

# HIPSSA Project

Support for Harmonization of the ICT Policies  
in Sub-Sahara Africa

TRANSPOSITION OF SADC CYBERSECURITY MODEL LAWS INTO  
NATIONAL LAWS FOR NAMIBIA, 2013

## Capacity Building on Electronic Transactions Bill

22nd of July 2013



# CASE LAW

- Scope of application
- Time and place of e-contracting
  - Writing
  - Signature
    - Advanced electronic signatures
- Amendment of existing agreements electronically
- Incorporation by reference



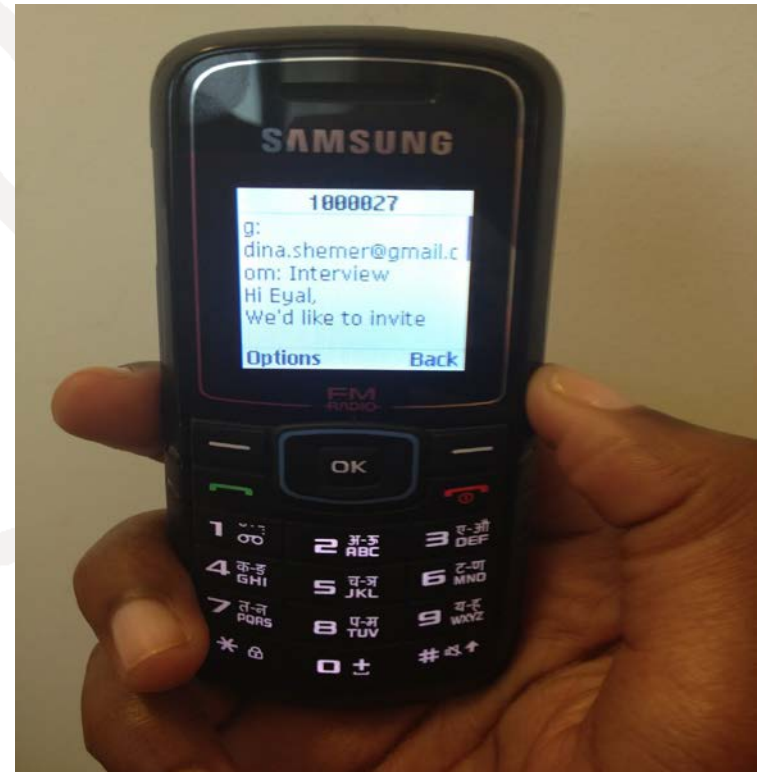
Scope of application

# SCOPE OF APPLICATION



# SMS sent in Haste

- *SIHLALI, MAFIKA v SABC* CASE NO: J 700/08
  - Suspended
  - SMS message to Chairperson of Board resigning





- Resignation accepted via e-mail message and a follow-up letter
- Retraction – not proper resignation
- Not able to retract after resignation was accepted

# *Sims v. Stapleton Realty, Ltd*

- *2007 Wisc. App. LEXIS 741 (August 23, 2007)*
- The Sims had entered into a listing contract with Stapleton 5% commission sale of the property
- Parties lowered the commission in pen & ink but not term of the listing contract
- E-mail Sims agreed Stapleton entitled to commission even though beyond term
- Sims disputed commission





# Electronic amendment

- Stapleton asserted that the emails constituted a written document under Wisconsin's Uniform Electronic Transactions Act
- Court of Appeals held parties had effectively amended a paper-based real estate listing contract by email
- **Recognition that the Bill will have great consequence applies to existing law also as far as contracts are concerned**



# SMS sent in Haste (2)

- Bill will apply to common law & statutes
- Legal recognition of SMS as writing – several consequences
- Message content & medium acceptable as written resignation
- Importance: recognition that the Bill will have great consequence **applies current contracts**





# TIME AND PLACE OF CONTRACT FORMATION



# Julia's example: Where and when is the contract formed?

- Sisi accesses Julia's web site <http://www.julia.co.na> and she completes online order form for a leritswana.







# WHERE AND WHEN?

Fred, a breeder based in Windhoek, sells puppies on [www.fredbulterries.co.na](http://www.fredbulterries.co.na). Sue, of Nairobi, completes an on-line order form on Friday. She receives an e-mail from Fred informing her that she will be the owner of a puppy when proof of payment is received. She pays and send proof of payment. Fred's power is switched off and he cannot switch on his computer. On Sunday he sells all five puppies to his neighbour. Does Sue have an action for

breach of contract?



# Theories

- Theories:
  - Information theory
  - Mailbox/ Postal theory



Committed to connecting the world

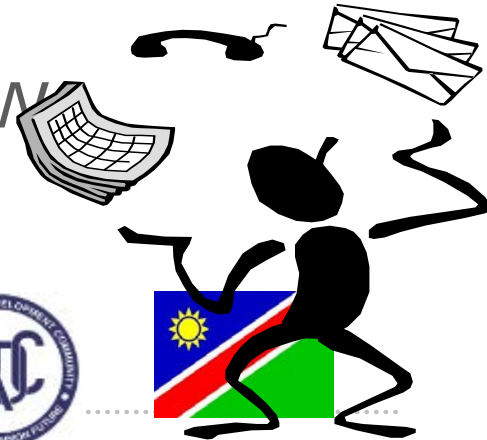


European Commission



# Place of Contracting

- *Locus contractus* - place of last step for completion of contract
- Place posted; Location of mailbox;
- inter partes place where you were where meeting of minds
- If you know when, you know where!





# Difficulty in applying paper-based rules

- Time – E-communications “instantaneous”?
- Mobile devices - place where last step taken....anywhere

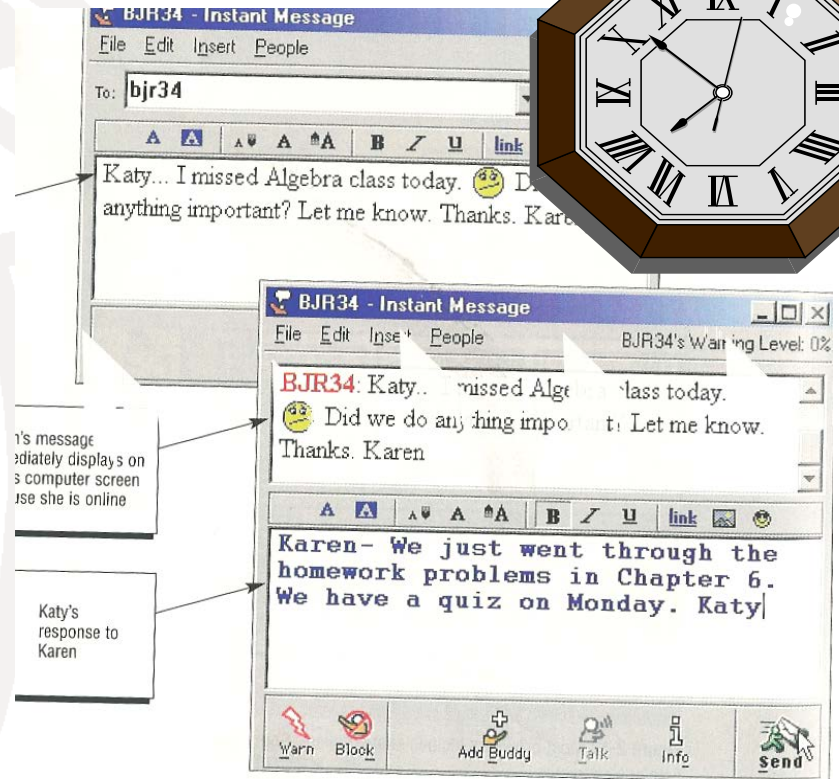
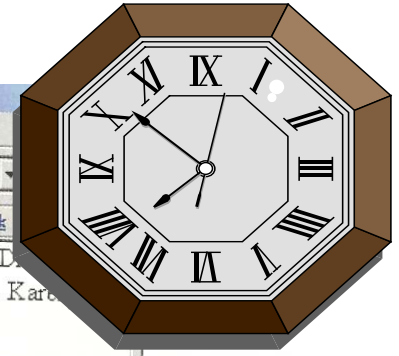


Figure 2-33 Instant messaging is a real-time Internet communications service that notifies you when one or more people are online and then allows you to exchange messages or files or join a private chat room with them.

# E-mail not instantaneous

- Prof Chandler: 11 seconds
  - Received: from mail1.unisa.ac.za (mail.unisa.ac.za [163.200.216.139]) by alpha.unisa.ac.za; Tue, 21 Sep 2004 17:16:42 +0200
  - Message-ID: <415045C6.3C77480E@uottawa.ca> Date: Tue, 21 Sep 2004 11:16:23 -0400



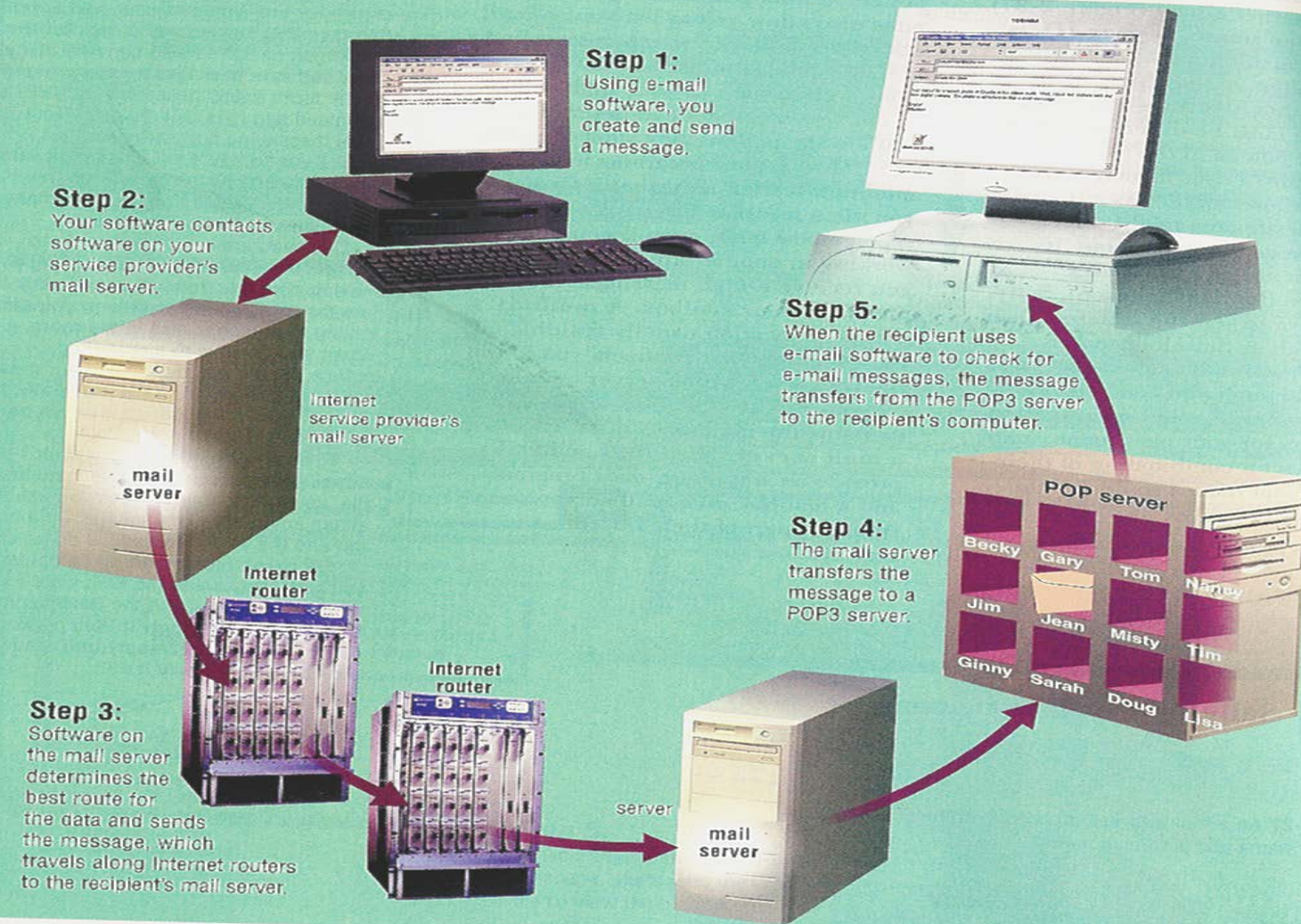
# Sometime it takes longer...

- Unisa student: 2 hours 3 seconds
  - Received: from mail1.unisa.ac.za (mail.unisa.ac.za [163.200.216.139]) by alpha.unisa.ac.za; Thu, 23 Sep 2004 20:46:44
  - Received: from mail.telkomsa.net (nobelium.telkomsa.net [196.25.69.102]) by mail1.unisa.ac.za (Postfix) with ESMTP id 39640340F9 for ; Thu, 23 Sep 2004 20:46:42 +0200 (SAST) Received: (gmail 20465 invoked by uid 104); 23 Sep 2004 18:46:40



# Illustration

FROM THE SENDER TO THE RECEIVER



# Namibian Bill: Reception theory

Where parties conclude a contract by means of data messages, such contract is formed at the time when and the place where the acceptance of the offer becomes effective.

(2) An offer: effective at the time it is received by the offeree.

(3) The acceptance of an offer effective: at the time that it is received by the offeror.



# Julia's example: Where and when is the contract formed?

- Sisi accesses Julia's web site <http://www.julia.co.na> and she completes online order form. It is automatically accepted by Julia's information system.
- Time acceptance received by offeror
- Acceptance enters Sisi's designated information system – whether she reads it or not





# BPuppies: WHERE AND WHEN?

Fred, a breeder based in Maseru sells puppies on [www.fredbullterries.co.ls](http://www.fredbullterries.co.ls).

Sue's proof of payment entered Fred's info system on Friday. Objective requirement – fact that Fred's power is switched off and he cannot switch on his computer is **irrelevant**.



# Case law: Lost in cyberspace



visualparadox.com



# CASE LAW: E-CONTRACTS





# Jafta v Ezemvelo KZN Wildlife [2008] 10 BLLR 954 (LC)



- Jafta: offer of employment on condition that he accepts by 24h00 31 December 2007



# The plot thickens...

- He is travelling and later that same evening received an SMS from Wildlife's HR Manager stating that Wildlife needed to know whether Jafta was going to accept its offer.
- Jafta replied by SMS:
  - Have responded to the affirmative through a letter emailed to you this evening for the attention of your CEO. Had problems with email I had to go to internet café.
- Wildlife never receives his e-mail. Wildlife hired the next candidate and Jafta sued for breach of contract



# Was a contract formed?

- At trial, the HR Manager denied receiving Jafta's e-mail but admitted receiving the text, although she could not recall seeing the word "affirmative" in it.
- Wildlife's defense: there was never a contract, because its offer had not been validly accepted.





## *Jafta court*

- The Court held: Jafta's SMS reply "to the affirmative" was a direct and unequivocal acceptance of the offer and formed a valid contract.

Text messages may seem casual, it would be a mistake to treat them as having no legal effect. A valid and enforceable contract can be formed through the exchange of text messages.



# Jafta

- Court criticised ECT Act –
  - no provision for risk allocation if data messages lost in cyberspace
- ECT Act clear – sent not received - Contract not formed - **Lost in cyberspace...**
- Designated information system or system used for that purpose – SMS message from HR



- Burden of use of technology has shifted
  - Postal – offeror risk
  - E-communications addressee carries risk

# SM Integrated Transware Pte Ltd v Schenker Singapore

- Singapore: High Court[2005] SGHC 58 **Question: can an exchange of e-mails can result in binding lease agreement?**
- Civil Law Act (Cap. 43) ("CLA") requires for a lease of land a written memorandum or note evidencing the terms of the agreement and the signature of the document by the person against whom the contract was to be enforced (section 6 (d) of the CLA1).



# E-mails contained lease agreement

- The court held:
  - Plaintiff's e-mail with draft lease as attachment & the defendant's e-mail reply accepting the terms amounted to a memorandum in the meaning of article 6 of the CLA, as they contained the essential terms of the lease.
  - NOTE: Illustrates incorporation by reference



# Lease signed by lessor?

- Court held the common law concept of “signature” loosely interpreted - typewritten or printed form of a signature are sufficient.
- Typewritten form = signature typed e-mail
- *In casu* the **signature requirement was met** even though the sender’s name was not typed into the e-mail, but only appeared in a line reading “From: [sender’s name]...”, if:
  - the sender knew that his name appeared at the head of every message next to his e-mail address so clearly that there could be no doubt that he was intended to be identified as the sender of the message (art. 7 (1) (a) MLEC).



# Incorporation by reference

- Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.
- Best practice: Ticket cases



Were terms expected?



Yes

No

Would reasonable person have noted the incorporation?

Not bound

Yes.....

No



**Bound whether terms were read or not.**



# Example

**New Tariffs** New Telkom tariffs w.e.f. 1 August 2007... [more>>](#)  
**Buy a PC from Telkom!** Buy a PC on your Telkom account for as little as R219.37 per month... [more>>](#)  
**Telkom PrepaidFone Waya-Waya** Stay connected all year for R120 and ringa waya-waya [more>>](#)  
**Moving home?** Now Telkom SmartMoves has an easy to use service to inform your friends and family your new contact details in one go!..... [more>>](#)  
**Let your opinion be heard...** Have your say and earn exciting rewards... [more>>](#)  
[Home](#) | [PAIA](#) | [Terms & Conditions](#) | [Proudly South African](#)

© Telkom SA Limited. 2007. All Rights Reserved

Reserved



.....  
© IN TERMS OF SECTION 11 OF THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS (ECT) ACT 25 OF 2002 AND THE COMMON LAW OF CONTRACT, THESE TERMS AND CONDITIONS ARE VALID, BINDING AND ENFORCEABLE AGAINST ALL PERSONS THAT ACCESS THE TELKOM WEBSITE, WEB PAGES OR ANY PART THEREOF.

IF YOU DO NOT AGREE TO BE BOUND BY THESE TERMS AND CONDITIONS YOU MAY NOT USE THE TELKOM WEBSITE. REASONABLE USE OF THE TELKOM WEBSITE SHALL AUTOMATICALLY BIND THE USER TO THIS AGREEMENT.

### DEFINITIONS AND INTERPRETATION

Hyperlinks herein to legal documents should be deemed part of these terms and conditions in terms of section 11(3) of the ECT Act. **The fact that some or all of the hyperlinks may, from time to time, be non-operational, shall not affect the validity and interpretation of these terms and conditions.**

f) Telkom's Standard Terms and Conditions for the provision of Public Switched Telecommunication Services (also referred to as the "Abridged Conditions of Contract)". Please [click here](#) to access the Abridged version

as well as the complete set of Terms and Conditions.

Online Bill Terms and Conditions  
Ease-e-Bill Terms and Conditions

.....  
Committed to connecting the world

European  
Commission



## Best practices links:

Referred to in a way in which a **reasonable person would have noticed the reference thereto** and incorporation thereof

- Font size / colour
- Place on web page

Links **MUST** work



# Conclusion

- Application of rules on electronic transactions
- Paper-based contracts e-amended
- Common law applied e-contracts
- Incorporation by reference – links must be visible and must work





---

# THANK YOU...

**Tana Pistorius**  
ITU INTERNATIONAL EXPERT  
[pistot@unisa.ac.za](mailto:pistot@unisa.ac.za)  
Research Professor: UNISA

Union Internationale des Télécommunications  
International Telecommunication Union

