LEGAL CONSIDERATIONS AROUND ECOMMERCE

Category: Commercial Law
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We live in an ever globalised and connected world where it is possible to buy someone lunch across borders using a website or a mobile app. As the sale of goods and services from website and mobile apps increase, the appetite for online shopping continues to grow. However, various legal considerations should be made when selling goods or services online. Below is a brief summary of some considerations that should be made by an online business.

The validity of the eCommerce contract:

The Electronic Communications and Transactions Act 2002 ("**ECTA**") is the primary legislation regulating eCommerce in South Africa. The ECTA provides for the facilitation and regulation of electronic communications and transactions, including issues relating to electronic signatures, consumer protection, electronic evidence, and cybercrimes. Its primary objective is to facilitate and provide legal certainty on e-commerce and electronic records.[1] Electronic contracts are only valid if they meet the requirements (*essentialia*) of contracts. This means that for the contract to be valid, there must be an offer, acceptance of that offer, intention to create a binding relationship, consensus between the contracting parties, that the parties must have legal capacity and competency to effect the transaction and lastly, the contract must be legal and Section 22(2) of ECTA regulates the times and places for the conclusion of electronic contracts. The section stipulates that an agreement concluded between parties by means of data messages is concluded at the time when and place where the acceptance of the offer was received by the offeror. This provision is, however, applicable only where the parties have not expressly varied the rules of ECTA by means of a contract.[2] Furthermore, Section 26(1) provides that the agreement is valid upon receipt of the acceptance of the offer and it is not necessary for the offeror to acknowledge receipt.

Payment System

An eCommerce business allows for a growing number of ways to accept payments. Section 43(5) of the ECTA requires that the supplier, in an electronic transaction, must 'utilise a payment system that is sufficiently secure with reference to accepted technological standards at the time of the transaction and the type of transaction concerned'. The most common secure methods of accepting payment in

eCommerce business are card payments. Consideration of the types of payment system which will be used to secure the payment, leaves a lot of legal questions relating to how the consumer[3] will pay, and whether that payment can be considered legal tender. Further, there must be a clear undertaking by eCommerce business that all domestic card transactions adhere to all applicable domestic issuing, acquiring, clearing and settlement rules and procedures.[4]

Data Protection

It's essential that an eCommerce business complies with provisions of data protection laws in its chosen jurisdiction. In South Africa, the Protection of Personal Information Act ("**POPIA**") considers how controlling contractors or responsible parties, ensure the lawful processing of personal information. Furthermore, it introduces consequences for non-compliance and poor protection of user data, specifically, personal information. POPIA will hopefully come into force from 1 April 2020, with a grace period of one year which starts running from the commencement date.

Jurisdiction

An eCommerce business has the capacity to cross borders effortlessly. It is therefore imperative, for the purposes of an agreement, that a contract provide for a forum selection clause that expressly states the governing law of an agreement in a manner that leaves no doubt as to where the binding nature of the contract lies.

If you have an eCommerce business or moving to start an eCommerce business, consider these legal considerations of eCommerce and contact us for more good, clear, precise advice.

[1] S Snail, 2012, '*Electronic contracting in South Africa (e-contracts)*' Cyberlaw@SA III pg. 41 – 59

[2] See section 21- 23 of the Electronic Communications and Transactions Act of 2002; Op cit pg.44

[3] Section 1 of ECTA is defines A "consumer" as any natural person who enters or intends entering into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier.

[4] For further details kindly examine amongst other South African Reserve Bank Act: Directive No. 1 of 2020 *Directive for conduct within National Payment System: Domestic card transactions2020* on https://www.gov.za/sites/default/files/gcis_document/202002/43033rg11044gon181.pdf (last accessed 09/03/2020)