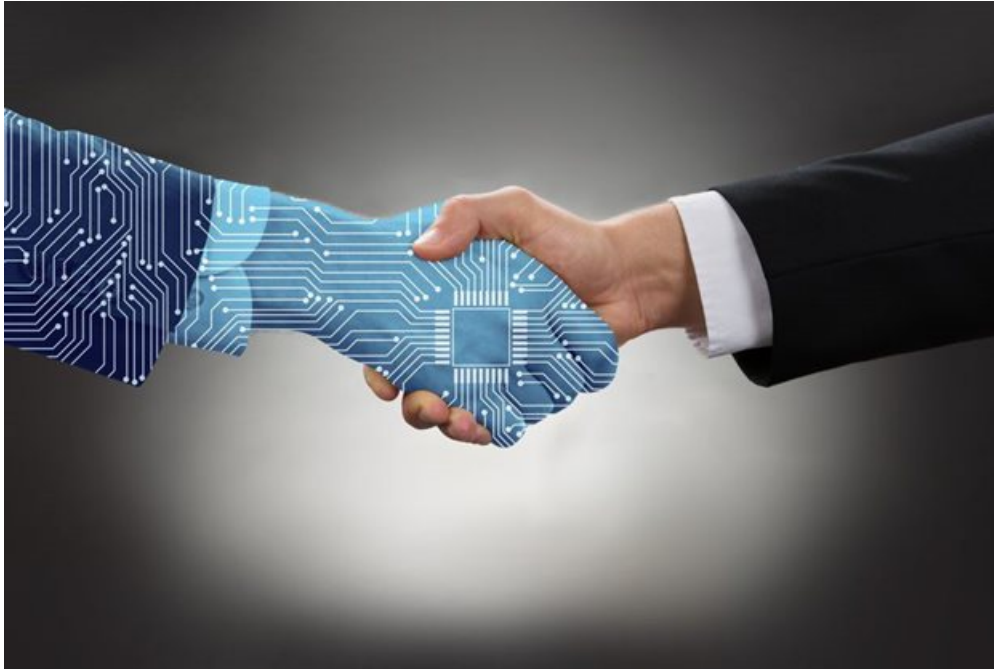


Consumer protection: Why online contracts need to be regulated

By [Dr Alec Basson](#)

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Almost every time you browse a website, click the "accept" icon or download software, you are concluding an online contract ? a non-negotiated contract such as the terms and conditions regulating the use of websites or the privacy policies of online suppliers. You are rarely required to sign them and their content is not properly regulated, which means you could be agreeing to adverse terms without realising it.



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“The only option available for consumers is to refrain from using the service, or in some instances certain browser settings can be used to help protect their privacy. The unfortunate truth is, however, that there is very little consumers can do to protect themselves online, which is why potentially unfair terms in online contracts need to be regulated,” says Dr Sanmarie van Deventer from the Department of Private Law at Stellenbosch University (SU). She obtained her doctorate in Private Law at SU recently.

Van Deventer says events like the Facebook-Cambridge Analytica data scandal illustrate the need to regulate the content of online contracts and in so doing ensure adequate protection for consumers. She points out that “online contract” is not meant to include other online transactions, for example a contract negotiated and concluded via e-mail.

As part of her study, Van Deventer determined how online contracting fits into existing legal principles in South African law and also analysed and evaluated this outcome by comparing it to legislation in America and the European Union, where various directives and regulations regarding online contracts have been adopted. Van Deventer says in South African law, very little has been written on the subject and the courts have not had the opportunity to consider the matter.

“Although the Electronic Communications and Transactions Act 25 of 2002 makes it clear that contracts can validly be concluded online, other questions such as the enforceability of browse-wraps (i.e. contracts concluded through conduct such as continued browsing, and thus lacking an unambiguous act of acceptance) still remain unanswered.

“Some of the issues arising from these contracts, for example clauses eroding privacy or barring access to courts, have not been considered by the South African legislature in the context of online contracts. Although the Consumer Protection Act 68 of 2008 and the Protection of Personal Information Act 4 of 2013 regulate many of the issues, they fall short in certain aspects because they were not aimed specifically at the online environment.”

Ineffective measures

Van Deventer says her study found that measures aimed at increasing consumer awareness of online terms (heightened disclosure) are generally ineffective as a means of ensuring consumer protection. These ineffective measures could have adverse consequences because they legitimise the enforcement of unfavourable terms.

“Consumers rationally choose not to read the terms of online contracts because the cost in the form of time spent significantly outweighs the benefit, especially since consumers enjoy practically no bargaining power in respect of online contracts.

“They are often unaware of entering into a contract – they do not know that browsing leads to contract conclusion, or click their acceptance of the terms without realising the legal consequences. Thus, not only do consumers not realise what they are agreeing to, they are in any event unable to change the terms.”

According to Van Deventer, one possible exception to the general ineffectiveness of consent-related measures is the notion of voluntary consent introduced in the European General Data Protection Regulation (GDPR).

She says the fact that the GDPR requires consent that is both freely given and separate when a consumer agrees to the use of his/her personal information, prevents a supplier from making the use of a website or product conditional upon such consent, unless using the information is essential for providing the service.

“This means that agreeing to non-essential use of his or her personal information becomes optional for the consumer, instead of it being a prerequisite for accessing the internet service. This form of consent could provide effective protection to consumers, although it is only advisable for specific clauses.”

Unfair terms

Van Deventer states that generally the content of online contracts should be regulated. In this regard, she identifies specific clauses that are affected by uniquely online risks.

These potentially unfair terms include clauses relating to the appropriation of ancillary rights (such as the use of personal information and consumer-generated content), unilateral variation clauses (a supplier can vary the terms of a contract without the consumer agreeing to the variation), unilateral termination clauses, choice-of-jurisdiction clauses (clauses referring the court that is selected to adjudicate any dispute resulting from the contract) and choice-of-law clauses (clauses determining which laws will be used to decide a dispute arising from the contract).

She says when disputes arise, consumers are reluctant to litigate and enforce their rights because it is expensive and cumbersome.

“Ideally, regulatory bodies and consumer organisations should play a more active role in enforcing legislative provisions, and mechanisms should be found to deter suppliers from inserting unfair terms in online contracts.”

Van Deventer says her findings could also assist courts when they are required to decide these issues. The comparative evaluation can help identify possible solutions to potential problems inherent in online contracts, in line with international best practice. This could assist policy makers in formulating measures for protecting South African online consumers.

She adds that the legislature and consumers will benefit most from her research. “It is the legislature that bears the responsibility of enacting laws to protect vulnerable consumers.”

ABOUT THE AUTHOR

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