

# **The Enforceability of Incorporated Terms in Electronic Agreements**

Pieter GJ Koornhof\*

*Lecturer, University of the Western Cape*

This article seeks to evaluate the validity of different methods of incorporating terms into electronic agreements, and to what extent the use of these different methods may influence the enforceability of the incorporated terms. The two most common methods of electronic incorporation, namely click-wrap and web-wrap, are set out, and the status of their incorporation is analysed by studying positions in the United States of America (US) and the United Kingdom (UK), before referring to South Africa. The common law position regarding incorporated terms for both signed as well as unsigned documents is discussed.

It is argued that, irrespective of the method of incorporation adopted, incorporated terms would most likely be valid in light of the provisions of the Electronic Communications and Transactions Act. This notwithstanding, due care must be taken in how the different methods in themselves are used, as this might still affect whether particular incorporated terms will be enforced. This is especially pertinent in the light of contracts which may fall under the ambit of the new Consumer Protection Act. However, neither the Electronic Communications and Transactions Act nor the Consumer Protection Act seeks to replace the common law, but rather adapt it and create a general framework for such types of agreements and transactions to operate in. It is submitted that the law applying to incorporation by reference in signed documents should apply to those instances where click-wrap is used, whereas the law applying to that of unsigned documents should apply when web-wrap is used.

## **1. INTRODUCTION**

The advent of computers and the internet has fundamentally changed the way in which we view and interact with the world. The age-old adage that the world is becoming smaller by the day has never been truer. One would be hard-pressed to find anyone operating within a professional context who has not yet adapted to the demands that this medium has created.

---

\* BA LLB LLM (Stell), Attorney of the High Court of South Africa, Lecturer in the Department of Mercantile and Labour Law at the University of the Western Cape.

The online purchase and sale of products and services is no longer a novelty,<sup>1</sup> and it is common cause that the internet has become a very important part of national and international business.<sup>2</sup> This has naturally led to new legal challenges, and has far-reaching effects with regard to, *inter alia*, the law of contract and jurisdiction. As a result, many countries have adopted legislation to seek to regulate and address these issues, with South Africa introducing the Electronic Communications and Transactions Act,<sup>3</sup> which came into force on 30 August 2002.

As the internet has evolved, so too have electronic transactions. Often when a contract is concluded online, be it through a website or via e-mail, terms are incorporated into it through the use of so-called click-wrap and web-wrap agreements. With the advent and rising popularity of online social networking, more and more individuals enter into agreements to attain membership and access to websites such as Facebook, Twitter and Myspace.<sup>4</sup> These agreements have become quite commonplace, and are constantly under criticism due to the fact that they often place restrictions and create duties of which most people are generally unaware. For instance, many social networking services will include terms relating to the regulation and assignment of intellectual property, as well as that of forum-selection, placing unwitting parties in a position where they may have to institute action in a foreign jurisdiction and then subject to foreign law. While these membership agreements are traditionally considered to be of a non-commercial nature, this is not always the case anymore.<sup>5</sup> However, due to the overwhelming imbalance in contracting power, individuals are still faced with a “take it or leave it” option. In effect, these problems are similar to those traditionally experienced with standard form contracts in general.

This paper seeks to establish whether the most common methods of incorporating terms in electronic agreements (namely click-wrap and web-wrap, as stated above) are, in principle,

---

<sup>1</sup> For instance, kulula.com, South Africa’s largest online retailer, has an annual revenue in excess of R2,5billion. ([www.comair.co.za](http://www.comair.co.za) – Accessed on 2 October 2010).

<sup>2</sup> Van der Merwe et al, *Information and Communications Technology Law*, LexisNexis (2008) at 141

<sup>3</sup> Act 25 of 2002 (as amended), hereinafter referred to as ECTA.

<sup>4</sup> These websites may be found at [www.facebook.com](http://www.facebook.com), [www.twitter.com](http://www.twitter.com) and [www.myspace.com](http://www.myspace.com), respectively.

<sup>5</sup> In this regard, especially Facebook has received criticism over its constant amendment of its relevant user policies for the purposes of greater profiting from advertising, even in the light of alleged privacy violations. For further reading, see “Profit over privacy at Facebook” (<http://www.news24.com/SciTech/News/Profit-over-privacy-at-Facebook-20100502> - Accessed on 1 October 2010); “Google’s Orwell Moment” (<http://www.newsweek.com/2010/02/16/google-s-orwell-moment.html> - Accessed on 1 October 2010); and “Facebook Privacy under fire again” (<http://mybroadband.co.za/news/internet/13848-Facebook-privacy-under-fire-again.html> - Accessed on 3 October 2010), among others.

valid, and to which extent these different methods are enforceable in South Africa, and whether adequate protection is provided under South African law. First, the most common methods of electronic incorporation shall be discussed, before moving to a comparative analysis. Recent case law pertaining to the question at hand shall be discussed, and the situation in South Africa shall be compared to that in the US and the UK. These systems were chosen for several reasons, briefly set out as follows:

- There are legislative tangents between South Africa and both countries, owing to the fact that the UNCITRAL Model Law on Electronic Commerce<sup>6</sup> has heavily influenced the legislation of these jurisdictions.<sup>7</sup>
- With regards to the United Kingdom, it is common cause that, our predominantly Roman-Dutch roots notwithstanding, our system of contract law has been historically influenced by theirs, especially with regard to the question at hand, and it is therefore beneficial to look at their position in order to evaluate our own. Furthermore, the country can also be looked at in order to give a brief overview of how the European Union (EU), through instruments such as the e-Commerce Directive,<sup>8</sup> purports to deal with the issue.
- The United States of America has by far the largest body of law regarding click-wrap and web-wrap agreements, and is therefore valuable for purposes of case study and may offer valuable guidance in determining a way forward.

## 2. ELECTRONIC METHODS OF INCORPORATION

With regard to commercial agreements entered into electronically (whether between businesses, or between a business and a consumer), provisions found in documents such as sales and returns policies, as well as other standard terms and conditions, are often incorporated by reference. Over and above this, such clauses are also commonly incorporated in transactions which are not traditionally regarded as commercial in nature, such as setting up an account for e-mail services or a social networking website. In fact, agreements and transactions of such a seemingly non-commercial nature are often the most controversial

---

<sup>6</sup> The Model Legislation serves as the primary influence for many of the provisions found in our very own ECTA.

<sup>7</sup> United Nations Commission on International Trade Law – Status: 1996 UNCITRAL Model Law on Electronic Commerce ([http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html) - Last Accessed on 4 March 2011).

<sup>8</sup> Electronic Commerce Directive 2000/31/EC.

ones.<sup>9</sup> In the following section, the most common electronic methods used for incorporating terms and conditions will be set out and discussed.

## 2.1 ‘Click-wrap’ agreements

A click-wrap agreement (also known as a ‘click-on’ or ‘click-through’ agreement) is a common method used where consumers are required to click on a button or link to indicate their acceptance of particular terms and their willingness to proceed.<sup>10</sup> These types of agreements are essentially a digital version of so-called ‘shrink-wrap’ agreements. In the case of a shrink-wrap agreement, a product, normally computer software, will contain a standard-form agreement placed on top of or inserted in the packaging of a product which is normally encased in cellophane or plastic wrapping. The conduct of a consumers, in instances where they voluntarily tear open the wrapping, may then be relied upon as an indication that they have assented to the terms of the standard-form agreement.<sup>11</sup> Johnson indicates that click-wrap agreements are generally used in three instances: where a term of use must be accepted (with regard to regulating access to certain websites); where an exclusion clause is to be relied upon in an effort to deflect or limit liability; and in software licencing agreements.<sup>12</sup>

A common example of a click-wrap agreement is where a consumer is transported, commonly via the clicking of a hyperlink, to a webpage containing terms and conditions to be incorporated into the agreement, where there is normally (at the end of the page) a button with the phrase “I agree” printed on or next to it. Another example is where a link is provided referring to terms and conditions which are sought to be incorporated by reference. If the consumer clicks on the link, a new (normally independent) webpage will open up and display the relevant provisions. In such instances, there is normally a button with the phrase “I hereby agree to the terms and conditions found in the link provided” either next to, or slightly below the link. A prudent web or software programmer may even go so far as to place additional requirements in his code. These requirements might include: only allowing a consumer to

---

<sup>9</sup> Another recent controversy relating to such instances, is the criticism against Google for attempting to adopt a “uniform” privacy policy over its entire product offering, sparking new concerns about the protection and sharing of personal information of its products’ users. For further reading, see Fritz, *Should you be worried about Google’s New Privacy Policy*, Wall Street Daily (26 January 2012), available at <http://www.wallstreetdaily.com/2012/01/26/should-you-be-worried-about-google%E2%80%99s-goog-new-privacy-policy/> (Last accessed 6 March 2012).

<sup>10</sup> Forder & Svantesson, *Internet and E-Commerce Law*, Oxford University Press (2008) at 52.

<sup>11</sup> Pistorius, *Click-wrap and Web-wrap Agreements*, (2004) SA Merc LJ at 569.

<sup>12</sup> Johnson, *The Legal Consequences of Internet Contracts*, Transactions for the Centre of Business Law, Issue 37 (2005) at 51.

click on the relevant button after a certain amount of time has passed; requiring the consumer to actually click on the link containing the terms and conditions referred to before he may click on the button provided, or requiring a person to scroll through the entire set of terms and conditions in question before being able to click on the button.

As its name suggests, a click-wrap agreement requires a positive act from a consumer. Normally the transaction will not commence, or the software cannot be installed, unless a consumer clicks on the particular link or button. This conduct may then presumably be relied on by the other party as an indication that the consumer has, in fact, assented to the terms. At the very least, even if the terms referred to are unread, there is an indication that a consumer was aware of them.<sup>13</sup> In order to prove that the act of clicking took place, the party wishing to rely thereon (normally the website owner or administrator) may keep an audited record of the event.<sup>14</sup> However, it is submitted that, even in such instances where care is taken to avail individuals of terms and conditions sought to be incorporated, the average person will often simply click on a link or button without taking the precaution or making the effort to read the terms completely, if at all.

## 2.2 ‘Web-wrap’ agreements

A web-wrap agreement, sometimes also referred to as a ‘browse-wrap’ agreement, has similarities to that of a click-wrap agreement, and is often used under similar circumstances, except for one rather fundamental difference. Where a click-wrap agreement actually requires a positive action to indicate assent, a web-wrap agreement does not. Generally, this type of agreement refers to those instances where a consumer contracts electronically, and the terms and conditions are displayed in a simplified form.<sup>15</sup> Sometimes the terms will be displayed on the web page being used to conclude the electronic agreement, but this is not always the case. Other methods may include placing a hyperlink leading to a separate page where the terms and conditions seeking to be incorporated may be found (this is still quite common when parties seek to incorporate terms into an agreement concluded via e-mail), or by letting an additional window containing the relevant terms ‘pop up’ while the consumer is in the

---

<sup>13</sup> Pistorius (2004) at 570.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

process of concluding the agreement. Traditionally, in those instances where a hyperlink was used, it would often only be found at the bottom of a web page or in small print.<sup>16</sup>

The most common drawback when using web-wrap agreements is of a probative nature. A consumer is not required to click on the terms and conditions if it is provided via a hyperlink,<sup>17</sup> and there are a few ways to actually ascertain whether or not such a person was aware of the fact that the hyperlink contained contractual terms sought to be incorporated in the electronic agreement. Even in such instances where the terms and conditions are actively displayed, it is still elusive to prove that it has been read or assented to. The only aspect that a party may potentially rely upon is the fact that the consumer has in fact proceeded with the transaction. It is submitted that this on its own is, however, not sufficient evidence that a consumer should be bound by the terms and conditions attached. Forder and Svantesson suggest that, in instances where a computer log indicates that a consumer has downloaded the terms found in the hyperlink provided, there would be a reasonable indication that a party has read or was aware thereof.<sup>18</sup>

### **3. THE VALIDITY AND ENFORCEABILITY OF ELECTRONIC METHODS OF INCORPORATION**

Electronic agreements have the potential to be, and often are, trans-border in nature. It is not uncommon for a South African consumer, for example, to purchase goods from a foreign website, or to conclude an e-mail agreement with someone who is abroad. Owing to a lack of South African case law on the point, as well as the fact that the above situation makes it pertinent to be mindful of the law and principles of foreign jurisdictions, it is necessary for some comparative analysis to be made. In light of this, it is submitted that the position in the US of as well in the UK should be considered, as both are major hubs for electronic commerce. Over and above this, due to relative international convergence in the field of electronic law,<sup>19</sup> the precedents and principles of these jurisdictions may also serve to shed light on how the situation should be managed in South Africa. Despite the principles and provisions of ECTA, the common law position is still applicable in South Africa, and

---

<sup>16</sup> Forder & Svantesson (2008) at 50.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> With regard to South Africa and the USA, there is a strong similarity between ECTA and the American Uniform Electronic Transactions Act, both which are based on the UNCITRAL Model Law on Electronic Commerce. With regard to the United Kingdom, they have adopted the provisions of the e-Commerce Directive, which also shares principles with the above model instrument.

accordingly the standard position relating to the law of incorporation by reference will also be set out and discussed.

### 3.1 The position in the United States of America

Under US law, the theoretical basis for the validity of click-wrap and web-wrap agreements is to be found in the provisions of the Uniform Commercial Code.<sup>20</sup> Specifically, the UCC states (in § 2-204) that “[a] contract for the sale of goods may be made in any manner sufficient to show agreement [...]” This principle has also been further strengthened by provisions found in the Uniform Electronic Transactions Act<sup>21</sup> (which has been adopted by the majority of US States), as well as the Electronic Signatures in Global and National Commerce Act.<sup>22</sup> With regard to both UETA<sup>23</sup> and E-SIGN<sup>24</sup>, an “electronic signature” is defined as “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.”<sup>25</sup> Both instruments also provide for facilitation of the electronic agreements and transactions with regards to formality requirements of writing and signatures.<sup>26</sup>

Both click-wrap and web-wrap agreements are both seen as so-called “contracts of adhesion,” owing to the standard nature of the terms generally sought to be incorporated, and are thus generally interpreted in favour of the weaker bargaining party.<sup>27</sup> This notwithstanding, the two types of agreements are treated somewhat differently.<sup>28</sup>

One of the first cases to look at the validity of click-wrap agreements was that of *Groff v America Online Inc*,<sup>29</sup> where the question was raised as to whether a consumer should be held bound to a forum-selection clause found in the terms of service for the provision of internet services by the defendant. In his judgment, Clifton J notes:

---

<sup>20</sup> Hereinafter referred to as the UCC.

<sup>21</sup> Hereinafter referred to as UETA.

<sup>22</sup> 15 U.S.C. chapter 96, hereinafter referred to as E-SIGN.

<sup>23</sup> Section 1.

<sup>24</sup> § 7006(5).

<sup>25</sup> Emphasis my own.

<sup>26</sup> The relevant provisions in UETA are found in sections 7-9, whereas the provisions of E-SIGN are encapsulated in § 7001(a).

<sup>27</sup> Trakman, *The Boundaries of Contract Law in Cyberspace*, I.B.L.J 2009 2 159 at at 160.

<sup>28</sup> Pistorius (2004) at 571-2.

<sup>29</sup> 1998 WL 307001 .

While defendant prepared this contract, plaintiff was under no obligation to agree to the terms. Plaintiff had the option to refuse the service and the contract offered by plaintiff. Although plaintiff, in his affidavit, states “I never saw, read, negotiated for or knowingly agreed to be bound by the choice of law...” he does not point to any conduct of defendant or other reason why he could not. Indeed as pointed out in defendant's affidavit and argued in his memorandum, one could not enrol unless they clicked the “I agree” button which was immediately next to the “read now” button... or, finally, the “I agree” button next to the “I disagree” button at the conclusion of the agreement... Our Court, at 518, stated the general rule that a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents. Here, plaintiff effectively “**signed**” the agreement by **clicking** “I agree” not once but twice. Under these circumstances, he should not be heard to complain that he did not see, read, etc. and is bound to the terms of his agreement.<sup>30</sup> (emphasis added)

As a general rule, it would seem that click-wrap agreements are in principle enforceable under US law. This was seen to be the case in the judgments of *In re RealNetworks, Inc., Privacy Litigation*<sup>31</sup> where parties were held bound by an arbitration clause found in the relevant incorporated terms; in *i.LAN Systems, Inc v. Netscout Service Level Corp*<sup>32</sup> where the agreement was seen to be enforceable even in the case where the parties contracted on a “money now, terms later” basis, and in *Feldman v. Google, Inc.*<sup>33</sup> where a user was held to be bound by a forum-selection clause. Accordingly, it is not simply enough to argue that the incorporated terms should be severed because they are to be found in a click-wrap agreement.

The above mentioned principle notwithstanding, it must still be borne in mind that the validity or enforceability of the terms found in click-wrap agreements will be decided on a case by case basis. In *Bragg v. Linden Research, Inc.*<sup>34</sup> the plaintiff, a user of Second Life, a popular massively multiplayer online community, had his account suspended due to his involvement in certain “exploits” deemed wrongful by the defendant. When the plaintiff tried to institute action to have his account re-opened, the defendant sought to enforce an arbitration clause found in the relevant click-wrap agreement. The court held that the arbitration clause was both procedurally and substantive unconscionable, due to the fact that the relevant provision had been ‘tucked away’ among several other terms found under the heading “GENERAL

---

<sup>30</sup> 1998 WL 307001 at 5.

<sup>31</sup> 2000 WL 631341 at 7.

<sup>32</sup> 183 F.Supp.2d 328 at 338.

<sup>33</sup> 513 F.Supp.2d 229 at 238.

<sup>34</sup> 487 F.Supp.2d 593.

PROVISIONS,<sup>35</sup> and that the arbitration would have to be held in California, despite the fact that the plaintiff was domiciled in another state, which resulted in the forum being neither neutral nor cost-effective.<sup>36</sup> Apart from the arbitration clause, it also came to light that the terms of service empowered the defendant to suspend accounts at their own discretion if there was a mere suspicion of foul play.<sup>37</sup> Accordingly, the relevant terms were held not to be enforceable.

With regard to web-wrap agreements, it would seem that the courts are generally more reluctant to hold the incorporated terms enforceable. In *Ticketmaster Corp. v. Tickets.Com, Inc.*,<sup>38</sup> the court held that the plaintiff could not simply rely on terms and conditions which it had placed on the bottom of its home page on a place where the average user would not care to even look.<sup>39</sup> Even if reference to the terms sought to be incorporated is placed in a prominent position on a web page, this will also not necessarily be sufficient, as it will depend on whether it is clear that there is a requirement to assent to them. This is evident from the judgment in *Specht v. Netscape Communications Corp.*,<sup>40</sup> where it was found that where a party provided a hyperlink to the terms and conditions together with the phrase “Please review and agree to the terms [...] before downloading and using the software” this could only be seen as an invitation and not a requirement for the use of the software.<sup>41</sup> However, in *Register.com, Inc. v. Verio, Inc.*<sup>42</sup> the court did hold a web-wrap agreement to be enforceable. In the particular case, the plaintiff included a notice stating that, through using its service, a party agrees to be bound to certain conditions regarding the use of the data provided. The court held that parties making regular use of the service could in fact be held bound, as it may then be reasonably assumed that they had been made aware, or reasonably should have been aware, of the notice.<sup>43</sup>

---

<sup>35</sup> 487 F.Supp.2d 593 at 606-607.

<sup>36</sup> 487 F.Supp.2d 593 at 609-610.

<sup>37</sup> 487 F.Supp.2d 593 at 611.

<sup>38</sup> 2000 WL 525390.

<sup>39</sup> 2000 WL 525390 at 3.

<sup>40</sup> 150 F.Supp.2d 585.

<sup>41</sup> 150 F.Supp.2d 585 at 596.

<sup>42</sup> 356 F.3d 393.

<sup>43</sup> 356 F.3d 393 at 401-402.

With regard to the validity and enforceability of both click-wrap and web-wrap agreements, Terenzi<sup>44</sup> summarises the principles necessary to form binding online agreements, namely that the user must have adequate notice that the proposed terms exist; the user must have a meaningful opportunity to review the terms; the user must have adequate notice that taking a specified, optional action manifests assent to the terms, and, lastly, the user must, in fact, take that action. It is submitted that, while click-wrap agreements generally adhere to these principles quite easily, it is also possible for web-wrap agreements to do so.

### 3.2 The position in the United Kingdom

UK courts have yet to deal conclusively with the question of whether click-wrap or web-wrap agreements are valid and enforceable, and the amount of scholarly writing on the subject is quite limited. Johnson<sup>45</sup> argues that the position should be similar to how the courts have handled ticket cases.<sup>46</sup> However, as Johnson also points out, certain directives of the EU, such as the EU Distance-Selling Directive<sup>47</sup> may influence this position.<sup>48</sup> Accordingly the relevant directives shall be discussed. Article 9 of the E-Commerce Directive<sup>49</sup> states that

Member States shall ensure that their legal system allows for contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

The above mentioned article provides for recognition of electronic agreements, and presupposes that, in principle, click-wrap and web-wrap agreements would not be simply seen to be invalid due to their electronic nature. In incorporating the above directive, the UK does lay down additional provisions in its Electronic Commerce (EC Directive) Regulations, 2002.<sup>50</sup> In article 9 of the regulations, it states that a service provider shall, prior to an order being placed by the recipient of a service, provide to that recipient in a clear, comprehensible and unambiguous manner information regarding, *inter alia*, the different technical steps

---

<sup>44</sup> Terenzi, *Friending Privacy: Toward self-regulation of second generation social networks*, 20 FDMIPMELJ 1049 (2010) at 1079-1080.

<sup>45</sup> Johnson, *All wrapped up? A review of the enforceability of "shrink-wrap" and "click-wrap" licences in the United Kingdom and the United States*, E.I.P.R. 2003, 25(2), 98-102 at page 6.

<sup>46</sup> The principles relating to ticket cases are expanded upon below.

<sup>47</sup> Directive 97/7/EC.

<sup>48</sup> Johnson (2003) at page 6.

<sup>49</sup> Directive 2000/31/EC.

<sup>50</sup> United Kingdom Statutory Instrument 2002/2013.

which are to be followed to conclude the contract; whether or not the concluded contract will be filed by the service provider and whether it will be accessible, as well as the technical means for identifying and correcting input errors prior to placing of an order.

The provisions of the EU Unfair Terms Directive<sup>51</sup> were incorporated into, *inter alia*, the Unfair Terms in Consumer Contracts Regulations, 1999,<sup>52</sup> which states in article 5(1) that a 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. As Reed indicates,<sup>53</sup> the Annex to the Unfair Terms Directive provides a non-exhaustive list of terms that would be regarded as unfair, and includes several examples which are of relevance to electronic agreements. Such instances would be where the legal rights of a consumer are inappropriately excluded or limited; where a consumer will be irrevocably bound to terms he had no real opportunity to become acquainted with prior to the conclusion of the contract, and excluding or hindering a consumer's right to take legal action or exercise any other legal remedy. Article 8 of the regulations also state that an unfair term shall not be binding on a consumer, but that the rest of the contract may remain binding if it is capable of continuing in existence without the unfair term.

The EU Distance-Selling Directive, which binds any contract for the sale of goods or services concluded with a consumer as a consequence of an organised distance sales scheme of the supplier using a means of communicating at a distance,<sup>54</sup> places certain obligations on a supplier. In terms of article 12, these obligations may also not be waived by the consumer. Most of the provisions relate to the right of information regarding the supplier, as well as the nature of the products or services sold, and it should be provided in a manner which is readily available and accessible to the consumer. These principles have, to a greater extent, also been incorporated into Consumer Protection (Distance Selling) Regulations, 2000.<sup>55</sup>

---

<sup>51</sup> Council Directive 93/13/EEC.

<sup>52</sup> United Kingdom Statutory Instrument 1999/2083.

<sup>53</sup> Reed, *Internet Law: Text and Materials* (2<sup>nd</sup> Edition), Cambridge University Press (2004) at 297.

<sup>54</sup> Council Directive 97/7/EC, article 2(1).

<sup>55</sup> United Kingdom Statutory Instrument 2000/2334.

It is submitted that none of the above mentioned provisions affect the general validity of click-wrap or web-wrap agreements, but it may affect the enforceability of particular terms contained therein if they do not comply with the relevant regulations. Johnson notes that as long as the terms sought to be relied on are inconspicuous and provided in a clear and comprehensible manner, such agreements should be accepted.<sup>56</sup> Owing to the similarities between English and South African law of contract, it is submitted that, in the instance where a precedent is finally set in the UK, such judgments should be taken into account when the South African situation is evaluated. Strategically speaking, the principles and provisions of the relevant EU directives should also be considered, due to South Africa's ties to the areas as a trading partner. However, at this point in time, it is submitted that it would be more prudent for South Africa to give due regard to the precedents of the US.

### **3.3 The position in South Africa**

Owing to the fact that ECTA does not seek to replace the common law, but rather to create a framework wherein it may operate, it is pertinent to first discuss the standard position, before moving on to the position under ECTA.

#### **3.3.1 General principles relating to incorporation by reference**

It is trite law that provisions may be incorporated into a contract by means of reference.<sup>57</sup> Such terms may be incorporated irrespective of whether the document containing the agreement and reference has been signed by the parties. This position notwithstanding, the principles regarding incorporation by reference slightly differ depending on whether the document was signed or not. The situation relating to both signed and unsigned documents shall be individually discussed below. With regards to electronic agreements, it is submitted that ECTA seeks to create a framework through which electronic agreements may effectively function, and therefore does not purport to substantially change the common law position.<sup>58</sup> The same position also applies with regard to the Consumer Protection Act,<sup>59</sup> as can be seen from its own provisions.<sup>60</sup> Furthermore, it is also important to note that there are many agreements of a commercial nature, such as those between businesses, private individuals and other parties who have equal bargaining power, that fall outside of the defined scope of the

---

<sup>56</sup> Johnson (2003) at page 6.

<sup>57</sup> Kerr, *The Principles of the Law of Contract* (6<sup>th</sup> Edition), Butterworths (2002) at 343.

<sup>58</sup> In this regard, see both the Preamble and Section 3 of ECTA.

<sup>59</sup> Act 68 of 2008, as amended (hereafter referred to as the CPA).

<sup>60</sup> In this regard, see Sections 2(10) and 3(1) of the CPA.

CPA.<sup>61</sup> It is therefore beneficial to first discuss the general principles, before moving on to the specific provisions found in these laws.

### 3.3.1.1 Signed documents

A person signing a document shall normally be accepted as having assented to the contents found therein. This would also serve as sufficient proof that he has availed himself of the terms and provisions contained in the document, irrespective of whether or not he can show that he was not, in fact, aware of them,<sup>62</sup> or was unable to understand them.<sup>63</sup> This is in line with the *caveat subscriptor* rule, which has been firmly established in South African law.

The justification for the *caveat subscriptor* rule is to ensure that the need for both legal and commercial certainty is met when dealing with the interpretation and enforcement of signed agreements.<sup>64</sup> The true basis of the principle is the doctrine of quasi-mutual assent, which provides that the party seeking to rely on the contract may reasonably assume that the signatory, through the action of signing a document, has indicated his intention to be bound by the agreement. In *George v Fairmead (Pty) Ltd*,<sup>65</sup> a lodger sued the hotel in question for clothing and personal effects which had been stolen from his room. The hotel, in their plea, sought to rely on the fact that the lodger had signed the hotel register containing a form which limited their liability for certain instances, including that of theft. On analysis of the facts, as well as the cases related to the subject at hand, Fagan CJ states the following:

**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.** In cases of the type of which the three I have mentioned are examples, the party who seeks relief must convince the Court that he **was misled as to the purport of the words to which he was thus signifying his assent.** That must, in each case, be a question of fact, to be decided on all the evidence led in that particular case. I see no difference in principle between the case where the allegation is a misdescription of the document and one where it is a misrepresentation of its contents; the misdescription of the document - as when a man is told he is merely signing a receipt for a cheque when the document contains a guarantee - is material

---

<sup>61</sup> Section 5(2).

<sup>62</sup> Van der Merwe et al, *Kontraktereg: Algemene Beginsels* (3de Uitgawe), Juta (2007) at 322.

<sup>63</sup> Hutchison & Pretorius (eds), *The Law of Contract in South Africa*, Oxford University Press (2009) at 237.

<sup>64</sup> Hutchison & Pretorius (eds) (2009) at 237.

<sup>65</sup> 1958 (2) SA 465 (A).

only in so far as it gives a misleading indication of what the document contains.<sup>66</sup> (emphasis added)

As Christie notes,<sup>67</sup> it is the indication of an attitude, be it express or implied through the conduct of the signatory, which entitles the other party to regard a document as binding. This principle, however, must be balanced with that of fairness. Accordingly, a party who signs a document in error may escape liability if the error itself was *iustus*.<sup>68</sup> As Fagan CJ notes:

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.”<sup>69</sup> (emphasis added)

As seen from the above, it must be noted that the doctrine of quasi-mutual assent may only be relied on by a party who acted reasonably.<sup>70</sup> Thus, the courts have, at times, diluted the *caveat subscriptor* rule to ensure an equitable result. Most applicable to the discussion at hand, this would include such instances where, *inter alia*, an important clause is ‘hidden away’ by printing it in small print or placing it in a part of the agreement where one would not normally expect to find it. In the case of *Dlovo v Brian Porter Motors*<sup>71</sup> the respondent, a vehicle repair shop, claimed payment for repairs made to the appellant’s motor vehicle, while the appellant in turn counterclaimed for additional repairs made to the vehicle in question after it had been stolen from the respondent’s premises and had been damaged. With the initial repairs the appellant had signed “job cards” containing clauses exempting the respondent from liability arising from, *inter alia*, loss or theft. The conditions were printed on the front, and were marked with the heading “Conditions of Contract,” yet had appeared in smaller print than that of the text found on the rest of the form. The appellant never read the conditions, nor was her attention drawn to them. In the court *a quo*, the clauses were held to

---

<sup>66</sup> 1958 (2) SA 465 (A) at 472.

<sup>67</sup> Christie, *The Law of Contract in South Africa* (5<sup>th</sup> Edition), LexisNexis (2006) at 176.

<sup>68</sup> Hutchison & Pretorius (eds) (2009) at 237.

<sup>69</sup> 1958 (2) SA 465 (A) at 471.

<sup>70</sup> Christie (2006) at 178.

<sup>71</sup> 1994 (2) SA 518 (C).

be enforceable, and two aspects were put to the appellate court, namely whether the clauses formed part of the agreement between the appellant and respondent, and whether the clauses could effectively limit the respondent's liability in the instance. With regard to the first question, Seligson AJ states:

[...] [I]t is open to the parties to vary the *naturalia* of the contract of deposit by a contractual stipulation which provides for custody of the property in question to be at owner's risk and which may relieve the depository of liability for negligence. Such an exemption clause may not, however, exclude liability for damage caused by the wilful or fraudulent acts of the depository.<sup>72</sup>

In addition, the learned judge noted:

If, however, the signatory is able to show that he/she was misled as to the nature of the document, its purport or its contents, the doctrine of *caveat subscriptor* will not prevail, for the signatory would have acted under *justus error* [...] 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.**<sup>73</sup> (emphasis added)

Accordingly, the appellant was not held to be bound by the provisions in question.

Christie opines that a further defence, namely where a document was signed without being read and which contains terms which a reasonable person would not expect to find therein, should also be welcomed to South African law.<sup>74</sup> This line of reasoning was to a certain extent confirmed by the Supreme Court of Appeal in the case of *Mercurius Motors v Lopez*.<sup>75</sup> The case also dealt with the theft of a motor vehicle, this time from the premises of the motor dealer where minor repairs were to be affected to it. Yet again, the dealer in question tried to rely on exemption clauses found in the documents signed by the respondent. In his judgment, Navsa JA held:

---

<sup>72</sup> 1994 (2) SA 518 (C) at 524.

<sup>73</sup> 1994 (2) SA 518 (C) at 525.

<sup>74</sup> Christie (2006) at 178.

<sup>75</sup> *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA).

An exemption clause... that undermines the very essence of the contract... should be **clearly and pertinently** brought to the attention of a customer who signs a standard instruction form, and not by way of an **inconspicuous and barely legible clause** that refers to the conditions on the reverse side of the page in question.<sup>76</sup>

It is submitted that such unexpected terms should also be reasonably explained to a signatory in instances where they are drafted in a manner which is overly technical or legalistic.

The above judgment is also in accordance with the principles and provisions laid down in the CPA, which advocates that fair business practices should be promoted,<sup>77</sup> and that certain categories of clauses which could be seen as prejudicial should be pointed out to individuals.<sup>78</sup> When such a term is pointed out, the nature and potential effect of the clause should be explained,<sup>79</sup> and a consumer should be given adequate opportunity to receive and comprehend the provision.<sup>80</sup> Furthermore, the act requires that a consumer indicate his assent in one of the prescribed manners. It should be noted that the definitions of “consumer,” “transaction” and “consideration” in the CPA is quite wide,<sup>81</sup> and may therefore cover contracts which would not traditionally be considered commercial in nature. However, as already noted, the CPA does not do away with the existing common law remedies,<sup>82</sup> but rather seeks to establish a framework through which our existing law can operate in a manner that is “fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally.”<sup>83</sup> This is also important in light of the fact that the CPA will not cover all consumer agreements. In terms of Section 5(1), the Act only applies to transaction occurring within the Republic of South Africa. In other words, there must be some kind of supply or performance in terms of the contract occurring within South Africa. It is submitted that this provision may accordingly be wide enough to potentially provide protection for consumers entering into trans-border contracts where the goods or benefit of services flows to South Africa, and may therefore cover social networking services such as Facebook. However, if the performance is outside of South African borders, the CPA will not apply. With regard to

---

<sup>76</sup> 2008 (3) SA 572 (SCA) at 578.

<sup>77</sup> Section 3(1)(c).

<sup>78</sup> Section 49(1).

<sup>79</sup> Section 49(2).

<sup>80</sup> Section 49(5).

<sup>81</sup> Section 1.

<sup>82</sup> Section 2(10).

<sup>83</sup> Section 3(1)(a).

business agreements and other agreements not covered by the CPA due to their nature, parties may still benefit from the principles confirmed in the *Mercurius Motors* judgment.

It is submitted that the principles and arguments in the discussion above are also valid in such instances where terms found in documentation outside the signed document are incorporated by reference into the agreement. This is especially pertinent in such instances where unexpected or otherwise unacceptable terms are ‘hidden away’ in the documents which are being referred to. Irrespective of whether the CPA is applied, or the precedent set in the *Mercurius Motors* case, a reasonable party seeking to rely on such terms should, at the very least, make reasonably available a copy of the relevant documents referred to, and also ensure that any unusual provisions in such documents are written in a manner which can reasonably be understood and pointed out to a consumer.

### **3.3.1.2 Unsigned documents**

When dealing with unsigned documents which purport to incorporate terms by reference, it is more difficult to establish whether a party has, in fact, assented to the incorporation of the terms sought to be relied on.<sup>84</sup> Accordingly, additional evidence would have to be adduced in order to establish that a contracting party should be held bound in these cases.<sup>85</sup> The principles relating to these instances are dealt with in the so-called ‘ticket cases.’ Generally the type of ticket concerned is a standard form, and includes, *inter alia*, travel services such as airline, railway, and bus services, financial services, tickets for entertainment events, dry cleaning and repair services. Christie notes that these contracts, while not technically involving true *consensus* after a process of bargaining (presumably due to the relative inequality in bargaining power between the contracting parties), greatly outnumber the amount of traditional contracts concluded between parties in everyday life.<sup>86</sup> It is submitted that with the advent and subsequent explosion of electronic commerce, this situation has been greatly exacerbated.

To determine whether a party should be held bound in such ticket cases, the South African courts have adopted a set of practical rules (in the form of a series of questions) taken from

---

<sup>84</sup> Kerr (2002) at 344.

<sup>85</sup> Van der Merwe et al (2007) at 322.

<sup>86</sup> Christie (2006) at 179.

the English courts.<sup>87</sup> These questions can be found in the judgment of *Central South African Railways v McLaren*<sup>88</sup> where Innes CJ (quoting from Lord Herschel) stated:

- (1) Did the plaintiff know that there was printing or writing on the ticket? ...
- (2) Did she know that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage?
- (3) Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions?<sup>89</sup>

Logically, of the above questions, the last one is only relevant if the answer to either of the first two questions is in the negative. The case of *King's Car Hire (Pty) Ltd v Wakeling*<sup>90</sup> dealt with the theft of a vehicle from a parking garage. On the parking ticket, as well as on a notice placed in the garage, the words "Cars parked at owner's risk" had appeared. In this regard, Harcourt J holds:

In regard to the incorporation of a condition by virtue of the display of notices or the delivery of a ticket incorporating reference to the deposit being at 'owner's risk', the law, as I appreciate it, is that such a condition may be incorporated either **expressly or by implication**. ... In regard to incorporation by implication, a series of cases dealing with incorporation into contracts of terms contained in tickets has established a reasonably certain series of rules which must be applied to the facts of any particular case. Stating the matter briefly, the approach of the Courts is to enquire whether the person who received a ticket knew that there was printing or writing on it. Secondly, if so, a further question is 'did the person who received the ticket know that the printing or writing contained provisions of, or references relating to provisions of, the contract in question?' If these questions are answered in the affirmative, then the provisions in question are part of the contract. **If either of such questions is answered in the negative, then a third question becomes relevant**, namely 'did the person giving the ticket do what was reasonably sufficient to give the plaintiff notice of the conditions?' If the answer to such last-mentioned question is in the affirmative then, also, the provisions or conditions are part of the contract; if not, then the condition forms no part of the contract.<sup>91</sup> (emphasis added)

<sup>87</sup> Van der Merwe et al (2007) at 323.

<sup>88</sup> *Central South African Railways v McLaren* 1903 TS 727.

<sup>89</sup> 1903 TS 727 at 734-735.

<sup>90</sup> 1970 (4) SA 640 (N).

<sup>91</sup> 1970 (4) SA 640 (N) at 643.

*Central South African Railways v James*<sup>92</sup> dealt with an instance where a return train ticket contained a reference stating that terms and conditions found in a separate document (which was freely obtainable) were to be incorporated into the agreement with the passenger, and which related to the duration for which the ticket was valid. It was common cause that the respondent had read the ticket and was aware of the reference. On determining whether the respondent was liable for an additional fare related to using the return ticket after it had expired, Solomon J states:

[W]here a person receives a ticket on the back of which there is writing, and reads that writing, and discovers from it that the ticket is issued subject to certain rules and regulations, **he must be taken to have assented to be bound** by those rules and regulations.<sup>93</sup> (emphasis added)

The above principle also applies in those instances where no ticket was issued, but rather a verbal agreement where terms may have been incorporated through the use of notices. In *Durban's Water Wonderland (Pty) Ltd v Botha and another*<sup>94</sup> damages were claimed for injuries sustained by a mother and daughter after a mechanical failure at a water theme park. The management of the park denied any liability on the basis that they had posted notices over the park exempting them from claims of such a nature. On analysis of the law, Scott JA observed that:

The principles applicable to so-called 'ticket cases' apply *mutatis mutandis* to cases such as the present where reliance is placed on the display of a notice containing terms relating to a contract. ...Had Mrs Botha read and accepted the terms of the notices in question there would have been actual *consensus* and both she and Mariska's guardian, on whose behalf she also contracted, would have been bound by those terms. 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 [...] Mrs Botha conceded that she was aware that there were notices of the kind in question at amusement parks but 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. In these circumstances, the **appellant was obliged to establish that the respondents were bound by the terms of the disclaimer on the basis of quasi-mutual assent**. This involves an inquiry whether the appellant was **reasonably entitled to**

---

<sup>92</sup> 1908 TS 221.

<sup>93</sup> 1908 TS 221 at 226.

<sup>94</sup> 1999 (1) SA 982 (SCA).

**assume** from Mrs Botha's **conduct** in going ahead and purchasing a ticket that she had assented to the terms of the disclaimer or was prepared to be bound by them without reading them. ...The answer depends upon whether in all the circumstances the appellant did what was 'reasonably sufficient' to give patrons notice of the terms of the disclaimer. The phrase 'reasonably sufficient' was used by Innes CJ in *Central South African Railways v McLaren* 1903 TS 727 at 735. Since then various phrases having different shades of meaning have from time to time been employed to describe the standard required [...] It is unnecessary to consider them. In substance they were all intended to convey the same thing, viz an **objective test** based on the **reasonableness of the steps taken by the proferens to bring the terms in question to the attention** of the customer or patron. (emphasis added)

If it can be proved that a customer has in fact read the relevant terms, it is not traditionally necessary to prove that he understood them in order to be held bound. This may even be the case in such instances where the document refers to another (such as a reference to relevant terms and conditions or regulations), irrespective of whether the consumer actually read the second document referred to. This is the principle established in the case of *Burger v Central South African Railways*,<sup>95</sup> where liability was sought to be limited with regard to the loss of a consignment of books delivered by rail, where the consignment form (which was signed by an agent and subsequently read by the appellant) referred to conditions found in a separate yet related document. In this regard, Innes CJ opines:

Can a man who has signed a document in the form of the one now before the Court claim that he is not bound by it, simply because he did not read what he signed, and did not know what the document referred to? Had the regulations alluded to in the consignment note been annexed to it or printed upon it, there could surely have been no doubt as to the signatory being bound. And the fact that though referred to in the contract, they were not actually printed as part of it cannot alter the legal position of the consignor. The appellant could easily have acquainted himself with the regulations; a copy was kept at the inquiry office, and it was the special duty of one of the clerks to give information to consignors and others with regard to them. Had Meyer read what he signed and asked for information, or had Burger after he perused the consignment note gone to the office and made inquiries, the additional charge of 5s. could have been paid before the package left, and full liability would have attached to the railway.<sup>96</sup>

If it cannot be shown that a customer read or was aware of any contractual terms or references, the conduct of the person seeking to rely on the contract becomes relevant. It must

---

<sup>95</sup> 1903 TS 571 at 578 .

<sup>96</sup> *Ibid.*

then be determined whether such a person took steps to draw the attention of a reasonable consumer to the terms so that he would be reasonably entitled to assume, on the basis of quasi-mutual assent and from the conduct of the consumer, that the terms have either been read and assented to, or that the consumer is prepared to be bound by them without reading them.<sup>97</sup> The question of what steps would be reasonably necessary would depend upon the nature of the document, and whether it may be expected to refer to contractual terms under normal circumstances.<sup>98</sup>

The defences available to parties in ticket cases are similar in nature to those where the *caveat subscriptor* rule would apply.<sup>99</sup> Especially relevant to this discussion would be those instances where a party seeks to ‘hide’ uncommon, unexpected or unreasonable terms in such documents or within other documentation referred to. In applicable agreements and transactions, it should also be noted that the relevant provisions of the CPA<sup>100</sup> will also apply irrespective of whether the document sought to be relied on has been signed or not. It is submitted that in the instance where a document is unsigned and a party seeks to rely on the terms therein, even greater care must be taken in assuring that a consumer is aware of the implications thereof.

### **3.2 The Position in terms of ECTA**

Tantamount to the position in the UK, the validity of click-wrap and web-wrap agreements has yet to be tested in South African courts. Fortunately, the provisions of ECTA provide a point of departure which offers some guidance and makes it possible for the situation to be discussed and evaluated from first principles.

Section 11(1) of ECTA states that information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message. In addition, provision is also made in sections 12 and 13 to facilitate any formality requirements for electronic agreements with regard to writing and signatures. Furthermore, section 24 states the following:

---

<sup>97</sup> Christie (2006) at 180.

<sup>98</sup> Hutchison & Pretorius (eds) (2009) at 238.

<sup>99</sup> Christie (2006) at 183.

<sup>100</sup> As discussed in 2.1 above.

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.**” (emphasis added)

Section 11 seems to indicate that both click-wrap and web-wrap agreements may be seen to be valid under South African law. Furthermore, if a signature is not required to indicate an expression of intent, and any other means may be used to infer it, it only follows logically that the conduct of a user may be used as a point of reference to suggest his assent. This is particularly useful when it comes to determining whether the terms found in a web-wrap agreement should be enforced, as the most common expression of intent would then be that of a party carrying on with an agreement through, for example, downloading software or making use of online service.

One of the most innovative provisions found in ECTA, as indicated by Pistorius,<sup>101</sup> is that of sections 11(2) and (3) which seek to regulate electronic incorporation by reference. According to section 11(2), information is not without legal force and effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in it. Section 11(3) goes even further in that it provides that, even if the information sought to be incorporated is not in the public domain, it will still be regarded as having been incorporated in those instances where it was referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof, and if it is accessible in a form in which it may be read, stored and retrieved by the other party. The relevant information may be stored either electronically or as a computer printout, as long as it is reasonably accessible by being reduced to an electronic format by the party seeking to incorporate it.

The situation described above differs slightly from the common law approach to incorporation by reference, which merely requires a clear reference to any terms sought to be included. Van der Merwe notes that this higher standard is however fully justified owing to the fact that the

---

<sup>101</sup> Pistorius (2004) at 573.

terms sought to be relied on may be made available easily and cheaply.<sup>102</sup> This is due to the fact that the actual cost involved with online storage of information is generally far less than that of reproduction and distribution of physical documentation. In evaluating the accessibility of the terms sought to be relied upon, one should consider the availability of the linked information (in common language, whether the hyperlink is ‘broken’ or not), the integrity of the data, and the extent to which the terms are subject to amendment at a later stage.<sup>103</sup>

ECTA contains certain consumer protection provisions which apply to electronic transactions in Chapter VII. Section 43 of ECTA provides that a supplier must make certain information available to consumers via its website. This includes the provision of any terms of agreement, including any guarantees, which will apply to the transaction.<sup>104</sup> If a supplier does not provide such information, a consumer will have the right to cancel any transaction or agreement within 14 days.<sup>105</sup> As to the method in which this information is to be supplied, the Act is silent, and it is submitted that both notices through web-wrap and click-wrap may be accepted. Insofar as Chapter VII applies, the provisions of ECTA prevail over the provisions of the CPA<sup>106</sup> Except for these instances, all other provisions of CPA, such as those found in Section 49, must still be complied with. It should also be noted that the general applicability of ECTA, compared to the CPA, is relatively wider. With regard to consumer agreements covered by Chapter VII of ECTA, the protection provided applies irrespective of the legal system applicable to the agreement in question.<sup>107</sup> Over and above this, the general sphere of ECTA applicability covers with respect to “any electronic transaction or data message.”<sup>108</sup> Owing to the fact that most online retailers and social networking services fall under the ambit of transactions covered by Chapter VII of ECTA, South African consumers will be granted protection irrespective of the trans-border nature of such agreements.

In principle, it is submitted that both click-wrap and web-wrap agreements would be regarded as valid in the South African context. In fact, whereas web-wrap agreements are sometimes seen to be more problematic due to the fact that some jurisdictions require a positive action,

---

<sup>102</sup> Van der Merwe et al (2008) at 168.

<sup>103</sup> Pistorius (2004) at 574.

<sup>104</sup> Section 43(1)(k).

<sup>105</sup> Section 43(3).

<sup>106</sup> See, in this regard, section 23(1)(b) of the CPA, *inter alia*.

<sup>107</sup> Section 47.

<sup>108</sup> Section 4(1).

this would not be the case under the provisions of ECTA, as Pistorius observed.<sup>109</sup> However, the fact that these methods will be seen as valid does not necessarily fully answer the question as to whether they may be treated differently when it comes to the enforcement of terms sought to be incorporated.

With regard to the general question of enforceability, Pistorius submits that click-wrap and web-wrap agreements should be treated similarly to that of ticket cases.<sup>110</sup> This view is also in line with that adopted by Johnson as pertaining to the UK.<sup>111</sup> While such an approach is not wrong, it is submitted that a distinction may still be made between click-wrap and web-wrap, and that there is a different, and more nuanced approach which may be followed when dealing with click-wrap agreements.

As noted above, it is quite common for click-wrap agreements to make use of tick-boxes where a user must indicate his assent by making a mark in the relevant space. In ECTA, an electronic signature is defined as that of “**data** attached to, incorporated in, or **logically associated with other data** and which is **intended by the user to serve** as a signature”<sup>112</sup> (emphasis added), which is quite similar to the provisions found in UETA and ESIGN. It is trite law as to what the function of a signature is, namely that it is some kind of personal mark which may be used to identify a party and to convey or confirm an intention to be bound (*animus signandi*). It is submitted that these aspects can be attributed to a click-wrap. Firstly, in instances where a tick-box is used, an actual mark is being made, whereas in instances where only a click is required, record is often kept of the physical action. Secondly, with regards to the identification of the party, this can easily be done through either using the contact or personal details provided by an individual, as well as through the method of recording and tracking an individual’s IP<sup>113</sup> address. Thirdly, the intention to be bound may be inferred from the actual conduct of the individual through both providing their details and their conduct in the physical world. If one takes into account that the definition of an electronic signature in ECTA places a greater emphasis on the mental element of a signature rather than the physical element, it is accordingly not absurd to view the actions attributed to

---

<sup>109</sup> Pistorius (2004) at 574.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Supra.*

<sup>112</sup> Section 1.

<sup>113</sup> Internet Protocol.

a click-wrap as a type of signature. This interpretation also accords with the view that the court took in the case of *Groff v America Online Inc.*

If the above view is to be accepted, it would logically entail that click-wrap agreements are similar to that of a signed document, and accordingly that the *caveat subscriptor* rule should in fact apply. This, in essence, would therefore award a somewhat higher status to click-wrap agreements, similar to the stance adopted by American courts, and would also ease the evidentiary burden of parties wishing to rely upon them. It is submitted that web-wrap, being the modern version of incorporating terms into an unsigned document, should be treated in line with the principles laid down in the ticket cases.

#### **4. CONCLUSION**

It is submitted that ECTA provides a solid framework for the regulation of click-wrap and web-wrap. Currently there exists no clear reason in law or in principle why these types of agreements should not generally be seen as valid or enforceable. The question of what would be sufficiently reasonable measures to be adopted by parties seeking to rely on such terms have yet to be answered by South African courts, and it also stands to be determined as to whether a distinction will in fact be made between the two different methods of electronic incorporation. This aspect notwithstanding, if one takes into account the additional protection offered by legislation such as the CPA, it is safe to say that individuals who are misled by unexpected or unfair incorporated terms do in fact have proper recourse to and remedies in South African law.