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DECLARATION:

I, the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my Bachelor of Laws Degree (LL B) is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.
I, Yvonne Dausab, do hereby certify that this Dissertation research was carried out under my supervision.

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I have always thought that I would finish my dissertation in a few months time, that wasn’t so. Writing a dissertation need a lot of research work and dedication. Above all, it needs a very dedicated supervisor who understands your topic and who is willing to go an extra mile for you. This was indeed, the case with me. For that I wish to thank the following people.
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ABSTRACT

The internet is being used to an increasing extent for commercial purposes including the making of contracts for the supply of goods and services. Because of the global nature of its operation, this entails a massive increase in a number of consumer contracts where suppliers and customers are located in different legal jurisdictions. Although the formulation of the law has been an evolutionary process, adapting to suit the needs of
commerce and society, the pace of change regarding electronic commerce is too great for this process to take place.

The legal issues regarding internet commercial contracts are far from being resolved. While it cannot be expected that new law should immediately be adopted every time technology changes, existing laws are not capable of being adapted to the demands of internet commercial transactions.

The global character of the internet undermines the effectiveness of domestic and national laws based on geographical boundaries, and so much so are the policies and national laws on consumer protection. This dissertation research seeks to address the issue of how far does the law of contract and common law principles (Namibian perspective) protect the parties to a commercial transaction concluded through the internet.

The author argues that the global character of the internet and the rapid change in technology presents an obstacle to regulation and that current contract law, based on national physical boundaries does not offer certainty of adequate protection to the parties to internet commercial transactions, particularly the consumers. Finally, the paper concludes that the general principles of contract law (purchase and sale) cannot be stretched to entirely offer protection to the parties in an online commercial contract and recommends that it would be ideal to create collaboration forums that is as International as possible in a form of a uniform code, convention or treaty specifically for the purposes of regulating internet commercial transactions.
CHAPTER 1: INTRODUCTION

1.1 Background of the study

"Technological development has implied that the Internet has become more sophisticated and easier to utilize. These facts have resulted in the fact that business and consumers have taken to the Internet. Increasingly, the Internet has become a marketing instrument utilized by business, public authorities and interest groups in order to get onto contact with citizens...." Although electronic contracts have been accepted and promoted...many fundamental aspects of the contract law have been left for courts to wrestle with when disputes arise.¹

Technological advancement has practically changed every sphere of human existence. Today the internet is not only used as an information tool, but has become a global phenomenon for business activities. The internet has become a real global market place and offers numerous advantages of trade on the global network, to both the consumers and suppliers of goods and services. The consumer can, in an unknown extent up to the present – get access to information, offers, etc, which meet his precise area of interest. He is able to receive advertisements and offers from suppliers from various parts of the world, just as simple as the material from the local shops. The information is accessible day and night, every day of the week – and in principle no matter where the consumer might be.

In as much as the internet offers advantages to the consumers and suppliers alike, its global character presents a challenge to regulation. The internet enables transactions between people who do not know, and in many cases cannot know, each other’s physical location, unless such location is disclosed by the parties to the agreement. Increasingly, more and more transactions are concluded through the internet including the making of commercial agreements. Without a doubt, current obstacles and vacuums in Namibian law will continue to impede online commercial activities for a period of time, but it must be remembered that it is not only the law which is underdeveloped if at all available, but also the very field which it is required to regulate. Developing interconnection of systems and software will continue to raise new legal challenges for a while.²

¹ Cairo, lvc. v. Cross media Services, Inc. 2005. WL 756610
Current law (general contract law principles and common law) has been specifically designed to address and regulate ordinary contracts. It cannot therefore be expected to address each obstacle as it arises, yet it can also not be ignored entirely. Suffice it to mention that, no matter how we argue to stretch the general principles of contract and common law we cannot sufficiently regulate and control the commercial agreement and transactions concluded online.

It is against this relatively inflexible background of contract law (purchase and sale) that the questions have arisen with regard to the role and protection offered by contract law principles and common to the parties who concludes contracts through the internet. Online contractual arrangements have therefore raised complex legal issues unprecedented in the application and existence of substantive commercial law. Technology’s impact on traditional contract law doctrines is readily apparent in the dilemmas generated by internet transactions.

1.2 Statement of Research Problem

The invention of internet commercial transactions and its increasing adoption as the most preferable method of doing business around the globe has raised uncertainty not only in the minds of consumers and suppliers, but also in the minds of Judicial officers regarding the applicable law and remedies for a potential lawsuit. Since the internet commercial transactions are inevitably the potential driving force of globalization, it is imperative that, at the very least, rules governing it do not pose threats to restrict it but rather to create certainty and reliability to promote such contract actions. The solution to online commercial transactions therefore lies in normative and well established standards that provide adequate safeguards on which one can rely for potential lawsuits, resulting from breach of a commercial online contract, or to demand specific performance between the parties in respect of a particular contract.

1.3 Methodological approach

It has been realized that a number of countries would offer vital lessons of experience to online commercial agreements, both in terms of their existing policy and regulatory
frameworks. It was therefore, deemed appropriate to review available literature both books and online articles on the subject, which would set the scene for further analysis.

1.4 Focus and Objectives of the study

The heart of this study is the deliberation about the protection of the parties to an online commercial agreement concluded through the internet. Knowing that there exists “traditional way of doing business” before the internet, the general principles of contract law and common law are tested in a comparative analysis. This is so because firstly, the commercial agreements concluded through the internet, present a different dimension of doing business and with it came several risks. Secondly, given the very nature of online commercial agreements, parties specifically, the consumers need to understand that doing business online characteristically differs from that in an ordinary contract.

Be that as it may, the study will also briefly discuss the effects of institutions such as the World Trade Organisation (WTO), and its position on commercial internet contracts, its normative framework and policies. The focus will also center principally, on consumer protection given the fact they are often in a less advantageous position, compared to suppliers. The Namibian perspective will also be given a beam, correctly so because it is but one of the developing and consumer based country.

1.5 Significance of the Study

Trade has been praised by many nations as an integral part of economic development. The internet has greater potential and role to play in the advancement of global trade and thus the stimulation of economic development of both the individual state and world economy. This study is first and foremost an attempt to contribute and stimulate academic debates regarding the protection of parties to internet commercial agreements. Secondly, this study may provide answers to local courts and people conducting business through the internet, particularly in Namibia. Specifically, the study is significant to businesses using the internet in their operations. These businesses should know the risks they are exposed to, the type of activities that will enable them to
pursue, where, when, how and why to enforce their claim for non-performance or breach of the terms of the online agreement.

1.6 Hypotheses/Research Questions

The main thesis of the study is that the protection of the parties to an internet commercial contract requires that the country national legislation and policy framework must address the nature and scope of internet commercial contracts and draw lessons from other countries. Secondly, that a multilateral approach and or universal legislation is a possible step in the right direction to effectively regulate internet commercial transaction given the effect of globalization. The study therefore systematically seeks to answer the following question: *Does the principles of the law of contract adequately protect parties to commercial agreements concluded through the internet?*

1.7 Literature Review

The issue of contracts concluded through the internet has been a concern for academics in recent years. Some writers believe that common law principles regulating acceptance by conduct would adequately apply to commercial internet contracts and hence the protection of the parties. Schu\(^3\) has however submitted that Private International Law can protect the parties to a commercial online contract. He did not however enlighten the readers whether internet contracts, in his opinion are international agreements. This article was therefore a discussion on how Private international law can protect parties to online commercial agreements.\(^4\)

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\(^4\) Moritz Keller (2004. Lessons for The Hague: internet jurisdiction I contract and tort cases in the European community and the United States. Article available on line at [www.jcil.org/journal/articles/407.html](http://www.jcil.org/journal/articles/407.html). Accessed on 25 May 2007. He appeared to have suggested that the national legislations (for instance in Canada & USA) are an answer to internet related litigation and should therefore be intergraded into an international solution for multinational litigation for a solid international solution to be achieved.
Shippey⁵ affirm that most countries that do not apply common law have civil law systems.⁶ Civil law is characterized by comprehensive and systematic compilations of statutes, or codes of law that govern most aspects of human endeavor. These countries have developed codes first and then their courts. She however thinks that the decision in common law is more predictable than it would be in a common law court, which will rely on the preceding case law.⁷

No specific study has sought to systematically demonstrate how and why the general principle of contract law and common law would not protect parties to a commercial agreement made through the internet or at least, provide an explanation why contract law or common law of a specific country would or would not provide clear standards for litigants to a lawsuit arising from breach of commercial internet contracts.

1.8 Namibian Literature review

It should be stated that little research has been done on the subject in Namibia; if at all something has been researched. The Central Bank of Namibia carried out a short research on a similar subject, but on the effect of electronic commerce on the financial sector.⁸ Namibia has a hybrid legal system, which is both the common law and the Roman Dutch Law based system; it has neither statute regulating online contracts nor has any case come before our courts to make a pronouncement on this aspect and hence this area of our common law on electronic commerce remains a challenge.

This research work thus endeavors to explore and contribute towards the debate on electronic commerce or internet commercial contracts. In essence this research work seeks to extend the literature to the premise that neither common law, nor the general principles of the law of contract are sufficient enough to protect parties to online commercial agreements. But rather that a systematic multilateral legal framework is

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⁶ At p. 121
⁷ Ibid
essential to create a conducive and desirable environment for online commercial transactions.

1.9 Paper Organisation and structure

This study is divided into six chapters. Chapter 1 introduces the background of the study or research topic, literature review and the methodological approaches, the research focus and objectives as well as the research hypothesis. Chapter 2 provides for Contracting Generally, the methods of contracting on an ordinary contract (traditional contracts) are looked at, whilst the review of the general principles of contract law. Chapter 3 which is the largest part of this study deals with contracting online particularly as it relates to the formation of online commercial agreements and the validity thereof. Chapter 4 deals with Consumer protection; Chapter 5 is a brief discussion of online contracts terms and conditions, and the comparison of such terms with the terms in ordinary contracts, focus will be on the method of display and negotiation (consensus) thereof; and Chapter 6 and final chapter of the study seeks to draw some conclusions and provide recommendations on how protection for the parties to a commercial agreement can be attained and the need to encourage consumer protection.
CHAPTER 2: CONTRACTING

2.1 General

Contracting generally for purposes of this research paper refers to the conclusion of contracts in an ordinary/traditional manner, including through electronic media but excluding the internet. A contract may be defined as an agreement between two or more people made with the intention of creating an obligation. Sometimes the agreement places obligations on only one of the parties, in which case we speak of a unilateral contract, for example a contract of donation.

It is basic, black letter, that in the first week of law school we are taught that in order to have a valid contract there must be, at least 3 essential elements. These elements are an offer, acceptance and consideration.

The question of why people ordinarily fulfill their contractual obligations is of paramount importance to this research work. This is so for the reason that it leads us to answer that the high rate of contract performance is no doubt the fear of legal sanction which helps to deter breach. The matter however goes beyond mere fear of the law. Indeed, as Murphy\(^9\) writes, the fear of officially imposed sanction (e.g. Judgment for damages) may be a relatively minor deterrent in many situations. The duty to keep a contract therefore means a prediction that you must pay damages if you do not keep it.

The second principle on which the law of contract is based is why should promises or commercial contracts be legally enforced? Sanctions imposed for non-performance has been, until recently an official court command to ensue performance and the fulfillment of the promise (specific performance) or otherwise a judgment awarding monetary damages against you may ensue.\(^10\)

Enforcing contracts facilitates trade by promoting present reliance on future promise. When the exchanged promises are to be performed at different times, legal enforcement can assure the person who has promised to perform first that he can rely on the subsequent performance by the other side to the agreement.


\(^10\) Ibid
By encouraging a high volume of private exchange and the economic growth and development that results therefrom, the law contributes to both the welfare of the individual participants and the nation as a whole.\textsuperscript{11} It should be mentioned that trade is the engine of economic development and through trade individuals make profit and pay their fair share of tax which ultimately result in improved infrastructures, health care facilities and services.

A contract seen from a different angle is a bargaining relationship. In the bargain relationship, the two primary objectives of the parties are to reach an agreement on a proposed exchange of economic or other resources and then satisfactorily to complete the exchange. Depending upon the situation of the parties, the transaction and other market or legal constraints, a certain amount of negotiation over terms may precede the final expression of an agreement.

Put in Murphy’s words\textsuperscript{12}, whenever the options of the parties are subject to their own choice rather than predetermined by law or circumstances, negotiation (bargaining) is likely to occur. Thus, presumably, in any given transaction the parties ought to negotiate over such items as willingness to deal one with one another.

Negotiations would also, in all likelihood entail the description, quality and quantity of what it is that one party is proposing to provide, the price and method of payment, the time and method of performance, which party bears what risks, the duration of the relationship and so forth. An assumption here is that individual bargainers will define their wants in a rational way to seek to satisfy them through a process of voluntary exchange.

Similarly, if there is adequate information and sufficient choice, another assumption is that both parties will gain from the completed exchange that is, both parties will conclude that the transaction has increased if not maximized their satisfactions. The two objectives of negotiating the terms of the agreement are consistent with the concept of

\begin{footnotes}
\item \textsuperscript{11} Murphy et al. at p 4
\item \textsuperscript{12} \textit{Ibid}
\end{footnotes}
consideration above and an exchange completed to the satisfaction of both parties satisfies a standard of efficiency.  

2.2 Contract law Principles

This part examines the issues that need to be considered when executing contracts. Although some of the issues have already been raised above, it is imperative that all the five requirements to be complied with when contracting generally are listed and discussed, in brief:

As stated above a contract is an agreement between two or more parties. It is a voluntary undertaking whereby the parties agree as to a set of obligations and responsibilities. For a contract to come into existence there needs to be five elements satisfied. They are:

1. An offer which is made by one party to another.
2. The offer must be accepted by another party. A counter offer is a rejection of the current offer. Often the current offer is made again but there is no obligation to do so.
3. Value must be exchanged between the parties (consideration).
4. Intention to create legal relationship. This obligation is normally easy to satisfy.
5. Certainty, an ambiguous contract is void, i.e. it never existed. Courts rarely find contracts bad for uncertainty, however, there needs to be certainty in the parties, principal undertakings, the subject matter and the price must be certain.

Terms in a contract may be express or implied: For a term to be implied into an agreement it must satisfy the following requirements:

1. It must be reasonable and equitable;
2. It must be necessary to give business efficacy to the contract, so that no terms will be implied if the contract is effective without it;
3. It must be so obvious that it goes without saying;

13 Ibid
4. It must be capable of clear expression; and
5. It must not contradict any express term of the contract.

Normally, it is only where there is breach of contract that legal proceedings are commenced in a Court or otherwise. A breach does not necessarily discharge a contract. The contract may be terminated by the party not in breach, at its option, if the breach is a breach of an essential term. The normal remedy for a breach of contract is to sue for loss of damage suffered which is reasonably foreseeable as a result of the breach. This is often called damages. The object of an award of damages to compensate for breach of contract is to put the person who suffered the damage in the same position as though the contract was fulfilled.  

2.3 Contracting requirements

It is commonly an integrated agreement that a contract is an agreement between two or more persons, to provide, to do, or to refrain from doing something for a contract to be legally enforceable, even in the case of online contracts and as discussed above there are certain essential elements which, must be present.

2.3.1 Offer

According to Buys\textsuperscript{15} it is maintained that an offer is not without legal effect merely on grounds that it is expressed in the form of a data message, or that it is not established by means of an electronic signature but by some other means from which a person’s intent can be inferred.

He went further that, the above position is an indication that the common law requirement that an offer must be in writing is maintained. It logically follows that an agreement formed when both offer and acceptance are conveyed by means of a data message, there is no alteration of the position that the offer can be made orally and


\textsuperscript{15} Supra At p. 103
accepted in electronic form and vice versa. Thus, unlike in the ordinary contract, an offer is preferred to always be in writing (data form).

An offer must be clear and unequivocal and must be accompanied by serious intention to create a binding contract. Observably, many of the offers made through the internet are however not easy for a layperson to easily identify whether they are serious offer or simply an invitation to treat or do business and therefore an advertisement. In Crawley v Rex\textsuperscript{16} it was established that an advertisement does not necessarily constitute an offer, but may instead be regarded as an invitation to do business.\textsuperscript{17}

### 2.3.2 Acceptance

A binding contract is formed once unequivocal acceptance of the offer can be inferred from the writing or the conduct of the offeree\textsuperscript{18}. It is vital that any intended acceptance of an offer takes due cognizance of a required method of acceptance, which the offeror is entitled to insist compliance with.\textsuperscript{19} Buys states that in South African law for example, should a hypothetical offeror insist that acceptance of the offer be communicated to it by means of email, it will, in terms of the offer, only be deemed to have been received upon the offeror’s receipt of an acknowledgement of receipt of its acceptance by the offeree.\textsuperscript{20} Should the offeree attempt to accept the offer by placing a telephone call for example, or refuse to allow an electronic acknowledgement of receipt to be dispatched by its software, no contract will come into existence. At this juncture, it should be noted that the general principle of contract or in terms of an ordinary contract the moment the acceptance has been expressed or dispatched the offeree is practically, required to acknowledge receipt.

\textsuperscript{16} 1909 TS 1105

\textsuperscript{17} In Carill v Carbolic Smoke Ball Company [1983] 1 QB 256 (CA), court indicated that depending on the manner in which an advertisement is construed, it may however qualify as an offer. For this reason, if in any doubt, commercial enterprises are advised to consult an attorney to ensure that online advertising material, whether delivered by email or via the internet or otherwise, conforms to the intention of the retailer.

\textsuperscript{18} Reid Bros (South Africa) Ltd v Fischer Bearings Co. Ltd. 1943 AD 232

\textsuperscript{19} Bloom v The American Swiss Watch Co. 1915 AD 100

\textsuperscript{20} Supra at p. 104
2.3.3 Formalities

The general rule is that validity and enforceability of contracts in South African law and hence Namibian Law, does not require formalities to be met, but there are, however, a number of exceptions. In certain instances it is required by law that the contract must be reduced to writing for it to be enforceable. Examples of these are contracts for the sale of land, suretyship agreements and contracts for the assignment of copyright. In some instances it is required that the contract be notarially executed or registered; an antenuptial contract is an example of a contract which must be registered to be valid against third parties.

2.3.4 Possibility of performance

The performance of the terms of the contract at the time of the contract was entered into must be possible, both legally and physically, for the contract to be legally binding. In order to “void” an agreement on grounds of impossibility, that impossibility must be unqualified as opposed to merely probable, the impossibility must be objective as opposed to subjective, the impossibility must not have been intentionally caused by either party to the agreement, and the impossibility cannot entail something which the contracting party would have reasonably entertained as a risk a the time of making his or her undertaking of contract.

2.4 Contract of Purchase & Sale

The internet commercial agreements are characterized by the “formation” of an ordinary contract of purchase and sale. Just like in an ordinary contract where the law prescribes certain duties to both the seller and purchaser, the situation is much alike when it comes to internet commercial agreement. The discussion of this part is necessitated by the fact that the rights of the parties to a commercial transaction, can be said to be derived from the duties the parties owe to each other.
2.4.1 Formation

A contract of purchase and sale is an agreement in terms of which the one party (Seller) undertakes to deliver possession of a thing (the *merx*) in return for the other party’s (the purchaser’s) undertaking to pay a sum of money (the price or *pretium*). The *essentialia* of the contract are therefore the mutual promises with regard to *merx* and price\(^{21}\).

The object of the sale may be of any kind, corporeal or incorporeal;\(^ {22}\) even a thing that is still to come into existence in the future may be sold. The price must be in money\(^ {23}\) if it is anything else the contract is not one of purchase and sale, but may be a contract of exchange (barter). In conformity with the general principles, the rule is further that the price must be fixed or ascertainable but if no price is fixed, it may often be clear from the surrounding circumstances that it is the parties’ intention that the price which is current or usual for the article in question, is to be paid and this constitutes valid sale.

Normally consent is the only requirement for the conclusion of a contract of purchase and sale and such contracts may therefore be concluded in any appropriate manner. Exceptions are, however, *inter alia* the sale of land and contracts governed by the Credit Agreements Act,\(^ {24}\) both of which must be in writing.

2.4.2 Duties of the Seller

In the absence of agreement to the contrary, the following are the duties imposed upon a seller *ex lege*:

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\(^{22}\) Otherwise the contract is void for impossibility of performance See Richtown Development (PTY) Ltd v Dusterwald 1981 3 SA 691(W)

\(^{23}\) Or mainly in money as e.g. where my old motor car is used in part-payment of the purchase price for a new one (the so-called trade-in). The intention of the parties is conclusive in this regard. If no intention can be ascertained the contract is held to be the most prevalent one, namely a contract of sale. See Mountbatten Investment (Pty) Ltd v Mahomed 19891 SA 172 (D)

\(^{24}\) Sec 5(1) of Act 75 of 1980
2.4.3 The duty to look after thing sold until delivery

Until the thing is delivered, the seller has the obligation to take care of it like a reasonable man. He is liable if the thing is lost or damaged due to his fault (dolus or negligence). This obligation is diminished where the buyer is in mora creditoris, in which case the seller is only liable for loss or damages due to his intentional or grossly negligent failure to take care of the merx.

2.4.4 The seller's liability for latent defects

If the seller has guaranteed the absence of defects in a thing sold and then delivers a defective product, he is liable for breach of contract (warranty) and liable accordingly. Similarly, if he has intentionally concealed from the buyer the presence of defects known to him, he is guilty of fraudulent misrepresentation and again liable accordingly. in both instances he will have to pay consequential damages. Where a defective thing is delivered but the seller has not given any warranties or made any representations, the buyer is normally not entitled to consequential damages; nevertheless he is not without protection.

It is sometimes said that in the circumstances sketched above, the purchaser has an action based on an implied warranty against latent defects. Action may be instituted if the defect is substantial, that is if the thing is largely or completely unfit for the purpose for which it was bought. Alternatively, if he chooses or if the defect is of a lesser nature, the buyer may make use of the action quanti minoris for a reduction in the purchase price, namely the difference between that price and the value of the defective thing.

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25 For example if the thing sold is lost or damaged accidentally, ie without any fault on the part of the seller, the buyer bears the risk.
26 Hosten WJ, at p. 772
27 Hosten WJ, at p. 773
28 Ibid
29 Harckett v G&G radio and Refrigerator Corporation 1949 3 SA (A)
30 Le Roux v Autovend (Pty) Ltd 1981 4 SA 890 (N)
The seller’s *ex lege* liability for latent defects may be excluded by an agreement between the parties to that effect. A sale with such an agreement is said to be *voetstoots* and will only exclude the seller’s liability for defects of which he was unaware.\(^{31}\)

In a few specific instances a purchaser may claim consequential damages for latent defects of which the seller was unaware and in respect of which he gave no warranty or made no misrepresentation. This is the case where the seller is an “artificer”, that is the manufacturer of the thing sold,\(^ {32}\) or where he is a merchant who “publicly professes to have attributes of skill and expert knowledge in relationship to the kind of goods sold”.

### 2.4.5 Duties of the purchaser

The purchaser’s main duty is to pay the purchase price. This performance too is regulated by the general rule in this regard. He must also accept delivery of the thing sold; otherwise he is in *mora creditoris*. If the seller has incurred expenses in caring for the thing sold between the conclusion of the sale and the moment of delivery, the buyer has the duty to reimburse him.\(^ {33}\)

### 2.4.6 The passing of ownership

Ownership in the thing sold is transferred by delivery, that is registration in the name of the buyer in the case of immovable and one of the recognised methods of tradition in the case of movables. Delivery causes ownership to pass only if credit is given to the buyer or, in the case of a cash sale, when the purchase price has been paid.\(^ {34}\) A sale is a cash sale where payment of the full purchase price has to take place simultaneously with the delivery of the thing; in the absence of indications to the contrary, a sale is presumed to be for cash.\(^ {35}\)

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31 See Hosten WJ *Supra* fn 21

32 *Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd* 1981 3 SA 216 (C)

33 Hosten WJ, at p. 776

34 In other words, in the case of a credit sale ownership passes immediately on delivery but in the case of a cash sale only when the purchase price has been paid in full, even if delivery has already taken place. See *Laing v South African Milling Co. Ltd* 1921 AD 387

35 Hosten WJ at p. 776
2.4.7 Passing of the risk

Where after a contract of purchase and sale is concluded and before delivery has taken place, the thing sold is damaged or destroyed without any fault on the part of the seller, one would expect the seller to bear the loss since he is still the owner of the thing; and since the seller's duty to deliver is discharged through supervening impossibility of performance, one would likewise expect the buyer to pay the purchase price to be discharged. In these respects however, a Hosten puts it, the contract of purchase and sale differs from other contracts. The rule, inherited from Roman law, is apparently that as soon as the contract is perfecta the risk for damages or loss of the thing sold rests on the buyer who, in the case of such accidental damage or loss, nevertheless remains liable for the full purchase price. A contract is said to be perfecta as soon as it is concluded and binding.37

CHAPTER 3: ELECTRONIC CONTRACTS

36 Ibid
37 Except in instances where the purchase price is not yet fixed or ascertainable, where the merx is not yet ascertained and where the sale is subject to a suspensive condition.
3.1 Formation of electronic contracts

There used to be a time when sales contracts were entered into at face-to-face meetings between parties to that agreement. Nowadays a contract is very often made over the telephone, or by fax. One of the most significant legal issues in making business over the internet is the ability of businesses and consumers to form contracts without ever touching a pen or shaking a hand. This section will thus highlight contracting online particularly as it relates to the formation of commercial online agreements and the validity thereof.

In practice websites require users to enter into “click-wrap” or online contracts by requiring the user to click on a box marked “I agree”, or otherwise to subject users to a website’s terms and conditions of use.\(^{38}\) Another type of internet contract is the so-called shrink-wrap contract, where one party states that by performing some acts, the other party agrees to be bound by the terms of the agreement. No negotiation takes place and there is no signed and delivered evidence that the contract has been concluded. Instead, an act (click) constitutes acceptance of all terms.

The purchase of digitized products, such as software, music, and even statistical information and books over the Internet, including by e-mail has been noted.\(^ {39}\) The delivery of such products may take place via the internet (for instance if the software and other digitized products is not contained on a computer disc that is delivered by post). In that way information is transferred from one computer to another with the way that information is transferred from one computer to another with the information being downloaded on to the recipient’s/purchaser’s computer. In such cases there are conceptual problems over whether the contract is for the sale of goods or provisions of services.

\(^{38}\) Schulze at 35

\(^{39}\) See also Karen Aboukre ‘Adapting to a New World of E-Commerce: the need for Uniform Consumer Protection in the international Electronic Market place; (2003 George Washington International LR 425 at 427-428, who list websites that also sell wine and art over the internet which are then sent to the client through customary delivery channels. Another example is eBay, an auction website that provides an online trading platform for the sale of collectibles, sports equipment, and even motor vehicles.
When contracts are made over the internet it may be necessary to decide where a contract was made or where it was breached, or whether a supplier directed his professional or commercial activities to the place of the consumer’s domicile. It seems unlikely that a technical analysis of the locations of the consumer’s computer, his or her Internet server, the server which hosts the supplier’s website, the supplier’s computer, and the various ways in which this information is read or downloaded can offer a satisfactory solution to the problem of determining the court’s jurisdiction.  

In order for a contract to be concluded, it is required that there should be an unconditional offer and acceptance. In many instances, of course, there may be several iterations of offer and counter-offer before the parties reach an agreement on all important matters concerned with the contract.

In the situation where a customer purchases goods in a shop there is little problem in determining the question where a contract is made. The question when the contract is also concluded is a less problematic. Where goods are displayed in retail premises, it is normally the case that the display constitutes what is referred to as an invitation to treat. An offer to purchase will be made by the customer which may be accepted or rejected by the seller instantly. There are sound reasons for such an approach, not least due to the possibility that goods might be out of stock or that the wrong price tag may have been placed on an item by mistake. In practical terms it can be said that a contract will typically be concluded when customer’s offer of payment is accepted by the seller.

Subject to any other mechanism agreed between the parties, it is generally the case that acceptance becomes effective when it is communicated to the offeror. Clearly in the case of a face-to-face transaction as stated above, this occurs at the point where the acceptor indicates—whether by words or actions—that the offer is acceptable.

Another complex issue is when the parties transact at a distance. Previously the post office constituted the only significant communication network. A set of special rules, the so-called ‘postal rule’ provides that the contract is deemed to have been concluded the

40 Schulze at 35
42 Lloyd at p. 241
moment the acceptance is placed into the postal system. The main rational for such an approach is that, once the message has been posted, it moves out of the control of the sender. The effect of this is, of course, that a contract will be concluded before the offeror is aware of the fact of acceptance.

3.2 Formal requirements for contract validity

Generally, parties agree to enter into a contract on terms desirable and agreeable to them, which may be in writing, verbally, or may even be implied from the parties’ actions. In these situations, the fact that a contract is entered into electronically will have no impact upon its legal validity, with any legal concerns relating to the manner in which its terms might be evidenced. In a number of situations, however, legal provisions may require that a contract is constituted in writing and that it must be signed by the parties involved.

The requirement that a contract be in writing historically is paramount for four (4) reasons: in the first place it is the desire to reduce disputes, second, is to make the parties aware of the consequences of their dealings, third, is to provide evidence upon which third parties might rely upon the agreement and fourthly to facilitate tax, accounting and regulatory purposes.

The requirement for the formal validity of the contract obviously requires some scrutiny. Strictly speaking not all the contracts are required to meet the certain formalities, in particular the above mentioned ones. The internet contracts have a characteristic that is unique and which formal validity requirements will not easily be applicable. It would probably take some endless and complex debate on the authenticity, on subject such as the originality of the printed or downloaded copy. It is therefore imperative to note that the nature and type of the contract determines the applicability for the requirements of formal validity.

3.3 Nature, scope and types of Commercial internet contracts
Online commercial contracts are concluded by parties who are often in different countries and even continents. The parties do not often know each other and or their respective localities. This is a primarily indicator and distinctive nature of internet commercial transactions.

Commercial online contracts have been defined as ‘commercial activities which are carried on by means of computers interconnected to by telecommunication lines; and more simply as ‘business transactions conducted over the internet’”43. Interpreted broadly, the definition covers a scenario where goods are advertised on a website, but the contract with the consumer is concluded in the traditional way as opposed to the commercial contract concluded through the internet.44

Today, there are essentially two types of standardized electronic agreements: the click-through agreement and the browse-wrap agreement. A click-through agreement is an agreement that requires an offeree to click on an acceptance icon, which evidences manifestation of assent to be bound to the terms of a contract. On the other hand, a browse-wrap agreement is one that is typically presented at the bottom of the website and where acceptance is based on “use” of the site and therefore the use signifies the acceptance irrespective of whether “one” really intended to “just” use or conclude an agreement.

The very nature and mechanism of concluding an internet agreement/contract has been subjected to the test of whether commercial online agreements are valid and enforceable contracts. This is basically what this part seeks to address, as we shall in subsequent parts of this research.

3.4 Contractual validity of online Commercial contracts

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44 Ibid
For most computer literate people, a day would not pass without them coming across any form or type of contract. In many instances suppliers view their products while a person is busy with the internet and such person is at times tempted to enter into such contracts by simply submitting to the required act.

In case of internet, it is generally done by clicking on some icon like “I agree”. Most people do it as just another necessary evil to be done. However miniscule it may seem to a lay man, these actions of ours is of immense importance because it leads to valid and enforceable contracts and those terms, that we hardly even bother to read. As stated elsewhere in this research, most of the internet commercial contracts are concluded through click-wrap or web-wrap agreements. The cardinal question this part seeks to address is therefore “whether these agreements are valid and binding contracts in the eyes of law? Can they be enforced and if so why and how and where!

The very basic bedrock of any contract is the intention to enter into a legal relationship and that there should be ‘meetings of minds”. It must be already clear by now that in most of these contracts the party assenting to the terms does so not knowing or having the intention to enter into a contract. Even if he/she has knowledge of the terms there is a doubt whether there is a meaningful intention to adhere to certain standard clauses put by the other party, this frustrates the very concept of meeting of minds.

The concept of validity of online commercial contacts varies from state to state and has been subject of academic debates for sometimes. In the UK and the US and even in South Africa for example, online commercial agreements through either the Click-wrap or browse-through are recognised as agreements that are valid and enforceable contracts.

It is imperative to note that the validity of online/electronic agreement may be held valid and enforceable by statutory recognition. The United Nations Commission on International Trade Law (UNICITRAL) for example has pertinently recognised the validity of Electronic Data Interchange (EDI) wherein expressly lay down that offer and

acceptance by electronic agents are valid and binding contracts.\textsuperscript{46} This is just an indication that, because of globalization, the internet is here to stay, whether we like it or not. Technology and globalization have necessitated the need for new approaches that human being especially the business persons should keep up with and not the other way round. For the business fraternity particularly the consumers, the desire to make good use of the advantages presented by the internet cannot be doubted, what is left for them is a normative legal frame work to get rid of risks and uncertainty and simply of ensures a systematic method of disputes resolution.

\textbf{3.5 Normative framework of electronic commerce}

Distance selling, principally in the form of mail order and catalogue selling has been a feature of commercial life for many years. Given this; it is tempting to suggest that the fact that commercial transaction may now take place through the medium of the internet raises no new legal issues. To an extent this is indeed the case.

The legal models regulating commerce have tendered to be shaped to suit a particular state of assumptions. The bulk of trade has been concerned with goods rather than services, whilst international trade has tended to be the province of the commercial sector. Electronic commerce challenges the continued validity of some legal assumptions. Whilst this does not of itself require that legal principles be overturned, the nature and emphasis of aspects of commercial law do require to be re-oriented.\textsuperscript{47}

The question when and where a contract is made is one, which assumes significance when the parties transaction is concluded through the internet than on a face-to-face basis. In some cases, the law has imposed requirements that contracts be concluded in a particular manner. This typically requires that the parties sign the document to evidence their wish to accept and be bound by its terms.\textsuperscript{48} The issue in electronic contracts is however that, it is practically impossible to be certain whether a document existing purely in electronic form, if it is to be downloaded or printed, is the original one.

\textsuperscript{46} Rupak Ghosh at p. 3/4
\textsuperscript{47} Ian Lloyd at 241
\textsuperscript{48} For example the alienation of land
To a certain extent the authenticity cannot be, immediately confirmed. The parties need to be certain that if they sign an electronic contract, the terms and conditions contained therein are not altered or tempted with. Such alterations would only be immediately detected if made on the ordinary paper contract unlike with a document in a purely electronic form.

The general principles of the contract regulated these methods by addressing the specific issues as follows:

In the case of the telephone, it has been argued that the parties are put in the same position as though they have concluded a face to face contract. In the case of *Tel Peda Investigation Bureau (Pty) Ltd v Van Zyl*49, the above position was confirmed that:

> Parties in telephonic communication with each other are virtually in the same position as if they are *inter praeentas*. In order to speak to each other they make use of an instrument to enable them to do so. The very object of their using such instrument is to gain the direct communication that it affords.50

Thus with the agreement concluded through the telephone the issue is settled, parties are deemed to have concluded a face to face agreement when the offeror has received the acceptance the contract has been concluded.51

With the contact concluded via the post, the situation is a different one. The general principle is that the offer becomes a contract on the posting of the offer. Christie writes that a contract is concluded at the posting of the letter of acceptance and not with the receiving of the letter.52 When using postal services as a method of communication, it would be unreasonable to expect from the offeree to wait for the acceptance letter to reach the offeror, who would then be required to post the letter confirming the receipt of the acceptance.53 Such procedures would be time consuming and would prevent the offeree from making preparations for the performance of his obligations under the

49 1965 (4) SA 475 (E)
50 Per Jennet JP at 479
51 Christie at p. 89
52 *Ibid* at p. 80
53 *Ibid*
contract. The letter of acceptance may be delayed before it reaches the offeror and such delay could lead to the offeror entering into a contract with another party. It was thus vital for the court in *Cape Explosive Works Ltd v SA Oil and Fat Industry* to formulate the position that the contract was firstly concluded where the letter of acceptance was to be received, or secondly, the contract is concluded where the letter of acceptance is posted.

The conclusion of contracts through the other electronic media, the issue of the place of conclusion the contract, which is can be very important to dispute resolution, is less complex. It is true that internet commercial transaction has, presented a somewhat different face, which has made it impossible without some controversies place it within the existing methods.

### 3.6 Applicable method to commercial online contracts

The very first question to be asked is how far we can stretch the traditional principles of the law of contract laid down for the above mentioned methods to online contracts? It is believed that most of the commercial transactions entered into via the internet are those known as contract of adhesion taking the forms of click-through and the browse-wrap agreements. Contracts of adhesion arises when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms. Such a contract will be enforced against the weaker party when it is (1) not within that party’s reasonable expectations; or (2) is unduly oppressive, unconscionable or against public policy.

Arguably, it can be said that since the online commercial agreements do not put the parties in a spontaneous communication it can be equated with a contract concluded via email. This is because although the internet is in fact much faster than the postal service, in both cases, there is a degree of some delays. From this perspective, we can confidently say that the same principle in as in the law of contract applies.

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54 *Ibid*

55 1921 CPD 244

56 See subsequent footnote, infra
It can be concluded that even with enthusiastic attempts to locate the internet commercial online within the existing/traditional methods of traditional contract, solutions would not be easy to find as it is with the traditional contracts. With the traditional contract, it has been easy to determine the time and place of conclusion of the contract and this played a role in resolving the disputes involving breach of contracts before courts. Although the place and time of conclusion of the contract are generally important for disputes resolution and the determination of court jurisdiction, this might not be of great importance to the online commercial agreements.

Online commercial agreements do not know any boundary, the place is insignificant, and with time that varies globally and according only to geographical explanations time is of no essence. The issue of applicable law lies to a largely on a new normative framework that should require compliance certain specifications entirely different from that of the traditional contracts.

CHAPTER 4: CONSUMER PROTECTION

4.1 General

The emergence of the Internet as a commercial vehicle has created tremendous opportunities for merchants and consumers alike. The internet benefits merchant, by enabling them to expand their businesses through worldwide marketing of their goods or services. The internet benefits consumers, by offering them convenience, selection and

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57 Note that the online contracts may also be concluded by email. The E-mail functions in the same manner as ordinary mail functions. The basics are the same. A specific address and user name is assigned to the letter and it travels through the internet until it reaches its specified destination instead of physically transferred to its destination, which takes some time, e-mail travels through the various servers and networks in its data format, until it reaches its destination, normally within a few minutes. This cannot be put in the same position as telephone.
access to information day and night, every day of the week and in principle no matter where the consumer might be\textsuperscript{58}. Although increasing numbers of consumers are discovering these benefits of the internet, many are still reluctant to make purchases over the internet. They are particularly faced with the questions about security and privacy, accuracy of information, means of redresses and dispute resolution should their agreement not be honoured.

The Internet offers consumers unparalleled opportunities of choice and access and, it can be expected with millions of users that will probably be online in future; the potential for new business opportunities are extraordinary. However, in the borderless, anonymous world of the Internet, buyers and sellers interact across national borders, making fraud and deception even more likely to occur. For the promise of electronic commerce to be realized, buyers and sellers need to have confidence that the products they buy and the firms they deal with are fairly represented, that they will get what they pay for and be paid for what they sell, and that legal recourse is available if either party fails to honour any of his obligations.

In an ordinary/traditional contract, confidence through laws and regulations to protect consumers against deception and fraud in the physical world are easy to put into perspective and practice. Adapting policies to the electronic world has become an increasingly important priority. Protection for consumers online to date has as Mann\textsuperscript{59} puts it, been an extension of national laws and regulations. It is no secret that policy makers particularly those who are consumer based countries like Namibia, are faced with temptations to legislate electronic commerce for specific solutions to protect their citizen. But with the issue of cross-boarder electronic commerce consumers and businesses facing the differing laws of numerous countries, this protection conceivably remains illusive. Probably, this could be reason why most consumer based countries have not sought legislation on electronic commerce.

While in some transactions parties may often choose or identify the law that is applicable in their own agreement, using the country of origin’s laws as the default, this is not likely

\textsuperscript{58} The traditional opening hours of the shops are of secondary importance.

to be satisfactory for consumer transactions. The disputes that arise from online consumer purchases are likely to be of relatively small dollar value, making it difficult and expensive to pursue legal action. Consumers need affordable and simple ways to resolve disputes.

A fundamental problem faced by consumers in electronic transactions is the absence of clear information available to consumers. The online standard agreements need to state the basics information such as the seller's identity and location, total price, payment and shipping arrangements, any conditions on purchase, including warranties and return or refund arrangements, and mechanisms for addressing complaints.

The electronic medium also makes fraud and deception (in contrast to the honest mistakes) easier. Marketing messages that entice consumers into impulse buying, get-rich-quick schemes, and copycat (fake) web sites make it difficult for consumers to differentiate between scam, fraud, and the real thing.

In order to provide a certain and stable environment for conducting business, consumer protection becomes critical. This is so because the new environment provides new opportunities for businesses and with it comes new types of threats. It is therefore, important that consumers display some kind of trust and confidence in goods and services offered online. They must be confident that these fairly represent what they had in mind and that the merchants with whom they are dealing will be able to deliver their goods timely and are not engaged in any illegal activity such as fraud and deception. In addition, it is important that consumers are protected against harmful goods, services and content and sufficient information about the goods and the supplier are provided and regulated.

Protection of the consumer's interest against abuse of new technological possibilities must naturally be made in a manner that does not undermine the Internet's advantages as open and accessible information interchange. It is worth noting that the boundlessness of the Internet implies that a single country will not be able to legislate and maintain its own rules towards all foreign citizens and business companies. Consequently, it is a certainty that the Internet demands a higher priority of International
collaboration both regarding preparation of new/harmonized rules and maintenance of
the rules.

4.2 The applicable law to electronic contracts

Samson’s\textsuperscript{60} opinion that the fact that electronic agreement can be enforced does not
mean that any particular agreement is in fact enforceable seems to be true. This is
because contracting parties must still turn to ordinary contract law principles to
determine the enforceability of particular agreements.

Depending on how you look at an online agreement will practically determine your court
of jurisdiction. If viewed from the perspective that an internet commercial transaction is
an international agreement, the principles of Private International Law applies and the
applicable law is determined therefrom. Countries have different legal systems and that
laws affect contractual arrangement understanding and making a distinction between
your own country’s legal system and the legal system of the other party’s country law is
important for two reasons; first, the laws in both countries will determine certain aspects
of your contractual relationship. Second, the laws of one country may be more favorable
to you than those of the other country\textsuperscript{61}.

It is however believed that contracts for the sale of goods are typically regulated by
uniform laws that are similar to the United Nations Convention on International Sales
Contract (GISG). There seems to be an agreement between, Shippey and Schu\textsuperscript{62}, in that
they see commercial online contract as international transactions.

4.3 Jurisdiction on online contracts based on Internet activities

\textsuperscript{60} Martin Samson. Click-wrap Agreement Held enforceable. Article Available on line. At

\textsuperscript{61} Karla C. Shippey. 1999. International Contracts: Drafting the international sales contract for attorney and

\textsuperscript{62} Supra
The question of civil jurisdiction over cyberspace activity is in one sense far more conventional than legislative jurisdiction or choice of law. While one can imagine that in times to come the world community might choose to recognise different, independent legal standards to govern cyberspace activity, such cyberlaws would still have to be enforced in conventional courts.

Jurisdiction refers to the Court’s competence to hear the matter or dispute. As it is the case with the terms and conditions in the contract of adhesion, choice of jurisdiction and forum is just another term which consumers have to decide whether to take it or leave the entire contract, there is likewise no discussion for the choice of jurisdiction.

Schu opined that there is no Internet judicial authority that can resolve disputes without the consent of the parties or litigants. The traditional notions of jurisdiction focus heavily on the location where the transaction in dispute took place to determine the proper jurisdiction to adjudicate the dispute. As repeatedly stated in this paper, Internet transactions are conducted over network, thereby ignoring all traditional geographic boundaries. Addressed on the Internet are not geographic but digital addresses that can be accessed from anywhere around the globe.

In the absence of any specific legislation regulating jurisdiction in electronic commerce cases (and especially legislation with a consumer protective character, such as the EU legislation, a Namibian consumer will be subject to the general principles of jurisdiction when having to decide where to institute legal action against the supplier. In so far as international electronic commercial transactions are concerned, a local consumer may be forced to pursue his claim against the foreign supplier in a foreign forum.

In practice, it will be highly unlikely that the terms and conditions of the Internet contract will not include a choice-of-law clause, given the fact that a foreign supplier who trades internationally attempt to secure “home jurisdiction” advantage for him. As a result, the Namibian consumer will have no choice but to subject himself to the foreign supplier’s own forum, a situation which is undesirable and costly.

63 Schu at p. 36
64 Schulze at p. 44
4.4 Enforcement of judgments

It has been long recognised that a judgment of court is worth nothing if it cannot be enforced. So the recognition and enforcement of foreign judgments is nothing new in Namibian law or in most jurisdictions worldwide. It is also one of the requirements in our law that the court rendering the judgment must have had international jurisdiction or competence according to the Namibian Law and perhaps in many other countries.

4.5 The World Trade Organization (WTO) and electronic commerce contracts

Doing business through the internet is already, or would be the engine of global trade, due to the affordable services and benefits it offers. The fear or uncertainty, with regard to the internet commercial transactions could be an obstacle to trade liberalization, that either the consumers or supplier would actually be compelled to engage into other method of doing business such as sending business envoys to negotiate and inspect the goods in other countries around the globe.

Globalization and the internet, as a subjective submission, go hand-in hand with each other, you cannot therefore favour one and disregard another. Multinational enterprises have realized the need to mobilize global clients through the internet. In the same vein, the WTO has encouraged member states to adopt binding norms governing electronic commerce, including applicability of existing trade law, non-discrimination, technology neutrality, forbearance, least restrictive means, transparency, and freedom to form valid electronic contracts.

The WTO has done substantial amount of work on electronic commerce, and hence electronic agreement, both direct on its trade-related aspects and more generally on the infrastructures necessary to the development of global as well as domestic electronic commerce.

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65 Also in Private International Law


Mann and others also point out the challenges faced by both the organizing structure of the WTO and how its members operate (request-offer negotiations and negative vs. positive commitments).

While the WTO can have apparently done some substantial work on electronic commerce, it should be regarded that it has only encouraged its member states to act in a certain direction. It should be pointed out that the WTO Microsoft White Paper on electronic commerce is a child of certain states and logically so, only applicable to the WTO member states. With that in mind the WTO, should practically take substantive steps to ensure individual parties with the desire to enter into the internet commercial transaction with any party or company are protected irrespective of whether their localities and their relationship with the WTO.

Even assuming that the WTO is made up of all the states on this earth, its policies and/or provisions on electronic commerce, as proposed by the Microsoft White Paper is almost on the benefit the internet can offer to consumers and suppliers globally. Suffice it to mention that, the WTO has significantly taken advantage of the opportunities offered by the internet to ensure global trade, but has thought less on the potential risks resulting from such transactions and on the normative legal framework to alleviate such risks.

4.6 Contracting online: Legal and Practical issues

4.6.1 Doing business online

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69 Supra
70 The WTO dispute settlement might not be effective to individuals as they are with member states. The question on the binding effect and the burdensome process that individuals can anticipate could be undesirable to individuals doing business online, who might expect fast and immediate remedies to their disputes. Such disputes can be settled by a normative legal framework, without having to go to court but by for example prescribing specific formalities for online transactions. Or by laying a legal framework that affords the innocent parties local jurisdictions.
It is suggested that Internet has not changed the way people do business; it has simply created a new medium for doing business. The basics principles of contract, whether in writing, oral or online, have remained much the same. Like any new frontier, however, transacting on the Internet does present certain unique challenges to these established principles.

One of the challenges is that in most instances the contracting parties may never meet in person. To ensure that binding rights and obligations are created, it is all the more important to ensure that each party to a contract has unlimited contractual capacity for the purpose of that agreement, particularly in light of the number of minors who are Internet users. In addition, issues including jurisdiction and choice of law have major significance, as to the parties may in all probability be geographically distant and subject to differing rules of law.

Despite its challenges, it seems the internet has already become a domain for business and would probably be more so in the future. In some countries like South Africa, and presumably in many of the developed countries such as the United States and the United Kingdom and others, legislations have been enacted to assist in seeking clarity to some of concerns of contracting online. In Namibia, unfortunately, parliament is far from making one and hence the law regulating internet transaction is yet to see the light.

4.5.2 The present Legal Position in Namibia

Internet and its application to electronic agreements is changing many world industries drastically. Namibia is no exception. Thus, Namibia has reached the stage where the previous market structures are beginning to change as the internet spreads. This reality became a challenge to relevant authorities and policy makers. This part is therefor aimed at capturing the state of commercial agreements concluded through the internet in Namibia.

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72 Ibid
4.5.3 The State of electronic commerce agreements in Namibia

According to the study done by the Bank of Namibia on the implication of electronic commerce on the financial system\textsuperscript{73} it was noted that most companies have their own websites, an indication that a presence on the internet is becoming a necessity for many companies and consumers alike as they realize the potential and opportunities the internet can offer. The study further noted that important activities that are carried out online include shopping, obtaining after sales reports, marketing etc.\textsuperscript{74}

The Bank of Namibia study has however noted several barriers to electronic commercial transactions. It revealed that some of the companies (suppliers) indicated that the majority of their customers are not ready to buy via the internet. The overall lack of a legal framework in Namibia to protect customers and vendors was mentioned as one of the common problems preventing some companies from adopting electronic commercial transactions.\textsuperscript{75} Some companies also cited fear of paying without the products or services being delivered, this is a clear indication that both the supplier companies and consumers do not trust the internet for their commercial transactions and hence the desire for a regulatory framework.

CHAPTER 5: ONLINE TERMS AND CONDITION

5.1 General

This part addresses the key issues concerning electronic businesses contracting online. It looks at how online merchants want to select the customer with whom he/she deals? Does email fall under postal rule or the receipt rule of acceptance? Does an electronic
document constitute “writing; and how electronic business can display its standard terms and conditions online. Shortly put, this part is a critical approach to the manner in which terms and conditions are displayed in internet contract.

Unlike ordinary/traditional contracts, most online contracts will not be formed after lengthy discussions and negotiations over specific terms and clauses. Rather, they will generally be standard form contracts called contracts of adhesion. Besides key issues such as price, quantity, and quality of goods or services, the terms in these contracts are not negotiated but are offered on a “take-it-or-leave-it” basis. The standard terms are pre-drafted by the merchant to protect its interests, and the customer receives them only at the time of purchase usually without either the time or the desire to scrutinize them.

With the traditional/ordinary contract the position is just the opposite. Both the merchant and the purchaser discuss and agree to the terms and conditions favorable to them. This is because in most cases, unlike the online contracts the agreement is in a solid or written form and the parties have adequate time to utter, amend or even exclude certain terms unfavourable to either party. Put simply, parties have adequate time to examine and familiarize themselves with the contents of the agreement.

As to whether the general principles of the law of contract adequately protect parties to the online commercial agreement, the issue has to a certain extent been settled. That is to say that online commercial contracts terms and conditions put one party who is a merchant in a superior position to take advantage of control and influence over the contents of the agreement to the detriment of the consumer or purchaser. From this angle, it could be difficult to decide, given the fact that the one party is in a superior position, how this can protect both parties, at least not equally. Notionally, this may even present problems of intent in a traditional contract.

Unlike traditional/ordinary contracts, online agreements has created new concerns not often peculiar to the traditional/ordinary contracts such as how to adequately display terms and conditions, which is the focus of this chapter.

5.2 Displaying Contract Terms online
The terms and conditions in a standard form contract will have no effect unless the customer is given "notice" of them before the contract is formed.\textsuperscript{76} For example, in \textit{Olley v. Marlborough Court Ltd},\textsuperscript{77} a contract for a hotel room, having been signed at the hotel's reception desk, was not subject to terms found on a notice in the bedroom. In general, this "timing issue" should not pose a significant problem for online contracts, because online merchants can easily display the standard terms before a customer submits the order.

A closer examination reveals that the terms of online contracts are not bad or have bad effects \textit{per se}, but the issue is the notice and time the purchaser/consumers have to peruse and/or familiarize him/herself with such terms and conditions.\textsuperscript{78} The timing issue can be rectified since the merchant can easily display standard terms before a customer submits to the order, it does not seem to pose a significant problem.

According to Chissick et al\textsuperscript{79} the requirement of notice could pose, a greater obstacle to online standards form of contracts unless the customer signs\textsuperscript{80} the contract in which case all specified terms should be effective, merely displaying the terms somewhere may not be sufficient. Simply put by Lord Denning M R in \textit{Thornton v Shoe Lane Parking}\textsuperscript{81} the customer is bound by the …condition if he knows that a ticket (for instance) issued subject to; or if the company did what was reasonably sufficient to give him notice of it. For more onerous conditions such as ones that deprive the customer of legal rights and remedies the law should demand an even greater effort by the merchant to give notice.\textsuperscript{82}


\textsuperscript{77} \textit{Olley v. Marlborough Court Ltd} [1949] 1 K.B. 532

\textsuperscript{78} Ibid

\textsuperscript{79} Ibid

\textsuperscript{80} Note that when parties signs are actually bound by the contents contained in such an agreement.

\textsuperscript{81} [1971] 2 QB 163 at 170

\textsuperscript{82} Ibid
If [the exemption] is so wide and so destructive of rights that the court should hold any man bound by it unless it is drawn to his attention in the most explicit way. In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it or something equally startling.\textsuperscript{83}

Terms could be displayed at the bottom of the order form or web page. Since the terms are conspicuously displayed, this method may have greater legal weight in terms of Notice. Thus in turn provide the consumers with sufficient desire and attention to read through such terms.

5.3 Contract formation terms\textsuperscript{84}

One of the principal areas requiring express terms in an online contract is how the contract itself is formed. In traditional/ordinary contracts, this issue has created less concern, since the “rules” and business practice are better established. However, in online contracts electronic businesses will want to expressly delineate the contract formation process to create greater legal certainty and to vie themselves as many options and advantages as possible.

The “contract formation” clause of the standard terms and conditions can encompass the entire contract formation process.

5.4 Payment and Delivery terms

Standard terms and conditions will undoubtedly specify the specific payment and delivery terms of the transaction. Merchants and customers alike, have to be reminded that; cash lost in post for example constitute non-payment. Thus the sending of payment is not like sending an acceptance, the posted rule does not apply.\textsuperscript{85}

In order to satisfy the payment terms of the contract, the other party must receive the payment. Applying this rule to cyberspace, digital cash that becomes “lost” \textit{en route} to the online merchant does not constitute payment either. If it is a fault in the line or server

\textsuperscript{83} Ibid
\textsuperscript{84} Note that not all terms are discussed for the purposes of this research.
\textsuperscript{85} Luttges \textit{v Sherwood} (1895) 11 TLR 133
connection and subsequently the digital cash disappears the customer is left with the loss and or risks.86

Due to the rule in the *Luttges*87 case people in traditional commerce rarely even sent cash through the mail: it is too insecure. Besides, an unscrupulous merchant theoretically could even keep the cash and deny ever having received it.

Without a doubt, consumers in the cyberspace would probably desire two systems, (1) anonymous digital cash or micro-payment systems for small transactions and privacy, and (2) traceable digital cash for larger transactions and accountability.88

Contrary to the above is the position set in the English case of *Norman v Rickett*89 which suggested that if the contractual terms described a method of payment and the sender observes the specified procedures, the sender will not have liability for the lost payment. From the above perspective, consumer’s standpoint, this case rightfully balances the burden of accountability and record keeping imposed by the *Lutteges* case above.

In a nutshell, a contract is composed of expressed or implied terms. Express terms of a contract are to be found in the statements –written or oral –which the parties made in the process of reaching consensus.90 An implied term is an unexpressed provision which the law imports into the contract. The law reads implied91 terms into a contract to give expression to the common intention of the parties. The relevant argument to suffice in case of terms and conditions on online contracts is whether consensus was reached between the parties unless the party in the inferior position’s attention is drawn to such terms and conditions (not only a mere display) but the attention should be drawn to such terms, such as the price, delivery, cancellations, methods of payment, etc. so that consumers know without any doubt what they are assenting to. It is only through this that their protection is certain.

86 Chissick *et al* at 112
87 *Supra* fn 84
88 Chessick *et al* at p. 112
89 (1886) 3 TLR 182
91 Commonly known as tacit term see Sharrock fn 89 (above)
CHAPTER 6: CONCLUDING REMARKS AND RECOMMENDATIONS

The review of the current legal and regulatory regime revealed that it cannot adequately regulate commercial transactions concluded through the internet. There is therefore, a need to formulate a new legal framework that adequately covers transactions concluded
electronically. The need to address the situation is not only to minimize the vulnerability of the individuals and institutions already involved, but also to develop and safeguard the online commercial agreements. Moreover the internet dictates that the legal framework should also take into account the concerns of cross borderer business transactions. Therefore, to ease trading across borders in the electronic environment requires negotiations of international agreements, especially when this type of trade increases.

The boundlessness of the internet implies that a single country will not be able to legislate and maintain its own rules towards all foreign citizens and businesses companies. Consequently, it is a certainty that the internet demands higher priority of international collaboration both regarding preparation of new/harmonized rules and maintenance of the rules.

Common law and hence the general principles of the contract law, only addresses and protect consumers and parties to online agreement to a certain degree. Common law and the general principles of contract law, as alluded to above apply generally to the Internet, even if they were written before the advent of electronic commerce, and that proved insufficient. In order for the internet commercial transactions to flourish, a commercial legal framework needs to be in place to recognize, facilitate, and enforce electronic transactions worldwide.

The recommended commercial framework should promote international coordination by adopting model laws and uniform rules, conventions and treaties, and technical standards and protocols which should be adopted by all states. In this way, the uniform law relating to internet commercial transactions will not be limited to a particular state. The internet commercial contracts actually know no boundaries, and like it, shall be such uniform law or code.

In addition, the internet is global and this would require protracted and lengthy discussions at the international level. Individual states like Namibia cannot afford to wait for such discussion to be completed. They can, however, begin by putting in place a legal and regulatory framework for not only electronic commercial contracts, but also on internet generally. This will first and foremost safeguard consumer protection and create certainty and reliability for internet commercial contracts. Namibia for example will need
to establish a normative framework that takes into account the need to protect parties to internet commercial transaction, as a first step.

The state of affair with regards to the general principle of the law of contracts differs from country to country. The nature of online commercial online agreements is the same irrespective of national boundaries and need to be regulated by one and the same law irrespective. If the current situation where we have different legislation based on National boundaries regulating the internet is allowed to continue then it would appear that different treatments are applied to merchants and consumers using the very same object which is the internet.

Finally, the world is fast becoming a single global village. When confronted with modern problems and changes such as globalization, which undermines the existing laws, a rapid solution is to create new laws to fit the situation. Our leaders should thus endeavour to enact legislation or a statute that looks at online commercial agreements as a problem for a single global village that would effectively protect parties to online commercial agreements.

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