

A legal framework for the treatment of input errors in electronic contracts

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Abstract

The central task in this study is to discover and analyse the legal framework applicable to input errors in electronic contracts. The study analyses the law of South Africa, the *Electronic Communications and Transactions Act 25 of 2002* (hereinafter referred to as the ECT Act) to be more specific, and the *United Nations Convention on the Use of Electronic Communications in International Contracts* (2005) (hereinafter referred to as the UNECIC).

The ECT Act is the statute regulating electronic communications and transactions in South Africa. It was passed by the South African parliament in 2002. Almost all provisions of the ECT Act are based on the *United Nations Model Law on Electronic Commerce* (1996). However, section 20 thereof, which deals with input errors, was not based on the Model law, but on provisions from statutes of leading jurisdictions.¹

The UNECIC is a new international convention by the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL). The Convention came into operation on the 1st of March 2013,² and is the first United Nations convention that deals with electronic communications. Article 12 thereof deals with automated transactions, and section 14 with input errors. These are the two provisions that shall be analysed in relation to the UNECIC in this work.

With the UNECIC having come into full operation, there is a real need to harmonise domestic laws with it. In various jurisdictions, including Singapore³ and Australia,⁴ the statutes governing electronic communications have been amended with some provisions of the UNECIC. Article 14 is one of the provisions of the UNECIC which have been domesticated in both jurisdictions. Judged against the UNECIC, a number of issues relating to input errors in the ECT Act are inconsistent with the new international standards embodied in the UNECIC. This work recommends that South

1 Pistorius 2008 *JILT* 8.

2 Lemay 2013 <http://www.unis.unvienna.org/unis/pressrels/2013/unisl181.html>.

3 MIK 2012 Research *Collection School of Law* 13.

4 MIK 2010 Research *Collection School of Law* 1.

Africa must adopt the UNECIC, and secondly that some of the provisions dealing with input errors in the ECT Act must be aligned with the UNECIC by amendment.

Keywords

1. Electronic contracts
2. Input errors
3. Electronic agents
4. Automated Transactions
5. Automated message systems

Opsomming

Die sentrale fokus van hierdie studie is om die wetlike raamwerk van toepassing op invoerfoute in elektroniese transaksies te ondersoek en te analiseer. Die studie bekyk die wet van Suid-Afrika, by name die *Elektroniese Kommunikasie en Transaksiewet 25 van 2002* (hierna die EKT-wet), en meer spesifiek, die *Verenigde Nasies Konvensie op die Gebruik van Elektroniese Kommunikasie in Internasionale Kontrakte* (2005) (hierna die VNEKIK).

Die EKT-wet is die statuut wat elektroniese kommunikasie en transaksies in Suid-Afrika reguleer. Dit is deur die Suid-Afrikaanse parlement bekragtig in 2002. Byna al die bepalings van die EKT-wet is gebaseer op die *Verenigde Nasies Modelwet op Elektroniese Handel* (1996). Afdeling 20 daarvan, wat handel oor invoerfoute, is egter nie gebaseer op die Modelwet nie, maar op die bepalings van statute van leidende jurisdiksies.⁵

Die VNEKIK is 'n nuwe internasionale konvensie deur die Verenigde Nasies se Kommissie van Internasionale Handelsreg (hierna VNKIHANR). Die Konvensie het van krag geword op 1 Maart 2013,⁶ en is die eerste Verenigde Nasies konvensie wat handel oor elektroniese kommunikasie. Artikel 12 van die konvensie handel oor geoutomatiseerde transaksies, en afdeling 14 met invoerfoute. Hierdie studie analiseer die twee bepalings met betrekking tot die VNEKIK.

Aangesien die VNEKIK in volle werking is, moet binnelandse wette daarmee geharmoniseer word. In verskeie jurisduksies, insluitende Singapoer⁷ en Australië,⁸ is die statute wat elektroniese kommunikasie reël verander om van die bepalings van die VNEKIK in te sluit. Artikel 14 is een van die bepalings wat in albei die bogenoemde jurisdiksies geinkorporeer is. Gemeet aan die VNEKIK, is verskeie sake wat verband hou met invoerfoute in die EKT-wet teenstrydig met die nuwe

5 Pistorius 2008 *JILT* 8.

6 Lemay 2013 <http://www.unis.unvienna.org/unis/pressrels/2013/unisl181.html>.

7 MIK 2012 Research *Collection School of Law* 13.

8 MIK 2010 Research *Collection School of Law* 1.

internasionale standarde soos vervat in die VNEKIK. Hierdie studie beveel aan dat Suid-Afrika die VNEKIK aanneem, en tweedens dat van die bepalings wat betrekking het op invoerfoute in die EKT-wet hersien word om ooreen te stem met die VNEKIK.

Sleutelwoorde

1. elektroniese transaksies
2. invoerfoute
3. Elektroniese agente
4. Outomatiseerde transaksies
5. Outomatiese boodskap stelsels

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List of abbreviations

1. CISG United Nations Convention on the International Sale of Goods
2. EDI Electronic Data Interchange
3. JILT Journal of Information Law and Technology
4. CER Electronic Commerce Research
5. JICLT Journal of International Commercial Law and Technology
6. PER Potchefstroom Electronic Law Review
7. RCTL CJ Rutgers Computer and Technology Law Journal
8. UNECIC United Nations Convention on the Use of Electronic Communications in International Contracts
9. UNCITRAL United Nations Commission on International Trade Law
10. US United States of America
11. UETA Uniform Electronic Transactions Act 1999
12. ECT Act Electronic Communications and Transactions Act 25 of 2002
13. ETA Electronic Transactions Act 162 of 1999
14. ET Act Electronic Transactions Amendment Act 33 of 201

CHAPTER 1

1 Introduction

The aim in this study is to investigate the treatment of input errors both under the *Electronic Communications and Transactions Act 25 of 2002* (hereinafter referred to as ECT Act) and the *United Nations Convention on the Use of Electronic Communications in International Contracts* (2005) (hereinafter referred to as UNECIC). Electronic communications being a relatively recent invention in human history, laws of different jurisdictions, especially the law of contract, found it difficult to deal with the legal challenges brought by it. Consequently, the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) developed the *UNCITRAL Model Law on Electronic Commerce* (1996) and the *UNCITRAL Model Law on Electronic Signatures* (2001). The aim behind these two instruments was to harmonise the response of various legal systems to challenges of electronic commerce and these have in turn been used in drafting relevant legislation in various jurisdictions, South Africa included.⁹ The law applicable to electronic contracts in South Africa is the ECT Act, section 20 of which deals with input errors. Perhaps it is important to note that the *UNCITRAL model law on Electronic Commerce*, with reference to which the ECT Act was drafted, does not effectively deal with the issue of input errors.¹⁰ On the international level, the United Nations General Assembly adopted the UNECIC, which came into effect on the 1st March 2013.¹¹ This is the very first convention to effectively deal with the question of input errors in electronic contracts, hence its relevance to this study.

1.2 Problem statement and research question

The doctrine of input errors in electronic contracts has been developed solely to protect a party who, acting in his natural person, is faced with the task of communicating with an automated message system of another party in concluding a

9 Snail 2008 *JILT* 3.

10 United Nations *United Nations Convention* 73.

11 Lemay 2013 <http://www.unis.unvienna.org/unis/pressrels/2013/unisl181.html>.

contract.¹² It is a fact that in a setting where a natural person deals with an automated system to conclude a contract with another, there is a higher possibility than in traditional paper based contracts, of his input errors and mistakes passing undetected.¹³ For example, while it is unlikely for a person to unintentionally deliver his offer or acceptance to a post office, it is not unreasonable to imagine a situation where a person would claim not to have intended concluding a contract by hitting "Enter" on a computer keyboard or by clicking on an "I agree" icon on a computer screen. In *Chwee Kin Keong v Digilandmall.com Pte Ltd*,¹⁴ the High Court of Singapore observed that input errors may occur as a result *inter alia* of (a) human error, such as the entering of wrong figures or accidental pressing of keys on the keyboard (b) faults in software programming, and (c) transmission problems in the communication system.

The occurrence of input errors in electronic commerce under both domestic and international trade law raises a number of complicated legal issues that the pre-electronic communications laws may find difficult to effectively deal with. Indeed, examples are not wanting in that regard. To mention but a few, the first issue relates to the very meaning of the term "input error" and proving it in a court of law, also the legal consequences and legal remedies available to the parties in the event of the occurrence of an input error. For example, does the existence of such an error render the contract void or voidable? Secondly, what should happen to the performance in the event that the other party, acting on the strength of another's input error, renders performance in accordance with the terms of the contract before the error is identified and communicated to him? Thirdly, are there any exceptions to the general consequences of input errors, and under what circumstances can those exceptions be rightly raised? It is with these and other relevant questions that this study will deal.

Input errors are different from contractual mistake. The law of electronic communications does not deal with contractual mistake but input errors.¹⁵ As a

12 Gabriel 2006 *Unif.L.Rev.n.s* 302.

13 Gabriel 2006 *Unif. L.Rev.n.s* 302.

14 [2004] 2 SLR 594.

15 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

result, the common law principles of contractual mistake are still applicable to electronic contracts, but only in the event of a mistake.¹⁶ Consequently, it is necessary in dealing with the treatment of input errors under the ECT Act to consider also the treatment of mistake under the common law of South Africa.

The question addressed by this study is: what is the legal framework applicable to the treatment of input errors in electronic contracts?

1.3 Research methodology

This study is mainly based on a literature review of relevant textbooks, case law, law journals, International Conventions, legislation and internet sources dealing with input errors in electronic contracts. Primary and secondary source material relating to input errors will be subjected to critical analysis which will give rise to conclusions and recommendations. Although this is not a comparative study, a comparison shall also be made between the ECT Act and the UNECIC, so as to assess the South African approach in comparison to prevailing international standards. Furthermore, reference shall also be made to relevant foreign precedents where necessary.

1.4 Study outline

The second chapter covers an introduction and a general overview to the law of input errors. It mainly focuses on the definition of the specialised terminologies adopted and used in that law. Amongst the terms that are defined is "input error," "automated transaction," and "electronic agent." The chapter continues to discuss the conditions under which an input error may occur, and the difference between input errors and other types of mistakes that occur in the process of contracting. Furthermore, the various types of automated transactions such as Electronic Data Interchange and interactive commercial websites shall also be explored. The use of electronic agents for purposes of contracting is a relatively novel phenomenon. As a result it is of utmost importance in that chapter to discuss the essential elements of an electronic agent, and the attribution of the actions of such agents to their owners.

16 United Nations *United Nations Convention* 80.

Lastly, chapter two examines the various ways in which employers of electronic agents can help their contractual partners correct or control their errors before concluding automated transactions.

The third chapter deals with the issue of contractual mistake in contracts. The concept of mistake, the constituent elements of a contractual mistake and the various types of mistakes recognised by the South African common law shall be discussed in that chapter. The main aim in the third chapter will be to illustrate the point that the law draws a distinction between mistake and input errors in electronic contracts. Furthermore, while input errors are addressed by the ECT Act, contractual mistakes in electronic contracts are dealt with by the common law of contract. Lastly, the chapter attempts to show that while the common law of mistake might effectively address the issue of contractual mistake in electronic contracts, it is possible that it might struggle to address the issue of online pricing errors, which are generally considered to be a species of unilateral mistake.

In the fourth chapter, the main task is the discovery and analysis of the legal framework applicable to input errors under the ECT Act. Definitions of the terms "automated transaction" and "input error" under the Act are explored in full. Another issue addressed in that chapter is the approach of the ECT Act with regard to attribution of the actions and messages of electronic agents to their owners, and the proper manner of incorporating terms into the contract when electronic agents are used to contract. The fourth chapter shall also address the treatment of input errors under the ECT Act; the remedy or remedies available to a party who has committed an input error and the conditions to be fulfilled before the remedy can be enjoyed. Lastly, the chapter pays attention to the treatment of error in consumer contracts under the ECT Act.

The fifth chapter investigates the treatment of input errors in international contracts under the UNECIC. That chapter first addresses the scope of application of the Convention, and the definition of the concept of an "International electronic contract" under the convention. It shall also cover the approach of the UNECIC towards the issue of incorporation of terms into electronic contracts and the attribution of

messages sent by automated message systems to their owners. Furthermore, chapter five addresses the legal effect of input errors under the UNECIC, the remedy available to a party who has committed an input error, and the various conditions that have to be fulfilled before the remedy offered by the Convention can be enjoyed. Lastly, the fifth chapter shall also consider the relationship between contractual mistake and input errors under the UNECIC.

The sixth chapter, being the last chapter, covers the final conclusions drawn from the discussion and the analysis made in the foregoing chapters. This chapter contains brief summaries of all the discussions and conclusions made in the entire work, and from all that recommendations follow.

CHAPTER 2

2 The notion of input errors in electronic contracts

2.1 Introduction

It is generally assumed that there is a potentially higher risk of a mistake occurring in a nearly instantaneous transaction.¹⁷ When keying in information, a user may make typological or keystroke errors relating to quantity, description of goods, personal particulars, even worse, he may unintentionally click the "send" button and the contract is concluded.¹⁸ In cases where an online order is received and processed by an electronic agent, it will not be reviewed by a natural person, and as such, obvious errors will pass unnoticed.¹⁹ Consequently, be it under domestic legislation or an international convention, drafters of the law have found it valuable to devote a provision specially to the treatment of input errors in electronic contracts. The aim in this chapter is to fully explore the notion of input errors in electronic contracts.

17 Gabriel 2006 *Unif.L.Rev.n.s* 302.

18 Kah Leng 2006 Computer Law and Security Report 157.

19 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

2.2 Input errors

Mistakes or errors will inevitably occur in the course of electronic contracting.²⁰ In electronic transactions, an input error occurs when a person intends to enter a specific piece of information into the system but accidentally enters something else.²¹ In *Chwee Kin Keong and Others v Digilandmall.Com. Pte Ltd* [2004] 2 SLR 594 the High Court of Singapore noted that:

[Mistakes in electronic contracts] can result as a result of human interphasing, machine error or a combination of such factors. Examples of such mistakes would include (a) human error (b) programming of software errors and (e) transmission problems in the communications system. Computer glitches can cause transmission failures, garbled information or even change in nature of information transmitted...Such errors can be magnified almost instantaneously and may be harder to detect than if made in a face to face transaction or through physical document exchange.²²

Care must be taken to distinguish input errors from so called "errors of judgment". An error of judgment is one where the person intends to enter specific information, and does actually enter it, but would not have done so had he known other necessary facts.²³ This kind of mistake will generally be treated by the common law of contractual mistake. As observed by some scholars,²⁴ the law of the treatment of input errors is not intended to provide a general rule for the issue of mistake. It is devoted to only one type of mistake, namely input errors. As shown already, it is the instantaneous nature of electronic communications which makes the potentiality of mistakes higher than in traditional paper based or oral contracts. Under many domestic laws the law of input errors in electronic transactions is *expressis verbis* limited to automated transactions. Such an approach is reasonable because the real danger of making mistakes involves websites that permit immediate or instantaneous conclusion of a contract.²⁵ Consequently, non-interactive websites, email and many other "non-interactive mediums" of electronic communication are excluded from the operation of the law of input errors.

20 Kah Leng 2006 <http://www.wseas.us/e-library/conferences/2006cscs/papers/534-147.pdf>.

21 Gabriel 2006 *Unif. L.Rev.n.s* 303.

22 Par [102].

23 Gabriel 2006 *Unif. L.Rev.n.s* 303.

24 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

25 Polanski 2007 *Journal of International Commercial Law and Technology* 117.

2.3 Automated transactions

A variety of complicated functions may be performed in an interactive and flexible manner through an innovative artificial intelligence system.²⁶ In recent years, the use of electronic agents in the conclusion of contracts has become more common than ever. Such agents are increasingly participating in legally relevant activities, from negotiation to the conclusion of a contract. Today, many electronic contracts are concluded by computer systems capable of autonomously executing the mandates assigned to them without need for any human review.²⁷

An automated transaction may be defined as a system for automatic negotiation and conclusion of a contract without involvement of a person, or at least on one of the ends of the negotiation chain.²⁸ The critical element in the definition of an "automated transaction" is the lack of involvement of a human actor, and the presence of an electronic agent on one or both sides of a transaction. A classical example of an automated transaction involving electronic agents on both sides is an Electronic Data Interchange transaction (herein after referred to as EDI). EDI may be defined as the direct transfer or interchange of structured data according to an agreed message format between computer systems by electronic means.²⁹ Both computer systems are able to send, accept and process the message through a program by using the same format and to send an acceptance message.³⁰ An example of an automated transaction involving one electronic agent is a website programmed to receive orders that have been completed by customers electronically. Having received the order, the system will usually generate an acknowledgement or receipt of the order and then process the order accordingly.

Wooldridge and Jennings³¹ define an electronic agent as a hardware or software-based computer system that enjoys the following properties: autonomy, being the capacity to act without the direct intervention of humans, the capacity to interact with

26 Pistorius 2008 *JILT* 7.

27 Sartor 2009 *Artf Intell Law* 253.

28 United Nations *United Nations Convention* 40.

29 Coetzee 2003 *S.Afr. Mercantile L.J* 2.

30 Coetzee 2003 *S.Afr. Mercantile L.J* 3.

31 Wooldridge and Jennings 1995 *Knowledge Engineering Review* 117.

other agents or humans, the capacity to perceive their external environment and to respond to changes that are coming from it, and the capacity to exhibit goal-directed behaviour by taking the initiative. Andrade and others³² add to this by observing that an electronic agent must be autonomous so that it is capable of making independent decisions regarding appropriate responses. Secondly, it must be reactive, in that it must be able to perform appropriate actions without constant direction from its owner. Lastly, it must be proactive in the sense that it must initiate actions without constantly referring back to its user.

The economic reasons for the employment of electronic agents or entities in the negotiation and conclusion of contracts are as follows. Firstly, there is a reduction of labour costs for the e-merchants. The program can do in one day what one employee might need more than a whole week to accomplish. Secondly, electronic agents know not time nor rest in their work. Consequently, valid contracts can be concluded at any time of the day, even after midnight. However, the party who deals in his natural person with the electronic agent of another in the conclusion of the contract may not be so benefited; in fact, at one time he may be instantaneously prejudiced by that fact. For instance, an accidental click of the "send" button may bind him to terms the error of which, had he been communicating with a natural person, would have been immediately recognised and rectified.

Input errors can only be made by a natural person who interacts with an electronic agent to conclude a contract, not by pre-programmed devices.³³ Thus, the law of input errors benefits only the buyer rather than the seller, or active persons rather than pre-programmed commercial professionals.³⁴ Logically so because the seller would have had a chance to review the information he uploaded onto the program. Secondly, in a fully automated system, on the part of the seller, human decisions are only involved in designing the system and creating rules for human assent, no human decisions are involved in any specific commercial transaction. But, this approach raises serious concerns in light of the fact that many errors or mistakes in

32 Andrade, Novais and Neves "Will and declaration" 53-56.

33 Polanski 2007 *JICLT* 117.

34 Polanski 2007 *JICLT* 117.

electronic contracts are made by sellers rather than buyers. For instance, in 2003, experienced online retailer Amazon.com reportedly lodged 6,000 orders for a \$1,049 television incorrectly listed online for \$99.99 before the company detected and immediately corrected the pricing error.³⁵

2.4 Attribution of the actions of electronic agents

The main intention behind the law of the treatment of input errors is the allocation of risks concerning errors in electronic communications in a fair and sensible manner.³⁶ Generally, the actions of a machine are attributable to the person who instructed or programmed the machine to perform a specific action.³⁷ In one case³⁸ where goods were erroneously offered over the Internet for a price below the price intended by the seller, and the system automatically generated a reply from the seller stating that the customer's "order" would be immediately "carried out", the court affirmed the principle that automated communications were attributable to the persons on whose behalf the system had been programmed and in whose names the messages were sent. The court further affirmed the legal value of the messages sent by the automatic reply function as binding expressions of intention and valid acceptances for purposes of contract formation.³⁹

2.5 Error detection and correction techniques

Scholars have often advised that online merchants who use electronic agents to negotiate and conclude contracts should make error-correction mechanisms available to the user before the contract is finalised.⁴⁰ There are at most two types of error control technique available for employ by electronic vendors; the first technique is a confirmation service which allows the customer to confirm the submission of his

35 Groebner 2004 *Shidler J.L. Com. & Tech* 26.

36 United Nations *United Nations Convention* 75.

37 Pistorius 2008 *JILT* 9.

38 No. 9 U 94/02 (Oberlandesgericht Frankfurt. 20 November 2002 *JurPC – Internet Zeitschrift für Rechtsinformatik*, *JurPC WebDok* 91/2003 <http://www.jurpc.de/rechtspr/20030091.pdf>).

39 This is a German case, and due to language barriers, the author could not access the full record of the judgment. The summary provided above is taken from United Nations Commission on International Trade Law 2003 <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V03/880/47/PDF/V0388047.pdf?OpenElement>.

40 Kah Leng 2006 *Computer Law and Security Report* 157.

online order, e.g. after clicking the "submit" button, the system may display the message "Are you sure you want to submit this message?." As correctly observed by others, this is a technique purely for avoiding input errors more than correcting them.⁴¹ Another technique provides the customer with a summary of the online order before dispatch, and so if the customer notices an error, the system allows him to edit the online order form before sending it over for processing.

2.6 Conclusions

The foregoing discussion illustrates that the law of the treatment of input errors is only applicable in cases where a natural person interacts with an electronic agent of another party in negotiating and concluding a contract. As a result, the issue of input errors will not arise where both parties to the contract are using electronic agents to conclude a contract. Secondly, a party dealing with an electronic agent cannot invoke the law of input errors if before finalisation of the contract, the system gave him an opportunity to review and correct his errors. This is so because such a party is deemed in law to have reviewed the information he entered, and has made a conscious decision to confirm it, aware of all the terms. Lastly, the law of input errors does not deal with contractual mistake in general, but with the specific form of mistake known as input errors.

CHAPTER 3

3 The South African Common law treatment of mistake in contracts

3.1 Introduction

In Roma-Dutch law, *consensus* plays a vital role in the formation of the contract. For a contract to come into existence there must be *inter alia* a meeting of the minds or coincidence of the wills, or *consensus ad idem*, these phrases being interchangeable.⁴² As such, it is acceptable to say that a contract comes into

41 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

42 Christie *The Law of Contract* 24.

existence if the parties are *ad idem* on creating between themselves an obligation or obligations, as well as on all its particulars, such as content.⁴³ However, at times one or both parties to the contract may labour under a mistake or error regarding the other party's true intentions, which results in *dissensus* or absence of true agreement.

The aim of this chapter is to investigate the doctrine of mistake and its treatment in South African Common law. As a matter of great importance, it is worth mentioning at the very beginning that the general principles of contract formation are applicable to mistake in cyberspace.⁴⁴ In relation to the topic under consideration in this work, the understanding of the treatment of mistake is relevant to the extent that ultimately, one will be able to differentiate between mistake and input errors in electronic contracts, and the differences inherent in the treatment of each.

3.2 Mistake

The law recognises three types of mistakes in contract, namely, unilateral mistake, mutual mistake and common mistake.⁴⁵ Each of these types of mistakes is discussed fully in this discourse. Mistake is further generally subdivided into different categories such as an *error in corpore*, *error in persona*, *error in negotio* and *error in qualitate* etc.⁴⁶ As shall be shown, the definition of contractual mistake in law is limited only to mistakes that will suffice to relieve a party from his obligations. This conclusion finds credence in the view of Corbett AR in *Trust Bank of Africa Ltd v Frysch*⁴⁷ when he observes that:

It is trite, nevertheless, that not every error in the mind of a contracting party, even if induced by the other party, results in the vitiation of the contract on the ground of dissensus. To have this effect the error must, at least, have played a material role in the decision of the mistaken party to enter into the contract.⁴⁸

43 Van der Merwe *et al* *Contract* 21.

44 Pristorius *JLIT* 12.

45 Christie *The Law of Contract* 363-364.

46 Van der Merwe *et al* *Contract* 25.

47 1977 3 SA 562 (A).

48 587D – E.

However, it is not enough that the mistake is material, it should also be real and reasonable in the prevailing circumstances, and this is known as the doctrine of *iustus error*.⁴⁹ In law, for a mistake to suffice to free a party from his contractual obligations, it must not only be material, but it must also be reasonable. These two elements of a mistake need further exposition because one cannot fully appreciate the legal definition of a mistake without first understanding the constituent elements of that definition.

3.2.1 The Constituent elements of a Mistake

3.2.1.1 The Requirement of Materiality

To succeed in his claim or defence, the mistaken party will have to prove that his mistake relates to a material matter.⁵⁰ A mistake is material or essential if it excludes consensus,⁵¹ or as put by Miller J in *Diedericks v Minister of Lands*:⁵²

...a mistaken belief of fact will not release a party from the consequences of an agreement which manifests his assent to the terms thereof unless it is a mistake of such a type or nature that it negatives consent; in other words, it must be shown that because he laboured under that mistake in concluding the agreement, his consent to the terms thereof, although apparent, was not real. The mistake must, therefore, be one which touches the agreement in a material or fundamental respect, for example, in relation to its subject-matter.

In investigating the materiality of an alleged mistake, it is submitted that the eminent question will always be whether the alleging party would have agreed to the terms of the agreement had he known the truth, and the onus is on him to prove that he would not have. This conclusion finds support in the case of *Khan v Naidoo*.⁵³ In that case, the respondent had lent a sum of money to the appellant's son after the latter had signed an acknowledgment of debt. The appellant had signed a deed of suretyship in which she bound herself as surety and co-principal debtor for her son's obligations. On sequestration of the appellant's son estate, the respondent pursued

49 *Stewart v Zagreb Properties (Pvt) Ltd* 1971 2 SA 346 (RA) 351 A.

50 Christie *The Law of Contract* 365.

51 Van der Merwe *et al Contract* 25.

52 1964 1 SA 49 (N) 55G.

53 1989 3 SA 724 (N).

his case against the appellant and obtained judgment against her in a magistrate's court. On appeal, the appellant alleged that, at the time she signed the deed of suretyship, she believed that she was signing some paper which had to do with the transfer to her of property. Didcott JA held that:

By any reckoning, as I see matters, the appellant needed to prove that she would never have signed the guarantee had she realised what in truth it was. Her defence could not succeed without such proof, however sound in other respects it might notionally have been. That is surely inescapable. For she would have failed to demonstrate then that her mistake mattered. The misrepresentation by Abed Khan of the document's tenor, morally reprehensible though it was, would not have been shown to be legally material.⁵⁴

Concepts such as *error in corpore*, *error in persona*, *error in negotio*, and *error in qualitate* and mistake of law are relevant to the materiality of the mistake.⁵⁵ In the case of *Lake and Others NNO v Caithness*⁵⁶ the respondent thought he was selling his farm to Mr Lake (the first plaintiff) personally, whereas Mr Lake was in fact concluding a sale as a trustee for a trust. When the trust demanded transfer of the land, the respondent alleged an *error in persona* on the ground that he had never intended to sell the farm to a trust but to Mr Lake personally. The court held that, for a defence of *error in persona* to succeed, it must be shown *inter alia* that the identity of the other contracting party was an essential ingredient of the contract in the sense that his identity had in itself a material bearing upon the intention of the defendant to enter into a binding contractual relationship with him.⁵⁷ The court held in favour of the respondent that the mistake was material because the subject-matter of sale was an old family farm with a family graveyard on it. The defendant was prepared to sell to Lake, whom he knew as he had known his father before him and, by necessary implication, whom he trusted to look after the family graveyard. He would not have sold to the trustees in the John Lake Trust, some of whom he did not know.

54 Page 728.

55 Van der Merwe *et al Contract* 26.

56 1997 1 SA 667 (E).

57 672 F-H.

3.2.1.2 The Requirement of Reasonableness

As a general rule, a mistake is reasonable if it occurs in objective circumstances that make it excusable in the eyes of the law.⁵⁸ The majority of the cases in which a mistake was held to be reasonable are those in which the mistake was caused by the misrepresentation of the other party, either by commission or omission. For example, in the case of *Shepherd v Farell's Estate Agency*,⁵⁹ an estate agency advertised that it handled the sale of businesses, and the advertisement included the words: "Our motto: No sale, no charge. All advertisements are at our expense." Attracted by the advertisement, Shepherd instructed the estate agency to sell his business, and signed without reading a contract that bound him to pay commission if a sale took place, whether or not as a result of their efforts. It was held that Shepherd was not bound by his signature because his mistake was caused by the estate agency's advertisement.

A mistake will also be held reasonable if the other party failed to remove a wrong impression on the part of the one alleging mistake, especially where the omission breaches a *duty to speak*.⁶⁰ The duty to remove an error will arise *inter alia* if the other party knows, or ought to reasonably have known that the other party was labouring under a mistake in concluding the contract. For instance, in the case of *Maresky v Morke*⁶¹ the respondent alleged that he had entered into the agreement in the mistaken belief that the property described in the agreement of sale was situated at place A, whereas it was in fact situated some 200-300 metres away from that spot.⁶² On the day before the auction, an advertisement for the auction which had appeared in a newspaper had described the property to be auctioned as being situated at site A. The agent had indeed rectified the error to a group of prospective buyers, which had not included the respondent because he had arrived late at the auction. The respondent's bid at the auction was not accepted. The next day he went to the agent's office and made a higher offer, which was accepted by the appellant.

58 *Trollip v Jordaan* 1961 1 SA 238 (A) 248-249.

59 1921 TPD 62.

60 Van der Merwe *et al Contract* 48.

61 1994 1 SA 249 (C).

62 Page 251.

While there, the agent had pointed out to him the true position of the property on a street map and a site diagram, but this did not alert the respondent to the fact that the appellant's property was not the one on which the auction had been held. The court held that:

... on the facts of this case, appellant should (through his agent, Mr Radowsky, who not only received the offer but conducted all the negotiations on behalf of his principal) have realised that there was a real possibility of a mistake on the part of respondent and he should either have enquired whether respondent really intended to purchase property B, rather than property A, or made it clear to him that it was property B and not property A which was for sale. Mr Radowsky conceded that there was a possibility of an error and said that he pointed out the position of the property on the street map 'because I wanted to make sure that he wasn't making an error'. The magistrate found, and I agree with him, that what Radowsky did was not enough to remove the error which had been brought about by his misleading advertisement...⁶³

The above discussion addressed the concept of mistake in South African common law of contract, more importantly, the two constituent elements of a mistake which a party must allege and prove if he is to succeed in his claim. Below, the three types of mistakes follow, namely unilateral, mutual and common mistake. Under each type of mistake shall also be discussed the remedies available to a party who succeeds in the claim for mistake.

3.3 Types of Mistakes

3.3.1 Unilateral Mistake

At times it does happen that even without the fault of the other party, a party to a contract is mistaken regarding a material factor to the contract. The mistake in issue may relate to the subject or object of the agreement, or the person with whom the contract is being concluded *etc.* The law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered.⁶⁴

63 258C-D.

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

Apart from misrepresentation on the part of the other party, a party alleging unilateral mistake will only succeed if he can show that the other party knew, or ought to have known of, or caused the mistake.⁶⁵ A classical example of a of unilateral mistake which a party knew or ought to have known is illustrated in the case of *Horty Inv (Pty) Ltd v Interior Acoustics (Pty) Ltd*⁶⁶ in which, due to a typing error, a lease for two years ending in 1983 was reflected in the document to end in 1993. The lessee wanted to hold the lessor to the agreement, wherefore the lessor raised the defence of unilateral mistake. The court first noted that this was a case of unilateral mistake concerning an error in *negotio* which could only avail the plaintiff if it was material and reasonable. The court then held that a reasonable man would definitely have realised that the lease should have read "1983" and not "1993"; and because of this feature the defendant could not rely on the doctrine of quasi-mutual assent to hold plaintiff to the lease.

There is a heavy burden on the mistaken party. The burden is particularly made heavy by the doctrine of quasi-mutual assent.⁶⁷ In treating mistake, courts usually take into account the fact that there is another party involved in the contract and will consider his position too.⁶⁸ This approach is logical because, whatever a person's true intentions might be, if he conducts himself in such a manner that a reasonable man would believe that he was agreeing to the terms proposed by the other party, and the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.⁶⁹ Therefore, the other party is then entitled to rely on the doctrine of quasi-mutual assent, which renders the contract binding and enforceable despite the lack of apparent consensus.

65 *Horty Inv (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W) 540 C-D.

66 1984 3 SA 537 (W).

67 Where there is a misrepresentation, a party will easily refer to the other party's misrepresentation to prove that he was harbouring under a mistake. However, where dissensus is not readily apparent, the party that acted contrary to the subjective consensus should be held bound to the apparent agreement if he has conducted himself in a manner that gives the other party reason to believe that he was contracting with him on certain terms. This in short is the doctrine of quasi-mutual assent. For full discussion see Thejane 2012 *PER* 516.

68 *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 471B-D.

69 *Smith v Hughes* (1871) LR 6 QB 597 at 607.

The general rule is that a unilateral mistake renders a contract null and void.⁷⁰ Where the mistake has been caused by the other party's material representation, the contract is merely voidable at the instance of the misrepresentee.⁷¹ What this means is that the party claiming mistake may either elect to abide by the contract or rescind it. In the case of *Sonap Petroleum (South Africa) (Pty) Ltd v Pappadogianis*⁷², Harms AJA has gone as far as to allege that rectification and unilateral mistake are mutually exclusive concepts. However, there is ample authority that rectification of a contract will be granted in cases of unilateral mistake induced by fraud.⁷³

3.3.2 Mutual Mistake

A mutual mistake occurs where there is non-correspondence of offer and acceptance,⁷⁴ or where each party has a mistaken understanding of the other party's intention and neither is aware of the other's mistake.⁷⁵ Subject to the application of the doctrine of quasi-mutual assent, parties who are mutually mistaken are by definition not *ad idem*.⁷⁶ In the matter of *Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd*⁷⁷ the seller and the buyer were not agreed on the subject-matter of the sale. While the buyer thought he was purchasing clutch parts, the seller thought he was selling different motor parts altogether.⁷⁸ In an action by the seller for payment of the purchase price, the court held that as much as there was dissensus between the parties regarding the *merx*, the purported contract was void *ab initio*.⁷⁹

The doctrine of reasonableness and quasi-mutual assent are applicable to mutual mistake. For instance, in the case of *Pieters and Co v Salomon*⁸⁰ Pieters and Co had agreed to pay Salomon moneys owed by one Berger. Later there was

70 *Van Dyk v Petersen (5846/2006) [2010] ZAWCHC 122 Par [25]*.

71 *Sim Road Investment CC v. Morgan Air Cargo (Pty) Ltd [2010] ZASCA 081 Par [22]*.

72 1992 3 SA 234 (A) 238 D.

73 *Offit Enterprises (Pty) Ltd v Knysna Development Co (Pty) Ltd 1987 4 SA 24 (C) 26E, 29A*.

74 Christie *The Law of Contract* 375.

75 Van der Merwe *et al* *Contracts* 28.

76 *Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd 2008 1 SA 279 (W) Par [21]*.

77 2008 1 SA 279 (W).

78 Page 281 par [8].

79 Page 283 par [16].

80 1911 AD 121.

disagreement on the total amount that Pieters and Co had agreed to pay Salomon on behalf of Berger. The court held that Solomon's understanding that Pieters and Co were agreeing to pay him the full amount owing was reasonable, and that Pieters and Co's understanding that they were agreeing to pay him only the amount appearing in Berger's books was unreasonable, so Salomon's version was enforced.

3.3.3 Common Mistake

A common mistake is one where both parties labour under the misapprehension with regard to a material term of the contract. For example, if both parties think that they are selling and purchasing X whereas, in fact, they are selling and purchasing Y.⁸¹ An illustrative case is that of *Dickinson Motors (Pty) Ltd v Oberholzer*⁸² in which Oberholzer had paid a specific amount to Dickinson for delivery of a motor car. The car was bought on hire-purchases, and the purchasers defaulted on payment. The court sheriff had mistakenly attached a wrong car, and delivered it to Dickinson Motors. Both parties, Dickenson Motors and Oberholzer, were under a mistaken view that it was the right car which Dickenson had repossessed. Consequently, Oberholzer had paid money purportedly owing, but later realised that it was the wrong vehicle for which he had paid. The court held that:

The plaintiff would not, and the defendant knew that he would not, have considered paying his son's indebtedness except to secure the release of the car on which the money was owing. It was only because the defendant's officers believed that the car at Vereeniging was the one they had sold to A. G. Oberholzer that they were prepared to release it to his father against payment of his indebtedness. The ... [money] was paid under a common mistake in regard to a matter which was vital to the transaction and if either of them had been aware of the true position the transaction would not have gone through.⁸³

A common mistake will render a contract void *ab initio*.⁸⁴ However, a common mistake relating to the existence of a particular state of affairs will not render the contract void, unless it can be said that the parties expressly or tacitly agreed that the validity of the contract was conditional upon the existence of that state of

81 *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 1 SA 914 (A) 915 D.

82 1952 1 SA 443(A).

83 450 A-D.

84 Kerr *The Principles* 255.

affairs.⁸⁵ A state of affairs referred to herein is what is known in the law of contract as a condition.⁸⁶ In a contract affected by a fundamental common mistake, a party who has partly rendered performance before the discovery of the mistake has a remedy of restitution.⁸⁷ Another remedy open to a party in the case of a common mistake is rectification of a contract. Rectification will be granted where due to the common mistake, the written contract does not reflect the true intention of the parties.⁸⁸ The parol evidence rule does not operate against a party who seeks to bring extrinsic evidence to prove that the written document does not reflect the true intention. As put by Farlam AJA in *Tesven CC v South African Bank of Athens*:⁸⁹

To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed...⁹⁰

In conclusion, all that has been said with regard to mistake will equally apply to electronic contracts. The ECT Act does not have specific provisions for the treatment of mistake in electronic contracts. The fact that the common law of mistake applies with equal effect to electronic contracts notwithstanding; there is a specific issue which is special to electronic contracts that must be investigated. The issue of unilateral mistake in electronic contracts, pricing errors to be more specific, may prove problematic if the common law is applied to it as it currently stands.

3.4 Mistake in Electronic Contracts

3.4.1 Snapping up a Bargain

The previous chapter discussed the notion of input errors in detail , and it was shown that in automated transactions, especially where a transaction is concluded with an active website such as Amazon.com, it is the buyer more than the seller who is most

85 *Wilson Bayly Holmes (Pty) Ltd v Maeyane and Others* 1995 4 SA 340 (W) 344I.

86 *Van Reenen Steel (Pty) Ltd v Smith NO and Another (97/2001) [2002] ZASCA 12 (25 March 2002)*

87 Kerr *The Principles* 243. See also *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 1 SA 443(A).

88 Christie *The Law of Contract* 383.

89 2000 1 SA 268 (SCA).

90 Page 241 par [16].

likely to make errors.⁹¹ However, a clear investigation of the issue of mistake in electronic contracts reveals that, in automated transactions, sellers are the most likely to make mistakes.⁹² The most common form of mistake committed by sellers in automated transactions is a pricing error.⁹³ For example, in 2003 Amazon.com lodged 6,000 orders for a \$1,049 television set incorrectly listed online for \$99.99 before the company detected and corrected the pricing error.⁹⁴ If its user interface designed for online contracting was not designed to minimise the company's risk to that kind of liability, Amazon.com would have had to abide by the contracts. However, in 2002 Kodak was not so lucky as to avoid the orders. Kodak had offered via its Shop@Kodak website a digital camera package including a camera, a docking station, memory card and paper. The offer was advertised as a "special deal" and the price was advertised as £100. This price was a mistake; the true figure ought to have been £329. Kodak agreed to satisfy all orders which had been confirmed, citing a desire to offer the best "customer service."⁹⁵

An online pricing error is generally considered a species of unilateral mistake on the part of the online vendor. The buyers, attracted by the price, will usually place their orders electronically. Since the contract is concluded by an electronic agent, the said agent will immediately generate acknowledgements of receipt of order, thus accepting the buyer's order. A customer who has taken advantage of the low price will insist that the contract is concluded on that price and will seek its enforcement. The online vendor on the other hand will allege in his defence the existence of a pricing error, meaning that no contract was formed.

"Snapping up" is a legal phrase normally used to describe a situation where a party accepts an offer with the knowledge that it might be subject to a mistake. In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis*⁹⁶ Harms AJA noted that:

91 Polanski 2007 *JICLT* 117.

92 Polanski 2007 *JICLT* 117.

93 Groebner 2004 *Shidler J.L. Com. & Tech* 1.

94 Groebner 2004 *Shidler J.L. Com. & Tech* 2.

95 Bates 2002 www.law.cam.ac.uk/faculty-resources/10000256.pdf.

96 1992 3 SA 234 (A).

If the offeree realises (or should, as a reasonable man, realise) that there is a real possibility of a mistake, he has a duty to speak and to enquire whether the intention expressed was the actual intention. Whether or not there is a duty to speak would, obviously, depend upon the facts of the case. The snapping up of a bargain, however, in the knowledge of the possibility that the declared intention did not represent actual intention, would not be bona fide. Where an offeree is alive to the real possibility of a mistake and, failing in his duty to speak and enquire, decides instead to snatch a bargain, there is no consensus and, thus, no binding agreement.⁹⁷

The conduct of online buyers to place their orders for purchase of a wrongly priced product is known as a "snapping up." The essence of "snapping up" lies in taking advantage of a known or perceived error in circumstances which ineluctably suggest knowledge of the error.⁹⁸ The main issue then is whether in internet contracts, it is possible for the online vendor to prove knowledge, actual or implied, of the pricing error on the part of the buyer? So far, there is no reported South African case of a "snapping up" in an electronic transaction, and it is not immediately clear whether the aforesaid principle can be applied to electronic contracts with no difficulty. However, as shall be shown below, while the law of "snapping up" can be applied with relative ease to ordinary or non-instantaneous electronic contracts, it will surely prove problematic to automated transactions. In the first place, most of the active commercial web sites are mainly (if not wholly) automatic. Consequently, even if the duty to speak arises, the notice will go to the website and not to a natural person who can rectify the error. Anyone who tries to communicate with such companies through emails provided on their websites is, immediately after the dispatch of the email, most likely to receive an email stating as follows:

Thanks for contacting [name of company]. This is an automated response, acknowledging receipt of your message. Please do not reply to this message...

This is a sign that communication with natural persons from the company may not be so easy, and this has a tremendous impact on the duty to speak. Lastly, extending the principles of the common law to automated transactions, a natural person who interacts with the website to buy a product is not the offeree but the offeror. The website constitutes an offer to the public, and according to Coetzee,⁹⁹ when a vendor advertises goods for sale to the public via a website or other online services; he is

97 235 B-C

98 *Chwee Kin Keong v Digilandmall.com Pte Ltd* Par [116].

99 Coetzee 2004 *STELL LR* 515.

not making an offer but merely inviting others to make offers.¹⁰⁰ Thus, in automated transactions, if there is anyone who can be said to have snapped an offer, it is not the buyer, but the seller on whose behalf the website is acting.

Having illustrated the difficulty of executing a duty to speak when one interacts with an automatic website, and having also illustrated that the buyer in such cases can snap no offer because he is the offeror, it is clear that the e-vendor is only likely to succeed if he can show that the buyer knew, or ought to have known of the likelihood of a mistake in the price. However, this places a heavy onus on the seller because in such websites, one finds things like "~~\$47.95~~ \$18.74," which is an indication that the price has been reduced from what it was previously. If in the above example, \$18.74 is a mistake that ought to have read \$ 38.74, the seller will have difficulty convincing the court that the buyer knew or ought to have known of the mistake. This is so because a reasonable buyer would understand the \$18.74 to have replaced the cancelled \$47.95, and such bargains are not foreign to the internet.

The South African common law of unilateral mistake and "snapping up" transactions should be developed to accommodate automated transactions. This can be done mainly by applying the principles applicable in instances of "snapping up" without considering whether it is the offeror or offeree who snaps an advantage out of the other party's mistake. In fact, while South African common law seems to emphasize the terms "offeror" and "offeree" in its definition of "snapping up" transactions, other jurisdictions merely define it as taking advantage of a known or perceived error in circumstances which ineluctably suggest knowledge of the error.¹⁰¹ Secondly, it is most probable that a court faced with such a case will resort to general principles such as *boni mores*, public policy and principles of equity if necessary, to relieve the

100 This is a simplified view of a rather complicated issue. Many statutes regulating electronic communications do not deal with the issue of whether a web site constitutes an offer or invitation to treat. In many jurisdictions, the issue is determined by reference to the common law. For example, in English law, an interactive website for the sale of goods will constitute an invitation to treat, but in Danish law, it will constitute a definite offer, see Groebner 2004 *Shidler J.L. Com. & Tech* 8. According to article 11 of the UNECIC, an interactive website will constitute an invitation to make offers because it is not made to one or more specific persons.

101 *Tamplin v James* (1880) 15 Ch D 215 at 221. See also the judgment of the High Court of Singapore in *Chwee King Keong and Others v Digilandmall.Com Pte Ltd* [2004] 2 SLR 594.

e-vendor from the obligation to perform. Until such time when the matter would have been decided by a court of law, the law in this field will remain unsettled.

3.5 Conclusions

The aim in this chapter was to discuss the treatment of contractual mistake under the South African common law. The discussion revealed that in law, a mistake must be both material and reasonable to relieve a party from his contractual obligations. Furthermore, this chapter revealed that the law recognises only three types of mistakes, being unilateral mistake, mutual mistake and common mistake, and the remedies available to a party under each type of mistake have also been discussed. Lastly, the discussion showed that pricing errors made by e-vendors in interactive websites are a species of unilateral mistake, and further that the common law is likely to meet with obstacles if it is applied without any modification to instances of "snapping up". In relation to the whole discourse, the aim in chapter was to illustrate the point that the law distinguishes between contractual mistake and input errors; moreover that contractual mistake in electronic contracts is addressed by the common law and not the ECT Act. The following chapter discusses the treatment of input errors under the ECT Act.

CHAPTER 4

4 The treatment of input errors under the *Electronic Communications and Transactions Act 25 of 2002*

4.1 Introduction

The second chapter examined the various legal concepts applicable to the law of the treatment of input errors. The third chapter considered the issue of mistake in contract, the various forms of mistakes and the remedies of the parties in the event of a contract concluded pursuant to a mistake. The aim of the third chapter was mainly to facilitate a clear distinction between mistake and input errors in electronic

contracts. In the present chapter the treatment of input errors under South African law, under the ECT Act to be more specific is discussed.

4.2 The Electronic Communications and Transactions Act 25 of 2002

4.2.1 Objectives of the Act

Before the enactment of the ECT Act, there was no certainty regarding the legal framework governing the validity of electronic contracts. Issues such as whether electronic data and electronic signatures possess the functional equivalence of traditional pen and paper writing were clouded with uncertainty.¹⁰² With the advent of electronic mediums of communication, as early as 1964, it was clear that the law had to accommodate information technology. In the case of *Balzun v O'Hara and Others*¹⁰³ the Transvaal Provincial Division held that a telegram could constitute written and signed authority within the meaning of section 1(1) of the *General Law Amendment Act 68 of 1957*, which required a document to be written and signed. Later in the more recent case of *Council for Scientific and Industrial Research v Fijen*¹⁰⁴ the Appellate Division held that an e-mail constituted a valid written and signed document. This only serves to illustrate the pressure that was gradually mounting on the courts of law as the business world embraced information technology.

In 1996, UNCITRAL drafted the *UNCITRAL Model Law on Electronic Commerce (1996)*, and the *UNCITRAL Model Law on Electronic Signatures (2001)*, which as the titles suggest, are not conventions, but model laws. These two model laws were aimed at harmonising the response of domestic legal systems to the challenges of electronic commerce, and were indeed subsequently used in the drafting of domestic legislation for a large number of countries; South Africa included.¹⁰⁵ In 2002, the parliament of South Africa passed the ECT Act with the sole purpose of enabling and

102 Snail 2008 *JILT* 9.

103 1964 3 SA 1 (T).

104 1996 2 SA 1 (A).

105 Eiselen 2007 *PRE* 3.

facilitating electronic communications and transactions in the public interest¹⁰⁶ *inter alia* by promoting legal certainty and confidence in respect of electronic communications and transactions.¹⁰⁷

4.3 Automated transactions

While a substantial portion of the ECT Act was framed after the *UNCITRAL Model Law on electronic commerce*, there is evidence in scholarly commentaries that section 20 of the Act, which deals with automated transactions and input errors, was nevertheless not framed after the Model Law, but after legislative provisions in leading jurisdictions such as Canada and the US.¹⁰⁸ This must by no means come as a surprise because at the fear of unduly interfering with well established notions of contract law in various jurisdictions, the Model Law itself did not address the consequences of input errors.¹⁰⁹ Consequently, in interpreting section 20 of the Act, where necessary, reference shall also be made to judicial precedents and academic comments from some of the aforementioned jurisdictions.

4.3.1 Recognition of automated transactions

Section 20 (a) of the ECT Act provides that an agreement may be formed where an electronic agent performs an action required by law for agreement formation. An electronic agent is defined by the ECT Act as:

...a computer program or an electronic or other automated means used independently to initiate an action or respond to data messages or performances in whole or in part, in an automated transaction.¹¹⁰

A transaction concluded by an electronic agent on both or one side is known in law as an automated transaction. The ETC Act defines an automated transaction as:

106 Sec 2(1).

107 Sec 2(1)(e).

108 Pistorius 2009 *JILT* 4.

109 United Nations *United Nations Convention* 73-74.

110 Sec 1.

...an electronic transaction conducted or performed, in whole or in part, by means of data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person's business or employment.¹¹¹

It is clear that a critical element of an automated transaction is the presence of an electronic agent that can negotiate and conclude the contract without any human intervention. A problematic issue with regard to the use of electronic agents in the conclusion of contracts has always been the fact that a contract is an agreement between two or more persons, and involves consent, which means that only those who have power to consent can validly conclude binding contracts.¹¹² The question has been whether non-human entities such as computer programs possess the necessary capacity in law to conclude legally binding contracts? This question is relevant because in order for electronic commerce to succeed in the manner predicted by its enthusiasts, human and corporate traders must be assured that automated transactions are perceived and understood as contractual in nature.¹¹³ The provisions of the ETC Act, sections 20 (a) and 20 (b), explicitly confirm that contracts can be created by machines functioning as electronic agents for parties to the transaction, and thus negate the claim that lack of human intent at the time of contract formation prevents contract formation.

However, the matter of the use of electronic agents in the negotiation or conclusion of a contract in the ECT Act is very controversial, mainly because the Act does not make the use of electronic agents subject to prior agreement between the parties. This means that electronic agents can be used at any time for any purpose in the negotiation or conclusion of a contract, even without prior agreement to that effect. Bellia,¹¹⁴ notes that:

... It is true that persons using electronic agents have reason to know that other unknown persons may be using electronic agents capable of arranging transactions with theirs. What persons using electronic agents do not know or have specific reason to know is whether unknown persons assent to perform an arrangement thus made.

111 Sec 1.

112 Kerr 2001 *ECR* 188.

113 Kerr 2001 *ECR* 189.

114 Bellia 2001 *Emory. L.J* 1108.

The issue of prior agreement to the use of electronic agents may be relevant for instance where, due to prior dealings, a person knows that another has an electronic agent, and chooses to bypass the owner of the said agent to conclude a contract with his electronic agent. In such a situation, can it be said that a valid contract has been concluded? The answer must be in the affirmative, first because the ECT Act clearly confers contractual capacity on electronic agents,¹¹⁵ and secondly because the ECT Act binds a party to the actions of his electronic agent. Commenting on a similar provision in the *Uniform Electronic and Transactions Act* 1999 (hereinafter referred to as UETA), Dodd and Hernandez¹¹⁶ observe that:

...the proposed Uniform Electronic Transactions Act... [does not] require an agreement affirmatively empowering the agent. Thus, an electronic agent's power rests on the fiction that such agents do not differ from human agents; the principal has delegated actual authority through detailed instructions comprising the programs.

The specific problem raised by the issue of prior agreement to the use of electronic agents is that, where without the knowledge of the owner of the agent, another person successfully concludes a contract with the agent, the owner of the said agent may raise the point that the agent did not have the necessary authority to contract with that specific person or on certain terms. This argument fits well within section 25 (c) of the Act which provides that:

A data message is that of the originator if it was sent by an information system programmed by or on behalf of the originator to operate automatically unless it is proved that the information system did not properly execute such programming.

As shall be shown later, this provision contemplates the application of the common law of agency, and as such for the actions of the electronic agent to bind its owner, the agent must have been authorised to conclude the contract. Although it may be argued that the mere fact that an agent was programmed to contract with third parties is evidence of the fact that it had authority, yet it cannot be maintained that an electronic agent has properly executed its mandate if it concludes a contract on unintended terms or with a wrong person where either of the two is material to the agreement.

115 Sec 20(a).

116 Dodd and Hernandez 1998 *Computer L. Rev. & Tech. J.* 6.

In conclusion, the Act must be amended to the effect that in cases of closed systems such as EDI, the law must place a requirement of prior agreement to protect unsuspecting individuals from the injustice that threatens if they are to be bound to actions of their electronic agents. This recommendation is not so unreasonable because EDI is used where there is prior agreement between the parties and in this sense the law would bring no major change to the prevailing commercial practice. Secondly, the very definition of an EDI suggests the existence of an agreement because data has to be formatted to agreed standards to enable direct transmission between and processing by computers. Thirdly, such an amendment is justified because, as said already, EDI is a closed system by its very nature,¹¹⁷ and to allow just anyone to interfere with it as if it was an open system such as an interactive commercial website obviously prejudices the parties thereto.¹¹⁸

4.3.2 Attribution of actions of electronic agents

In electronic commerce, attribution refers to the manner in which one determines whether or not an electronic communication originates from a specific person, or machine in the case of automated transactions.¹¹⁹ According to section 20(c), a party using an electronic agent to form an agreement is presumed to be bound by the terms of that agreement irrespective of whether that person reviewed the actions of the electronic agent, or the terms of the agreement. This provision has been said to be in line with South African common law which normally attributes the actions of a machine to the person who instructed the program or programmed it to perform the specific function.¹²⁰ Section 25 (c) of the ECT Act provides that:

25. A data message is that of the originator if it was sent by-

117 By closed system is meant that rules and protocols of interaction are specified in advance. This can be distinguished from open systems, such as interactive commercial web sites where just anyone who so wishes is free to conclude with the electronic agent of another at any time without prior agreement.

118 Such interference may interfere with speedy delivery of messages; it may also undermine confidentiality and system security.

119 Pistorius 2002 *S. Afr. Mercantile L.J.* 739.

120 Pistorius 2008 *JILT* 9.

(c) an information system programmed by or on behalf of the originator to operate automatically unless it is proved that the information system did not properly execute such programming.

This means that the employer of the electronic agent can only avoid the contract if his electronic agent did not properly execute his programming. On the point of proper execution of the programming, the central issue will always be whether the information system or electronic agent was programmed to do what it did. Kerr ¹²¹ gives an example of an electronic agent programmed for the sale of shares, and he argues that it has an implied authority to operate within the scope of that which is necessary in the usual course of business to complete the transaction. Such an agent would have exceeded its mandate if it does anything outside the implied authority. Although Kerr's line of argument seems to suggest the application of the common law of agency applicable to human beings, he does not discuss the issue whether the common law applies as it is to electronic agents, or whether there must be some form of modification to specifically suit non-human agents.

Various theories have been developed amongst scholars to tackle the issue of attribution. Relevant for purposes of present considerations are the "mere tool" and "legal personality theory." According to the "mere tool theory,"¹²² electronic agents are viewed as no more than mere tools or means of communication between the parties. In sum, the actions of artificial agents are attributed to the agent's principal, and are binding on him whether or not they were intended, predicted, or a mistake. This would seem to be the approach of Section 20 (c) referred to above, for that provision binds the owner of an electronic agent to the actions of his agent regardless of whether or not he reviewed those actions. However, section 25 (c) seems to relax the harshness of the mere tool theory adopted by section 20 (c). It is clear from section 25 (c), that the owner of an electronic agent will not be bound by the actions of his agent if the agent did not properly execute the programming. This is the "legal personality theory," and it precisely puts electronic agents on a par with human agents. According to the "legal personality theory",¹²³ as reflected in section 25 (c), like a human agents, the actions of an electronic agent will only bind the

121 Kerr 2001 <http://www.law.ualberta.ca/alri/ulc/current/ekerr.htm>.

122 Chopra and White 2009 *University of Illinois Journal of Law Technology and Policy* 371.

123 Chopra and White 2009 *University of Illinois Journal of Law Technology and Policy* 371.

owner if the agent acted within its mandate. It is submitted in conclusion that the true provision regarding the attribution of the actions of the electronic agent to its owner is not section 20(c), but section 25 (c).

4.3.3 *Reviewing terms*

Section 20 (d) provides that a party interacting with an electronic agent to conclude an agreement is not bound by the terms of the agreement unless those terms were capable of being reviewed by a natural person representing that party prior to agreement formation. This provision has been said to dilute the incorporation by reference requirements as provided for under section 11 (3) of the Act.¹²⁴ Section 11 (3) provides that:

- (3) Information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is-
 - (a) referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and
 - (b) accessible in a form in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as, long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.

It is clear that section 11(3) requires much more than for the terms to be capable of review. It has been suggested that the dilution of this provision by section 20(d) has the effect that customers will be bound to terms and conditions where they were capable of being reviewed, regardless of the fact that reference thereto may have been unclear and indistinct.¹²⁵

The first difficulty with section 20 (d) is that it does not explain when "terms are capable of being reviewed by a natural person." But a few preliminary observations may assist in answering that question. In the first place, as has been noted above, the application of this section is expressly limited to instances where a natural person interacts with an electronic agent. The question of reviewability cannot arise where both parties employ electronic agents. By implication, this means that the terms must be in a form that can be comprehended by a natural person as opposed

124 Pistorius 2008 *JILT* 11.

125 Pistorius 2008 *JILT* 11.

to an electronic agent. This does make sense because in cases of EDI, where both parties use electronic agents, the terms are in structured formats, which are basically symbols and codes rather than words.¹²⁶ In conclusion, section 20(d) requires the terms to be in words rather than codes and symbols which are the language of computers not humans.

Secondly, the terms are reviewable in an automated transaction if they are made available by the electronic agent to the natural person before the contract is concluded. This is commonly the case in clickwrap contracts,¹²⁷ where the user assents to the terms of the agreement by clicking an onscreen button marked for example "I agree." As such, clickwrap contracts allow the user to read the terms and conditions before assenting.¹²⁸ This can be differentiated from cases where the terms and conditions are only made available after the conclusion of the online contract, or where the acceptance of the terms is made optional. The requirement that the terms be made reviewable before the conclusion of the contract is concluded is aimed at establishing consensus. As a result, where the natural person has not assented thereto, for instance by clicking an "I agree" icon, it will be hard for the e-vendor to prove that the terms were reviewed. For instance, in the matter of *Specht v Netscape Communications Corporation*¹²⁹ the defendant had downloaded software from a site. The question was whether he was bound by the terms of the licence agreement. He was able to download the software by clicking on the "download button" without manifesting assent to the license terms. The United States Court of Appeals held that the terms were not binding on the buyer because Netscape's SmartDownload allowed a user to download and use the software without taking any action that plainly manifests assent to the terms of the license.

Lastly, it is important to establish the legal effect of the absence of the capability of the terms to be reviewed by a natural person. It has been suggested by one author that the effect of lack of reviewability of terms is that the natural person will not be

126 Boss 1993 *Nw. J. Int'l L. & Bus.* 33.

127 Snail 2008 *JILT* 17.

128 Davidson *The Law* 68.

129 150 F Supp 2d 585 (SDNY 2001).

bound by the agreement.¹³⁰ With due respect, this is not correct, for the ECT Act provides in no ambiguous words that failing reviewability of the terms, a party will not be bound by the terms. In assessing the effect of section 20(d), one should not focus on the contract, but the enforceability of the terms and conditions.¹³¹

4.3.4 *The legal effect of input errors*

Quoted in full section 20 (e) provides that:

- (e) no agreement is formed where a natural person interacts directly with the electronic agent of another person and has made a material error during the creation of a data message and-
 - I. the electronic agent did not provide that person with an opportunity to prevent or correct the error:
 - II. that person notifies the other person of the error as soon as practicable after that person has learned of it:
 - III. that person takes reasonable steps, including steps that conform to the other person's instructions to return any performance received, or, if instructed to do so, to destroy that performance: and
 - IV. that person has not used or received any material benefit or value from any performance received from the other person.

These four requirements will be considered each in full below.

4.3.4.1 Material error and error control techniques

Section 20 (e) (i) is clear that no agreement will be formed where the electronic agent did not provide the natural person dealing with it an opportunity to prevent or correct his input error. This means that an automated transaction tainted by a material error is not voidable, but void.¹³² The emphasis here is on the phrase "material error." Although the ECT Act provides no guidance whatsoever regarding the factors that should be considered in determining the materiality of an error, one thing remains certain though, not every error will suffice to render an automated transaction void. However, the issue of materiality of an input error need not be that problematic, precisely because the requirement of materiality is fairly common in the law of mistake in general. To that extent, it is submitted that principles of the

130 Snail "Electronic Contracting In South Africa" 56.

131 Pistorius 2008 *JILT* 11.

132 Pistorius 2008 *JILT* 14.

common law of contractual mistake can be adopted in the determination of the materiality of an input error. Accordingly, an input error will be material if it relates to a material term of a contract such as the *mex* or the price.

There is a difference between error prevention and correction techniques. It appears from available literature that "error prevention" techniques are used to prevent the sending of the erroneous message, while "error correction" techniques on the other hand are used to enable the user to correct an erroneous message already send.¹³³

The UETA has a much similar provision to the effect that:

In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and...¹³⁴

As a means of preventing the sending of an erroneous message, some interactive websites provide a confirmation service that enjoins the user to confirm the submission of his online order, for instance, by way of a dialogue box asking the user "Are you sure you want to submit this order?". This is in short a technique which can be adopted to prevent the sending of an erroneous message. The user can click on the "no" button if he feels that there is an error in his message, or he may click "yes" to confirm the contents of his message. As an error correction technique, after the sending of the electronic message, the electronic agent may send the message back to the user for confirmation before the contract is concluded.¹³⁵ It appears that another fundamental difference between error prevention and error correction techniques is that in cases of error correction, the electronic agent must provide the user with the full record of the transaction, and the opportunity to edit or correct the record.

There are many controversial issues related to section 20 (e) (i), first amongst which is the question whether a valid contract will be concluded if the electronic agent provides either an error prevention or correction technique, but the natural person

133 Wright *The Law of Electronic Commerce* D-32. See also Pistorous 2008 *JILT* 13.

134 Sec 10 (2).

135 Pistorius 2008 *JILT* 13.

still commits an input error? Unlike the ECT Act, UETA provides that where the electronic agent has provided the user with an opportunity to control his error but that party nevertheless fails to do so, the effect of the error will be governed by other laws, including the law of mistake, and the parties' contract, if any.¹³⁶ It is clear from this provision that the mere fact that the user or natural person failed to prevent or correct the error despite the availability of an opportunity to do so does not necessarily mean that he will be held to the contract, he can still be relieved *inter alia* by application of the law of mistake. The absence of a similar provision in the ECT Act is likely to breed contradicting opinions in the interpretation of section 20 (e) (i). Despite the silence of the ECT Act on this matter, the mere fact that the user has failed to use any of the available error control techniques does not necessarily mean that he must be held to the contract. In the first place, it is clear under such circumstances that there is a unilateral mistake in the contract, and the ordinary law of unilateral mistake will free the user from the contract.

4.3.4.2 Notice of error

Section 20 (e) (ii) provides that the natural person who has committed an input error in transacting with an electronic agent must give the other party notice of the error as soon as is practically possible. In comparison with a similar provision in the UETA, this provision is very vague. The ECT Act does not address the issue as to what purpose the notice must serve. Can such notice be used to request the other party to provide an error correction opportunity where same was not provided prior to conclusion of the contract? The silence of the ECT Act on this issue is rather strange, because it is generally acknowledged that for the user or natural person to have the protection of section 20 (e), he must comply with the requirement of notice,¹³⁷ which makes the notice central to the remedy contemplated under section 20(e). The UETA on the contrary is clear that:

¹³⁶ Sec 10(3).

¹³⁷ Pistorius 2008 *JILT* 13.

...the individual [user] must promptly notif[y] the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person...¹³⁸

Secondly, the UETA provides that this provision may not be waived by agreement.¹³⁹ What this means in essence is that the user must strictly comply with the requirement of this provision.¹⁴⁰ The notice must advise the owner of the electronic agent of the presence of an error in the message and must state in express terms that the user intends to avoid the contract on that ground. With regard to the ETC Act, due to the relaxed nature of the section 20(e) (ii), it can be interpreted to require that the party who has committed an error advise the other party of the intention to avoid the contract on the ground of that error. Another important question is whether the notice must clearly identify the portion of the message which is erroneous to the other party, or whether it only suffices that the error is communicated in a general statement? The erroneous portion of the message must be clearly identified to the other party, to enable him make up his mind whether there was indeed an error or whether the user merely seeks to avoid the contract for ulterior motives.

Concerning the quickness or promptness of the notice of error, it is generally agreed that each case will be judged on its own practicalities,¹⁴¹ and one of the factors to be taken into account is the ability of the user or natural person to determine how to contact the person operating the electronic agent.¹⁴² Lastly, in terms of South African common law of contract, a party who fails to effect notice on time despite his ability to do so or who fails to give notice altogether may be held to the contract by application of the principle of quasi-mutual assent. In short, he may be taken to have conducted himself in a manner that gave the other party a belief that a valid contract was concluded on the terms of the contract.

138 Sec 10(2) (A).

139 Sec 10 (4).

140 Wright The *Law of Electronic Commerce* D-32.

141 Wright The *Law of Electronic Commerce* D-32.

142 Pistorius 2008 *JILT* 13.

4.3.4.3 Reasonable steps to return or destroy performance

Section 20(e) (iii) provides that the party who has committed an error must take reasonable steps, including steps that conform to the other person's instructions to return any performance received, or if instructed to do so, to destroy that performance. This provision contemplates the remedy of restitution, restitution of performance and not *restitutio in integrum*, as a reasonable step where performance has been rendered in error. Where return of performance is impossible, the other party may require the user to destroy the performance. In short, this is meant to ensure that the other party retains control of the performance effected in error.¹⁴³

The above provision must be read in conjunction with section 20 (e) (iv) which provides that the natural person in issue must not have used or received any material benefit or value from any performance received from the other person. If the natural person has already received performance, he must not have derived any material benefit from it. This provision prevents a party from avoiding the contract if he has received performance that cannot be returned or destroyed.¹⁴⁴ For illustration, a person who buys updates for an internet security antivirus, and who does actually use those updates to update his antivirus will lose the protection of section 20 (e) because he would have received a material benefit from the performance. Another relevant example is where a party has received performance in a form of information, once he reads the information, perhaps a secret recipe, he has already received a material benefit from it, and the return of the information will serve no good purpose.

4.4 Input errors and consumer protection

Section 43 (2) of the ECT Act provides that the supplier of goods on a website must provide the consumer with an opportunity to review an entire electronic transaction,¹⁴⁵ to correct any mistake¹⁴⁶ and to withdraw from the transaction before

143 Wright *The Law of Electronic Commerce* D-33.

144 Wright *The Law of Electronic Commerce* D-33.

145 Sec 34 (2) (a).

146 Sec 34 (2) (b).

finally placing an order.¹⁴⁷ When goods are sold online through an interactive commercial website, the owner of the web site will normally use an electronic agent to interact with his customers. There are a few differences between the general provisions on automated transactions discussed above, and those dealing specifically with issues of consumer protection. In the first place, as has been shown, the effect of input errors in automated transactions is that the contract so concluded is void provided the terms of section 20 (e) have been met, but in terms of section 43 (3) a consumer contract is voidable within 14 days of the consumer receiving goods or services. However, note must be taken that where the consumer has made a material error, section 20 (e) will still apply;¹⁴⁸ all that will determine whether a consumer contract is void or voidable is the type of error in question.

Secondly, while under general automated transactions provisions, the natural person cannot avoid the contract if he has already used the performance,¹⁴⁹ the provisions on consumer protection make no mention of this issue, all which is required is that if the consumer cancels the transaction, he must return the goods and be refunded.¹⁵⁰ Lastly, section 44 (1) provides that a consumer can cancel within seven days any transaction for supply of goods or services without reason and without penalty. However, a customer who cancels the transaction may be liable for the costs of returning the goods to the supplier.

4.5 Conclusion

This chapter showed that input errors are governed by the ECT Act and not the common law. According to the ECT Act a contract concluded by electronic agents on one or both sides is valid and enforceable. Secondly, for the terms of the contract to be binding on a natural person dealing with an electronic agent of another, such terms must be capable of being reviewed by the natural person before conclusion of the contract. Thirdly, according to the law, the actions of an electronic agent are binding on its owner unless the agent did not properly execute its programmed

147 Sec 34 (2) (c).

148 Pistorius 2009 *JILT* 6.

149 Sec 20 (e) (iv).

150 Secs 43 (a) and 43 (b).

mandate. Furthermore, the legal effect of input errors in automated transactions is to render a contract void. For a party who has made an input error to succeed in his claim, he must show that (1) the electronic agent with which he was dealing did not provide him with an opportunity to correct his error (2) he must give notice of his error to the other party (3), he must take reasonable steps to return or destroy any performance so rendered (4), and he must not have derived any material benefit from performance already rendered. This chapter also investigated the relationship between input errors and consumer contract. The next chapter shall investigate the treatment of input errors under the UNECIC.

CHAPTER 5

5 The treatment of input errors under the United Nations Convention on the Use of Electronic Communications in International Contracts (2005)

5.1 Introduction

On 23 November 2005, the United Nations General Assembly adopted the *United Nations Convention on the Use of Electronic Communications in International Contracts (2005)* (hereinafter the UNECIC). As of November 2006, the convention had already been signed by eight states, including the Central African Republic, China, Lebanon, Madagascar and Senegal.¹⁵¹ To date, it has been signed by a total of nineteen states, and has been ratified by two states, namely the Dominican Republic and Honduras.¹⁵² UNECIC entered into force on the 1st March 2013,¹⁵³ and it is the very first convention ever adopted specially for the treatment of international commercial electronic transactions.¹⁵⁴ The main objective of the convention is the adoption of uniform rules with the aim of removing obstacles to the use of electronic

151 Polaski 2007 *JICLT* 112.

152 UNCITRAL 2013 http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005_Convention.html.

153 Lemay 2013 <http://www.unis.unvienna.org/unis/pressrels/2013/unisl181.html>.

154 Polaski 2007 *JICLT* 112.

communications in international contracts to enhance legal certainty and commercial predictability.¹⁵⁵

The aim in this chapter is to ascertain the legal framework applicable to the treatment of input errors when they occur in an international electronic contract. As a preliminary step to the investigation of the issue central to this work, it will be of utmost importance first to discuss the scope of application of the UNEDIC. The issue of applicability is important and relevant to the extent that the Convention does not apply to every international electronic contract, but only to Contracts concluded under circumstances envisaged therein. Secondly, and this issue is closely affiliated with the question of the applicability of the UNEDIC, this Chapter shall also cover the definition of an "international electronic contract" for purposes of application of the Convention.

5.2 Scope of application of the Convention

If, or when, a dispute arises between parties to a contract that have their places of business in different states, the first question to answer will always invariably relate to the legal system governing the formation and validity of the contract.¹⁵⁶ Normally, where the contract contains no choice of law clause, the proper law¹⁵⁷ of the contract will be determined by the court in line with the principles of private international law. For purposes of present considerations, the important question is: When will the UNEDIC apply to an international electronic contract?

Article 1(1) provides that the UNEDIC shall apply to the use of electronic communications in connection with the formation of a contract between parties whose places of business are in different states. In this sense, the main emphasis is

155 See the Preamble to the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).

156 Eiselen 2007 *PER* 11.

157 "Proper law of contract" is an expression used to indicate the appropriate legal system governing an international contract as a whole or a particular issue raised by the contract, and where parties have made an express choice of law to govern such contract their choice should be upheld. See generally *Ekkehard Creutzburg v. Commercial Bank of Namibia* [2006] All SA 327 par [9].

the "internationality" of the contract,¹⁵⁸ and so where it is not apparent from the contract or the dealings between the parties that their places of business are in different states, the convention will not apply.¹⁵⁹ Unlike other international instruments, such as the *United Nations Convention on the International Sale of Goods* (1980) (hereinafter referred to as the CISG),¹⁶⁰ the UNECIC does not require both parties to be located in the Contracting States in order for it to apply to their transaction.¹⁶¹ This means in short that the UNECIC will apply either if the law of the Contracting State is the law chosen by the parties to govern their contract, or if no such choice was made, it will apply if the law of the Contracting State is applicable in terms of the rules of private international law of the forum.¹⁶²

The scope of the application of the UNECIC is undeniably very broad in comparison to that of the CISG, but it has the setback of uncertainty. As correctly observed by one author:¹⁶³

...with the CISG, the requirement that both parties be from contracting states allows the parties to determine easily whether or not the Convention applies to their contract, without having to apply rules of private international law to identify the applicable law. This narrower application of the CISG is thought to be compensated for by greater legal certainty

The uncertainty regarding the applicability of the UNECIC is introduced by the fact that, to an extent, its applicability is dependent on rules of private international law.¹⁶⁴ Nevertheless, the issue of uncertainty regarding the applicability of the convention is unnecessarily overrated because it can be easily cured by the parties inserting a choice of law clause in their contract. For instance, if the parties want the convention to apply, they are free to insert a choice of law clause to that effect in their contract to remove the uncertainty of conflicts of laws, and *vice-versa*.¹⁶⁵

158 United Nations *United Nations Convention* 31.

159 Art. 1(2).

160 Art. 1(a) of the CISG it is to the effect that the Convention will apply *inter alia* to an international contract for the sale of goods where the parties to the contract have their places of business in different states which are Contracting states.

161 Gabriel 2006 *Unif. L. Rev.n.s* 290.

162 Chong and Suling 2006 *SAC LJ* 120.

163 Gabriel 2006 *Unif. L. Rev.n.s* 291.

164 Eiselen 2007 *PER* 12.

165 According to article 3, the parties may exclude the application of the whole Convention, or they can derogate or vary the application of any of its provision.

5.3 International electronic contract

As pointed out already, article 1(1) of the UNECIC provides that the convention applies to the use of electronic communications in connection with the formation of a contract between parties whose places of business are in different states. That notwithstanding, the contract will not be regarded as "international" if the parties were both unaware of that fact either before or at the time of conclusion of the contract.¹⁶⁶ The term "contract" is given a wide meaning under the UNECIC; it includes not only contracts for sale of goods or services, for instance according to article 20 (1), the UNECIC will also apply where other international commercial conventions such as the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1959) and the CISG are applicable. This means in short that other kinds of contracts such as independent guarantees, letters of credit and arbitral agreements are contracts for purposes of the UNECIC.

In terms of article 2 the UNECIC does not apply to electronic communications relating to contracts concluded for personal, family or household purposes.¹⁶⁷ This provision excludes consumer contracts from the definition of a contract under the convention,¹⁶⁸ consequently from its application. As put by one author:¹⁶⁹

[T]he new Convention is limited to business-to-business (B2B) electronic commerce. Consequently, its provisions do not create any rights or obligations for online entrepreneurs with respect to contracts concluded for personal, family or household purposes (art.2(1)(a)). Therefore, any contracts concluded between professional party and a consumer (B2C) or between consumers themselves (C2C) or between consumers and professional parties (C2B) are excluded from the scope of the Convention.

Secondly, the convention also excludes from its scope transactions on a regulated exchange, foreign exchange transactions, and inter-bank payment systems.¹⁷⁰ Thirdly, bills of exchange and instruments for the transfer of titles are also excluded from the scope of the convention.¹⁷¹ The exclusions introduced by article 2 are

166 Eiselen 2007 *PER* 14.

167 Art.2(1)(a).

168 Gabriel 2006 *Unif. L. Rev.n.s* 292.

169 Polaski 2007 *JICLT* 114.

170 Art. 2(1)(a).

171 Art. 2(2).

absolute, and as such, consumers are completely excluded from the scope of the Convention.¹⁷² This provision is very different from article 2 (a) of the CISG, which only excludes consumer contracts before the conclusion of the contract, the seller neither "knew nor ought to have known that the goods were bought for any such use."

5.4 Automated transactions and automated message systems

As recognised by one author, one of the main fears in electronic commerce has always been whether "computers can contract."¹⁷³ Article 12 of the UNECIC settles the matter by providing that the absence of human review or intervention in a particular transaction does not by itself preclude conclusion of a valid contract. According to that provision:

A contract formed by the interaction of an automated message system and a natural person, or by the interaction of automated message systems, shall not be denied validity or enforceability on the sole ground that no natural person reviewed or intervened in each of the individual actions carried out by the automated message systems or the resulting contract.

The phrase 'automated message system' has been defined to mean:

[A] computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system.¹⁷⁴

A critical element in the definition of an automated message system is the lack of a human actor on one or both sides of a transaction.¹⁷⁵ In short, an automated message system is essentially an electronic agent as defined in the second chapter of this work. It is important also to note that the convention recognises two main ways in which an automated transaction can be formed, the first being where an electronic agent contracts with a natural person, and secondly where electronic agents contract *inter se*.

172 Report of the Working Group on Electronic Commerce on the Work of its 43rd Session (New York 14 June-2 July 2004) A/CN.9/548 par [101].

173 Gabriel 2006 *Unif. L. Rev.n.s* 288.

174 Art. 4(g).

175 United Nations *United Nations Convention* 41.

The UNECIC does not require prior agreement between the parties authorising the use of an automated message system by one or both of them. The previous chapter argued in relation to South African law that to allow parties to use electronic agents without prior agreement may breed complications. The same argument applies with equal effect to the Convention. For illustration, Article 20(1) of the UNECIC extends its application to contracts under international conventions such as the CISG. Article 15(2) of the CISG provides that an offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. Consider a hypothetical situation where an offer is made by means of a letter, and is revoked by an electronic agent. Is that withdrawal valid? *Prima facie*, the answer is in the affirmative because the convention recognises electronic communications, and so such communications cannot be denied validity or enforcement on the mere ground that they are in an electronic form.¹⁷⁶ However, the determining factor will always be the contract itself, and as the CISG Advisory Council¹⁷⁷ opined:

...A prerequisite for withdrawal by electronic communication is that the offeree has consented, expressly or impliedly, to receive electronic communications of that type, in that format and to that address.

In the absence of such an agreement, it will be for the court to determine the issue from available relevant evidence and other surrounding circumstances. There are strong reasons why the use of automated message systems must be made subject to agreement by the parties, especially in closed systems. Firstly, because the Convention applies mainly to business transactions, and because in current commercial practice, the use of automated message systems such as EDI in such transactions is governed by agreements,¹⁷⁸ the introduction of a requirement of agreement in the Convention would crystallise the already existing practice. Secondly, automated transactions such as EDI are by their very nature closed systems,¹⁷⁹ which means that they operate according to agreed rules, and so to permit any other person or entity to interfere with such closed systems will most likely disrupt other parties' transactions.

176 Art. 8(1).

177 CISG Advisory Council Opinion No.4.

178 Eiselen 1995 *S. Afri. Merchantile. L.J* 2.

179 Chopra and White 2009 *University of Illinois Journal of Law Technology and Policy* 8.

5.4.1 Incorporation of terms

Interestingly, the UNEDIC does not expressly deal with the issue of incorporation of trade terms by reference. The issue of incorporation of trade terms is a very controversial issue in international contracts, more so in electronic contracts where the terms may be incorporated by reference to a mere link.¹⁸⁰ Article 13 leaves the issue for domestic law and it has consequently been advised that web traders should consider the validity of the techniques they employ for incorporation of terms from the point of view of their own domestic law as well as those of their potential trade partners.¹⁸¹

In cases governed by the CISG, the question of incorporation is much more likely to be more complicated because the CISG too does not deal with that issue. At present there is no harmony in the interpretation and application of the CISG in relation to the issue of inclusion of standard terms, and the existing case law and academic commentary is divided on the question of whether the terms were made available to a party.¹⁸²

5.4.2 Attribution of electronic messages sent by automated message systems

The UNEDIC does not contain a specific provision dealing with attribution of messages sent by automated message systems. It only provides in article 4 (d) that an originator, being a person to whom an electronic message is attributable:

...[I]s a party by whom, or on whose behalf, the electronic communication has been sent or generated prior to storage, if any, but it does not include a party acting as intermediary with respect to that electronic communication.

It is submitted that this provision must be read in conjunction with article 12. Article 12 makes it clear that a contract formed by electronic agents is valid and enforceable despite the fact that the actions of the electronic agent were not reviewed by a natural person. By analogy, the owner of an electronic agent will be liable for its

180 Wu 1998 *Jurimetrics* 320.

181 Eiselen 2007 *PER* 84.

182 Eiselen 2011 *PER* 20.

actions despite the fact that he did not review such actions. The attribution of actions of electronic agents is based on the paradigm that such agents are capable to act only within the technical structures of its actual programming.¹⁸³ However, UNCITRAL warned that the phrase 'electronic agent' may only be used for the sake of convenience; in reality electronic agents are different from automated message systems. Consequently, the general principles of agency cannot be used in relation to automated message systems.¹⁸⁴ An automated message system must be viewed as a mere tool of communication, and as such, contracts entered into through such a system will always bind its owner.¹⁸⁵ On this issue UNCITRAL opined that:

In practice, the extent to which the party on whose behalf an automated message system is operated is responsible for all its actions may depend on various factors such as the extent to which the party has control over the software or other technical aspects used in programming the system. Given the complexity of those questions, in respect of which domestic law may give varying answers depending on the factual situation, it was felt that it would not be appropriate to formulate uniform rules...and that jurisprudence should be allowed to evolve.¹⁸⁶

5.5 Treatment of input errors

Quoted in *ex tenso*, article 14 of the Convention provides that:

14. Error in electronic communications

1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and

(b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.

183 United Nations *United Nations Convention* 69.

184 United Nations *United Nations Convention* 70.

185 Chopra and White 2009 *University of Illinois Journal of Law Technology and Policy* 15.

186 United Nations *United Nations Convention* 74.

Each of these provisions shall be considered in turn below.

5.5.1 Input error

The question of mistake and error is closely related to the use of automated messages in electronic commerce.¹⁸⁷ The assumption is that there is a potentially higher risk of a mistake in a nearly instantaneous transaction.¹⁸⁸ The notion of "input error" was discussed in full in the second chapter to this work, and there is no need for repetition here. The UNECIC is clear that an input error can only be committed by an individual who dealt with an automated message system of another person, and the system in issue did not give that individual a chance to correct his error. As such, the type of electronic error covered by the Convention can only occur in interactive websites, not in passive web sites, email, chats or electronic data interchange.¹⁸⁹

The high possibility of errors passing unnoticed in situations involving a natural person and an automated message system places an obligation on the online vendor to provide the buyer with a means of identifying and correcting input errors according to the *internet lex mercatoria*.¹⁹⁰ Although article 14 (1) gives incentives to parties acting through automated message systems to create built in safeguards that enable their contract partners either to correct or prevent the sending of an erroneous message,¹⁹¹ it is generally considered a drawback that the article does not introduce an obligation to use error identification and correction methods.¹⁹² Since article 14 is concerned with the allocation of risk, the owner of an automated message system who fails to provide any error control technique will bear the risk of errors that might occur.

187 United Nations *United Nations Convention* 73.

188 Gabriel 2006 *Unif. L. Rev.*n.s 302.

189 Kuczerawy and Kilian 2007 http://cbke.prawo.uni.wroc.pl/files/ebiuletyn/United_Nations.pdf.

190 *Internet lex mercatoria* is a phrase adopted by Paul Polanski in his contribution to the 18th Bled conference in 2005 in Slovenia. He defines it as customary practices or norms self-developed by the internet community with both an international and cross-cultural character.

191 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

192 Kuczerawy and Kilian 2007 http://cbke.prawo.uni.wroc.pl/files/ebiuletyn/United_Nations.pdf.

5.5.2 *Withdrawal of the error*

Where a natural person dealt with an automated message system which did not offer him an opportunity to either correct or prevent the sending of an electronic message, if there is any error in the message sent, that person has a right to withdraw the erroneous portion of the message.¹⁹³ Withdrawal of the erroneous portion was seen as beneficial in light of the fact that it gives parties a chance to redress errors even after the conclusion of the contract, and does as such strive for the preservation of the contract.¹⁹⁴ One author¹⁹⁵ notes that the main weakness of article 14 (1) is that it does not clarify the issue of the effect of the withdrawal. Although the UNECIC does not distinguish between material and immaterial errors,¹⁹⁶ the withdrawal of the error will not always preserve the contract, in fact, in cases where the erroneous portion relates to a material term of the contract, perhaps the price or description of the goods; the contract will not survive the withdrawal.¹⁹⁷

Moreover, if the natural person who made the error was acting on behalf of another person, the right to withdraw the relevant portion of the message will be exercised by the party on whose behalf the natural person was acting.¹⁹⁸ It has been advised that the right to withdrawal is an exceptional remedy intended to protect a party in error, and not a blank opportunity for parties to repudiate unfavourable contracts.¹⁹⁹ During the drafting of the Convention, a concern was raised that article 14 (1) would defeat its own purpose since the only evidence of the error would be the assertion of the interested party that he made an error.²⁰⁰ UNCITRAL concluded that in determining the existence of an input error, the court must take into account all relevant facts and circumstances.

193 Art.14(1).

194 United Nations *United Nations Convention* 77.

195 MIK 2012 http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3050&context=sol_research.

196 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

197 Mazzota 2007 *RCTLCj* 290.

198 United Nations *United Nations Convention* 71.

199 United Nations *United Nations Convention* 76.

200 Polaski 2007 *JICLT* 117.

5.5.3 Conditions for withdrawal

The right to withdrawal is conditional on the fulfilment of two conditions listed in articles 14 (1) (a) and (b). In sum the two conditions are that the party who committed the error must give the other party notice of his error, and secondly that the party who wants to withdraw must not have derived any material benefit from the performance already rendered. These two conditions shall be considered in turn below.

5.5.3.1 Notice

Article 14(1) (a) provides that the person who committed an error, or the party on whose behalf he was acting must notify the owner of the automated message system of the error as soon as possible after having learned of it. It is clear from this provision that for the notice to be effective, it must not be general, but must actually identify the portion of the message which is alleged to be erroneous. Secondly, the notice must also express the intention by that party not to be bound by the erroneous portion of his message.²⁰¹

Lastly, the UNECIC states that the notice of an error must be made as soon as the error is discovered. As usual, what is soon enough will depend on the individual facts of each case. While this provision conforms to good faith, it has been argued that its main difficulty is that it applies a subjective test.²⁰² On the contrary, it has been suggested that the right to withdrawal should be exercised from the moment when the party who made an error ought to have known of his error, which in most cases will be after examination of the goods. UNCITRAL was mindful not to impose any time limits on the issue of notice, firstly because time limits are a matter of public policy, and secondly because the right to withdrawal is still limited by the second condition which requires that the party in error should not have received any material benefit from the performance.²⁰³

201 United Nations *United Nations Convention* 78.

202 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

203 United Nations *United Nations Convention* 79.

5.5.3.2 Material benefit

If the person who has a right to withdraw the error in his message has already received performance from the other party, and has already used the said performance, he will lose his right to withdraw the error. For example, consider a person who has received performance in the form of information, he will derive a material benefit or value from that information by the mere fact of having read it.²⁰⁴ Secondly, a person who has received performance in a form of a service will not be allowed the right to withdraw his error because he would have already derived a material benefit from the performance. Generally the determination of the issue whether a party has indeed derived a material benefit will be a matter of fact, and the onus will rest on the individual who alleges to have made an error to show that he has derived no material benefit or value from the performance.²⁰⁵

Some researchers suggest that if the performance received loses value with time, the party in error will lose the right to withdraw his error.²⁰⁶ UNCITRAL too was mindful of this fact, and it noted that in such situations, restitution will not be adequate.²⁰⁷ In short, although the buyer would not have derived any material benefit or value from the performance, equity principles require taking the interests of both parties into consideration.²⁰⁸ Consequently, it would not be equitable in such a situation to allow that, by withdrawing the erroneous portion of the message, a party could avoid the entire transaction,²⁰⁹ precisely because the seller will suffer detriment due to such avoidance.

An important issue not addressed by the Convention is the fate of the goods if an input error is found to exist; should the goods be returned to the rightful owner, and if yes, who must bear the costs of the return?²¹⁰ Moreover, can the goods be

204 United Nations *United Nations Convention* 80.

205 Boss and Kilian *The United Nations Convention* 209.

206 Boss and Kilian *The United Nations Convention* 209.

207 United Nations *United Nations Convention* 80.

208 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

209 United Nations *United Nations Convention* 80.

210 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

destroyed? According to UNCITRAL the second issue is left to the *lex fori*,²¹¹ and so it is possible that depending on the position of the domestic law applicable, the goods may be returned or destroyed. For instance, if South African law²¹² is applicable, the goods can be either returned or destroyed if the owner makes that request.

5.6 Article 14 and the law of mistake

Article 14(2) provides that article 14 will not affect the application of any law that may govern the consequences of any error other than an input error. UNCITRAL noted that the aim of Article 14 is to provide a specific remedy with respect to input errors that occur under specific conditions, and not to interfere with the general doctrine of error in domestic law.²¹³ This means in short that, any error which is not an input error will be dealt with under the applicable national law, not the Convention.

5.7 Conclusion

The aim in this chapter was to investigate the treatment of input errors in international electronic contracts under UNECIC. It has been shown that the convention applies only in business-to-business transactions, as opposed to consumer contracts, foreign exchange transactions, promissory notes and other documents of title and transfer of title. Secondly, it has been shown that the Convention will apply to contracts governed by the CISG. The chapter further shows that the Convention does not specifically deal with the question of incorporation of standard trade, and the issue of attribution of electronic messages in automated transactions. Lastly, and this was the issue central this chapter, the discussion demonstrated that the right of withdrawal of the error is a remedy for a party who has

211 Boss and Kilian *The United Nations Convention* 206.

212 As shown in the previous chapter, section 20 (e) (iii) of the *Electronic Communications and Transactions Act 25* of 2005 requires that the person who has made an input error must take reasonable steps, including steps that conform to the instructions to return an performance received or if instructed to do so to destroy the performance.

213 United Nations *United Nations Convention* 80.

made an input error, subject of course to notice of error and the notion of material benefit.

The next chapter covers an overall analysis of the whole discourse, and draws conclusions. In addition, the chapter offers recommendations aimed at improving the position of the law in South Africa and under the UNECIC.

CHAPTER 6

6 Conclusion and recommendations

6.1 Introduction

The central quest in this work was to discover and analyse the legal framework applicable to the treatment of input errors in electronic contracts. The study concentrated on the *Electronic Communications and Transactions Act 25 of 2002*, which is a South African statute regulating electronic transactions in general; and on the *United Nations Convention on the Use of Electronic Communications in International Contracts* (2005). The UNECIC is a new Convention developed by UNCITRAL to regulate the use of electronic communications in the conclusion of international contracts.

The first chapter to this work covered the problem statement, research question, research methodology and the study outline.

The second chapter dealt with the general law of input errors. The main aim was to introduce, and to give an overview of the underlying principles of the law applicable to input errors. Furthermore, the various legal terminologies, such as "automated transaction," "input error," "electronic agent," etc, adopted by the law of input errors were also defined. The chapter showed that an automated transaction is an electronic transaction in which either one or both parties employ or use electronic agents to negotiate and/or conclude a contract. Moreover, it was also demonstrated that an input error will only occur in an automated transaction where only one party is

using an electronic agent and the said electronic agent did not afford the other party dealing in his natural person an opportunity to either prevent or correct his error before conclusion of the contract. The various ways in which an electronic agent can afford a natural person an opportunity to control his error before conclusion of the contract were also explored in that chapter.

The third chapter covered the treatment of contractual mistake in South African common law. Considered in context, the main aim of chapter three was to illustrate the fact that there is a difference between an input error and a contractual mistake. The first difference is that input errors only occur in automated transactions, whereas mistakes occur in both general electronic and traditional forms of contracts. The second difference is that input errors are regulated by the ECT Act, whereas contractual mistakes are left for treatment by common law. In isolation, chapter three dealt with the concept of contractual mistake, the three types of mistakes and the remedies available to the parties in case of each type of mistake. Lastly, the chapter demonstrated that while the common law of mistake might effectively address mistakes in electronic contracts, it is highly possible that it will encounter challenges with online pricing errors.

Chapter four dealt with the treatment of input errors under the ECT Act. The discussion showed that while a greater portion of the ECT Act was drafted on the foundation of the *UNCITRAL Model law on Electronic Commerce* (1996), section 20 was nevertheless framed after similar provisions in statutes of leading jurisdictions like Canada and the US. In relation to the issue central to this discourse, it was demonstrated that the remedy available to a party who has committed an input error is avoidance of the contract. Furthermore that in order to avoid the contract, the innocent party must fulfil the requirement of notice, he must take reasonable steps to return or destroy any performance already rendered pursuant to his error, and he must not have received any material benefit or value from the performance already rendered.

In chapter five, the central task was to discover and analyse the treatment of input errors under the UNECIC. It was demonstrated as a preliminary observation that the

UNECIC does not apply to consumer contracts, but to business-to-business transactions. Secondly, the chapter showed that the UNECIC applies to contracts governed by the CISG and other commercial instruments developed by UNCITRAL. It was furthermore discovered in that chapter that the legal effect of input errors under an international electronic contract is not to render the whole contract void, but rather that a person who has made such an error is afforded an opportunity to withdraw only the erroneous portion of his message. Moreover that in order to exercise that right, he must give the other party notice of his error, and must not have derived any material benefit or value from performance rendered to him on strength of the input error. Lastly, that the UNECIC does not address the issue of contractual mistake in international electronic contracts, but leaves that issue for the *lex fori*

6.2 Analysis of the treatment of input errors under the ECT Act

Section 20 (a) of the ECT Act acknowledges that an agreement may be formed when an electronic agent performs an action necessary for contract formation. An electronic agent is defined in the Act as *inter alia* a computer program used independently to initiate or respond to data messages in an automated transaction,²¹⁴ while an "automated transaction" is defined as an electronic transaction performed by means of data messages in which one or both parties use electronic agents.²¹⁵ As has been noted in the fourth chapter, the ECT Act does not require the existence of prior agreement between parties for a valid use of electronic agents. The legal capacity of electronic agents to contract is based on the premise that such agents have actual authority through programmed instructions to bind their owner.²¹⁶ Consequently, section 20 (c) attributes the actions of an electronic agent to its owner regardless of whether or not he reviewed such actions. Furthermore, section 25 (c) states that the message sent by an electronic agent is that of the owner unless he can show that the agent did not properly execute the programmed mandate.

214 Sec 1.

215 Sec 1.

216 Dodd and Hernandez 1998 *Computer L. Rev & Tech.* J 6.

Section 20(d) enjoins an electronic agent dealing with a natural person to contract to make the terms of the agreement available to such a person before formation of the contract. If the terms are not made available before conclusion of the contract, then such terms do not bind the natural person in issue. However, the contract remains valid and enforceable by both parties.²¹⁷ Where a contract is concluded between a natural person and an electronic agent, and the said electronic agent did not give the person an opportunity to correct his material error, the contract so concluded is void.²¹⁸ However, to succeed in avoiding the contract, the party who has made an error must give the owner of an electronic agent notice of an error as soon as is practically possible after discovering his error.²¹⁹ The ECT Act is nevertheless silent on the form and substance of the notice; it does not say whether the notice must take a form of a declaration of avoidance of contract, or whether it must identify the alleged error in the message. He must also take reasonable steps to return, or to destroy if so directed by the owner thereof, the performance already rendered.²²⁰

There are many problems with the manner in which the ECT Act deals with input errors. The first problem being that the ECT Act does not differentiate between the use of electronic agents in closed systems such as EDI and open systems such as interactive commercial websites. As a result, third parties are offered the liberty to interfere with the operation of the closed systems of other parties without any regard to their rules of interaction agreed upon in their interchange agreements. The second difficulty with the ECT Act is that it does not give any directions as to the form or substance of the notice discussed above.

6.3 Analysis of the treatment of input errors under the UNECIC

The treatment of input errors under the UNECIC is very different from the approach of the ECT Act. Article 14 (1) (a) of the UNECIC does not require a mistake to be material for it to qualify as an input error. Secondly, the person who has made an input error cannot avoid the contract; he can only withdraw the erroneous portion of

217 Pistorius 2008 *JILT* 11.

218 Sec 20 (e).

219 Sec 20 (e) (ii).

220 Sec 20(e) (iii).

his message. The issue of notice of error is also well addressed in the UNECIC. Article 14 (1) (b) unambiguously enjoins the party who has made an error to notify the other party of his error as soon as possible after discovering it. The said notice must indicate that an error was made in the message. The notice must not be general but must actually identify the erroneous portion of the message that should be withdrawn. The last requirement is that the party who has made an error must not have derived any material benefit or value from the performance already rendered.²²¹

The issue of attribution of electronic communications and actions to the owner of a non-human agent too is treated in a different manner. First of all, the UNECIC does not use the phrase electronic agent, except for convenience. The proper term under the UNECIC is "automated message system." The difference is that an electronic agent is an agent, *albeit* a non-human agent, an automated message system on the other hand is not an agent but a mere tool of communication. The consequence here is that unlike under the ECT Act, where the principles of agency are applicable to determine the liability of a party for the actions of his agent, the law of agency is not applicable to automated message systems,²²² which exposes its users to a higher potential for liability.²²³

Regarding the use of automated message systems, the UNECIC does not require prior-agreement from the parties. Parties can use automated message systems at any time for any purpose during conclusion of the contract. The same arguments advanced against the ECT Act on this issue are equally applicable to the UNECIC. Lastly, the UNECIC does not deal with the issue of incorporation of terms into the contract, which brings much uncertainty. Article 13 leaves the issue whether terms and conditions have been properly incorporated into a contract to the *lex fori*.

221 Art 24 (1) (c).

222 United Nations *United Nations Convention 70*.

223 Chopra and White 2009 *University of Illinois Journal of Law Technology and Policy* 15.

6.4 Final conclusions and recommendations

The main difference between the approach of the ECT Act and the UNECIC is that the UNECIC does not allow for avoidance of the contract. This remedy has been found proper as it seeks to preserve the contract.²²⁴ However, it is beyond doubt that where the input error that has to be withdrawn relates to a material term of the contract, the contract will inevitably come to an end.²²⁵ The ECT Act on the other hand allows outright avoidance of the contract on the strength of a material input error. This is not a major difference though; in fact in cases of a material error, a contract is doomed to the same fate under both pieces of law.

The problem with the ECT Act and with the UNECIC also, is the fact that they do not differentiate between the use of electronic agents in closed and open systems. This approach is problematic in as much as closed systems operate properly under pre-agreed terms, and are by their very nature exclusive of every third party who has not agreed to the terms. The current position of the law gives third parties liberty to interfere and temper with closed systems of contractual parties without regard to the rules of interaction. The prevailing commercial practice is that closed systems, especially EDI, are operated under interchange agreements, either drafted by the parties themselves or the industry. It is accordingly recommended that both the ECT Act and UNECIC should draw the difference identified above, and should place the requirement of prior-agreement between the parties before they can use electronic agents to transact in closed systems.

Moreover, section 20 (e) (ii) of the ECT Act should be amended to provide more clarity on the issue of notice. In the first place, it must be made clear whether the notice of error should be general, or whether it must clearly identify the alleged error within the electronic message. Furthermore, it must be made clear whether the notice must actually express the intention to avoid the contract. This issue is important because the remedy provided in section 20(e) is wholly dependent on the giving of notice as a first requirement.

224 *Mazzota 2007 RCTLJ* 290.

225 *Mazzota 2007 RCTLJ* 290.

Another issue that should be reconsidered is the issue of error control techniques. Although the ETC Act and the UNECIC do provide incentives to parties acting through electronic agents to create safeguards that enable their contract partners either to correct or prevent the sending of an erroneous message,²²⁶ it must be considered a drawback that both these pieces of law do not introduce an obligation to use error identification and correction methods.²²⁷ As one author correctly observes, the *internet lex mercatoria* obliges the online vendor to provide the buyer with a means of identifying and correcting input errors.²²⁸ It is recommended that the provision of error control mechanisms in automated transactions must be made obligatory for every online merchant.

226 Masadeh and Bashayreh 2006 <http://sljournal.uaeu.ac.ae/issues/31/docs/6.swf>.

227 Kuczerawy and Kilian 2007 http://cbke.prawo.uni.wroc.pl/files/ebiuletyn/United_Nations.pdf.

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