

UNDERSTANDING THE ELECTRONIC COMMUNICATIONS ACT PART 1 – *Moemedi Tafa (Partner)*

The more the world becomes a global village and individuals become literally a click away, the more it becomes clear that technology is changing the ways of engagement.

Technological developments favoured or not, continue to change the environment in which legal services, commercial transactions and consumer affairs are provided and carried out. These developments have an irreversible impact on the manner in which people interact, and select who they associate with.

The Internet is the world's fastest growing commercial marketplace, thus it is prudent to have legal frameworks that regulate its use, and more importantly, provide protection to consumers in this field. This has resulted in the global development of a "new law". Commonly referred to as ICT Law/ Internet Law or Cyber Law, this law has become a necessity more than a convenience.

Worldwide, countries have developed sets of domestic guidelines and/or statutes that aim to address the growing phenomenon of internet usage.

In Botswana, the newly enacted Electronic Communications and Transactions Act (which is still to come into force), attempts inter alia, to provide certainty in respect of the conclusion of e-transactions, the regulation of unsolicited commercial communications and consumer protection insofar as electronic communications and transactions are concerned.

The Act further provides comfort to consumers involved in electronic transactions and paves the way for transparent engagement between parties. With the Act addressing issues such as the "cooling off period" and legitimising the use of electronic signatures in certain instances, it provides a platform for the swifter conclusion of commercial transactions by means of these electronic mechanisms.

Case law, due to jurisdictional issues, in this field is very limited even in developed jurisdictions. Much reliance in Botswana will be placed on precedents of comparative jurisdictions until domestic case law caters for local dispute solutions.

Defining the E-Contract

When is a contract over the internet concluded? When is an offer accepted or deemed to be accepted? Does the mere clicking of a button create a legally enforceable and binding obligation on either of the parties? These are but a few of the crucial questions that individuals and organisations are more frequently faced with on a daily basis.

The starting point is to understand that the e-contract, like any other contract, must comply with the essentialia of a contract. A contract can be defined as an agreement (arising from true or quasi-mutual assent) which is, or is intended to be, enforceable in law.

For there to be a validly concluded agreement, there must be both offer and acceptance. Once both elements are present, it can be said that there is a "meeting of the minds".

Our law of contract requires the following elements of a contract be present for it to be legally binding: the capacity to act, consensus, lawfulness, and physical possibility. Formalities may be included but are usually not mandatory.

An e-contract can be defined as any kind of contract formed in the course of e-commerce by the interaction of two or more individuals using electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognise the existence of a contract.

To be continued... read next week's edition of The Legal Bulletin to read Part 2 of Understanding The Electronic Communications and Transactions Act.