⁴⁴ S 47 of ECTA provides that: “The protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question.” This is very broad and should presumably be read with s 90 of ECTA, which determines when a South African court will have jurisdiction to try an offence in terms of ECTA (see text to n 524 above). Also see s 48 of ECTA, which nullifies any provision which would exclude the rights granted in terms of Chapter VII of ECTA. Compare De Villiers 2013 *TSAR* 486 486-487 and Neels 2010 *Obiter* 123-124, both who interpret this as prescribing a preferential approach where choice of a legal system which adds rights may be valid; with Sibanda 2008 *DJ* 324-325, who is of the opinion that a strict approach is prescribed in terms of which South African law must be applied. This debate is however not pertinent for the present discussion.

⁵⁴⁵ See Sibanda 2008 *DJ* 327.

in order to ensure adequate protection for consumers, this must be counterbalanced with stricter rules relating to substantive control.⁵⁴⁶ The generally high degree of procedural unfairness in online contracts, which can be attributed to a lack of bargaining power and consumer awareness, means that substantive regulation of the terms is of particular importance.

Legal systems have largely found the existing measures of substantive control inadequate to ensure proper protection for online consumers. This is illustrated by the American experience, and can further be evidenced by the fact that the EU found it necessary to develop regulations and directives to address the most important issues facing online users, instead of relying on their general provisions relating to fairness. It has been argued that this will in all likelihood also be the experience in SA: a consumer will seldom succeed in relying on public policy to escape onerous terms in online contracts, because of the strict approach followed by courts in finding a term to be *contra bonos mores*. Furthermore, because the application of the CPA's provisions is not limited to non-negotiated terms, it can be argued that the standard for finding a term unfair might be too strict with regard to contracts tainted with a high degree of procedural unfairness. Despite incorporating procedural considerations into the fairness enquiry,⁵⁴⁷ the CPA does not give a clear indication what the effect of these considerations are.

A clear need for regulation has been illustrated. Legislation which is specifically tailored to the online environment can provide for a more refined approach and lead to a higher degree of certainty than legislation which applies to standard form contracts in general. This can either take the form of legislation regarding specific issues (such as privacy), or the development of a general statutory standard to ensure fairness in online contracts. The next chapter will focus on the suggested procedural and substantive dimensions of such an approach.

⁵⁴⁶ Also see Du Plessis 2019 *SA Merc LJ* 213.

⁵⁴⁷ S 52(2) of the CPA.

CHAPTER 5: CONCLUSION – PROPOSALS FOR THE REGULATION OF ONLINE CONTRACTS

5 1 Introduction

This dissertation mainly focuses on two questions: whether online contracts are enforceable in principle, and if so, to what extent should they be enforced. The first question raises issues relating to assent, and has been answered mostly in the affirmative: provided some conditions are met, online contracts will be regarded as *prima facie* validly concluded.¹ The more problematic question is the second one, which relates to both formation and substance, and asks what measures should be imposed to further regulate the enforceability of online contracts. There are two components to this question: it first asks whether more stringent requirements for assent should be recognised, and secondly what limitations should be placed on the content of online contracts.

The need for regulation to protect consumers from supplier overreach is almost universally recognised.² However, the form that this regulation should take is more controversial. Korobkin states that:

“Three regulatory alternatives to blanket enforcement of form terms exist: (1) require buyers and sellers to negotiate fully state-contingent contracts; (2) impose legislatively determined mandatory terms on contracting parties; (3) judicially evaluate and replace form terms *ex post*, on a case-by-case basis”.³

The first alternative refers to fully negotiated terms, but could also include specific assent requirements, such as initialling each term.⁴ The reference to state-contingent contracts (i.e. contracts dependent on future events) is uncertain, but could just indicate that these contracts have to provide for a wide array of possible unexpected

¹ See ch 3.

² Reporters' Introduction to the American Law Institute *Restatement of the Law, Consumer Contracts: Tentative Draft* (2019) (the Draft Restatement) 1; D Hutchison "The Nature and Basis of Contract" in D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 3 24; P Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 20; K Hopkins "Standard-Form Contracts and the Evolving Idea of Private Law Justice: A Case of Democratic Capitalist Justice Versus Natural Justice" 2003 *TSAR* 150 153.

³ R Korobkin "Bounded Rationality, Standard Form Contracts and Unconscionability" (2003) 70 *U Chi LR* 1203 1245.

⁴ 1245-1246.

events. The second alternative (i.e. mandatory terms determined by the legislature) seems impractical given the vast scope of online contracts.

It is proposed that the possible regulatory alternatives should instead be replaced with provisions that either aim to improve the quality of assent by setting stricter requirements for contract formation (by requiring full negotiation or specific disclosure), or that involve *ex post facto* scrutiny of the terms.⁵ These regulatory techniques are considered in this chapter,⁶ whereafter their application in the context of specific problematic clauses will be discussed.⁷

When evaluating the effectiveness and viability of the alternative regulatory responses, certain key observations regarding online contracts must be kept in mind. These observations are central to the evaluation of these contracts and have been referred to before, but as they have particular relevance in determining appropriate regulation, they also require brief mention in this context.

5 2 Key observations regarding online contracts

5 2 1 Business necessity as a justification for the enforcement of online contracts

The benefits and importance of standard form contracts are widely recognised, and have been discussed previously.⁸ The justification for their enforcement consistently refers to their economic purpose, such as the fact that they reduce transaction costs and allow suppliers to manage risks.⁹ For example, Sachs J stated:

“The use of standard forms responds to two economic pressures. They reduce the transaction costs of contracting by making available at no extra cost a suitable set of terms. In addition the printed forms permit senior management of a firm to control the contractual arrangement made by subordinate staff. For these reasons it makes sense to permit the use of standard forms, but to control the content of the terms of the contracts.”¹⁰

⁵ See Reporters' Introduction to the Draft Restatement 1-2.

⁶ See 5 3 below for the regulation of assent, and 5 4 below for the regulation of the content of a contract.

⁷ At 5 5 below.

⁸ See ch 2 (2 3 3).

⁹ See PJ Sutherland “Ensuring Contractual Fairness in Consumer Contracts after *Barkhuizen v Napier* 2007 (5) SA 323 (CC) - Part 2” (2009) 20 *Stell LR* 50 63.

¹⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 139.

One of the fundamental observations made by the reporters of the Draft Restatement is that “the use of standardization in the production of contract terms is ... a source of potential benefits to consumers and businesses alike.”¹¹ These considerations also hold true for online contracts, and leads to the conclusion that the enforcement of standard form contracts – and by extension online contracts – is essential.

This assumption has been challenged by some commentators. Marks argues that one indication that online contracts are not vital to suppliers is the fact that the majority of suppliers make use of browse-wraps instead of click-wraps, even though the former is more likely to be found unenforceable.¹² According to him, this illustrates “a conscious tradeoff made by the online sellers to choose expediency over effectiveness.”¹³ Radin and Kar also aver that the default contract law rules are sufficient to regulate the relationship between the supplier and the consumer.¹⁴ They further allege that these rules provide a fairer balance between the interests of the supplier and the consumer than terms drafted by only one of the parties.

However, these commentators are by far in the minority and the prevailing view remains the notion that standard form contracts are essential for commercial reasons. Online suppliers require consent to perform certain actions essential for delivery of their services, for example the use of personal information and user-generated content by social media sites. Ben-Shahar further argues that invalidating boilerplate terms would remove the option for consumers to pay lower prices in return for more supplier-friendly terms,¹⁵ which would “likely expel many who cannot afford this package out of the market.”¹⁶

Three important implications flow from the observation that online contracts are both justified by and essential for commercial practice. First, if this justification is accepted, the reason why judges should not be allowed too wide a discretion to interfere in the contractual relationship created by online contracts is not because of the fear of

¹¹ Reporters’ Notes to Para 2 of the Draft Restatement 35.

¹² CP Marks “Online and ‘As Is’” (2017) 46 *Pepp LR* 1 48-49; CP Marks “Online Terms as In Terrorem Devices” (2019) 78 *Maryland LR* 247 249.

¹³ Marks 2019 *Maryland LR* 249.

¹⁴ See nn 55-61 below.

¹⁵ O Ben-Shahar “Regulation through Boilerplate: An Apologia” (2014) 112 *Mich LR* 883 895, 899.

¹⁶ 896.

encroaching on the autonomy of the parties, but rather because of the need for certainty.¹⁷ Certainty and economic efficiency are recognised values forming part of the South African law of contract.¹⁸

If too much emphasis is placed on fairness in contract law, it could undermine considerations of certainty.¹⁹ In *Brisley v Drotzky*,²⁰ Olivier JA recognised that an approach that incorporates reasonableness and fairness will lead to a degree of legal and commercial uncertainty, but opined that:

“dit is die prys wat ‘n viriele regstelsel, wat billikheid net so belangrik as regsekerheid ag, moet betaal: ‘n balans moet gevind word tussen kontinuïteit van die regsistiem en die aktualiteit van die sosiale werklikheid”.²¹

Certainty is thus not a holy cow, but remains an important objective to take into account when proposing a form of regulation.

Secondly, if business efficiency is relied on as providing a justification for enforcing online contracts even in the absence of meaningful assent, it follows that the degree to which a term serves an economic purpose should be a factor in determining its enforceability. Thus, when evaluating whether a term is unfair, unreasonable or unjust in terms of the Consumer Protection Act 68 of 2008 (CPA), courts should give due regard to the factor listed in section 52(2)(f), namely

“whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier”.

¹⁷ See *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) 339: “Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty”.

¹⁸ See *Oregon Trust v BEADICA* 231 CC 2019 4 SA 517 (SCA) para 35; C Lewis “The Uneven Journey to Certainty in Contract” (2013) 76 *THRHR* 80 82-83; D Hutchison “Good faith in the South African Law of Contract” in R Brownsword, NJ Hird & G Howells (eds) *Good Faith in Contract: Concept and Context* (1999) 231 230-231 (also quoted by D Hutchison in “Non-Variation Clauses in Contract: Any Escape from the Shifren Straitjacket?” (2001) 118 *SALJ* 720 744-745).

¹⁹ Lewis 2013 *THRHR* 88.

²⁰ 2002 4 SA 1 (SCA).

²¹ Para 78: “that is the price which a virile legal system, which deems fairness of equal importance to legal certainty, must pay: a balance must be struck between continuity of the legal system and the actuality of the social reality” (own translation).

Finally, unless the conclusion that online contracts are essential is successfully challenged, unrealistic formation requirements are untenable. If the requirements for assent make it practically impossible for online suppliers to conclude binding contracts with consumers, they might be unable to continue providing goods or services or have to significantly increase the price. Thus, if proper informed consent is impossible, insisting on it may cause more harm than good.

5 2 2 Reading online contracts is irrational

Numerous studies have confirmed what most consumers intuitively know: consumers do not read online contracts regardless of how they are displayed or how effortlessly they can be accessed.²² Wilkinson-Ryan refers to the “now-uncontroversial fact of universal non-readership”,²³ and the reporters of the Draft Restatement observe that

“consumers rarely read standard contract terms no matter how those terms are disclosed.”²⁴

Due to the reasons mentioned previously, it is irrational for consumers to read online contracts.²⁵ Consequently, Schulte-Nölke states that

“one of the most, if not the most, important functions of the law of standard contract terms should be to relieve consumers ... from the burden of any obligation to read, ponder over, or even negotiate the bulk of standard contract terms before they agree to their application.”²⁶

This observation has important implications when considering regulatory responses to the problem of adverse terms in online contracts. It means that efforts to enhance fairness cannot rely on factors which require the consumer to read the contract, for example whether the product could be obtained from another supplier on more

²² See ch 3 (3 2 2 1). Also see O Ben-Shahar & CE Schneider *More Than You Wanted to Know: A Failure of Mandated Disclosure* (2014) 67-69; F Marotta-Wurgler “Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s ‘Principles of the Law of Software Contracts’” (2011) 78 *U Chi LR* 165 168; Y Bakos, F Marotta-Wurgler & DR Trossen “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts” (2014) 43 *J Leg Stud* 1 31; O Ben-Shahar “The Myth of the ‘Opportunity to Read’ in Contract Law” (2009) 5 *ERCL* 1 2.

²³ T Wilkinson-Ryan “The Perverse Consequences of Disclosing Standard Terms” (2017) 103 *Cornell LR* 117 120.

²⁴ Reporters’ Notes to Para 2 of the Draft Restatement 35.

²⁵ See ch 3 (3 2 2 1).

²⁶ H Schulte-Nölke “Incorporation of Standard Contract Terms on Websites” (2019) 15 *ERCL* 103 121.

favourable terms. Naturally, it also impacts the prospect of success of disclosure as a regulatory technique, an issue which will be addressed more thoroughly below.²⁷

5 3 Regulating assent in online contracts

5 3 1 Introduction

We now return to the assent-related aspects of the questions asked in the introduction. The main concern raised in respect of the enforcement of online contracts is the lack of mutual assent generally characterising its formation.²⁸ Both the American and South African common law allow for the enforcement of unread terms by subscribing to an idea of blanket assent: consumers agree that the terms will apply regardless of their content, thereby assuming the risk of adverse terms. One exception to this general position, at least in South African law, is where terms are deemed surprising, and lead to a material and reasonable mistake. This renders the supplier's reliance on consent unreasonable, and, in terms of the *iustus error* doctrine, such terms are void.²⁹ As previously argued, this exception is an important instrument which courts can utilise to ensure that consumers' reasonable expectations are given effect to.³⁰

It was shown that, like American law, South African courts do not insist that consumers must have actual knowledge of the content of a standard form contract; and despite the absence of true consent, or even a reasonable reliance on the existence of true consent, both legal systems allow for the enforcement of terms.³¹ The Draft Restatement concretises this position.³² However, this move has attracted much criticism. As mentioned before, this mostly revolves around the fact that the assent-requirement has been watered down to require little more than notice.³³ While this concern is not without merit, it seems to be the inevitable consequence of standard form contracts. Whether this criticism holds any water depends on the feasibility of

²⁷ See 5 3 2 below.

²⁸ See ch 3.

²⁹ See ch 3 (3 4 6).

³⁰ See ch 3 (3 6 4).

³¹ See ch 3 (3 6 2).

³² Draft Restatement para 2.

³³ Ch 3 (3 5 3 3).

alternatives or solutions, especially in light of the conclusion above that online contracts are essential.³⁴

Proposals specifically aimed at reforming the assent-requirement can be grouped into two broad categories: those which only regard terms representing a meeting of the minds as binding contractual terms;³⁵ and those which argue for increased disclosure or specific disclosure-related measures to improve the quality of assent.³⁶ Another solution, which can be distinguished from mere disclosure-based solutions, is the notion of free or voluntary consent as envisioned in the General Data Protection Regulation (GDPR).³⁷ This concept will be considered separately.³⁸

5 3 2 Proposals which hold that the enforcement of online contracts cannot be justified based on assent

Scholars have warned that relaxing the assent-requirement by requiring only notice of the existence of contractual terms and a manifestation of assent (instead of actual assent) might lead to “normative degradation”³⁹ by eroding the very essence of contractual legitimacy. A further argument, which was previously referred to,⁴⁰ is that it would be preferable – from both a practical and theoretical point of view – to recognise that the enforcement of online terms is not justified by assent, and consequently also to remove assent as a requirement.⁴¹ For example, Zacks argues that:

“The elimination of assent appears to violate the conception of basic freedom from contract. That, however, is largely the point: this situation may exist now, and the fiction that it does

³⁴ See 5 2 1 above.

³⁵ See 5 3 2 below.

³⁶ See 5 3 3 below.

³⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and repealing Directive 95/46/EC (General Data Protection Regulation).

³⁸ See 5 3 4 below.

³⁹ MJ Radin *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013) 19; MJ Radin “The Deformation of Contract in the Information Society” (2017) 37 *OJLS* 505 522.

⁴⁰ See ch 3 (3 7).

⁴¹ See WD Slawson “Standard Form Contracts and Democratic Control of Lawmaking Power” (1971) 84 *Harv LR* 529 544.

not is what permits the routine enforcement of oppressive terms unilaterally imposed on consumers in a coercive fashion.”⁴²

If assent no longer justifies the enforcement of standard terms, an alternative basis to legitimise their enforcement must be found. The most persistent of these is the so-called “contract-as-product” theory.⁴³ Leff was the first to argue that contracts of adhesion bear a closer resemblance to a product than a contract,⁴⁴ an observation that was echoed by Slawson soon thereafter.⁴⁵ They argue that a standard form is presented to the consumer as an assembled “product”, and in the same way as a consumer is not expected to understand and expect the mechanism by which, for example, a refrigerator operates, he is also not expected to comprehend the content of the standard terms.⁴⁶ Where the standard terms restrict the use of the product in a way which interferes with its expected utility, this restriction should be regarded as similar to a defect in the product limiting its use.⁴⁷ Classifying standard terms as products would protect the consumer’s reasonable expectations,⁴⁸ because

“when a particular standard form had failed to serve the purposes which the buyer had good reason to expect it to serve, the failure would be a breach of warranty.”⁴⁹

The main benefit of the contract-as-product theory thus lies in the fact that it relieves the consumer from the duty to read; or conversely negates the notion that terms (regardless of their substantive effect) are binding because of a consumer’s manifestation of consent.⁵⁰ If the standard form terms are not viewed as contractual

⁴² EA Zacks “The Restatement (Second) Of Contracts S 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts” (2016) 7 *Wm & Mary Bus LR* 733 773-774.

⁴³ See JP Nehf “Shopping for Privacy Online: Consumer Decision-Making Strategies and the Emerging Market for Information Privacy” (2005) *University of Illinois Journal of Law, Technology & Policy* 1 7-8.

⁴⁴ AA Leff “Contract as Thing” (1970) 19 *Am U LR* 131.

⁴⁵ Slawson 1971 *Harv LR*; WD Slawson “Mass Contracts: Lawful Fraud in California” (1974) 48 *S Cal LR* 1.

⁴⁶ Slawson 1974 *S Cal LR* 17.

⁴⁷ Leff 1970 *Am U LR* 149-151; Slawson 1971 *Harv LR* 546-547.

⁴⁸ Slawson 1971 *Harv LR* 523: “what is needed is a set of legal principles which reconcile the interests of issuers in setting such terms as they wish on an agreement and of the consumer in having his reasonable expectations fulfilled.”

⁴⁹ Slawson 1974 *S Cal LR* 18.

⁵⁰ See Slawson 1974 *S Cal LR* 15-16.

in nature, it would give courts a wider power to exercise control over these terms in accordance with the law of torts.⁵¹

In the nearly 50 years since its development, this theory has received some academic support,⁵² but has not enjoyed judicial approval.⁵³ South African authors have also not subscribed to this view, deeming it largely inconsistent with the distinction between personal rights and property.⁵⁴

A more recent theory proposed by Kar and Radin, and which they refer to as shared meaning analysis, holds that boilerplate terms should not be viewed as contractual in nature, but rather as a form of “pseudo-contract”.⁵⁵ They rely on the use of linguistics⁵⁶ to argue that only terms which contribute to the parties’ shared understanding of their agreement should have contractual force,⁵⁷ all other boilerplate terms they regard as “ride-along text”⁵⁸ which does not form part of the shared meaning of the parties.⁵⁹ This, they believe, will prevent the distortion of freedom of contract which occurs when

⁵¹ Radin *Boilerplate* 101 and ch 11; HG Beh “Curing the Infirmities of the Unconscionability Doctrine” (2015) 66 *Hastings LJ* 1011 1034: “The boldest suggestion to reinvigorate unconscionability is to establish a parallel tort-based claim.”.

⁵² See, for example, Radin *Boilerplate* 199.

⁵³ JM Moringiello “Signals, Assent and Internet Contracting” (2005) 57 *Rutgers LR* 1307 1314.

⁵⁴ See GTS Eiselen *Die Beheer oor Standaardbedinge: 'n Regsvergelykende Ondersoek* LLD thesis Potchefstroom University (1988) 51.

⁵⁵ RB Kar & MH Radin “Pseudo-Contract and Shared Meaning Analysis” (2019) 132 *Harv LR* 1135, see specifically 1166-1167.

⁵⁶ In particular the views of Grice (see 1144-1154).

⁵⁷ 1155: “To determine whether a particular piece of boilerplate text contributes a valid term to a contract, one must therefore ask whether the text was ever entered into a linguistic exchange in a sufficiently cooperative manner to create a common meaning of the parties.”

⁵⁸ 1192.

⁵⁹ They define the shared meaning as “the meaning that is most consistent with the presupposition that both parties were using language cooperatively to form a contract” (at both 1146 and 1154).

a supplier is allowed to create a contract unilaterally⁶⁰ in an environment which makes it impractical for consumers to read these boilerplate terms.⁶¹

The practical effect of their proposal is that only the core terms of a transaction would be enforceable, rendering most standard terms without legal effect and resulting in “the roiling of markets by precluding buyers and sellers from maintaining confidence in their agreements.”⁶² The authors do not address the common view that online contracts are essential;⁶³ and unless it can be disproved, this solution does not seem feasible.⁶⁴ They have also been criticised for envisioning an unworkable subjective approach to establishing consensus by requiring “actual agreement”.⁶⁵ Part of Feldman’s criticism of Kar and Radin’s proposal of shared meaning analysis is based on their failure to address the crucial reasons why objective considerations were introduced in contract law, and he argues that:

“The duty to read and understand a contract rests on sound legal and economic policies. As shown above, the authors’ rejection of the fundamental premise that the law holds a

⁶⁰ 1155, 1161: “The premises of freedom of contract — and also freedom from contract — suppose parties with equal capacities to define and enter into only those terms that both agree offer expected gains for each, trusting a well-functioning legal system to focus legal enforcement on their shared agreements. Assimilationists have not yet recognized the depth of the normative problems with construing pseudo-contract as contract and giving some parties — but not others — the unilateral right to shape aspects of ‘contracts’ without producing common meanings to which both parties have actually agreed.”

⁶¹ 1207.

⁶² S Feldman “Actual Agreement, Shared Meaning Analysis, and the Invalidation of Boilerplate: A Response to Professors Kar and Radin” 14-2-2019 *SSNR* <<https://ssrn.com/abstract=3336377>> (accessed 7-11-2019) 6.

⁶³ See 5 2 1 above.

⁶⁴ See Feldman “Actual Agreement, Shared Meaning Analysis, and the Invalidation of Boilerplate: A Response to Professors Kar and Radin” *SSNR* 25-30.

⁶⁵ Feldman “Actual Agreement, Shared Meaning Analysis, and the Invalidation of Boilerplate: A Response to Professors Kar and Radin” *SSNR* 19-20, 52-63: “Kar and Radin fully embrace the ‘unworkable’ subjective theory as the foundation for their proposal” (63). See Kar & Radin 2019 *Harv LR* 1138: “Without the presence of an *actual agreement* freely reached, the state is not easily justified in enforcing a contract, because instead of enhancing the parties’ freedom of contract, the legal system would be limiting it” (own emphasis).

party responsible for reading and understanding its contract would impair the party's exercise of autonomy and thereby undermine the stability and predictability of contracts."⁶⁶

Ben-Shahar further points out that consumers are just as ignorant with respect to the default rules.⁶⁷ These rules might further prove more difficult to ascertain than those set out in the standard form contract.⁶⁸ Thus, declaring all boilerplate invalid will not solve the problem of consumer ignorance.⁶⁹

Even though both of the theories discussed above (contract-as-product and shared meaning analysis) are difficult to reconcile with the South African law of contract, it does not detract from the basic problem identified by the various scholars: by classifying these non-negotiated terms as contracts, they are afforded the same protection as negotiated contractual terms despite the absence of a bargaining process or meaningful assent. It is thus the problem identified in the previous chapter, namely the fact that judges continue to pay lip-service to contractual freedom in evaluating the enforceability of standard terms,⁷⁰ which these proposals primarily try to address. However, this can be done in a less drastic and more doctrinally sound manner, for example by providing that certain terms are presumptively unfair, as explored below.⁷¹

5 3 3 Disclosure-based solutions in general

5 3 3 1 *Effectiveness of disclosure as a means to ensure fairness*

Traditionally, regulation of standard form contracts took one of two forms (or a combination of both) – either the content of the contract was regulated, or disclosure was mandated.⁷² Disclosure in particular is favoured by the legislature⁷³ because of its low implementation cost:

⁶⁶ Feldman "Actual Agreement, Shared Meaning Analysis, and the Invalidation of Boilerplate: A Response to Professors Kar and Radin" *SSNR* 79.

⁶⁷ Ben-Shahar 2014 *Mich LR* 887-888.

⁶⁸ 888.

⁶⁹ 892.

⁷⁰ See ch 4 (4 4 2).

⁷¹ See 5 5 below.

⁷² Bakos et al 2014 *J Leg Stud* 2.

⁷³ Ben-Shahar and Schneider describe just how prevalent disclosure as a regulatory technique is in all areas of the law (*More Than You Wanted to Know* ch 2). Also see SI Becher & TZ Zarsky "Seduction by Disclosure: Comments on *Seduction by Contract*" (2014) 9 *Jrslm Rev Legal Stud* 72 72.

“Requiring disclosure puts only a very minimal burden on firms, requires almost no judicial or regulatory oversight, and does not otherwise interfere with parties' private ordering.”⁷⁴

However, there is little evidence to show that increased disclosure has the intended effect, and most academics recognise its historic failure to ensure fairer contract terms.⁷⁵ The reasons for this mostly relate to consumers' failure to read⁷⁶ or failure to comprehend⁷⁷ the terms of standard form contracts, and include the fact that consumers lack the necessary literacy or education to understand even simplified disclosures;⁷⁸ that consumers are so overloaded with information that they cannot read and assimilate it all, and end up making worse decisions;⁷⁹ that some consumers prefer to avoid decision-making (particularly relating to complex and unfamiliar subjects);⁸⁰ and that disclosures cannot correct heuristic biases affecting consumers' decision making.⁸¹ The problem can be summarised as follows:

“Studies numerously testify that people don't notice disclosures, don't read them if they see them, can't understand them if they try to read them, and can't use them if they read them.”⁸²

The main difficulty with a solution focused on disclosure is that the more information is provided, the less likely consumers are to read it. Merely increasing the amount of information available to consumers will be ineffective and will most probably exacerbate the problem.⁸³

⁷⁴ Wilkinson-Ryan 2017 *Cornell LR* 137-138 (footnotes omitted).

⁷⁵ Ben-Shahar & Schneider *More Than You Wanted to Know* 43-51; O Ben-Shahar & CE Schneider “Coping with the Failure of Mandated Disclosure” (2015) 11 *Jrslm Rev Legal Stud* 83 83.

⁷⁶ See ch 3 (3 2 2 1). Also see Ben-Shahar & Schneider *More Than You Wanted to Know* 71-72; Wilkinson-Ryan 2017 *Cornell LR* 123.

⁷⁷ See ch 3 (3 2 2 2).

⁷⁸ Ben-Shahar & Schneider *More Than You Wanted to Know* 8, 47, 80-91; Ben-Shahar 2009 *ERCL* 13.

⁷⁹ Ben-Shahar & Schneider *More Than You Wanted to Know* 51, 101-105.

⁸⁰ 67.

⁸¹ Ben-Shahar & Schneider *More Than You Wanted to Know* 56-57, 110-112; Ben-Shahar 2009 *ERCL* 14.

⁸² Ben-Shahar & Schneider *More Than You Wanted to Know* 55.

⁸³ O Bar-Gill *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (2012) 36. Also see RA Hillman “Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire” (2006) 104 *Mich LR* 837 850.

5 3 3 2 *Specific disclosure-related suggestions in the online context*

Various suggestions have been made in an attempt to circumvent the non-reading problem in online contracts. One category of solutions focuses on highlighting specific terms and making them easier to digest. Probably the most prominent of these is so-called “smart disclosure”, which encourages suppliers to place terms which consumers expect in a less noticeable place, and to highlight in a prescribed warning box those terms which consumers assume will be more favourable toward them than what is actually the case.⁸⁴ Porat and Strahilevitz propose a variation of this, which would see suppliers use information they possess about consumers to personalise the terms disclosed to those consumers.⁸⁵ A less tailored use of the warning box is suggested by Preston, namely the creation of a table providing a summary of the terms similar to the “calorie and content” box found on foodstuffs.⁸⁶ Another suggestion, which also relies on selective disclosure, is the use of a score denoting the quality of the underlying terms.⁸⁷ This can be used to circumvent the problem of information overload,⁸⁸ but does not serve to inform consumers of individual terms.

Other proponents of disclosure as a solution in online contracts suggest that an additional manifestation of consent should be required – merely clicking once is not sufficient. For instance, it is suggested that only terms for which the consumer indicates consent in a specific manner (for example by initialling, which requires a more deliberate action)⁸⁹ should be enforced.⁹⁰ One of Kim’s suggestions broadly supports

⁸⁴ I Ayres & A Schwartz “The No Reading Problem in Consumer Contract Law” (2014) 66 *Stanford LR* 545 545-609.

⁸⁵ A Porat & L Strahilevitz “Personalizing Default Rules and Disclosure with Big Data” (2014) 112 *Mich LR* 1417 1470-1476.

⁸⁶ CB Preston “Please Note: You Have Waived Everything!: Can Notice Redeem Online Contracts?” (2015) 64 *Am U LR* 535 580-582. A similar idea has also been proposed by Ben-Shahar 2009 *ERCL* 25-26.

⁸⁷ O Bar-Gill “Defending (Smart) Disclosure: A Comment on More Than You Wanted to Know” (2015) 11 *Jrslm Rev Legal Stud* 75 76. This is similar to the rating proposed by Ben-Shahar 2009 *ERCL* 22-24).

⁸⁸ Bar-Gill 2015 *Jrslm Rev Legal Stud* 77.

⁸⁹ AM Balloon “From Wax Seals to Hypertext: Electronic Signatures, Contract Formation and a New Model for Consumer Protection in Internet Transactions” (2001) 50 *Emory LJ* 905 933.

⁹⁰ DD Barnhizer “Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts” (2014) 44 *Southwestern LR* 215 218.

this view – she argues that so-called tailored assent should be obtained, which means that sellers should “require the non-drafting party to click after each promise.”⁹¹

These suggestions rely on the assumption that disclosure can draw the attention of individual consumers to terms which would otherwise have gone unnoticed, and allow them to make a choice whether or not to accept those terms and thus continue with the transaction. However, a consumer’s failure to read is not the only factor leading to unfair terms. Reading a term does not automatically mean comprehending its consequence,⁹² nor does it give the consumer the ability to influence the terms.⁹³ Consumers are also generally apathetic towards contract terms *ex ante*;⁹⁴ they do not believe that any of the long list of misfortunes provided for in the terms will befall them. Thus, even if the formation problem can theoretically be solved by proper disclosure, it might not influence consumer behaviour or lead to substantively fairer contract terms.⁹⁵

Furthermore, it is doubtful whether disclosure can succeed in rendering otherwise non-salient terms salient, in the sense that the consumer will factor those terms into their decision-making process. Certain terms, like arbitration clauses and choice-of-forum clauses, are “arguably not susceptible to salience solutions.”⁹⁶ There is a high likelihood that regardless of how many clicks are required, consumers will continue to

⁹¹ N Kim *Wrap Contracts: Foundations and Ramifications* (2013) 196.

⁹² See ch 3 (3 2 2 2). Also see Ben-Shahar 2014 *Mich LR* 890: “the ideal of informed consent is impossible to achieve when a true understanding of the decision requires experience, background knowledge, intuition, and technical mastery, which only experts have.”

⁹³ See ch 4 (4 2).

⁹⁴ Ben-Shahar 2009 *ERCL* 25; S Grundmann “A Modern Standard Contract Terms Law from Reasonable Assent to Enhanced Fairness Control” (2019) 15 *ERCL* 148 166-167.

⁹⁵ Barnhizer 2014 *Southwestern LR* 219 is of the opinion that “even the best quality assent likely will not improve the quality of the resulting contract.” Also see T Naudé “Unfair Contract Terms Legislation: The Implications of Why We Need It for Its Formulation and Application” (2006) 17 *Stell LR* 361 371, 377-378.

⁹⁶ Wilkinson-Ryan 2017 *Cornell LR* 136. Also see MJ Radin “What Boilerplate said: A Response to Omri Ben-Shahar (and a Diagnosis)” (2014) *Public Law and Legal Theory Research Paper Series Paper No. 392 4* (available at <<https://ssrn.com/abstract=2401720>>); MJ Radin “Less than I Wanted to Know: The Submerged Issues in ‘More than I Wanted to Know’” (2015) 11 *Jrslm Rev Legal Stud* 51 57.

do what they currently do: click to get rid of the terms and continue with the transaction, instead of clicking because they consent to it.⁹⁷

5 3 3 3 *Cost of disclosure*

Despite recognising the futility of disclosure as a means of ensuring fair terms, most commentators continue to support the idea that consumers must be granted an opportunity to study the terms before contract conclusion⁹⁸ and disclosure continues to feature prominently in consumer protection legislation.⁹⁹ Part of the rationale for insisting on disclosure is the general assumption that even if it is ineffective, it can do no harm. However, Wilkinson-Ryan challenges this view, arguing that the cost of disclosure lies in its psychological effect: consumers (and to a large extent also courts) regard properly disclosed standard terms as binding.¹⁰⁰ She therefore identifies the problem as the fact that

“the terms, afforded so little attention [by the consumer] *ex ante*, have too much weight *ex post*.”¹⁰¹

Hillman similarly concludes that disclosure may aggravate unfairness (by leading to the enforcement of suspect terms), instead of alleviating it.¹⁰² Although requiring disclosure makes theoretical sense because it serves to satisfy the assent requirement, it is precisely for this reason that disclosure as a means of control is problematic:

“Mandatory website disclosure would therefore reinforce Llewellyn’s conception of consumers’ blanket *assent* to reasonable standard terms... [and] consumers who agree to

⁹⁷ See Hillman 2006 *Mich LR* 844, who notes that methods of attracting attention to specific terms has not had particular success in traditional standard form contracts.

⁹⁸ See Ayres & Schwartz 2014 *Stanford LR* 561. Also see Wilkinson-Ryan 2017 *Cornell LR* 136.

⁹⁹ Ben-Shahar 2009 *ERCL* 10. See for example European Legal Studies Institute, Osnabrück University *Contribution to Growth: Legal Aspects of Protecting European Consumers* (2019) 33, where it is said that “consumer protection through information has been subject to criticism, as its overall effectiveness has been questioned, the Consumer Rights Directive proves that protection through information can also be pursued efficiently by consumers”. Disclosure is also mandated in the both the CPA and ECTA (see nn 126 and 127 below).

¹⁰⁰ Wilkinson-Ryan 2017 *Cornell LR* 139-164; M Furth-Matzkin “The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence” (2019) 70 *Alabama LR* 1032.

¹⁰¹ Wilkinson-Ryan 2017 *Cornell LR* 164.

¹⁰² Hillman 2006 *Mich LR* 839. Also see Wilkinson-Ryan 2017 *Cornell LR* 165.

a standard-form transaction after mandatory website disclosure would have a more difficult time complaining of hollow assent.”¹⁰³

Establishing whether there was assent and proper disclosure further acts as a distraction: instead of evaluating the merits of a specific terms and determining what suppliers should be allowed to do, courts determine whether the consumer assented to the terms.¹⁰⁴ Requiring specific terms to be drawn to the attention of the consumer can “be a double-edged sword which may ultimately work against the consumer”, because it strengthens the argument for its fairness.¹⁰⁵ It could thus persuade courts to place more value on freedom of contract when evaluating the enforceability of a term.¹⁰⁶

Another concern raised by scholars opposed to heightened disclosure is that it not only fails in its purpose, but also “spare[s] lawmakers the struggle of enacting better but less popular reforms.”¹⁰⁷ In other words, the argument is that even if disclosure in itself is not harmful, it is continually relied on as a method of ensuring fairness despite its proven ineffectiveness and thus prevents the legislature from considering more effective means of regulation.¹⁰⁸

5 3 3 4 *Reasons for continued reliance on disclosure*

In response to the failure of disclosure to influence the contracting decision of consumers, and the possible risks associated with increased disclosure, some academics have questioned whether there is any reason to continue requiring that suppliers must disclose standard terms at all.¹⁰⁹ Their argument goes further than merely advocating against heightened disclosure; instead they propose that the assent-requirement and the concomitant duty to disclose should be abolished in its

¹⁰³ Hillman 2006 *Mich LR* 846 (emphasis in original).

¹⁰⁴ Wilkinson-Ryan 2017 *Cornell LR* 170; Ben-Shahar 2009 *ERCL* 21.

¹⁰⁵ T Naudé “The Consumer’s ‘Right to Fair, Reasonable and Just Terms’ Under the new Consumer Protection Act in Comparative Perspective” (2009) 126 *SALJ* 505 510; T Naudé “Section 49” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 49-1 49-5.

¹⁰⁶ See ch 4 (4 4 2).

¹⁰⁷ Ben-Shahar & Schneider *More Than You Wanted to Know* 11.

¹⁰⁸ Ben-Shahar & Schneider 2015 *Jrslm Rev Legal Stud* 90.

¹⁰⁹ See ch 3 (3 7).

entirety. However, at least two arguments support a continued insistence on assent and disclosure, despite the fact that consumers generally fail to read the terms.

The first relies on market forces to police standard terms. The idea that a so-called informed minority is sufficient to ensure fairness in standard form contracts was articulated in 1979 by Schwartz and Wilde.¹¹⁰ Thus, if disclosure can succeed in achieving such an informed minority, market forces will ensure fairer terms in general.

It is not suggested that this abolishes the need for other forms of regulation. Empirical evidence indicates that generally no informed minority exists in respect of online contracts.¹¹¹ The risk also exists, especially online, that suppliers can isolate the consumers who read the terms, and offer only them better terms (for example by using opt-out clauses).¹¹² Most academics thus accept that market pressure in itself provides insufficient control over online contracts.¹¹³ Nowhere is this need illustrated more clearly than by considering issues regarding privacy and use of personal information. In this regard, Hoofnagle indicates that after

“ten years of experience with privacy self-regulation online, ... the evidence points to a sustained failure of business to provide reasonable privacy protections.”¹¹⁴

Despite this, examples were provided in a previous chapter of isolated incidents where reputational risks – heightened by the use of social media¹¹⁵ – successfully led to reform of terms.¹¹⁶ It has been suggested that in the information age, consumer activism can play a greater role in ensuring fair contract terms.¹¹⁷ If an effective method

¹¹⁰ A Schwartz & AA Wilde “Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis” (1979) 127 *U Pa LR* 630. Also see Bakos et al 2014 *J Leg Stud* 6-7; Wilkinson-Ryan 2017 *Cornell LR* 134; D Wijayasriwardena “Consent in Online Contracts - Mindless or Mindful?” (2016) *Queen Mary University of London, School of Law Legal Studies Research Paper No. 234/2016* 14-15 (available at <<https://ssrn.com/abstract=2783793>>); Hillman 2006 *Mich LR* 843.

¹¹¹ Bakos et al 2014 *J Leg Stud* 32; Wilkinson-Ryan 2017 *Cornell LR* 134. Also see *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) 383-384.

¹¹² Ben-Shahar 2009 *ERCL* 19-20.

¹¹³ See Hillman 2006 *Mich LR* 843; Benoliel & Becher 2019 *Boston College LR* (Forthcoming) 39.

¹¹⁴ CJ Hoofnagle “Privacy Self-Regulation: A Decade of Disappointment” in in JK Winn (ed) *Consumer Protection in the Age of the 'Information Economy'* (2006) 379 379.

¹¹⁵ See Becher & Zarsky (2014 *Jrslm Rev Legal Stud* 76) state that “the recent technological changes have substantially enhanced the opportunities available for interpersonal learning”.

¹¹⁶ See ch 3 (3 7).

¹¹⁷ Barnhizer 2014 *Southwestern LR* 224.

exists of reporting and making other consumers aware of abusive behaviour or unfair terms offered by a supplier, suppliers may amend their contracts rather than suffer the reputational risk.¹¹⁸ Market mechanisms – which depend on proper disclosure of terms – can thus play a subsidiary role to strengthen the prevention of undesirable terms in online contracts.¹¹⁹

Secondly, consumer organisations could play an important role in policing terms, and adequate disclosure is essential to facilitate their role.¹²⁰ The EU experience (where abstract challenges are allowed in terms of article 7(2) of the Unfair Contract Terms Directive¹²¹) illustrates how important this function can be. Grundmann indicates that actions brought by consumer organisations in Germany significantly exceed those instituted by individual consumers.¹²² He further states that one of the main advantages of requiring a clear manifestation of assent is

“not necessarily that consumers tend to take substantive note in a considerable number of cases, but that *the set of terms is thus ear-marked in a completely transparent way*. Consumer associations do not risk the possibility that a target of attack will be withdrawn once they open a law suit.”¹²³

The need for an increased role of similar institutions in the South African context has also been recognised.¹²⁴

It is thus not argued that the obligation on suppliers to properly disclose terms, which is recognised in the common law,¹²⁵ as well as the Electronic Communications and

¹¹⁸ Becher & Zarsky 2014 *Jrslm Rev Legal Stud* 120.

¹¹⁹ Eiselen came to a similar conclusion with regard to traditional standard terms (see *Standaardbedinge* 476-477).

¹²⁰ See Grundmann 2019 *ERCL* 166.

¹²¹ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (the Unfair Contract Terms Directive). Also see RL Oakley “Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts” (2005) 42 *Houston LR* 1041 1066.

¹²² Grundmann 2019 *ERCL* 170.

¹²³ 171 (emphasis in original). Also see Schulte-Nölke 2019 *ERCL* 122, who refers to this as the “pinpointing function”.

¹²⁴ See T Naudé “Section 52” in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 52-1 52-3;

¹²⁵ See ch 3 (3 3 3).

Transactions Act 25 of 2002 (ECTA)¹²⁶ and the CPA,¹²⁷ should be abolished. However, relying on disclosure as a means of improving the content of terms by ensuring informed decision-making is a “dangerous line of reasoning”.¹²⁸ In light of this, it is difficult not to endorse the view of the reporters of the Draft Restatement that more reliance should instead be placed on *ex post facto* review of the terms.¹²⁹ The manner in which a term is disclosed will then serve as one factor to consider in determining the fairness of a term.

One notable exception to this conclusion exists, namely the concept of voluntary opt-in consent, as required in terms of the GDPR.¹³⁰

5 3 4 Voluntary opt-in consent

As previously discussed, the GDPR sets three important requirements for consent to the processing of personal information.¹³¹ First, consent must be given separately;¹³² secondly, a positive act by the consumer is required;¹³³ and finally, it must be “freely given”.¹³⁴ It is especially the last requirement that sets this form of consent (which can be referred to as “voluntary assent”) apart from other disclosure-based solutions. In terms of the GDPR, this means that a supplier cannot preclude a consumer from using a service because he refuses to consent to use of his personal information, unless such consent is essential for providing the service.¹³⁵

The requirement of voluntary assent stipulated in the GDPR only finds limited application: it applies in the context of use of personal information, and seemingly also when consent to online tracking is given.¹³⁶ It can be questioned, however, whether this can pose a more general method to ensure a higher quality of assent. Stated

¹²⁶ S 43.

¹²⁷ See s 50 read with s 22, as well as section 49.

¹²⁸ Schulte-Nölke 2019 *ERCL* 120.

¹²⁹ Reporters' Introduction to the Draft Restatement 3.

¹³⁰ See ch 4 (4 7 2 1).

¹³¹ See ch 4 (4 7 2 1).

¹³² Art 7(2) of the GDPR.

¹³³ Art 4(11), read with Recordal 32.

¹³⁴ Art 4(11), read with art 4(4).

¹³⁵ Art 4(4) of the GDPR.

¹³⁶ See ch 4 (4 7 2 1 n 373).

differently, can the requirement of voluntary assent also be utilised in the context of other clauses?

Because of the burden imposed on both the supplier and the consumer if voluntary consent is required, it is argued that it is only suitable to a small category of terms. From the supplier-side, voluntary consent obliges a supplier to continue providing the service regardless of whether the consumer accepted the specific term. Therefore, it must relate to rights which the law regards as so important that a supplier cannot insist that it should be traded for access to a product or service. In other words, policy reasons should exist why a supplier should be required to provide a consumer with a product or service, despite the consumer's refusal to agree to a certain term.

From the consumer-side, voluntary consent is arguably only appropriate in the context of rights which consumers regard as important *ex ante*. It is only terms which are susceptible to solutions based on salience¹³⁷ where voluntary consent is advisable, because it requires consumers to take notice of a term and make a selection. Terms that consumers typically have no interest in before contract conclusion, for example choice-of-law or choice-of-forum clauses, seem ill suited to an assent-based solution. One must also caution against overuse of voluntary consent – requiring separate assent to four or five terms per transaction would reduce the effectiveness of this measure.

In the context of online contracts, and specifically the problematic clauses identified earlier, it would seem that the only clauses which could possibly meet these criteria are those related to use of personal information (including online tracking) and use of consumer-generated content. This will be discussed further below.¹³⁸

5 3 5 Conclusion

Obtaining informed consent to online contracts seems nearly impossible. Put simply, consumers are generally not interested in contractual terms *ex ante*, except for a few core terms. Prescribing specific disclosure could merely perpetuate the myth that the problem of unfair terms can be solved by providing consumers with the information

¹³⁷ See n 96 above.

¹³⁸ See 5 5 1 and 5 5 2 below.

needed, a solution which has been proven to fail. It also triggers the duty to read, thereby convincing courts and consumers that the terms are binding.

It is thus argued that there is little to be gained by insisting on stricter formation requirements for online contracts in general; the only possible exception being voluntary consent, although this is only advisable for specific clauses. McGowan states that:

“Because it is rational for consumers not to read forms they will not read them—they are smarter than that. The law could require them to incur formation costs, such as initialing every paragraph, or clicking separately on 10 different dialog boxes and voice-recording ‘I agree,’ but it cannot ultimately require them to pay attention, much less understand. The nub of the problem is substance.”¹³⁹

The common-law position, which requires that the consumer must be given reasonable notice of the terms,¹⁴⁰ together with current legislation which provides that any written consumer agreement must be made available to the consumer in plain and understandable language,¹⁴¹ is sufficient. Prescribing further, specific formation requirements could be counter-productive, because it removes the flexibility provided by the common law for judges to develop guidelines regarding sufficient notice.

However, two instances can be identified where the common-law position regarding the formation of online contracts may require attention. The first exception pertains to browse-wraps whose terms can only be accessed after the consumer has accessed the website (and the act of contract formation has thus been completed). In terms of the common law, their enforceability is currently uncertain.¹⁴² Schulte-Nölke proposes a development in EU law to cater for this issue, by providing that it would be

“sufficient for the adoption of standard contract terms that govern the use of a website that the notice and the opportunity to review the terms are given, not before the consumer types the URL of the website and pushes ENTER (or clicks on a link, which has the same effect), but that these two elements do not need to be present before the entry page of the website has fully opened.

¹³⁹ D McGowan “Consumer Contracts and the Restatement Project” (2-9-2019) SSRN <<https://ssrn.com/abstract=3446802>> (accessed 4-11-2019) 15.

¹⁴⁰ See ch 3 (3 3 3 and 3 3 4).

¹⁴¹ See s 50 of the CPA, read with s 22.

¹⁴² See ch 3 (3 4 5 3).

An even more radical proposal would be to totally abandon any opportunity for the consumer to terminate the transaction after the standard contract terms have become available for review, and to consider, in the case of a website, all standard contract terms as adopted when the consumer opened the website and there is a notice on the terms and an opportunity to review them.”¹⁴³

In terms of the first proposal, it would thus be sufficient if the consumer is given notice of the terms of the browse-wrap and the opportunity to review them directly after accessing the website (and thus directly after contract formation), but the consumer must still be granted the opportunity to terminate the transaction after being granted the opportunity to review. Therefore,

“the standard contract terms become valid and enforceable at the moment that the consumer opens the website, but would retroactively be considered as not having been adopted at all if the consumer leaves the site before a reasonable time for reviewing the standard contract terms has passed.”

The second proposal is similar, except that this opportunity to terminate does not exist.¹⁴⁴

It would thus be possible for the legislature to clarify the situation by providing for their adoption in either of these two ways. However, the risk of a statutory provision is that it could usurp the courts’ common-law powers of review. In other words, if a statute provides that a browse-wrap terms of service will be adopted when a consumer visits a website for a specified time, courts may defer to the statutory provision instead of following the common-law approach by considering whether the supplier did “what was reasonably sufficient to give the [consumer] notice of the conditions.”¹⁴⁵ Consequently, it is preferable for courts to clarify the position using common-law principles, preferably by allowing for the adoption of a website’s terms of service provided in the form of a browse-wrap.

The second exception where moderate development of the common law is proposed is in the context of unexpected terms. Courts should be urged to recognise that

¹⁴³ Schulte-Nölke 2019 *ERCL* 124.

¹⁴⁴ 125.

¹⁴⁵ *Central South African Railways v McLaren* 1903 TS 727 735. Also see *King's Car Hire (Pty) Ltd v Wakeling* 1970 4 SA 640 (N) 645; *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (A) 991. See ch 3 (3 3 3 3).

consumers' mistakes as to the content terms are generally reasonable. Accordingly, suppliers should not be allowed to rely on the mere fact that a term was contained in the online contract to argue that the consumer should have been aware of its existence, and that the terms can therefore not be regarded as unexpected.¹⁴⁶ This provides an important protection to consumers' reasonable expectations, and can further encourage suppliers to identify surprising terms and bring them to the attention of consumers. Again, this development can take place judicially.

5 4 Regulating the content of online contracts

5 4 1 Introduction

The previous section reached a similar conclusion to the reporters of the Draft Restatement:

“Because the imbalance between businesses and consumers is so great, the application of contract law’s general rules of mutual assent alone are not likely to level the playing field. In a world of lengthy standard forms, which consumers are unlikely to read, more restrictive assent rules that demand more disclosures, more notifications and alerts, and more structured templates for manifesting assent are unlikely to produce substantial benefit for consumers.”¹⁴⁷

In terms of what the reporters previously referred to as the “grand bargain”,¹⁴⁸ it is acknowledged that

“If, despite reasonably communicated disclosures, consumers are not expected to scrutinize the legal terms up front, courts should scrutinize them *ex post*.”¹⁴⁹

It was illustrated in the previous chapter that the current rules aimed at achieving contractual fairness are generally insufficient, largely because the myth of consent still constrains these evaluations. The primary concern is terms which might not meet the unfairness criteria prescribed in the CPA, but which are problematic if the process of formation (particularly the consumer’s lack of knowledge and the fact that these terms do not form part of the core transaction between the parties) is considered.

¹⁴⁶ This was discussed in more detail in ch 3 (see 3 4 6, 3 4 8, 3 6 4 and 3 7).

¹⁴⁷ Reporters’ Introduction 3.

¹⁴⁸ See ch 3 (3 5 3 2).

¹⁴⁹ Comment 13 to Para 2 of the Draft Restatement.

In light of the low quality of assent characterising online contracts, it can be argued that a more robust fairness review should be provided in respect of terms contained in online contracts. One possibility is the inclusion of a statutory fairness review in ECTA which applies only to online contracts and allows courts to evaluate the substantive fairness of their terms more freely. The dimensions that such a solution can take are briefly outlined below, whereafter reasons are presented why the adoption of such a measure is regarded as premature in our law.¹⁵⁰

A more moderate solution is to identify specific terms which are problematic in the online context, and to regulate their use. This can be done by including these terms in the grey list contained in the CPA Regulations.¹⁵¹ The effect of such an inclusion will be discussed,¹⁵² before the various problematic clauses in online contracts which were identified in the previous chapter will be considered individually.¹⁵³

5 4 2 Including a general fairness review in ECTA

Courts accept, as a point of departure, that terms in a validly-concluded contract are enforceable. The argument can be made that this view should be challenged in the context of online contracts, because consumers cannot reasonably be expected to familiarise themselves with the content of online contracts. The reasons why this is particularly true for online contracts (such as their length and ubiquity) were explained previously.¹⁵⁴ Instead, it should be recognised that the enforcement of online contracts in general is justified based on their commercial necessity.¹⁵⁵ The logical implication of this argument is that online contract terms should only be enforceable in so far as they serve legitimate business interests.

This shift could be achieved by incorporating a general fairness provision in ECTA, which requires the supplier to show reasonable justification for the enforcement of non-core online terms that are detrimental to a consumer. The amount of justification required can be balanced against the extent to which the consumer could exercise a

¹⁵⁰ At 5 4 2 below.

¹⁵¹ Regulations to the Consumer Protection Act 68 of 2008 in GN R293 in GG 34180 of 2011-04-01 (CPA Regulations).

¹⁵² At 5 4 3 below.

¹⁵³ At 5 5 below.

¹⁵⁴ See ch 2 (2 4 2) and ch 3 (3 2 2 1).

¹⁵⁵ See 5 2 1 above.

meaningful choice (for example, where the consumer was offered the choice of paying a reasonable price for a better term).¹⁵⁶ Other factors which could play a role could include the extent to which the term deviates from the default position, how closely the term is related to the main subject-matter and whether the supplier can show a countervailing benefit enjoyed by the consumer.

Incorporating such a general fairness standard in ECTA aimed specifically at online contracts has certain advantages. It would provide a solution more tailored to online contracts, and can thus provide explicit recognition of the fact that consumer readership is both virtually non-existent and unreasonable. Secondly, the rapidly changing nature of the internet means that the slow legislative process might render it difficult for the legislature to respond timeously to new problematic terms. A general fairness provision can be used as an interim measure in respect of terms for which specific provision has not yet been made. It would provide a court with broad powers to evaluate the enforceability of any non-core term contained in an online contract and would thus not be limited to only certain identified terms.

However, despite these advantages, formulating and enforcing such a standard may give rise to certain problems. The first challenge is defining the scope of application of the proposed legislative provisions. On the one hand, a definition which is too broad will include contracts that do not necessarily share the characteristics which render click-wraps and browse-wraps problematic. For example, the non-negotiated terms in an employment contract sent via email are also standard form terms presented in an electronic form, and thus meet the definition used in this dissertation.¹⁵⁷ However, these terms do not merit the same scrutiny required for a website's terms of use. On the other hand, providing a too limited definition will create loopholes that suppliers can exploit. If contracts sent via email are excluded from review, suppliers can email their website terms of use to consumers and thereby avoid it being subjected to the envisioned provisions.

This challenge is not unsurmountable and can be overcome, for example, by limiting the application of the suggested provision to the terms of use, privacy policies and terms of sale of websites. However, a bigger concern is the lack of certainty that such

¹⁵⁶ See Naudé "Section 52" in *Commentary on the CPA* 52-21.

¹⁵⁷ See ch 2 (2 2 1).

a general presumption of unenforceability would bring. Allowing a consumer to challenge terms based on unfairness necessarily means sacrificing certainty to some extent, but too much uncertainty could have serious detrimental effects on suppliers. The impact could be especially problematic in light of the international nature of online contracts: global suppliers might choose to avoid the South African market if the enforceability of their contracts becomes too tenuous.

The lack of certainty could also be detrimental to consumers. If a clearer indication is provided of terms which have a high likelihood of being susceptible to a successful challenge, consumers can approach a court of tribunal with more confidence. It will also strengthen the hand of consumer associations to convince suppliers to refrain from using certain terms. Based on the findings of a recent study that evaluated the effect of unenforceable terms on consumer behaviour,¹⁵⁸ it can be argued that preventing the *ex ante* use of an unenforceable term will benefit consumers as a group more than an *ex post* finding of unenforceability. Legislation that provides a more targeted solution by identifying specific terms has a higher likelihood of abolishing the use of those terms.

Such a sweeping approach has not yet been adopted in other jurisdictions, and might thus also be premature in our law. Instead of formulating a fairness standard of general application to online contracts, it is advisable rather to identify and address specific clauses which tend to be unfavourable towards consumers. An existing mechanism which can be used for this purpose is the grey list contained in the CPA.

5 4 3 Adding specific terms to the CPA grey list

As previously discussed,¹⁵⁹ section 48 of the CPA establishes a general clause regarding contractual fairness in consumer contracts.¹⁶⁰ However, the legislature also recognised that some types of terms have the tendency to be unfair, unreasonable or unjust. Therefore, a grey list is included in Regulation 44 of the CPA Regulations. A term that appears on the list is regarded as presumptively unfair, and the onus is thus

¹⁵⁸ Furth-Matzkin 2019 *Alabama LR* 1055-1058.

¹⁵⁹ See ch 4 (4 4 3).

¹⁶⁰ T Naudé "Section 48" in T Naudé & S Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 48-13 48-13.

on the supplier to show that it is not “excessively one-sided” or “so adverse to the consumer as to be inequitable”.¹⁶¹

Adding terms to the grey list that have been identified as problematic in the online environment will thus succeed in changing the presumption of enforceability. The supplier will be required to show that, based on the factors mentioned in section 52(2) of the CPA, the term does not contravene section 48. In the context of online contracts, important factors which appear on in this list include the bargaining positions of the parties,¹⁶² the lack of negotiations,¹⁶³ and whether the term is necessary for the legitimate interests of the supplier.¹⁶⁴ Furthermore, courts must take into account whether plain and understandable language was used,¹⁶⁵ which renders terms drafted in unintelligible language and small print suspect.¹⁶⁶ Another factor to be taken into account is whether the consumer knew or reasonably ought to have known of the term.¹⁶⁷ Courts can perhaps read into this the question of whether a consumer could reasonably be expected to have been aware of the term or to have read the terms – and in the case of most terms contained in online contracts, the answer will be in the negative.

The effect of adding a term to the grey list would thus be to burden the supplier with the onus of justifying its enforcement, and a court will take procedural factors into account in determining whether the onus has been discharged. It would also create more certainty than the general standard discussed above,¹⁶⁸ because specific terms are targeted. The suitability of this proposal and its interaction with the notion of voluntary consent discussed above¹⁶⁹ will be considered below in the context of specific clauses.

¹⁶¹ Reg 44 of the CPA Regulations, read with s 48(2) of the CPA.

¹⁶² S 52(2)(b).

¹⁶³ S 52(2)(e).

¹⁶⁴ S 52(2)(f).

¹⁶⁵ S 52(2)(g).

¹⁶⁶ See Naudé “Section 48” in *Commentary on the CPA* 52-16.

¹⁶⁷ S 52(2)(h).

¹⁶⁸ See 5 4 2 above.

¹⁶⁹ See 5 3 4 above.

5 5 Identifying and regulating specific clauses

The previous chapter identified various clauses that pose problems in the context of online transactions.¹⁷⁰ The first category pertains to clauses that online suppliers use to obtain rights unrelated to the main transaction, and includes clauses related to privacy and those which regulate the use of consumer-generated content. Other problematic clauses that were considered are those allowing unilateral variation or unilateral termination by the supplier, as well as choice-of-forum and choice-of-law clauses. Some suggestions were made in the previous chapter regarding these clauses, and they will briefly be returned to and concretised below.

5 5 1 Privacy, use of personal data and online tracking

One of the main concerns which have recently surfaced in the online environment relates to consumer privacy and the use of consumer data. It is readily acknowledged that this issue is not only contractual in nature, and raises far bigger questions regarding the extent to which the personal details of individuals should be available for commercial use. However, the problem which must be addressed here is the fact that both the common law and Protection of Personal Information Act 4 of 2013 (POPI) allow suppliers to rely on terms hidden in online contracts to use private consumer information lawfully, or to collect data through online tracking.¹⁷¹

Two options present themselves with regard to regulation of these terms. The first is to amend either POPI or ECTA to incorporate the stricter consent requirements contained in the GDPR and Directive on Privacy and Electronic Communications (ePrivacy Directive).¹⁷² The second option is to add these terms to the grey list contained in Regulation 44 of the CPA Regulations.

Comparing the requirements for consent contained in POPI to those in the GDPR shows that, unlike the GDPR, POPI allows suppliers to obtain consumer assent to the

¹⁷⁰ See ch 4 (4 2 & 4 7).

¹⁷¹ See ch 4 (4 7 2 1).

¹⁷² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, as amended by Directive 2009/136/E of the European Parliament and of the Council of 25 November 2009 (Directive on Privacy and Electronic Communications) (ePrivacy Directive).

processing of data without such consent being voluntary or separate.¹⁷³ In other words, POPI allows a consumer to consent to use of his information by way of a click-wrap (which also contains other terms) and a consumer can also be denied access to the website or product if he fails to accept the click-wrap, whereas this will be insufficient for consent in terms of the GDPR. One option for the legislature is thus to amend POPI to require voluntary consent for the processing of personal information, which would mean that use of a service cannot be made provisional upon such consent, and that consent related to use of private information must be given separately or by way of an opt-in selection.

This can form part of a larger review of POPI with the challenges that the internet poses to the protection of personal information in mind. The European experiences with the implementation of the GDPR and ePrivacy Directive can be highly beneficial in this regard. POPI was enacted before the GDPR existed in its current form, and thus the South African legislature did not have the benefit of studying the final version of the GDPR. For example, unlike the provisions in the GDPR, POPI does not oblige a supplier to take reasonable steps to inform other data processors if a consumer withdraws his consent and requests that the information must be removed (the so-called “right to be forgotten”).¹⁷⁴ It has also been suggested that POPI should be reconsidered to bring it in line with the GDPR, so that compliance with one will ensure compliance with the other, in light of the fact that the EU is one of South Africa’s biggest trading partners.¹⁷⁵ These issues clearly fall outside of the scope of this study, and require a more thorough review. However, they illustrate that privacy concerns in the online environment are not purely contractual in nature.

¹⁷³ See ch 4 (4 7 2 1).

¹⁷⁴ Compare s 24 of POPI, which allows consumers to request that their personal information be deleted, with art 17 of the GDPR (and specifically art 17(2), which provides that “Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.”).

¹⁷⁵ J Giles “What does the GDPR mean for the POPI Act?” (13-5-2016) *Michalsons* <<https://www.michalsons.com/blog/gdpr-mean-popi-act/19959>> (accessed 7-11-2019).

Online tracking through the use of cookies also raises privacy concerns. Unlike privacy in general, however, this is solely an online issue. Therefore, ECTA arguably provides a better fit for provisions related to online tracking than POPI, because it is aimed specifically at the online environment.

In this regard, the South African legislature can again borrow from the EU. Specifically, in line with the provisions in the ePrivacy Directive, suppliers can be required to provide for an opt-in procedure to obtain consent for storing non-essential personal data (i.e. cookies) on a consumer's device, or for gaining access to that information.¹⁷⁶ Here, voluntary assent for non-essential cookies should also be required.

Amendments to POPI and ECTA, as described above, would provide very specific requirements for suppliers to obtain consent to privacy-related clauses. An alternative to these suggested amendments, is to allow for a more general fairness review of these clauses in terms of the CPA. Two suggested paragraphs can be added to the grey list in Regulation 44(3):

“A term ... is presumed to be unfair if it has the purpose or effect of –”

- (cc) allowing the supplier to process personal information of the consumer that is not necessary for the performance of the agreement;**
- (dd) allowing the supplier to store information, or to gain access to information already stored, on a device of the consumer, except where this is limited to storing or accessing of non-personal information which is necessary for the performance of the agreement.”**

The proposed amendments to ECTA and POPI adopts a more formalistic approach than adding terms to the CPA grey list. It prescribes the manner in which the supplier must obtain consent and, provided a supplier meets these requirements, he can be confident that the terms are enforceable. The proposed amendments to the CPA Regulations require a court to consider both the substantive effect of a term and its formation to decide on its enforceability.

¹⁷⁶ See Article 5(3) of the ePrivacy Directive, as amended by the Directive 2009/136/E (the Cookie Directive), and its interpretation in AG Szpunar's Opinion in Case C-673/17 *Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (21 March 2019) para 54.

There are benefits to both approaches. The proposed amendments to ECTA and POPI are more specific and ensure a higher degree of certainty. The CPA approach, on the other hand, allows courts to ensure that unfair terms are not enforced merely because the supplier complied with formal requirements. Another benefit of utilising the CPA Regulations is that regulations are less cumbersome to amend than the main portion of the legislation, and it can thus be adapted faster.

However, these two approaches are not necessarily mutually exclusive. This is analogous to the interaction between the specific disclosure requirements set out in section 49 and the requirement that contractual terms may not be unfair or unreasonable in terms of section 48 of the CPA. Compliance with the disclosure requirements does not render a term immune from a section 48 fairness review, because it is recognised that disclosure does not necessarily ensure substantive fairness.¹⁷⁷ In a similar way, voluntary assent is not an absolute guarantee of fairness. It is thus recommended that the legislature utilise both these avenues of regulation. Of course, the fact that voluntary assent was given by the consumer can be taken into account when a court evaluates the fairness of the particular term.

5 5 2 Copyright over or licence to use consumer-generated content

A second type of “crook” term which has been identified as problematic in the online context relates to clauses which deprive consumers of ownership of consumer-generated content or, more frequently, grant the supplier a very broad licence authorising use of such content.¹⁷⁸ Unlike the privacy-related clauses discussed above, this issue had not been specifically addressed by the EU regulator.

Based on the arguments set out above, it is suggested that a paragraph is added to the CPA grey list which renders a term presumptively unfair if it either deprives the consumer of copyright or grants a licence to the supplier which is wider than necessary to perform the service. This could be formulated as follows:

“A term ... is presumed to be unfair if it has the purpose or effect of –”

¹⁷⁷ See Naudé “Section 49” *Commentary on the CPA* 49-4.

¹⁷⁸ See ch 4 (4 7 2 2).

- (ee) permitting the supplier to use content created or uploaded by the consumer for purposes other than performing in terms of the agreement, or depriving the consumer of copyright of such content;”**

Furthermore, it is also suggested that voluntary consent should be required for the supplier to use content created or uploaded by the consumer that is not strictly necessary to provide the service.¹⁷⁹ If part of providing the service (for example a social media site) requires that other users should be able to share content posted by the consumer, the consent given can be structured in that way. Technology also increasingly makes it easier for suppliers to give consumers control over who can access or share content uploaded by them. This issue is again limited to the internet, and ECTA thus seems to provide the most suitable home for inserting the necessary provisions.

5 5 3 Contractual discretions enabling unilateral variation

Unlike the issues relating to privacy and consumer-generated content discussed above, the CPA grey list already presumptively prohibits terms enabling unilateral variation of the agreement by the supplier,¹⁸⁰ but only if the clause neither requires notification to the consumer of the variation nor grants the consumer the right to terminate pursuant to the proposed amendment.¹⁸¹ It was shown earlier that this provides insufficient protection to consumers, mainly because notification in itself does little to ensure fairness, and consumers may have reasons for not regarding termination as a viable option.¹⁸² Instead, it was argued that (i) the supplier must provide the consumer with effective notification of an amendment, which should include a summary or explanation of the terms which have been modified; and (ii) that the right to vary must be exercised reasonably (as in any event required by the common law),¹⁸³ and only for reasons stipulated in the contract.¹⁸⁴

These observations were made specifically in the context of online contracts, because of the ease with which suppliers can amend terms and notify online consumers about

¹⁷⁹ See 5 3 4 above.

¹⁸⁰ Reg 44(3)(i) of the CPA Regulations.

¹⁸¹ Reg 44(4)(c)(iv) of the CPA Regulations.

¹⁸² See ch 4 (4 7 3 1).

¹⁸³ See ch 4 (4 7 3 1).

¹⁸⁴ See ch 4 (4 7 3 1).

amendments to the contract (for example by way of an email or pop-up window when a consumer next visits the website). Thus, a provision can be included in ECTA that sets the abovementioned requirements for amending online contracts.

Additionally, consumers should be given the right to terminate the contract in response to the variation (currently, the lack of such a right merely renders the clause presumptively unfair in terms of the CPA), unless the consumer was given the option of continuing with the service on the original terms. If the consumer exercises the right to terminate, the provisions discussed below in the context of termination should find application.¹⁸⁵ The provisions relating to amendment and termination are thus interconnected, which provides a further reason for including them in ECTA: as will be seen below, the suggested provisions dealing with termination are applicable specifically to online contracts and are thus more suited to ECTA.

ECTA contains a definition of “transaction” (which is mainly used in the context of electronic transaction in the rest of the Act), namely “a transaction of either a commercial or non-commercial nature, and includes the provision of information and e-government services”.¹⁸⁶ However, ECTA contains no definition of an agreement or contract regulating these transactions. In this regard, it is proposed that a definition should be inserted in ECTA to provide for electronic consumer contracts, which could read as follows:

“‘electronic consumer agreement’ means any consumer agreement, as defined in the Consumer Protection Act 68 of 2008, that forms part of an electronic transaction;”

The following amendment to ECTA regarding unilateral variation of such contracts by the supplier is proposed:¹⁸⁷

“(1) A supplier may modify an electronic consumer agreement only if

(a) the consumer is informed in a clear and comprehensible manner of the modification and the effect of such modification;

¹⁸⁵ See 5.5.4 below.

¹⁸⁶ S 1 of ECTA.

¹⁸⁷ These provisions borrow from art 19 of Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain Aspects concerning Contracts for the Supply of Digital Content and Digital Services (the Directive for the Supply of Digital Content).

- (b) **the agreement permits, and provides a valid reason, for such a modification and the modification is reasonable in the circumstances; and**
 - (c) **the consumer is informed of his right to terminate the agreement in terms of subsection (2).**
- (2) **The consumer shall be entitled to terminate the electronic consumer agreement free of charge if the modification negatively affects his rights in terms of the agreement or his use of the service, unless the consumer is granted a reasonable opportunity to reject the proposed modified terms and continue the contractual relationship under the existing terms.”**

If these requirements are inserted in ECTA, a corresponding amendment can be made to Regulation 44(4)(c) of the CPA Regulations to clarify that a contractual term stipulating the supplier's right to modify in accordance with these requirements will not be regarded as presumptively unfair.

5 5 4 Unilateral termination clauses

A clause which grants only a supplier the right to terminate an open-ended contract without notice is also presumptively unfair in terms of the CPA.¹⁸⁸ However, the nature of online services, and especially those related to online storage of data, require that more specific protection must be provided to the consumer where the supplier decides to terminate the contract. These are aimed, in short, at allowing a consumer to extract his data from the service, preventing the supplier from continued use of any data or information provided by the consumer, and limiting the circumstances under which the supplier can terminate the contract.¹⁸⁹

With the exception of the last aim, namely that the circumstances under which a supplier should be allowed to terminate the contract should be limited, the suggestions primarily apply to online contracts. This makes ECTA the obvious choice for including these restrictions on a supplier's right to terminate an online contract. The following provisions can be included in ECTA:¹⁹⁰

“(1) A supplier may terminate an electronic consumer agreement only if

¹⁸⁸ Reg 44(3)(l) of the CPA Regulations (requiring notice) and Reg 44(3)(k) (requiring a reciprocal right).

¹⁸⁹ See ch 4 (4 7 3 2).

¹⁹⁰ These provisions borrow from art 16 of the Directive for the Supply of Digital Content.

- (a) the consumer is given reasonable notice of the termination, except in the case of serious breach by the consumer where such notice would cause harm to the supplier; and**
- (b) the agreement permits, and provides a valid reason, for such a termination and the termination is reasonable in the circumstances.**

(2) If an electronic consumer agreement is terminated by either party, the supplier shall:

- (a) provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced or generated through the consumer's use of the supplier's services, to the extent that data has been retained by the supplier, except where such content has no utility outside the context of the service supplied by the supplier. The consumer shall be entitled to retrieve the content free of charge, without significant inconvenience, in reasonable time and in a commonly used data format;**
- (b) take reasonable measures to destroy or delete all personal information of the consumer and any content provided by the consumer, with the exception of content which has been
 - (i) generated jointly by the consumer and others who continue to make use of the supplier's services; or**
 - (ii) aggregated with other data by the supplier and cannot be disaggregated or only with disproportionate efforts."****

5 5 5 Choice-of-jurisdiction and choice-of-law clauses

Choice-of-jurisdiction and choice-of-law clauses raise similar issues, and they can be dealt with under one heading. These clauses have the potential to deprive the consumer of effective enforcement measures or legal remedies respectively, and both of these clauses have been greylisted in terms of the CPA.¹⁹¹

However, the use of these clauses raises specific problems in the online context, as pointed out previously.¹⁹² One of the main concerns relates to the question of where an online contract is concluded. Depending on which construction is followed (i.e. whether the consumer is viewed as the party making or accepting the offer), it can either be deemed to be the place where the consumer is situated, or the place of

¹⁹¹ See regs 44(3)(x) and 44(3)(bb) of the CPA

¹⁹² See ch 4 (4 7 4).

contract conclusion could refer to the supplier's location.¹⁹³ Because of this uncertainty concerning the common-law position with regard to the place of offer and acceptance of online contracts, it is proposed that a further section is added to ECTA to the effect that:

“An electronic consumer agreement is concluded at the time when and place where the consumer accepts the agreement.”

This amendment will clarify which legal system applies in the absence of a choice-of-law clause, and will also ensure that the provisions of the CPA apply if the consumer entered into the agreement in South Africa.¹⁹⁴ Offences committed in terms of chapter VII of ECTA also seem to be unaffected by a choice-of-law clause, although the wording of section 47 is somewhat peculiar, inasmuch as does not specifically limit the protection to South African consumers or offences committed in South Africa.¹⁹⁵ POPI in any event applies where the responsible party “makes use of automated or non-automated means in the Republic”,¹⁹⁶ and consumers thus seem adequately protected even where the online contract nominates a foreign legal system as the proper law.

The proposed amendment to ECTA will also grant jurisdiction to a South African court, unless a court upholds a choice-of-forum clause excluding its jurisdiction. This will depend on whether the supplier can successfully challenge the presumed unfairness of the provision in terms of the CPA.¹⁹⁷ As acknowledged earlier, issues pertaining to international jurisdiction merit a more thorough review before concrete suggestions can be made, although effective consumer protection seems to require that consumers must be allowed to proceed in a forum convenient for them.¹⁹⁸

5 6 Enforcement of the proposed legislation

The focus thus far has been on possible legislative amendments which could ensure fairness. However, without effective measures regarding their implementation, such amendments could be futile in ensuring proper protection of consumer rights. The

¹⁹³ See ch 4 (4 7 4 1 and 4 7 4 2). Also see s 22(2) of ECTA, read with s 23(b) and (c).

¹⁹⁴ See S 5(1)(a) of the CPA. Also see the discussion in ch 4 (4 7 4 2).

¹⁹⁵ See ch 4 (4 7 4 2).

¹⁹⁶ S 3(1)(b)(ii) of POPI.

¹⁹⁷ See n 191 above.

¹⁹⁸ See ch 4 (4 7 4 1).

vindication of consumer rights requires a process which allows for the enforcement of these rights in a manner which is not too costly or burdensome for consumers, particularly in light of the generally low value of online transactions.¹⁹⁹ There are various barriers preventing consumers from seeking judicial redress, such as the cost of litigation²⁰⁰ and clauses restricting their access to courts (such as forum selection and arbitration clauses).²⁰¹ Section 69(d) of the CPA also prevents consumers from approaching a court for relief in terms of the Act, unless they have exhausted all other remedies,²⁰² but what those remedies are might not always be evident to the average consumer.²⁰³ Furthermore, the psychological effect contract conclusion has on a consumer must be noted.²⁰⁴ Research shows that consumers generally perceive standard terms as binding, and they are thus reluctant to challenge these terms.²⁰⁵

This issue is not limited to online contracts, and the phenomenon is also recognised in respect of standard form contracts.²⁰⁶ Two important mechanisms in this regard is for regulatory bodies, such as the National Consumer Commission or industry ombuds, to take a more active approach in resolving consumer disputes,²⁰⁷ and allowing abstract challenges to unfair terms by consumer organisations or a regulator.²⁰⁸

¹⁹⁹ See the letter by 23 State Attorneys General to Members of ALI dated 14-5-2019 (available at <https://ag.ny.gov/sites/default/files/letter_to_ali_members.pdf> (accessed 7-11-2019)) 8: "Most consumers lack the time and resources to litigate disputes, particularly where they have only been defrauded out of small amounts of money, meaning they would never have the opportunity for any *post hac* (sic) evaluation of the contract's terms".

²⁰⁰ J Rutgers "Business First. A Comment on the Adoption of Standard Terms under the American Restatement of the Law Consumer Contracts from a European Union Perspective" (2019) 15 *ERCL* 130 144.

²⁰¹ 144. Also see ch 4 (4 7 4).

²⁰² See *Joroy 4440 CC v Potgieter* 2016 3 SA 465 (FB).

²⁰³ See T Woker "Consumer Protection: An Overview Since 1994" (2019) 30 *Stell LR* 97 105-106.

²⁰⁴ Rutgers 2019 *ERCL* 145.

²⁰⁵ Wilkinson-Ryan 2017 *Cornell LR* 138-149.

²⁰⁶ This was already recognised by Eiselen in 1988 (Eiselen *Standaardbedinge* 437, 439).

²⁰⁷ J du Plessis "Lessons from America? A South African Perspective on the Draft Restatement of the Law, Consumer Contracts" (2019) 31 *SA Merc LJ* 189 214-215

²⁰⁸ The need for more proactive measures by consumer organisations is recognised by Naudé 2009 *SALJ* 527; Naudé "Section 52" in *Commentary on the CPA* 52-3. Also see 5 3 3 4 above.

Mechanisms should further be found to deter suppliers from inserting unfair terms.²⁰⁹ Although consumers do not read their contract *ex ante*, they may have to do so *ex post* if they need clarification on their rights. Allowing suppliers to insert these terms without sanction can therefore be detrimental to consumer rights. A study done in the context of rental agreements, but which would conceivably reflect the position with regard to standard form contracts in general, illustrated that consumers assume even unenforceable contract terms are binding.²¹⁰ It was thus stated that:

“Sophisticated landlords, for example, might realize that they can leverage their superior knowledge of the law to their advantage by drafting contracts that are unlikely to affect tenants’ *ex ante* renting decisions but are likely to affect tenants’ perceptions of their legal rights, and thus their *ex post* decisions, after a contract has been signed. Therefore, it is perhaps not surprising that there is increasing evidence of the prevalence of unenforceable and deceptive terms in consumer contracts and leases.”²¹¹

Provision should thus be made for preventative measures or penalties prohibiting repeat offences. This can, for example, take the form of an administrative penalty²¹² payable by the offending supplier to the National Consumer Commission.

Another option is to invalidate the entire transaction where an unenforceable term is included in the contract. If only the offending term is invalidated, suppliers can freely include all kinds of unfair terms in the hope of consumers abiding by the term instead of challenging it judicially.²¹³ This was referred to before in the context of unexpected terms.²¹⁴ However, invalidating the entire contract might not be the preferred option for the consumer, whose interests in some instances would be better served by continuing with the contractual relationship. It also does not necessarily act as a very strong deterrent, for example where counter performance by the consumer is provided in the form of data and the supplier thus already obtained a benefit from the transaction and does not have to repay money to the consumer. This will however depend on the

²⁰⁹ See Wilkinson-Ryan 2017 *Cornell LR* 171, who states that: “The right goal in this area ought to be to find ways of policing contracts of adhesion via legal mechanisms that deter firms from trying to informally legitimize unfair terms”.

²¹⁰ Furth-Matzkin 2019 *Alabama LR* 1035.

²¹¹ 1058.

²¹² Wilkinson-Ryan 2017 *Cornell LR* 171-172.

²¹³ 171.

²¹⁴ See ch 3 (3 4 6).

circumstances, and the CPA grants a court wide powers to make an appropriate order where it finds a contract or part thereof was unfair, unreasonable or unjust.²¹⁵

As mentioned above, these issues are not limited to the online context, and require a more in-depth analysis than this dissertation allows for.

5 7 Concluding observations

The rise of the internet has changed the face of commerce. It has also had a significant impact on contract law. By providing a new medium in which contracts are presented to consumers, the online environment has influenced not only the physical attributes of contracts, but also their content, and the manner in which consumers perceive these terms.²¹⁶

The issues arising from online contracts have received an increasing amount of attention in other jurisdictions, such as America and the EU. South African law, on the other hand, has been comparatively slow to address the difficulties relating to both the formation and substance of online contracts.

It was argued in this dissertation that our common law is sufficiently flexible to allow for the formation of online contracts, and that setting more stringent requirements for obtaining assent is unlikely to have the desired outcome. However, due to the fairly lenient formation requirements recognised in our law, more substantive scrutiny of the terms in online contracts is required. It is possible to identify specific clauses which must be addressed by the legislature, and suggestions were made with regard to their regulation. These suggestions are merely intended to serve as a guideline for initial, urgent actions: in light of the dynamic nature of the online environment, the legislature will continuously have to monitor and prevent new avenues of abuse by online suppliers.

²¹⁵ S 52(3) of the CPA.

²¹⁶ See ch 2 (2 4).

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