

PROBLEMS RELATING TO THE FORMATION OF ONLINE CONTRACTS: A COMPARATIVE PERSPECTIVE*

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The formation of online contracts has enjoyed considerable judicial and academic attention in American law. Generally, American courts are of the view that the rise of online contracts has not necessitated any changes to the fundamental principles of the law of contract, although commentators argue that the enforcement of online contracts has stretched the requirement of mutual assent beyond recognition. This article engages in a comparative evaluation of these arguments, as well as some proposals contained in the American Law Institute's Draft Restatement of the Law, Consumer Contracts. Ultimately, the aim is to identify whether the principles regarding the formation of contracts in South African law ought to be adapted or supplemented to accommodate online contracts. It is found that both legal systems subscribe to fairly lenient formation requirements. The possibility of recognising more stringent assent-related requirements, such as imposing specific disclosure requirements, is investigated. It is concluded that there is little to be gained by insisting on stricter formation requirements for online contracts in general, because consumers rationally choose not to read these contracts. Instead, recognising these concerns may provide the impetus for increased reliance on other forms of control, most notably regulating the use of certain problematic standard terms.

Contract – formation – online contracts – comparative law

I INTRODUCTION

Standard-form contracts have formed an essential part of commercial practice for a long time and are used in billions of transactions every year.¹ Yet, they remain controversial, mainly due to the general absence of consensus and the fact that they are open to abuse by the drafting party.²

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¹ Yannis Bakos, Florencia Marotta-Wurgler & David R Trossen 'Does anyone read the fine print? Consumer attention to standard-form contracts' (2014) 43 *J Leg Stud* 1 at 1.

² Dale Hutchison 'The nature and basis of contract' in Dale Hutchison & Chris Pretorius (eds) *The Law of Contract in South Africa* 3 ed (2017) 26; P J Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 20; Kevin Hopkins 'Standard form contracts and the evolving idea of private law justice: A case of democratic capitalist justice versus natural justice' 2003 *TSAR* 150 at 153.

It is often unreasonable to expect consumers to read standard-form contracts, because ‘informing oneself is typically more costly than the expected losses from not informing oneself and the prospect of minimal potential influence proportionally adds to this negative calculus’.³

The problems created by these contracts have been exacerbated in the modern technological era, which is characterised by the rise of electronic and online contract conclusion.⁴ Because online contracts are generally lengthier and more ubiquitous than paper-based contracts, it renders reading even more costly.⁵ This aggravates the formation problem associated with standard-term contracts, because it not only decreases the likelihood of true consensus being attained, but also plays a role in the determination of whether the supplier could reasonably rely on the existence of consent. The formation problem is further affected by the impact that the electronic nature of these contracts has on consumer perceptions:⁶ consumers usually have less transactional awareness when contracting online than when concluding an offline transaction.⁷ Therefore, it can be questioned whether clicking or continued browsing — actions generally required for indicating assent to online contracts — may be construed as acceptance of contractual terms.⁸

The enforceability of online agreements has received extensive judicial attention in America, and many of these decisions have attracted criticism.⁹ Analysing these decisions as well as their consequences may provide valuable guidance to South African courts when faced with similar legal problems. The formation of online contracts in the South African context

³ Stefan Grundmann ‘A modern standard contract terms law from reasonable assent to enhanced fairness control’ (2019) 15 *ERCL* 148 at 167. Also see Omri Ben-Shahar ‘The myth of the “opportunity to read” in contract law’ (2009) 5 *ERCL* 1 at 6.

⁴ Studies from 2013 indicate a marked increase in online transactions in the United Kingdom — 72 per cent of adults in the United Kingdom purchased goods or services online (Dasuni Wijayasriwardena ‘Consent in online contracts — mindless or mindful?’ Queen Mary University of London, School of Law Legal Studies Research Paper no. 234/2016 (2016) 3, available at <https://ssrn.com/abstract=2783793>, accessed on 12 August 2020). Also see Mindy Chen-Wishart ‘Regulating unfair terms’ in Louise Gullifer & Stefan Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (2014) 109; Eliza Mik ‘Contracts governing the use of websites’ (2016) *Singapore J Leg Stud* 70 at 74.

⁵ See Sanmarie van Deventer ‘Problems relating to the formation of online contracts: A South African perspective’ (2021) 138 *SALJ* 219 at 225–7.

⁶ Nancy S Kim ‘The wrap contract morass’ (2014) 44 *Southwestern LR* 309 at 316; David A Hoffman ‘From promise to form: How contracting online changes consumers’ (2016) 91 *NYU LR* 1595 at 1606–7.

⁷ Mik op cit note 4 at 79.

⁸ Van Deventer op cit note 5 at 230ff.

⁹ See part II(a) below.

has been addressed previously,¹⁰ and this article will set out the approach in American law, before engaging in a comparative evaluation of the two legal systems. Ultimately, the aim is to identify whether the principles regarding the formation of contracts in South African law must be adapted or supplemented to accommodate online contracts.

II THE GENERAL APPROACH TO THE FORMATION OF ONLINE CONTRACTS IN AMERICAN LAW

(a) *An overview of the judicial approach*

(i) *The development of online contracts in America*

The development of the American approach to the enforcement of online contracts can be traced back to the treatment of shrink-wrap contracts in this jurisdiction. Shrink-wraps — that is, printed standard terms which traditionally accompany computer software sold to a consumer — made their appearance when suppliers in the software industry needed a way to protect their intellectual property in their products.¹¹ This was done by enclosing terms underneath the outer packaging of the product, stating that the purchaser does not become the owner of the software, but merely a licensee,¹² and that these terms become binding when the product is opened.

Because this method means that consumers are only presented with the standard terms drafted by the supplier after the time of contract conclusion, it was argued that the terms of the contract did not form part of the bargained-for exchange.¹³ For this reason, American courts initially refused to enforce these terms.¹⁴ However, in *ProCD Inc v Zeidenberg*,¹⁵ Judge Easterbrook introduced a new approach.¹⁶ It was determined that all that is required for enforcement of the terms of the shrink-wrap to be procedurally fair is '[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable'.¹⁷

¹⁰ See Van Deventer op cit note 5.

¹¹ Batya Goodman 'Honey, I shrink-wrapped the consumer: The shrink-wrap agreement as an adhesion contract' (1999) 21 *Cardozo LR* 319 at 335; Nancy S Kim 'Wrap contracting and the online environment: Causes and cures' in John A Rothchild (ed) *Research Handbook on Electronic Commerce Law* (2016) 13.

¹² Goodman ibid at 332.

¹³ Aaron E Ghirardelli 'Rules of engagement in the conflict between businesses and consumers in online contracts' (2015) 98 *Oregon LR* 719 at 724; Goodman ibid at 337.

¹⁴ Ghirardelli ibid at 724; Goodman ibid at 337; Kim op cit note 11 at 14.

¹⁵ 86 F 3d 1447 (7th Cir 1996) (*ProCD*).

¹⁶ Ghirardelli op cit note 13 at 725; Goodman op cit note 11 at 344.

¹⁷ *ProCD* supra note 15 at 1451.

Although many viewed the court's decision in *ProCD* as based on the particular facts of that case,¹⁸ its applicability was extended shortly thereafter by the same judge in *Hill v Gateway2000 Inc.*¹⁹ It was made clear that the reasoning in *ProCD* applied to the law of contract in general, and was not limited to specific transactions relating to software.²⁰ One reason for the court's finding was that it would be impractical to expect the supplier to recite the entire contract over the phone, because most buyers would end the call and thus terminate the sale.²¹

These decisions created a great deal of controversy. In fact, *Hill* has been described as 'the most criticized contracts case of the last twenty-five years'.²² The decision to enforce shrink-wrap contracts was clearly motivated by economic rather than legal considerations, and was done 'to assist software manufacturing businesses by endorsing a pro-business approach to shrink-wrap contracts'.²³ Although the finding in *ProCD* was perhaps the correct one on the facts of that case,²⁴ taking into account the fact that the consumer was a sophisticated businessman and the particular condition served an important economic function,²⁵ it created a precedent which caused 'a substantial shift in power away from the consumer to the computer software publishers who already occupy the position of superior bargaining power'.²⁶ The new approach allowed suppliers to bind consumers to terms presented to them only after completion of the transaction,²⁷ and further endorsed the idea that consumers may consent to contractual terms through their conduct, even where they are unaware that the specific act would indicate assent.²⁸

Although shrink-wraps are not online contracts, their development indirectly contributed to the acknowledgement of both click-wrap and browse-wrap contracts.²⁹ Click-wraps are online contracts which require the consumer to indicate consent in a positive manner, for example by

¹⁸ See Susanna Maria van Deventer *Regulating the Form and Substance of Online Contracts: South African and Foreign Perspectives* (unpublished LLD thesis, Stellenbosch University, 2020) 22 for a brief discussion of the facts of the case.

¹⁹ 150 F 3d 1147 (7th Cir 1997) ('*Hill*').

²⁰ Kim op cit note 11 at 15. Also see *Hill* ibid at 1148.

²¹ *Hill* ibid at 1149.

²² Hoffman op cit note 6 at 1603. Also see Goodman op cit note 11 at 352; Roger C Bern "'Terms later" contracting: Bad economics, bad morals, and a bad idea for a uniform law, Judge Easterbrook notwithstanding' (2004) 12 *Journal of Law and Policy* 641 at 642–3.

²³ Ghirardelli op cit note 13 at 726.

²⁴ Goodman op cit note 11 at 359.

²⁵ Ibid at 352.

²⁶ Ibid at 344.

²⁷ Ghirardelli op cit note 13 at 727.

²⁸ Ibid at 727.

²⁹ Ibid at 728; Kim op cit note 11 at 18.

clicking ‘I agree’, whereas browse-wraps instead rely on conduct prescribed in the contract (usually browsing the website) as an indication of assent.³⁰

(ii) *The enforceability of click-wraps*

Click-wrap contracts were initially introduced as digital shrink-wraps³¹ — that is, they were loaded on the disk containing software, and the consumer had to agree to the terms when using the disk for the first time.³² When the internet became more commonly used, click-wraps migrated to the online environment and required consumers to agree to terms before continuing with an online activity.³³

Modern click-wraps therefore fundamentally differ from shrink-wraps, because the consumer can review the terms prior to agreement and must give an indication of assent.³⁴ Due to this, click-wraps are generally regarded as enforceable by American courts.³⁵ Authority for this is often found in Article 2-204(1) of the Uniform Commercial Code, which provides that a contract for the sale of goods can be formed ‘in any manner sufficient to show agreement’.³⁶ Furthermore, both the Uniform Electronic Transaction Act (‘UETA’)³⁷ and the Electronic Signatures in Global and National Commerce Act (‘E-Sign’)³⁸ provide that transactions should not be denied legal effect solely because they are in electronic form.³⁹

³⁰ Cheryl B Preston & Eli W McCann ‘Unwrapping shrinkwraps, clickwraps, and browsewraps: How the law went wrong from horse traders to the law of the horse’ (2011) 26 *BYU J Pub L* 1 at 17–18; Mik op cit note 4 at 73; Juliet M Moringiello ‘Notice, assent, and form in a 140 character world’ (2014) 44 *Southwestern LR* 275 at 280.

³¹ See for example *i.Lan Systems Inc v Netscout Service Level Corp* 183 F Supp 2d 328 (D Mass 2002) for the early use of the term ‘click-wrap’. Also see Juliet M Moringiello & William L Reynolds ‘From Lord Coke to internet privacy: The past, present, and future of the law of electronic contracting’ (2013) 72 *Maryland LR* 452 at 464–5; Pieter G J Koornhof ‘The enforceability of incorporated terms in electronic agreements’ 2012 *Speculum Juris* 41 at 44.

³² See Moringiello & Reynolds *ibid* at 464–5 for a discussion on the historical development of the term ‘click-wrap’.

³³ See Nancy S Kim *Wrap Contracts: Foundations and Ramifications* (2013) 39–41.

³⁴ Moringiello & Reynolds op cit note 31 at 465. Also see Tarra Zynda ‘Ticketmaster Corp. v Tickets.com, Inc: Preserving minimum requirements of contract on the internet’ (2004) 19 *Berkley Tech LJ* 495 at 506.

³⁵ Erin Canino ‘The electronic “sign-in-wrap” contract: Issues of notice and assent, the average internet user standard, and unconscionability’ (2016) 50 *UC Davis LR* 535 at 539. See for example *Feldman v Google Inc* 513 F Supp 2d 229 (ED Pa 2007) at 236; *i.Lan* supra note 31 at 336–38. Also see William J Condon ‘Electronic assent to online contracts: Do courts consistently enforce clickwrap agreements?’ (2004) 16 *Regent U LR* 433 at 440–53 for an overview of early click-wrap decisions.

³⁶ Also see Zynda op cit note 34 at 505; Kim op cit note 11 at 17.

³⁷ (1999), 7A(I) ULA 225 (2002).

³⁸ Pub L 106-229, 114 Stat 464 (codified at 15 USCA §§ 7001–7006).

³⁹ See UETA s 7(b): ‘(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation’;

American courts have repeatedly emphasised that online contracts should be treated no differently to their paper equivalent,⁴⁰ and the act of clicking is equated with signing a document.⁴¹ Click-wraps where the icon serves the sole purpose of indicating acceptance are thus deemed effective.⁴² Where enforcement is denied, it is usually due to terms which are substantively unconscionable or which violate public policy, and not because of procedural flaws.⁴³ Clicking triggers the duty to read, and consumers will be held bound to the terms despite their ignorance of the content thereof.

However, the definition of signature in both the mentioned Acts requires the consumer to click with the intention of signing a contract.⁴⁴ It must thus be clearly indicated that clicking amounts to consent.⁴⁵

and E-Sign s 101(a)(1): ‘a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form’. This is similar to s 11 of the Electronic Communications and Transactions Act 25 of 2002.

⁴⁰ *Register.com v Verio Inc* 356 F 3d 393 (2nd Cir 2004) at 403: ‘While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.’ Also see *Fteja v Facebook Inc* 841 F Supp 2d 829 (SDNY 2012) at 839; *Cullinane v Uber Technologies Inc* 2016 US Dist LEXIS 89540 at 17; *Feldman* supra note 35 at 236.

⁴¹ See *Meyer v Uber Technologies Inc* 868 F 3d 66 (2nd Cir 2017) at 75, quoting *Sgouros v TransUnion Corp* 817 F 3d 1029 (7th Cir 2016) 1033–34: ‘Courts around the country have recognized that [an] electronic “click” can suffice to signify the acceptance of a contract,’ and that ‘[t]here is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement’; *Groff v American Online Inc* 1998 WL 307001 (RI Super Ct 1998) 5: ‘Here, plaintiff effectively “signed” the agreement by clicking “I agree” not once but twice.’

⁴² See *Feldman* supra note 35 at 236; *i.Lan* supra note 31 at 336–8. Also see Reporters’ Note to Para 2 of the American Law Institute *Restatement of the Law, Consumer Contracts: Tentative Draft* (2019) (‘the Draft Restatement’) at 46; Juliet M Moringiello ‘Signals, assent and internet contracting’ (2005) 57 *Rutgers LR* 1307 at 1323; Canino op cit note 35 at 539; Nathan J Davis ‘Presumed assent: The judicial acceptance of clickwrap’ (2007) 22 *Berkeley Tech LJ* 577 at 579 and 582.

⁴³ Condon op cit note 35 at 453–4; Comments to Para 2 of the Draft Restatement at 44.

⁴⁴ See UETA s 2(8): “‘Electronic signature’ means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.’ E-Sign s 106(5): ‘The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.’ Also see Moringiello op cit note 42 at 1316.

⁴⁵ See *Specht v Netscape Communications Corp* 306 F 3d 17 (2nd Cir 2002) at 29–30: ‘a consumer’s clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms’. Also see Steven W Feldman ‘Actual agreement, shared meaning analysis, and the invalidation of

For example, in *Sgouros v TransUnion Corporation*,⁴⁶ the court confirmed that a click will only suffice as a manifestation of assent where ‘the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement’.⁴⁷

Hybrid forms of online contracts, which contain elements of both click-and browse-wraps, such as sign-in wraps,⁴⁸ are scrutinised more carefully to determine whether the design made it clear that clicking constitutes agreement to the terms. Despite requiring an affirmative click, they are treated as being similar to browse-wraps because of the ambiguity created where the click does not serve the primary function of indicating assent to the online contract.⁴⁹

(iii) *The enforceability of browse-wraps and hybrid forms of online contracts*

Browse-wraps purport to bind consumers through their conduct (by accessing a website), even though terms are not presented to them at the outset. As with shrink-wraps, American courts were initially reluctant to enforce browse-wraps for two reasons:⁵⁰ the absence of an ‘unambiguous indication of assent’,⁵¹ and the concern that a consumer might be unaware of the existence of the contract.⁵²

Especially the early browse-wrap decisions contradicted each other: while enforcement of the browse-wrap was refused in *Specht v Netscape Communications Corp*⁵³ due the absence of an unambiguous manifestation of assent, the same was not required in *Register.com v Verio Inc*.⁵⁴ The second school of thought, which only requires notice or constructive notice of the terms and regards browsing as a sufficient indication of consent, seems to have prevailed and browse-wraps are thus recognised as a valid method of contract conclusion,⁵⁵ thereby allowing suppliers to bind consumers

boilerplate: A response to Professors Kar and Radin’ SSRN 14 February 2019 at 57–8, available at <https://ssrn.com/abstract=3336377>, accessed on 13 October 2020.

⁴⁶ Supra note 41.

⁴⁷ Ibid at 1033–4.

⁴⁸ See the definition of sign-in wraps in *Berkson v Gogo LLC* 97 F Supp 3d 359 (EDNY 2015) at 399.

⁴⁹ See for example *Specht* (2002) supra note 45 and *Nicosia v Amazon.com* 834 F 3d 220 (2d Cir 2016), discussed below at part II(a)(iii).

⁵⁰ Ghirardelli op cit note 13 at 729; Zynda op cit note 34 at 507; *Specht v Netscape Communications Corp* 150 F Supp 2d 585 (SDNY 2001). Also see *Specht* (2002) supra note 45 at 335: ‘Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.’

⁵¹ *Specht* (2001) ibid at 595; Zynda ibid at 507.

⁵² *Specht* (2001) ibid at 594.

⁵³ Ibid.

⁵⁴ Supra note 40.

⁵⁵ See the Reporters’ Notes to Para 2 of the Draft Restatement at 46–9; Ghirardelli op cit note 13 at 729. See for example *Ticketmaster Corp v Tickets.com Inc* 2003 WL 21406289 (CD Cal 2003).

to contractual terms by the mere presence of a hyperlink providing for implied consent.⁵⁶ This was done to provide suppliers with an efficient process of contract formation without hampering the consumer's online experience,⁵⁷ in order to support online market growth.⁵⁸

Early American case law also refused to enforce the terms of browse-wraps because they found the terms to be so obscure that the reasonable user would not have noticed their existence and would thus remain unaware of the terms.⁵⁹ In more recent cases, however, they have generally been enforced where a hyperlink was visible on the screen without scrolling and was labelled in a way that prompted the consumer to review the terms.⁶⁰

According to American law, mutual assent or a reasonable reliance on the appearance thereof can only be present in the online environment if the consumer had actual or constructive notice⁶¹ of the terms of the proposed contract.⁶² The enforceability of browse-wraps thus hinges on the question as to what constitutes sufficient notice.⁶³ American courts have not always been consistent in the way in which sufficient notice is determined, especially in the case of browse-wraps or hybrid forms of online contracts.⁶⁴ Slight differences in the display of the terms or in the wording of the notice have led to opposite decisions, and Daiza indicates

⁵⁶ Ghirardelli *ibid* at 730.

⁵⁷ *Ibid* at 731.

⁵⁸ *Ibid*.

⁵⁹ See *Tompkins v 23andMe Inc* 2014 WL 2903752 (ND Cal 2014); *Van Tassel v United Marketing Group LLC* 795 F Supp 2d 770 (ND Ill 2011); *Hoffman v Supplements Togo Management LLC* 18 A 3d 210 (NJ Super App Div 2011); *Hines v Overstock.com Inc* 668 F Supp 2d 362 (EDNY 2009) affirmed 380 Fed Appx 22 (end Cir June 03, 2010), as discussed in Kim *op cit* note 33 at 97–100.

⁶⁰ See for example *Fteja supra* note 40; *Meyer supra* note 41; *Nguyen v Barnes & Noble Inc* 763 F 3d 1171 (9th Cir 2014). Also see Kim *ibid* at 107.

⁶¹ The concept of constructive notice refers to situations where no actual notice was given, but the consumer had 'a legitimate opportunity to learn the terms' (Canino *op cit* note 35 at 574). Also see *Specht* (2002) *supra* note 45 at 30; *Schnabel v Trilegiant Corporation* 697 F 3d 110 (2d Cir 2012) at 20. This is also often referred to as inquiry notice (see *Starke v Squaretrade Inc* 913 F 3d 279 (US App 2019) at 289; *Arnaud v Doctor's Associates Inc* 2019 US Dist LEXIS 153868 (NY Dist 2019) at 14).

⁶² See *Meyer supra* note 41 at 75; *In re Zappos.com Inc, Customer Data Security Breach Litigation* 2012 WL 4466660 (D Nev 2012); *Nguyen supra* note 60 at 1177; *Pollstar v Gigmania Ltd* 170 F Supp 2d 974 (ED Cal 2000) at 981–2; *Register.com supra* note 40 at 403; *Zynda op cit* note 34 at 507; *Mik op cit* note 4 at 73; *Canino ibid* at 574; Mark A Lemley 'Terms of use' (2006) 91 *Minnesota LR* 459 at 477: 'Courts may be willing to overlook the utter absence of assent only when there are reasons to believe that the [consumer] is aware of the [supplier's] terms.'

⁶³ *Southwest Airlines Co v BoardFirst LLC* 3:06-CV-0891-B 2007 WL 4823761 (ND Tex 2007) at 5: '[T]he validity of a browsewrap licence turns on whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site.' Also see Kim *op cit* note 33 at 93–5.

⁶⁴ Moringiello *op cit* note 42 at 1320.

that this makes it difficult to predict the enforceability of a browse-wrap beforehand.⁶⁵

For example, in *Fteja v Facebook Inc*⁶⁶ the court found that a Facebook user was ‘informed of the consequences of his assenting click’ because a notice stating ‘By clicking Sign Up, you are indicating that you have read and agree to the Terms and Service’ appeared immediately below the ‘Sign Up’ button.⁶⁷ A recent version of the Facebook sign-up page is illustrated in Figure 1 below. Also in *Meyer v Uber Technologies Inc*,⁶⁸ the court enforced terms where the button to register was followed by a notice stating: ‘By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY’,⁶⁹ as illustrated in Figure 2 below.

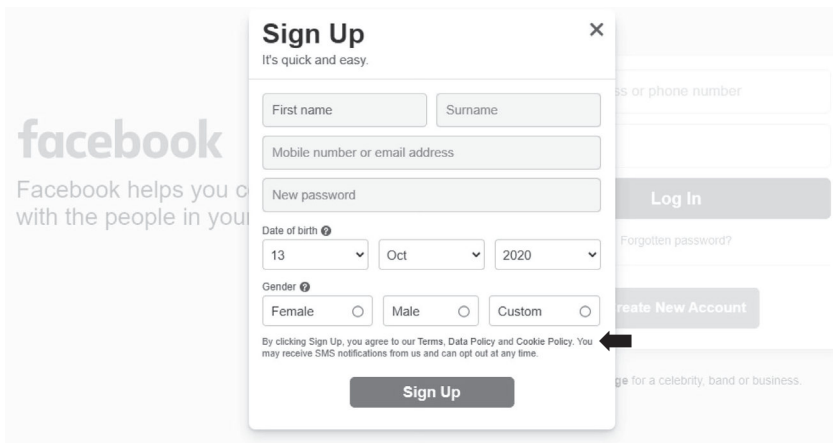


Figure 1⁷⁰

⁶⁵ Heather Daiza ‘Wrap contracts: How they can work better for businesses and consumers’ (2018) 54 *Cal WLR* 202 at 218.

⁶⁶ *Supra* note 40 at 837.

⁶⁷ *Ibid* at 835.

⁶⁸ *Supra* note 41.

⁶⁹ *Ibid* at 78. See Figure 2 below.

⁷⁰ Screenshot from www.facebook.com, accessed on 13 October 2020 (arrow inserted). The fine print (indicated by the arrow) reads as follows: ‘By clicking Sign Up, you agree to our Terms, Data Policy and Cookie Policy. You may receive SMS notifications from us and can opt out at any time.’

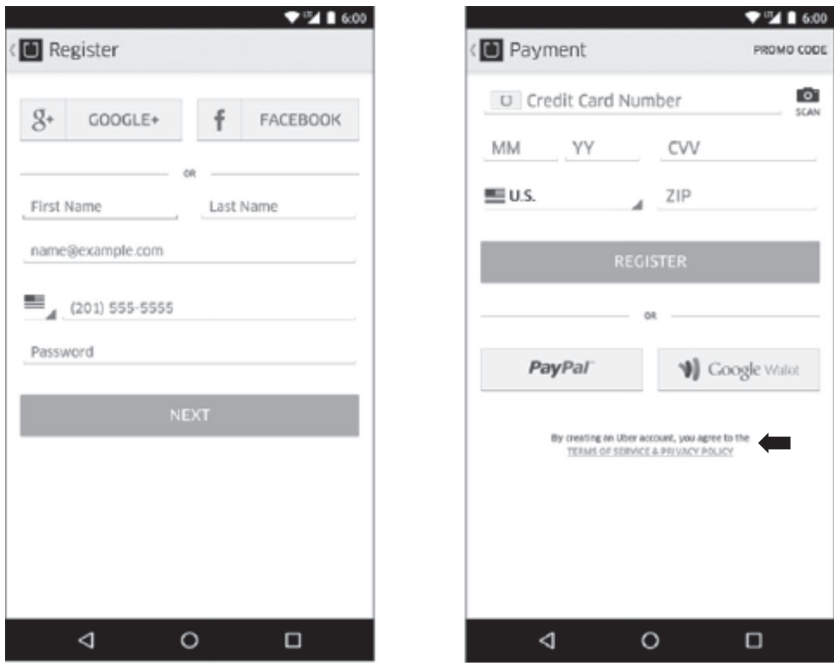


Figure 2⁷¹

This can be contrasted with *Berkson v Gogo LLC*.⁷² There the button was labelled ‘Sign in’, and it was indicated that clicking the button requires acceptance of the supplier’s terms. Nonetheless, the court deemed it insufficient, because ‘[t]he hyperlink to the “terms of use” was not in large font, all caps, or in bold’.⁷³ In *Nicosia v Amazon.com*⁷⁴ the enforcement of terms was also refused because the warning ‘By placing your order, you agree to Amazon.com’s privacy notice and conditions of use’ appeared at the top of the webpage and not in close proximity to the ‘Place your order’ button.⁷⁵ Furthermore, in *Nguyen v Barnes & Noble Inc*⁷⁶ the court held that where

⁷¹ Image contained in Addendum B to *Meyer* supra note 41 at 82 (arrow inserted).

⁷² Supra note 48.

⁷³ Ibid at 404.

⁷⁴ Supra note 49.

⁷⁵ Ibid at 30. Also see *Starke v Squaretrade Inc* supra note 61 at 289, where the court highlighted the importance of the design and interface of website in determining enforceability, and further tried to unify previous decisions by identifying some design features (at 290–3) which played a role in *Nicosia v Amazon.com* supra note 49 and *Meyer v Uber Technologies Inc* ibid. These factors were also repeated in *Arnaud* supra note 61 at 15–19.

⁷⁶ Supra note 60.

‘a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on — without more — is insufficient to give rise to constructive notice’.⁷⁷

It thus seems that the minimum requirements generally set by courts for enforcement of the terms of hybrid forms of online contracts are that there must be a conspicuous statement clearly indicating that clicking the icon amounts to acceptance of terms, and that this statement must preferably be in close proximity to the icon the consumer is required to click on and presented on an uncluttered interface.

By this standard, traditional browse-wraps (where the consumer is bound merely by virtue of browsing the website) should fall short of the required standard, because it generally does not contain a conspicuous notice indicating what will constitute acceptance. Yet, some courts have nevertheless accepted that a contract can be formed by browsing where this action is prescribed for contract formation, despite the absence of a clear statement to that effect.⁷⁸ However, other courts still seem to insist on a notice (either on the home page or last page) directing the consumer to review the terms.⁷⁹ They have been reluctant to accept that the mere use of a hyperlink stating ‘Terms of Service’ or something similar is sufficient to give notice to consumers that a contract is concluded, if no notice is provided to that effect.⁸⁰ For example, in *In re Zappos.com Inc Customer Data Security Breach Litigation*⁸¹ the court refused to enforce a browse-wrap because

‘[t]he Terms of Use is inconspicuous, buried in the middle to bottom of every Zappos.com webpage among many other links, and the website never directs a user to the Terms of Use. No reasonable user would have reason to click on the Terms of Use’.⁸²

As indicated below, this uncertainty is not resolved by the *Draft Restatement of the Law, Consumer Contracts* (‘the Draft Restatement’).⁸³

⁷⁷ Ibid at 1179.

⁷⁸ See *Ticketmaster* supra note 55; *Hubert v Dell Corp* 835 NE 2d 113 at 117–18 (Ill App Ct 2005). In *Arnaud* supra note 61 at 17–18, the absence of this notice was merely regarded as a factor which weighed against a finding that there was a manifestation of assent by the consumer.

⁷⁹ Such a notice was present in all three of the cases mentioned in note 60 above. The reporters of the Draft Restatement also recognise this judicial uncertainty (see Reporters’ Notes to Para 2 of the Draft Restatement at 47). Also see the discussion at part II(b) below.

⁸⁰ See *Hines* supra note 59; *In re Zappos.com* supra note 62.

⁸¹ Ibid.

⁸² Ibid at 8.

⁸³ See op cit note 42 and part II(b) below.

(b) *An overview of the proposals contained in the Draft Restatement*

The Draft Restatement, which is still in the process of being adopted by the American Law Institute,⁸⁴ recognises the challenges posed by standard-form contracts,⁸⁵ such as the irrationality of expecting consumers to study the terms and the potential for abuse by the supplier.⁸⁶ Two possible regulatory techniques are identified for addressing these issues, namely the requirement of mutual assent, and restricting the substantive effect of the contract.⁸⁷

The reporters of the Draft Restatement acknowledge that the length and complexity of standard-form contracts render informed consent implausible, and that the effectiveness of assent as a method of regulating terms is thus limited.⁸⁸ According to what was previously referred to as a 'grand bargain',⁸⁹ the reporters preferred to follow the trend of courts to

⁸⁴ See Omri Ben-Shahar 'Consumer contracts' *The ALI Advisor* 10 April 2017, available at <http://www.thealiadviser.org/consumer-contracts/project-feature-consumer-contracts/>, accessed on 14 October 2020; Greg Klass 'The Restatement of Consumer Contracts and quantitative caselaw studies' *New Private Law* 27 July 2017, available at <http://blogs.harvard.edu/nplblog/2017/07/27/the-restatement-of-consumer-contracts-and-quantitative-caselaw-studies-greg-klass/>, accessed on 14 October 2020. At the most recent annual meeting of the ALI membership (on 21 May 2019), members could only reach agreement on adoption of para 1 of the Draft Restatement, and the decision relating to adoption of the remainder of the Draft Restatement was postponed (see Alan S Kaplinski 'ALI annual meeting ends with uncertain future for Restatement of the Law, Consumer Contracts' Ballard Spahr LLP: Consumer Finance Monitor 22 May 2019, available at <https://www.consumerfinancemonitor.com/2019/05/22/ali-annual-meeting-ends-with-uncertain-future-for-restatement-of-the-law-consumer-contracts/>, accessed on 27 October 2020; Daniel Fisher 'Consumer advocates, business interests form rare alliance to block American Law Institute project' *PennRecord* 21 May 2019, available at <https://pennrecord.com/stories/512511439-consumer-advocates-business-interests-form-rare-alliance-to-block-american-law-institute-project>, accessed on 14 October 2020).

⁸⁵ Reporters' Introduction to the Draft Restatement at 1.

⁸⁶ *Ibid*; Reporters' Note to Para 2 of the Draft Restatement at 35.

⁸⁷ Reporters' Introduction to the Draft Restatement at 2.

⁸⁸ *Ibid* at 2–5; Reporters' Notes to Para 2 of the Draft Restatement at 35–7.

⁸⁹ See the Reporters' Memorandum to the American Law Institute *Restatement of the Law, Consumer Contracts: Discussion Draft* (2017) ('the Discussion Draft') 2–4. This terminology was removed from the 2019 Tentative Draft of the Draft Restatement, presumably in response to criticism (see the letter by 23 state attorneys general to the members of ALI dated 14 May 2019, available at https://ag.ny.gov/sites/default/files/letter_to_ali_members.pdf, accessed on 14 October 2020; Melvin Eisenberg 'The proposed Restatement of Consumer Contracts, if adopted, would drive a dagger through consumers' rights' *Yale Journal on Regulation: Notice & Comment* 20 March 2019, available at <http://yalejreg.com/nc/the-proposed-restatement-of-consumer-contracts-if-adopted-would-drive-a-dagger-through-consumers-rights-by-melvin-eisenberg/>, accessed on 14 October 2020; letter by Senator Warren to President of ALI dated 11 December 2017, available at https://www.creditslips.org/files/warren_-_consumer_contracts_-_dec_11_2017.pdf, accessed on 14 October 2020). Also see Adam J Levitin, Nancy S Kim, Christina L Kunz, Peter Linzer, Patricia

relax the assent requirement, but then place more emphasis on the ex post scrutiny of contractual terms.⁹⁰ Although this approach has been somewhat downplayed in the recent draft,⁹¹ they only set minimum requirements for finding mutual assent to online contracts. These requirements are, first, reasonable notice of both the existence of the terms and of the supplier's intention to incorporate them into the transaction and, secondly, the opportunity to review these terms.⁹²

The comments to the Draft Restatement illustrate how low it sets the bar for the adoption of online terms. Click-wraps will generally meet the criteria for adoption of standard terms.⁹³ The exact form of the click-wrap seems to be of lesser importance, as long as the terms are presented in a way that indicates that clicking amounts to acceptance.⁹⁴ It is not required that the consumer must have actual knowledge of the terms, only that the consumer clicked after having reasonable notice of the terms and a reasonable opportunity to review them. The enforceability of the terms also does not depend on the supplier's belief that the consumer intended to consent to the terms.

Browse-wraps are also enforceable, provided that the link to the terms is conspicuous or the consumers are sufficiently notified that their conduct constitutes acceptance.⁹⁵ There seems to be uncertainty whether both the prominent posting of a hyperlink and a prominent notice are required, and case law is divided.⁹⁶ Despite initially subscribing to the view that a mere hyperlink will suffice to place the consumer on notice with regard to the browse-wrap,⁹⁷ explicit endorsement of this approach no longer appears in the Draft Restatement, and the current position is less clear.⁹⁸ However,

A McCoy, Juliet M Moringiello, Elizabeth A Renuart & Lauren E Willis 'The faulty foundation of the draft Restatement of Consumer Contracts' (2019) 36 *Yale Journal on Regulation* 447 at 453, where the authors state that this constitutes a normative statement instead of a reflection of the prevailing legal position; the latter is the aim of a restatement.

⁹⁰ Reporters' Introduction to the Draft Restatement at 5.

⁹¹ See the discussion at Van Deventer op cit note 18 at 122–4.

⁹² Para 2(a) of the Draft Restatement.

⁹³ Comment 3 and Illustrations 2 and 3 to Para 2 of the Draft Restatement.

⁹⁴ Reporters' Note to Para 2 of the Draft Restatement at 46: '[Click-wraps] were enforced when clear terms were presented above or next to an "I Agree" box, when they were available via hyperlink next to the "I Agree" box, and when they were incorporated by reference in a clickwrap.'

⁹⁵ Illustration 10 to Para 2 of the Draft Restatement.

⁹⁶ Reporters' Note to Para 2 of the Draft Restatement at 47. Also see part II(a) above.

⁹⁷ See Illustration 11 to Para 2 of the 2017 Discussion Draft of the Draft Restatement.

⁹⁸ See Illustration 10 to Para 2 of the Draft Restatement, which was amended to require a notice informing the consumer that continued browsing constitutes acceptance. However, the Reporters' Notes to Para 2 of the Draft Restatement

the requirement that the consumer must receive ‘reasonable notice ... of the intent to include the term as part of the consumer contract’⁹⁹ might suggest that a mere hyperlink (without a notice informing the consumer that browsing amounts to assent) is insufficient.

If the browse-wrap pertains to use of the website, so that it can only be accessed after the consumer entered the site, the terms are deemed to be adopted if the consumer continues use of the website after having an opportunity to review the terms.¹⁰⁰ The notice requirement features prominently, because courts insist on conspicuous notice,¹⁰¹ despite the previous recognition by the reporters that ‘[n]otice provides only limited protection if consumers rarely read terms’.¹⁰²

Regarding hybrid forms of wrap contracts, the Reporters indicate that instead of strict classification, the focus should be on the manner in which the terms were presented.¹⁰³ Thus, where there was reasonable notice of the terms and of the supplier’s intention to incorporate the terms into the transaction, and the consumer had reasonable opportunity to review the terms, they will be binding.¹⁰⁴ The illustrations indicate that they will be enforced, provided a link to the terms is clearly displayed close to the icon required for completion of the transaction.¹⁰⁵

The Draft Restatement further confirms the post-affirmation adoption of standard terms, which was initially sanctioned in *ProCD*.¹⁰⁶ It is only required that the consumer has received prior notice of the terms and has the opportunity to terminate, without unreasonable cost or burden, after receiving an opportunity to review the terms.¹⁰⁷ Granting the consumer an opportunity to terminate upon receipt of the terms is seen as a substitute for the pre-contractual opportunity to review them.¹⁰⁸

at 47 does not seem to preclude the possibility of a conspicuous hyperlink constituting sufficient notice.

⁹⁹ Para 2(a)(1) of the Draft Restatement.

¹⁰⁰ Comment 6 to Para 2 of the Draft Restatement.

¹⁰¹ See parts II(a)(ii) and II(a)(iii) above.

¹⁰² Reporters’ Note to Para 2 of the 2017 Discussion Draft of the Draft Restatement at 9.

¹⁰³ Reporters’ Note to Para 2 of the Draft Restatement at 52.

¹⁰⁴ *Ibid* at 52.

¹⁰⁵ See Illustration 5 to Para 2 of the Draft Restatement.

¹⁰⁶ *Supra* note 15. Also see part II(a)(i).

¹⁰⁷ Para 2(b) of the Draft Restatement. Also see Comment 5 to Para 2.

¹⁰⁸ Reporters’ Note to Para 2 of the Draft Restatement at 42–3: ‘A right to terminate the transaction guarantees that consumers are only bound to terms they have a reasonable opportunity to review. In effect, the business’s prerogative to present the terms post assent comes at a cost: the contract is not finalized until the termination period expires, and consumers have the option during that period to undo an undesirable transaction.’

As mentioned, the reporters justify this lenient approach to the assent requirement by recognising the fact that standard terms are generally unread, and they point to the tendency of courts rather to focus on ex post scrutiny of the terms. This approach was more explicit in the previous draft of the Draft Restatement, where it was recognised that this calls for a ‘fundamental tradeoff’:¹⁰⁹ reducing the importance of mutual assent must be compensated by a heightened emphasis on fundamental fairness.¹¹⁰

Although this approach towards assent has been somewhat adapted in response to criticism, the black-letter provisions of the Draft Restatement have remained substantially unchanged. Many commentators remain critical of the permissive formation requirements,¹¹¹ and the future of the Draft Restatement is uncertain.¹¹²

(c) *An overview of the American academic debates regarding the formation of online contracts*

The judicial approach to the formation of online contracts in America has received extensive academic criticism. The main point of criticism stems from the argument that the courts deviate from the established legal rules relating to contract formation in the case of online contracts, and especially the rules on the requirement of mutual assent,¹¹³ despite professing to apply the same approach to both online contracts and traditional contracts.¹¹⁴

¹⁰⁹ Reporters’ Memorandum to the 2017 Discussion Draft of the Draft Restatement at 3.

¹¹⁰ Ibid at 3: ‘The increasing necessity for and presence of highly permissive adoption rules punctuate the importance of the remaining regulatory safeguard in consumer contracts — mandatory restrictions over permissible contracting. At the center of this technique stand rules that strike down unconscionable terms and provisions that undermine consumers’ benefit of the bargain. If consumers are not expected to scrutinize the legal terms up front, courts would scrutinize them ex post.’ See Van Deventer op cit note 18 at 194–202 for a discussion of substantive measures of control recognised in American law.

¹¹¹ For example, Kim states that ‘the proposed Restatement ignores the problems created by form and digitization and does nothing to address the problems created by ubiquitous digital contracts’ (Nancy Kim ‘The controversy over the Restatement of Consumer Contracts’ *ContractsProf Blog* 7 May 2019, available at https://lawprofessors.typepad.com/contractsprof_blog/2019/05/the-controversy-over-the-restatement-of-consumer-contracts.html, accessed on 15 October 2020).

¹¹² See Kaplinski op cit note 84. Also see Mark E Budnitz ‘The Restatement of the Law of Consumer Contracts: The American Law Institute’s impossible dream’ (2020) 32 *Loyola Consumer LR* 369.

¹¹³ Ghirardelli op cit note 13 at 729: ‘Browse-wrap agreements further reduced the already thin relevance of consumers’ assent in contract formation and increase the lack of actual notice of contractual terms to consumers.’

¹¹⁴ Kim op cit note 33 at 93, 109–11; Margaret Jane Radin ‘The deformation of contract in the information society’ (2017) 37 *OJLS* 505 at 506.

Traditionally, mutual assent is still required for contract formation,¹¹⁵ and silence does not constitute acceptance.¹¹⁶ However, in the online environment, the requirement of mutual assent has transformed into a requirement of sufficient notice.¹¹⁷ Courts are willing to assume consent exists if there was constructive notice of the terms,¹¹⁸ and if the consumer does not actively reject the terms.¹¹⁹ Consequently, Radin states that ‘the court will treat terms as if seen and, when so treated as seen, the court will treat them as if agreed to’.¹²⁰

The judicial treatment of online contracts in American law has also been criticised by adherents of the reliance theory, because these contracts are enforced despite it being recognised that the consumer’s conduct cannot reasonably be construed as a manifestation of mutual assent.¹²¹ Because it is well known that online contracts are not read or understood, suppliers cannot reasonably infer that consent is given.¹²² In terms of the reliance theory, a party will not be bound by his or her outward manifestation of will where the other party does not reasonably believe that he or she has the intention to be bound.¹²³ If suppliers are therefore aware that consumers do not intend to accept online terms through clicking or continued browsing, contract law provides little justification for enforcing

¹¹⁵ See s 17(1) of the American Law Institute *Restatement (Second) of Contracts* (1981); *Specht* (2002) supra note 45 at 28–9.

¹¹⁶ Kim op cit note 33 at 110; Daiza op cit note 65 at 217.

¹¹⁷ Eric A Zacks ‘The Restatement (Second) of Contracts s 211: Unfulfilled expectations and the future of modern standardized consumer contracts’ (2016) 7 *William & Mary Bus LR* 733 at 748–9: ‘The traditional requirements for formation have eroded with respect to online contract. Instead of assessing whether the consumer has made a manifestation of assent that can be reasonably understood as such, the primary focus for online contracts has been whether the consumer has notice that contractual terms exist, as the consumer’s manifestation of assent can be satisfied “by acting in a way that does not clearly indicate intent to accept the terms,” (Kim ibid at 109) including by not actively rejecting the terms.’

¹¹⁸ Radin op cit note 114 at 522.

¹¹⁹ Daiza op cit note 65 at 216.

¹²⁰ Radin op cit note 114 at 522. Also see Kim op cit note 33 at 128, where she explains how ‘the requirements of manifestation of consent seems to be subsumed in wrap contract cases with the issue of notice’.

¹²¹ Donnie L Kidd & William H Daughtrey ‘Adapting contract law to accommodate electronic contracts: Overview and suggestions’ (2000) 26 *Rutgers Computer & Tech LJ* 215 at 243.

¹²² Radin op cit note 114 at 520; Zacks op cit note 117 at 748; Mik op cit note 4 at 80. Also see Margaret Jane Radin *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (2013) 87, 89–90.

¹²³ See Mik op cit note 4 at 80; Zacks op cit note 117 at 745n26: ‘Modern approaches to the objective theory emphasize that it must be reasonable for the party perceiving the manifestation to understand it as communicating assent.’

such terms.¹²⁴ Although the supplier may reasonably believe that the consumer intends to contract on the salient terms — goods and price — it is not reasonable to believe that the consumer intends to be bound by fine print, which the consumer almost certainly has not read.

The decline of the assent requirement is further illustrated by the enforceability of shrink-wraps. Ghirardelli credits the decision in *ProCD*¹²⁵ for supporting the idea that implied assent may be given by way of conduct, even where the consumer is unaware that the particular conduct amounts to assent.¹²⁶ By allowing terms to be imposed where they could only be accessed by the consumer after conclusion of the transaction,¹²⁷ the court in *ProCD* also by implication validated the idea that terms could be adopted based on the consumer's failure to reject them.

Generally, the lack of actual mutual assent in standard-form contracts is explained in terms of Llewellyn's notion of blanket assent.¹²⁸ His theory accepts that no specific assent is given by the consumer in respect of standard-form contracts, except for a few negotiated terms.¹²⁹ Instead, he theorised that the consumer consents to the type of transaction and to any terms which are not unreasonable.¹³⁰

However, Kim argues that Llewellyn's theory does not provide justification for wrap contracts, because online contracting involves a less deliberate act by the consumer (either clicking or merely browsing)¹³¹ than signing a document, and instead of being presented with the terms, only notice of the terms (contained in a hyperlink) is provided to the consumer.¹³² Blanket assent requires that the consumer should have an awareness of the type of transaction and the fact that terms apply, although the consumer need not be aware of the content of the terms. Kim seems to reason that these basic conditions are absent in the case of online contracts because consumers are often ignorant of the existence of online contracts. Although commentators regularly recognise that the demise of meaningful assent

¹²⁴ Zacks op cit note 117 at 780: 'If the drafting party knows that consumers do not read terms and conditions on a website and do not anticipate being bound by a written contract or particular terms just because they clicked their agreement, then the drafting party may have little justification for relying on such manifestations of assent.'

¹²⁵ Supra note 15.

¹²⁶ Ghirardelli op cit note 13 at 727.

¹²⁷ See part II(a)(i) above.

¹²⁸ See Todd D Rakoff 'Contracts of adhesion: An essay in reconstruction' (1983) 96 *Harvard LR* 1173 at 1198–1206.

¹²⁹ *Ibid* at 1199.

¹³⁰ *Ibid* at 1199–1200.

¹³¹ See Van Deventer op cit note 5 at 230ff.

¹³² Kim op cit note 33 at 63, 130.

in standard-form contracts has preceded the internet era,¹³³ Kim argues that ‘online, the problem is even worse than the consumer not reading the contract — the consumer is often not even aware there is a contract’.¹³⁴

The primary reason for this shift is the absence of consumer awareness, which can be attributed to the impact of form on consumer perception.¹³⁵ This correlates with the main argument advanced by Moringiello, who focuses on the signalling function of signatures.¹³⁶ She argues that courts fail to recognise the differences between the manner in which consumers perceive electronic contracts compared to the paper variety, and that case law lacks a proper analysis of the way in which the terms are presented.¹³⁷ Instead, she avers that a misplaced reliance by courts on *Carnival Cruise Lines Inc v Shute*,¹³⁸ a case pertaining to standard terms printed on a cruise ship ticket, but where no lack of notice was averred,¹³⁹ caused courts to adopt too lenient a requirement regarding what will constitute sufficient notice.¹⁴⁰

Critics have made some suggestions to improve the quality of assent in online contracts. The viability of these suggestions will be considered below, in the broader context of various proposals for law reform.¹⁴¹

(d) Conclusion

The view generally held by American courts nowadays is that the rise of online contracts has not necessitated any changes to the fundamental

¹³³ See Ethan J Leib & Zev J Eigen ‘Consumer form contracting in the age of mechanical reproduction: The unread and the undead’ 2017 *U Ill LR* 65 at 66–76, who discuss the ‘death of contract’ which was already proclaimed in 1995; Daniel D Barnhizer ‘Escaping toxic contracts: How we have lost the war on assent in wrap contracts’ (2014) 44 *Southwestern LR* 215 at 217.

¹³⁴ Kim op cit note 33 at 54. Also see Moringiello op cit note 42 at 1319; Barnhizer ibid at 217: ‘In the online world, adherents barely even register that they are engaging in a contract. The judicial model of the reasonable party who has the opportunity to read the contract terms breaks down completely in that electronic context.’

¹³⁵ See Van Deventer op cit note 5 at 226–7.

¹³⁶ Moringiello op cit note 42 at 1307.

¹³⁷ Ibid at 1320.

¹³⁸ 499 US 585 (1991).

¹³⁹ Ibid at 590.

¹⁴⁰ See Moringiello op cit note 42 at 1320–3. See for example *Caspi v Microsoft Network LLC* 732 A2d 528 (NJ Super Ct App Div 1999) at 532: ‘The scenario presented here is different because of the medium used, electronic versus printed; but, in any sense that matters, there is no significant distinction. The plaintiffs in *Carnival* could have perused all the fine-print provisions of their travel contract if they wished before accepting the terms by purchasing their cruise ticket. The plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement.’

¹⁴¹ See part IV(c)(ii) below.

principles of the law of contract.¹⁴² For example, some courts have argued that there is no difference between printing terms on the back of a ticket and providing them by way of a hyperlink.¹⁴³ Courts have emphasised that browse-wraps are not unenforceable *per se*, because ‘people sometimes enter into a contract by using a service without first seeing the terms’.¹⁴⁴ With a few exceptions,¹⁴⁵ and despite academic criticism, American courts have generally been unwilling to take into account the differences occasioned by electronic contracting.¹⁴⁶

Faced with the reality that ‘the hoped-for readership [is] neither physically possible nor desirable’,¹⁴⁷ American courts have elected to manipulate the assent requirement in order to ensure the enforceability of online contracts. This lenient approach to the formation of online contracts has raised the ire of commentators, who argue that the requirement of mutual assent has been stretched beyond recognition.

Part of the difficulty with which courts are faced lies in the fact that assent is an all-or-nothing proposition. In other words, ‘[a] finding of assent leads to a finding of contract formation; on the other hand, a finding of no assent means that no contract was formed’.¹⁴⁸

Insisting on unrealistic formation requirements means that only the salient terms of the transaction (in respect of which actual agreement can be found), would be enforceable, a solution which is generally regarded as contrary to business interests.¹⁴⁹ It is widely accepted that standard terms are essential in an economy where products are mass-produced and distributed.¹⁵⁰ It allows suppliers to reduce costs, enhance certainty, and mitigate risks.¹⁵¹ The reporters of the Draft Restatement point out

¹⁴² See note 40 above. Also see *Starke* supra note 61 at 289: ‘We apply these same contract law principles to online transactions.’

¹⁴³ *Fteja* supra note 40 at 839; *Canino* op cit note 35 at 550. Also see Nancy S Kim ‘Situational duress and the aberrance of electronic contracts’ (2014) 89 *Chicago-Kent LR* 265 at 270.

¹⁴⁴ *Pollstar* supra note 62 at 982.

¹⁴⁵ For example *Berkson* supra note 48.

¹⁴⁶ See for example *Cullinane* supra note 40 at 17. Also see *Canino* op cit note 35 at 568; *Goodman* op cit note 11 at 322: ‘today’s judiciary has failed to give these new adhesion contracts the special treatment they deserve’; *Kim* op cit note 143 at 269; *Kim* op cit note 11 at 30; *Moringiello & Reynolds* op cit note 31 at 492.

¹⁴⁷ Tess Wilkinson-Ryan ‘The perverse consequences of disclosing standard terms’ (2017) 103 *Cornell LR* 117 at 127.

¹⁴⁸ *Kim* op cit note 33 at 193.

¹⁴⁹ *Davis* op cit note 42 at 579.

¹⁵⁰ G B Bradfield *Christie’s Law of Contract* 7 ed (2016) 211; Minette Nortje ‘Of reliance, self-reliance and caveat subscriptor’ (2012) 129 *SALJ* 132 at 151; *Hutchison* op cit note 2 at 26; *Kim* op cit note 33 at 21; *Goodman* op cit note 11 at 325.

¹⁵¹ See *Van Deventer* op cit note 18 at 37–8 for a discussion on the benefits and importance of standard-form contracts.

that instead of relying on overly strict assent requirements, courts have elected rather to employ substantive measures of control to prevent supplier overreach. Various academics agree with this position, and point out that focusing on improving assent is costly, and generally has limited benefits.¹⁵²

Courts can avoid confusion and criticism by explicitly acknowledging the doctrinal adjustment required in the case of online contracts, and the reasons for such an approach. For this reason the change in approach by the reporters of the Draft Restatement could be seen as somewhat regrettable: by explaining the grand bargain and describing the necessary trade-off between assent and substantive control, their initial position made it clear that the quality of assent will influence the measure of ex post scrutiny to which the terms should be subjected. As discussed above, the Reporters have moved away from this terminology,¹⁵³ and now refer to the relaxation of the assent requirement in terms of Llewellyn's approach of blanket assent instead.¹⁵⁴ The argument that the fairly lenient formation requirements should be offset by heightened substantive scrutiny is thus less explicit in the 2019 Tentative Draft of the Draft Restatement.

III COMPARATIVE EVALUATION

(a) *Introduction*

The discussion above provided a brief overview of the manner in which American law treats the formation of online contracts. A previous article in turn considered how South African courts are likely to apply local principles that govern the formation of these contracts.¹⁵⁵ Against that backdrop, this part of the article proceeds to evaluate the American and South African approaches from a comparative perspective. Ultimately, the aim is to identify what insights South African lawyers may gain from studying the American experiences.

(b) *Establishing assent to online contracts*

Both legal systems face the same question when establishing assent to online contracts: should consumers be bound to terms which they have

¹⁵² See Barnhizer op cit note 133, who argues that 'policing the quality of assent in the wrap context is a low value strategy unlikely to yield better results than adherents already get from drafters' (at 216) and that 'even the best quality assent likely will not improve the quality of the resulting contract' (at 219). Davis ibid at 580 similarly argues that 'alternative doctrines, rather than a more rigorous assent analysis, provide an acceptable way of adjudicating the enforceability of [online] terms while allowing the realization of the recognized benefits of standard form contracting in the electronic environment'.

¹⁵³ See part II(b) above.

¹⁵⁴ See Reporters' Introduction to the Draft Restatement at 5. See the discussion of Llewellyn's notion of blanket assent at part II(c) above.

¹⁵⁵ Van Deventer op cit note 5.

not read, and cannot reasonably be expected to read? If it is accepted that it is irrational and improbable for consumers to study the terms,¹⁵⁶ courts must either find grounds for enforcement of online contracts despite an absence of informed consent, or they must regard online contracts as unenforceable.¹⁵⁷ In other words, should the law accept what could be described as ‘uninformed consent’ as a valid basis for contract conclusion in order to accommodate online contracts? Rakoff has said:

‘To support a general presumption of the enforceability of [standard] form terms, one must instead begin with the assumption that a party is entitled to rely on a signature as a manifestation of assent, even if the reliance is not reasonable in the circumstances.’¹⁵⁸

In America, the notion of blanket assent provides a basis for enforcing online contracts despite consumer ignorance.¹⁵⁹ Where the consumer manifests assent to the terms, the consumer has a duty to read them.¹⁶⁰ Thus, in terms of the objective theory followed in American law, online terms will be valid regardless of whether they were read by the consumer, provided there was a manifestation of assent. The application of the latter requirement in the context of online contracts has sparked controversy in American literature, because commentators believe courts adopt too lenient an approach in determining whether a consumer manifested assent.¹⁶¹ In this regard, courts distinguish between click-wraps and browse-wraps. Therefore, an evaluation of the manner in which courts determine assent in each instance will be undertaken separately below.

Although South African law professes to apply the reliance theory as an objective corrective to the subjective will theory,¹⁶² a form of blanket

¹⁵⁶ See for example Wilkinson-Ryan op cit note 147 at 127; Daiza op cit note 65 at 217: ‘The reasonable person does not read the terms, nor do they have the legal background necessary to understand [them].’

¹⁵⁷ See Russel Korobkin ‘Bounded rationality, standard-form contracts and unconscionability’ (2003) 70 *U Chi LR* 1203 at 1205: ‘Given the complexity of modern commerce, the alternative to form contracts is almost certainly not the resurgence of fully dickered, obligationally complete contracts, but rather law-imposed default terms invoked to fill gaps in the contract the parties negotiate. Actual assent to each contract term in a transaction of any complexity simply is not possible; if terms are not imposed on one party by the other, some terms will almost certainly be imposed on both parties by the government.’

¹⁵⁸ Rakoff op cit note 128 at 1187.

¹⁵⁹ See part II(c) above.

¹⁶⁰ See Moringiello op cit note 42 at 1312; Daiza op cit note 65 at 211; Rakoff op cit note 128 at 1186; Zacks op cit note 117 at 746. With regard to the duty to read in general, see John D Calamari ‘Duty to read — A changing concept’ (1974) 43 *Fordham LR* 341.

¹⁶¹ See part II(c) above.

¹⁶² See *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 (4) SA 74 (A) at 78.

assent is also recognised.¹⁶³ Thus, online contracts may be enforced where it could reasonably be concluded that the consumer was generally aware of the terms, even where expecting the consumer to read the specific terms is unreasonable.¹⁶⁴ Where the consumer manifests assent — through clicking or other prescribed conduct such as browsing, for example — the consumer will be bound to the terms, either based on the caveat subscriptor rule or in terms of the rules developed for ticket cases.

Although the problem with regard to the formation of online contracts is approached from slightly different angles in the two jurisdictions — with South African law recognising the will theory as the primary basis for ascribing liability and ‘correcting’ it with doctrines that adopt an objective approach, whereas American law subscribes to an objective theory from the outset — they reach similar conclusions. Where a consumer manifests assent to terms, the consumer has a duty to read them, and carries the risk of adverse terms. Whether it is reasonable to expect the consumer actually to read the document is irrelevant; the focus is whether the consumer could reasonably be expected to be aware of the terms and to have manifested assent to them.

Placing a duty to read voluminous online contracts on consumers is unreasonable because of their length and prevalence, and because the terms are generally beyond the comprehension of consumers.¹⁶⁵ Consumers gain little benefit from studying the terms — not only can they not influence the content of the contractual terms, but they generally also cannot understand the meaning or effect thereof. It has been said that

‘[t]he duty to read, however, is better understood as a convention based upon particular contracting practices in a time where contracts were not ubiquitous It should never have evolved into permission for the drafting party to rely unreasonably on any manifestation of assent to the contract.’¹⁶⁶

Recognising a duty to read in online contracts thus requires courts deliberately to ignore the realities of online contracting. Arguably, the commercial necessity of enforcing these terms¹⁶⁷ has persuaded American courts to relax the assent requirement¹⁶⁸ and instead rely on other measures to protect consumers.

¹⁶³ See Van Deventer op cit note 18 at 71–5.

¹⁶⁴ See Van Deventer op cit note 5 at 243.

¹⁶⁵ Leib & Eigen op cit note 133 at 98; Ben-Shahar op cit note 3 at 7–8; Uri Benoliel & Shmuel I Becher ‘The duty to read the unreadable’ (2019) 60 *Boston College LR* 2255 at 2258.

¹⁶⁶ Zacks op cit note 117 at 767–8.

¹⁶⁷ See notes 150 and 151 above. Also see Kim op cit note 33 at 27: ‘A failure to recognize contracts of adhesion would mean slowing down and perhaps even stifling the growth of a valuable industry.’

¹⁶⁸ Zacks op cit note 117 at 773; Kim *ibid*: ‘Assent in the context of adhesive contracts thus became construed to mean acquiescence rather than active agreement.’

The potentially harsh operation of the duty to read can also be mitigated by a lenient application of the rules surrounding unexpected or surprising terms. This was discussed previously in the South African context,¹⁶⁹ but will also briefly be considered below.¹⁷⁰

As mentioned earlier, the duty to read in both American and South African law is only triggered where the consumer manifests assent to the terms. In this regard, a distinction is usually drawn between click-wraps and browse-wraps.

(i) *The enforceability of click-wraps*

American law equates the act of clicking (where acceptance of contractual terms is the only function served by that click) with signing a legal document.¹⁷¹ This is similar to the expected treatment of click-wraps in South African law, where indicating acceptance by clicking will probably be seen as analogous to indicating it by way of signature.¹⁷² In the South African context, it will mean that the caveat subscriptor rule applies, and the consumer will be bound to the terms regardless of whether the consumer was familiar with the content thereof. This correlates with the duty to read in American law, which will be triggered when the consumer manifests assent to the terms of the online contract.

However, consumers do not necessarily view clicking and signature in the same manner.¹⁷³ Relatively early in the history of online contracts, Moringiello cautioned that courts should not disregard the differences between electronic and traditional methods of contract conclusion and its impact on consumer perception, despite legislation seemingly placing them on equal legal footing.¹⁷⁴ This argument bears a resemblance to Kim's contention that consumers lack awareness of online terms, and that their enforcement can thus not be justified in terms of the notion of blanket assent.¹⁷⁵ However, courts can only judge intention from its outward manifestations. Unless a consumer can show that the act of clicking could objectively not be construed as a manifestation of assent, the consumer's subjective state of mind will not prevent enforcement. Doing so would mean clicking could never be regarded as a valid method of contract formation, and would hinder internet commerce.

¹⁶⁹ See Van Deventer op cit note 5 at 252ff.

¹⁷⁰ See part III(d) below.

¹⁷¹ See part II(a)(ii) above.

¹⁷² See Van Deventer op cit note 5 at 240.

¹⁷³ Kim op cit note 33 at 2; Kim op cit note 143 at 265–6, 272; Canino op cit note 35 at 555.

¹⁷⁴ Moringiello op cit note 42 at 1330, 1340.

¹⁷⁵ See part II(c) above.

Thus, although there might be truth to the argument that consumers do not view clicking in the same way as signature, it must be asked what the alternative is. If courts cannot assume a consumer assents to terms where the consumer clicks an icon clearly marked as an indication of acceptance, what measures should be put in place by suppliers to ensure enforceability of terms? Alternative suggestions, for example requiring multiple clicks or initials instead of merely a click, are considered below.¹⁷⁶ An important consideration must be whether such measures will succeed in creating true consumer awareness of the terms, without proving detrimental to online transacting. Imposing more onerous requirements for the formation of click-wraps will serve no purpose if these do not affect consumer behaviour.

Unless the law is developed to implement stricter requirements for the formation of click-wraps, courts in America (and probably also South Africa) will enforce click-wraps despite the concerns regarding consent. However, if these concerns are judicially recognised, it can provide impetus for increased reliance on other forms of control of online terms. Thus, even where clicking is viewed as valid assent for purposes of contract formation, courts should not fail to recognise that consumers are mostly only aware of the core terms, and perhaps the fact that some further terms apply.

(ii) *The enforceability of browse-wraps*

As mentioned above, American courts will enforce browse-wraps if the consumer was actually aware of the terms, or if conspicuous notice of the existence of the terms was given.¹⁷⁷ This is also the requirement for hybrid forms of online contracts such as sign-in wraps.

The position in American law regarding browse-wraps is similar to the expected approach in South African law where, in accordance with the principles developed for ticket-cases, courts are likely to require reasonably sufficient notice to enforce the terms if actual knowledge thereof cannot be proven.¹⁷⁸ The timing of the notice (that is, that the consumer has to indicate assent before the consumer is able to access the terms of the browse-wrap) might prove problematic in the South African context, but this is discussed below.¹⁷⁹

The question in both jurisdictions is thus what the requirements are for sufficient notice. The Draft Restatement mentions some examples: a hyperlink in a small font that can only be accessed by scrolling down does not constitute sufficient notice, whereas a prominent notice containing a

¹⁷⁶ See part IV(c)(ii) below.

¹⁷⁷ See note 62 above.

¹⁷⁸ See Van Deventer op cit note 5 at 243, 246ff.

¹⁷⁹ See part III(c) below.

hyperlink to the terms, which is positioned in the centre of the page in a large, clearly visible font, will suffice.¹⁸⁰ American case law also provides guidance, as discussed above.¹⁸¹

In light of the reservations expressed by American courts in respect of browse-wraps that do not contain a conspicuous notice alerting the consumer to the contractual terms, it is doubtful whether South African courts will be willing to accept that in such a case sufficient notice was provided. However, if a conspicuous notice is provided, which indicates that browsing will lead to contract formation, it is expected that South African courts will be willing to enforce browse-wraps. This will also be the case for hybrid forms of online contracts which comply with the two requirements identified above, namely a conspicuous statement placed near the relevant icon.

It could be asked whether emphasising the manner in which terms are displayed is a sensible approach, in light of the fact that the terms are seldom read.¹⁸² However, requiring a supplier to display the terms in a manner which will alert the reasonable consumer to their existence is not a costly exercise, provided clear guidelines are developed to enable suppliers to predict accurately the enforceability of their terms. This would thus provide a minimum level of protection by giving the consumer the opportunity to study the terms, without hindering commerce. It is important, however, that as is the case with click-wraps, courts should not feign ignorance of the fact that consumers generally remain unaware of the terms of online contracts, regardless of whether proper notice was provided.

(c) *Timing of the notice: PNTL, browse-wrap and shrink-wrap agreements*

One of the problems American jurists have identified with wrap contracts is the enforcement of terms provided after conclusion of a transaction. This is known as rolling contracts or ‘pay now, terms later’ (‘PNTL’) contracts. An example of these type of contracts is shrink-wraps,¹⁸³ although browse-wraps could also fall into this category (depending on when their terms are made available to the consumer).

Initially, American courts refused to enforce terms provided only after contract formation,¹⁸⁴ but this approach was altered radically pursuant to the decision in *ProCD*.¹⁸⁵ By implication, the court’s decision sanctioned

¹⁸⁰ Illustration 15 to Para 2 of the Draft Restatement.

¹⁸¹ See part II(a) above. See specifically the factors mentioned in *Starke* supra note 62 at 290–3 (and also repeated in *Arnaud* supra note 61 at 15–19), with reference to *Nicosia* supra note 49 and *Meyer* supra note 41.

¹⁸² See *Wilkinson-Ryan* op cit note 147 at 125–6.

¹⁸³ See part II(a)(i) above.

¹⁸⁴ *Schnabel* supra note 61. Also see *Kim* op cit note 33 at 97.

¹⁸⁵ Supra note 15. See part II(a)(i) above. Also see *Florencia Marotta-Wurgler* ‘Are “pay now, terms later” contracts worse for buyers? Evidence from software

acceptance by performance even where the terms are only accessible after contract formation, provided there was prior notice that further terms will apply and there is an opportunity to reject the transaction upon receipt of the terms.¹⁸⁶ By failing to return the product, the consumer is deemed to accept the terms.¹⁸⁷ The Draft Restatement also endorses the approach followed in *ProCD*.¹⁸⁸ The reporters indicate that despite academic resistance, this approach is dominant in case law.¹⁸⁹

The criticism levied against *ProCD* was discussed above,¹⁹⁰ and commentators have stated that the reasoning in *ProCD* provides an illustration of American courts' willingness to sacrifice adherence to contract-law principles to further commercial purposes.¹⁹¹ This acceptance of shrink-wraps gave judicial recognition to the acceptance of unseen terms,¹⁹² and thereby created the necessary foothold for the recognition of browse-wrap contracts by American courts.

Generally, for conduct to constitute acceptance of terms, it is logical to require that the person whose conduct leads to the conclusion of a contract must be aware that acting in a certain manner will result in binding obligations. Therefore, in traditional contract law a contracting party must be informed what actions will lead to contract formation prior to the act of assent.¹⁹³ It was recognised in *Specht v Netscape Communications Corp*¹⁹⁴ that 'a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms'.¹⁹⁵

In the case of some browse-wraps (typically those regulating the use of a website), the consumer has no way of knowing that the conduct constitutes acceptance, and thus it cannot be construed as a manifestation of consent.¹⁹⁶ However, American courts do not seem to insist on this requirement for browse-wraps, where the consumer is deemed bound by

license agreements' (2009) 38 *J Leg Stud* 309 at 309–11; Ghirardelli op cit note 13 at 724–5.

¹⁸⁶ *ProCD* ibid at 1450–2. Also see Ghirardelli op cit note 13 at 727, who states that the judgment 'endorsed the idea that acceptance by performance of unilateral contracts applies to cases in which consumers do not have notice of the entirety of the contractual terms at the time of purchase'.

¹⁸⁷ *ProCD* ibid at 1452. Also see Radin op cit note 114 at 517.

¹⁸⁸ Para 2(b) of the Draft Restatement.

¹⁸⁹ Reporters' Note to Para 2 of the Draft Restatement at 42–4, 49–52.

¹⁹⁰ See part II(a)(i) above.

¹⁹¹ Radin op cit note 114 at 517–18.

¹⁹² See part II(a)(i) above.

¹⁹³ Kim op cit note 33 at 109.

¹⁹⁴ (2002) supra note 45.

¹⁹⁵ Ibid at 30–1, quoting from *Windsor Mills, Inc v Collins & Aikman Corp* 101 Cal Rptr 347 (Cal Ct App 1972) at 351.

¹⁹⁶ See Moringiello op cit note 42 at 1319.

accessing the website, before the consumer had an opportunity to study the terms and learn that browsing amounts to acceptance.¹⁹⁷ This is similar to undertaking a journey and, after the train has left the station, being informed that by boarding the train you have given up certain rights.

Adoption of these browse-wraps is allowed by the Draft Restatement in terms of the section dealing with adoption of terms only made available after contract formation.¹⁹⁸ The reporters accept that ‘the manifestation of assent to the transaction and the adoption of the terms occur upon the continued use of the proprietary environment and the receipt of its benefits’, although ‘reasonable opportunity to exit without being bound to the terms’ after review must be provided.¹⁹⁹ Although an opportunity to terminate is thus required, the Draft Restatement does not specify the practical implications of this in the context of browse-wraps.

Because no precedent similar to that of *ProCD*²⁰⁰ exists in South African law, there is no authority for enforcing terms that the consumer could not access before contract formation.²⁰¹ If a court wants to follow the example of its American counterparts in recognising these terms, it will involve a similar ‘doctrinal distortion’.²⁰² It will further trigger the fourteen-day cancellation period provided for in s 43(3) of the Electronic Communications and Transactions Act 25 of 2002 (‘ECTA’), because the consumer is not given the opportunity ‘to review the entire electronic transaction’ before completing the transaction.²⁰³ Furthermore, it may require courts to circumvent the provision in the Consumer Protection Act 68 of 2008 (‘CPA’) prohibiting negative option marketing.²⁰⁴ As indicated elsewhere, this will depend on the willingness of courts to rely on the ongoing conduct of the consumer as an indication of assent, instead of the initial act of accessing the website.²⁰⁵ As in the case of *ProCD*, it is possible that the courts’ analysis might be influenced by commercial considerations.²⁰⁶

With regard to shrink-wraps, the element of continued use is usually absent. Therefore, they are unlikely to be enforced in South African law.²⁰⁷

¹⁹⁷ Kim op cit note 33 at 109: ‘The offeree may receive notice after undertaking the acts that constitute acceptance.’

¹⁹⁸ See part II(b) above.

¹⁹⁹ Comment 6 to Para 2 of the Draft Restatement.

²⁰⁰ Supra note 15.

²⁰¹ See Van Deventer op cit note 5 at 250ff.

²⁰² Radin op cit note 114 at 517.

²⁰³ Section 43(2) of the ECTA. Also see Van Deventer op cit note 5 at 237ff.

²⁰⁴ Section 31 of the CPA.

²⁰⁵ See Van Deventer op cit note 5 at 250ff.

²⁰⁶ See part IV(a) below for a further discussion of the role of commercial necessity.

²⁰⁷ See Van Deventer op cit note 5 at 251–2.

There is also little justification for their enforcement: the online context provides an easy medium for suppliers to make the terms available prior to contract formation, unlike the example of telephonic contracts mentioned by Judge Easterbrook in *Hill*.²⁰⁸ Suppliers can thus easily overcome the problem of unenforceable shrink-wraps by utilising either click- or browse-wraps.

(d) *Unexpected or surprising terms*

Online contracts tend to contain invasive and unexpected terms which are often unrelated to the primary transaction forming the subject of the contract.²⁰⁹ Two types of clauses have been identified in this regard, namely terms that erode a consumer's privacy, and those regulating the property rights of user-generated content.²¹⁰

American law has had difficulty dealing with the issue of unexpected or surprising terms.²¹¹ The unconscionability doctrine will only protect consumers against unexpected terms in extreme circumstances, and courts apply a stringent test for a finding of unconscionability.²¹² Because substantive unconscionability is so hard to prove, it has only been applied in a relatively small number of cases.²¹³

The doctrine of reasonable expectations also allows courts to overturn express contract language if it contradicts the consumer's reasonable expectations.²¹⁴ This doctrine places a duty on the supplier to draw the consumer's attention to unexpected and unreasonable terms, but it has mostly only been applied in insurance cases.²¹⁵ A similar doctrine is reflected in s 211 of the *Restatement (Second) of Contracts*.²¹⁶ However, this section requires the consumer to prove both the supplier's state of mind

²⁰⁸ Supra note 19.

²⁰⁹ Ghirardelli op cit note 13 at 737.

²¹⁰ Ibid.

²¹¹ Robert L Oakley 'Fairness in electronic contracting: Minimum standards for non-negotiated contracts' (2005) 42 *Houston LR* 1041 at 1065.

²¹² Ghirardelli op cit note 13 at 745; Canino op cit note 35 at 561–2; Oakley ibid at 1064; Cheryl B Preston "'Please note: you have waived everything': Can notice redeem online contracts?' (2015) 64 *Am U LR* 535 at 546.

²¹³ Oakley ibid at 1064.

²¹⁴ Robert A Hillman & Jeffrey J Rachlinski 'Standard-form contracting in the electronic age' (2002) 77 *NYU LR* 429 at 459; Ian Ayres & Alan Schwartz 'The no reading problem in consumer contract law' (2014) 66 *Stanford LR* 545 at 559.

²¹⁵ Oakley op cit note 211 at 1065; Robin Bradley Kar & Margaret Jane Radin 'Pseudo-contract and shared meaning analysis' (2019) 132 *Harvard LR* 1135 at 1201.

²¹⁶ Op cit note 115. Oakley ibid. Section 211(3) reads as follows: 'Where the other party has reason to believe that the party manifesting such assent would not do so if he knows that the writing contained a particular term, the term is not part of the agreement.'

(whether the supplier had reason to believe the consumer's assent is lacking)²¹⁷ and that the consumer would not have entered into the agreement at all if the consumer was aware of the term.²¹⁸ Consequently, Oakley avers that American law does not provide a proper mechanism to protect consumers against unexpected and unreasonable terms in an online contract.²¹⁹

The Draft Restatement also contains no provisions with regard to surprising terms,²²⁰ except in so far as it forms part of procedural unconscionability²²¹ or where such a term is the result of a deceptive act.²²² A surprising term is regarded as a defect in the bargaining process which may satisfy the procedural prong of the test for unconscionability.²²³ However, the reporters emphasise the substantive prong of the unconscionability enquiry.²²⁴ The fact that a term is unexpected or surprising will therefore rarely be enough in itself to avoid its operation in American law.

This is different from the position in South African law, where the rules surrounding unexpected terms pertain only to the assent requirement, and the substantive effect of the offending term is irrelevant.²²⁵ In this regard, South African law thus allows for more protection of the reasonable expectations of consumers. Invalidating terms which would not be expected by the reasonable consumer in the specific contract can also encourage suppliers to refrain from inserting such terms in an online contract, or to take steps to bring them to the attention of consumers.

²¹⁷ Ghirardelli op cit note 13 at 749. However, Hillman & Rachlinski op cit note 214 at 459 indicate that courts (especially in Arizona) have tended to shift their focus to the expectation of the drafter, rather than the consumer.

²¹⁸ See Leib & Eigen op cit note 133 at 79.

²¹⁹ Oakley op cit note 211 at 1065.

²²⁰ Eisenberg op cit note 89 criticises the absence of a provision similar to s 211 of the *Restatement (Second) of Contracts* op cit note 115 in the Draft Restatement.

²²¹ Para 5(b)(2) of the Draft Restatement.

²²² Para 6(a) of the Draft Restatement.

²²³ Comment 6(b) to Para 5 of the Draft Restatement. It is further recognised (at comment 7(b) to Para 5 of the Draft Restatement) that '[b]ecause of the length, complexity, and accumulation of standard-form contracts, an enhanced-format disclosure of a term does not guarantee that consumers will not be surprised and thus does not guarantee meaningful choice. The harsh effect of the standard terms can continue to be hidden even in full daylight, given that consumers rarely read those terms and, even if they do, often may not understand or appreciate their effect at the time of contracting.'

²²⁴ See the Reporters' Note to Para 5 of the Draft Restatement at 97: 'Courts have used the "sliding scale" approach to minimize the procedural-unconscionability requirement and emphasize the substantive-unconscionability requirement.'

²²⁵ *Burger v Central South African Railways* 1903 TS 571 at 576; Bradfield op cit note 150 at 210; although there have been cases where enforcement of unreasonable terms was refused — see *Owens v Ennis & Co* (1889–1890) 3 SAR TS 233 at 234; Bradfield *ibid* at 215.

The manner in which this doctrine can be developed in the online context in South African law has been discussed elsewhere.²²⁶

(e) *Incorporation by reference: hyperlinks*

The scope of an online contract can be significantly extended by inserting a hyperlink or hyperlinks in the contract presented to the consumer, which incorporate further online terms. In both American and South African law, such a hyperlink in an online agreement of which there is constructive or actual notice may suffice to incorporate the terms in the contract.²²⁷

The impact this has on the consumer's duty to read the document cannot be ignored. It has been found that hyperlinks impair the reading performance of consumers because they divide their attention.²²⁸ Because the terms are longer and have to be recovered from yet another place, an additional burden is also placed on the consumer. Arguably, this should be taken into account when determining whether the supplier could reasonably expect the consumer to read the online contract, thus rendering a mistake regarding the content of the online contract reasonable.²²⁹

However, if it is acknowledged that consumers ultimately do not read online contracts, regardless of their length, then the fact that extra documents are incorporated should not make a difference. It is only where a solution for improving the quality of assent by encouraging readership can be found that regulating the use of hyperlinks will have an effect.

(f) *Concluding observations*

The enforcement of standard-form contracts has always been contentious, but the features of online contracts demand a reconsideration of certain of the rules relating to standard terms to cater for the online environment. One of the main considerations pertaining to the establishment of assent to online contracts is that it is unreasonable and unrealistic to expect consumers to read their terms. There are various reasons for this, including their length, ubiquity, incomprehensibility, the cost of reading, and the lack of benefit in reading due to the adhesive nature of online contracts.

Both the American and the South African common law allow for the enforcement of unread terms by subscribing to an idea of blanket assent:

²²⁶ See Van Deventer op cit note 5 at 252ff. Also see Van Deventer op cit note 18 at 153–4 for a discussion of some factors that may play a role in shaping a consumer's expectation.

²²⁷ For American law see *Durick v eBay, Inc* 2006 WL 2672795 (Oho Ct App 2006); Reporters' Notes to Para 2 of the Draft Restatement at 40. For SA law, see Van Deventer op cit note 5 at 255ff.

²²⁸ Canino op cit note 35 at 557.

²²⁹ See part III(d) above.

consumers agree that the terms will apply regardless of their content, thereby assuming the risk of adverse terms.²³⁰ One exception to this general position, at least in South African law, is where terms are deemed surprising, and lead to a material and reasonable mistake. This renders the supplier's reliance on consent unreasonable, and, in terms of the *iustus error* doctrine, such terms are void.²³¹ As previously argued, this exception is an important instrument which courts can utilise to ensure that consumers' reasonable expectations are given effect.²³²

It was shown that, as in American law, South African courts do not insist that consumers must have actual knowledge of the content of a standard form contract; and, despite the absence of true consent, or even a reasonable reliance on the existence of true consent, both legal systems allow for the enforcement of terms.²³³ The Draft Restatement concretises this position.²³⁴ However, this move has attracted much criticism. As mentioned before, this mostly revolves around the fact that the assent requirement has been watered down to require little more than notice.²³⁵ While this concern is not without merit, it seems to be the inevitable consequence of standard-form contracts. Whether this criticism holds any water depends on the feasibility of alternatives or solutions, especially in light of the conclusion below that online contracts are essential.²³⁶

IV PROPOSALS FOR REGULATING ASSENT IN ONLINE CONTRACTS

(a) Introduction

The discussion thus far has considered whether online contracts are enforceable in principle. In both American and South African law, this question is answered mostly in the affirmative: provided some conditions are met, online contracts will be regarded as *prima facie* validly concluded. The question addressed in this part is whether online contracts should be enforced despite the lack of mutual assent that generally characterises their formation and, if so, whether more stringent requirements for assent

²³⁰ See Van Deventer op cit note 18 ch 3.

²³¹ See *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) para 12; *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA); *Fourie NO v Hansen* 2001 (2) SA 823 (W) at 832; Bradfield op cit note 150 at 210; Tjakie Naudé 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' (2006) 17 *Stellenbosch LR* 361 at 365; Minette Nortje 'Informational duties of credit providers and mistake: *Standard Bank of South Africa Ltd v Dlamini* 2013 1 SA 219 (KZD)' 2014 *TSAR* 212 at 218.

²³² See part III(d) above.

²³³ See part III(b) above.

²³⁴ Para 2 of the Draft Restatement.

²³⁵ See part II(c) above.

²³⁶ See part IV(a) below.

should be recognised. Proposals specifically aimed at reforming the assent requirement can be grouped into two broad categories: those which only regard terms representing a meeting of the minds as binding contractual terms,²³⁷ and those which argue for increased disclosure or specific disclosure-related measures to improve the quality of assent.²³⁸ These are considered below.

Another solution, which can be distinguished from mere disclosure-based solutions, is the notion of free or voluntary consent as envisioned in the General Data Protection Regulation ('GDPR').²³⁹ The GDPR sets three important requirements for consent to the processing of personal information.²⁴⁰ First, consent must be given separately;²⁴¹ secondly, a positive act by the consumer is required;²⁴² and finally, it must be 'freely given'.²⁴³ It is especially the last requirement that sets this form of consent (which can be referred to as 'voluntary assent') apart from other disclosure-based solutions. In terms of the GDPR, this means that a supplier cannot preclude a consumer from using a service because the consumer refuses to consent to the use of his or her personal information, unless such consent is essential for providing the service.²⁴⁴ The requirement of voluntary assent stipulated in the GDPR only finds limited application: it applies in the context of the use of personal information, and seemingly also when consent to online tracking is given.²⁴⁵ Because the notion of voluntary assent offers such a limited solution, a more detailed discussion falls outside the ambit of this article.²⁴⁶

²³⁷ See part IV(b) below.

²³⁸ See part IV(c) below.

²³⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and repealing Directive 95/46/EC ('General Data Protection Regulation').

²⁴⁰ See art 4(11) of the GDPR, read with art 1.

²⁴¹ Article 7(2) of the GDPR.

²⁴² Article 4(11), read with Recital 32.

²⁴³ Article 4(11), read with art 4(4).

²⁴⁴ Article 4(4).

²⁴⁵ See art 5(3) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, as amended by Directive 2009/136/E of the European Parliament and of the Council of 25 November 2009 (Directive on Privacy and Electronic Communications) ('ePrivacy Directive'). Also see AG Szpunar's opinion in *Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V* C-673/17, 21 March 2019 para 83: 'The requirements for consent do not greatly differ as regards cookies and, more generally, processing of personal data.'

²⁴⁶ For a discussion regarding the possible role of voluntary consent see Van Deventer op cit note 18 at 267–8, 276–9.

When evaluating the effectiveness and viability of possible regulatory responses, two by now familiar observations regarding online contracts must be kept in mind: (i) reading online contracts is irrational; and (ii) the enforcement of online contracts in general is justified based on their commercial necessity.

With regard to the first observation, numerous studies have confirmed what most consumers intuitively know: consumers do not read online contracts, regardless of how they are displayed or how effortlessly they can be accessed.²⁴⁷ Wilkinson-Ryan refers to the ‘now-uncontroversial fact of universal non-readership’,²⁴⁸ and the reporters of the Draft Restatement observe that ‘consumers rarely read standard contract terms no matter how those terms are disclosed.’²⁴⁹

This observation has important implications when considering regulatory responses to the problem of adverse terms in online contracts. It means that efforts to enhance fairness cannot rely on factors which require the consumer to read the contract²⁵⁰ — for example, whether the product could be obtained from another supplier on more favourable terms. Naturally, it also impacts the prospect of success of disclosure as a regulatory technique, an issue which will be addressed more thoroughly below.²⁵¹

The second observation relates to the fact that the justification for the enforcement of standard-form contracts consistently refers to their economic purpose, such as the fact that they reduce transaction costs and allow suppliers to manage risks.²⁵²

²⁴⁷ See Omri Ben-Shahar & Carl E Schneider *More Than You Wanted to Know: A Failure of Mandated Disclosure* (2014) 67–9; Florencia Marotta-Wurgler ‘Will increased disclosure help? Evaluating the recommendations of the ALI’s “Principles of the Law of Software Contracts”’ (2011) 78 *U Chicago LR* 165 at 168; Bakos, Marotta-Wurgler & Trossen *op cit* note 1 at 31; Ben-Shahar *op cit* note 3 at 2.

²⁴⁸ Wilkinson-Ryan *op cit* note 147 at 120.

²⁴⁹ Reporters’ Note to Para 2 of the Draft Restatement at 35.

²⁵⁰ See Hans Schulte-Nölke ‘Incorporation of standard contract terms on websites’ (2019) 15 *ERCL* 103 at 121: ‘One of the most, if not the most, important functions of the law of standard contract terms should be to relieve consumers ... from the burden of any obligation to read, ponder over, or even negotiate the bulk of standard contract terms before they agree to their application.’

²⁵¹ See part IV(b) below.

²⁵² See P J Sutherland ‘Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) — Part 2’ (2009) 20 *Stellenbosch LR* 50 at 63. The benefits and importance of standard-form contracts are widely recognised, and have been discussed elsewhere (see Van Deventer *op cit* note 18 at 37–8). Also see *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 139, where Sachs J stated: ‘The use of standard forms responds to two economic pressures. They reduce the transaction costs of contracting by making available at no extra cost a suitable set of terms. In addition the printed forms permit senior management

One of the fundamental observations made by the reporters of the Draft Restatement is that ‘the use of standardization in the production of contract terms is ... a source of potential benefits to consumers and businesses alike’.²⁵³ These considerations also hold true for online contracts, and lead to the conclusion that the enforcement of standard-form contracts — and by extension online contracts — is essential.²⁵⁴

The fact that online contracts are both justified by and essential for commercial practice has important implications when substantive measures of control are considered.²⁵⁵ However, it also affects assent-related measures. Unless the conclusion that online contracts are essential is successfully challenged, unrealistic formation requirements may be detrimental to suppliers and consumers alike. If the requirements for assent make it practically impossible for online suppliers to conclude binding contracts with consumers, they might be unable to continue providing goods or services, or might have to increase the price of goods significantly. Thus, if proper informed consent is impossible, insisting on it may cause more harm than good.

(b) *Proposals which hold that the enforcement of online contracts cannot be justified based on assent*

Scholars have warned that relaxing the assent requirement by requiring only notice of the existence of contractual terms and a manifestation of assent (instead of actual assent) might lead to ‘normative degradation’²⁵⁶ by eroding the very essence of contractual legitimacy. A further argument is that it would be preferable — from both a practical and theoretical point of view — to recognise that the enforcement of online terms is not justified by assent, and consequently also to remove assent as a requirement.²⁵⁷ For example, Zacks argues:

‘The elimination of assent appears to violate the conception of basic freedom from contract. That, however, is largely the point: this situation may exist now, and the fiction that it does not is what permits the routine enforcement of oppressive terms unilaterally imposed on consumers in a coercive fashion.’²⁵⁸

of a firm to control the contractual arrangement made by subordinate staff. For these reasons it makes sense to permit the use of standard forms, but to control the content of the terms of the contracts.’

²⁵³ Reporters’ Notes to Para 2 of the Draft Restatement at 35.

²⁵⁴ A minority of commentators hold an opposing view (see Colin P Marks ‘Online and “as is”’ (2017) 46 *Pepp LR* 1 at 48–9; Colin P Marks ‘Online terms as *in terrorem* devices’ (2019) 78 *Maryland LR* 247 at 249; Kar & Radin *op cit* note 215 at 1135). See the brief discussion in Van Deventer *op cit* note 18 at 251.

²⁵⁵ See Van Deventer *ibid* at 251–2.

²⁵⁶ Radin *op cit* note 122 at 19; Radin *op cit* note 114 at 522.

²⁵⁷ See W David Slawson ‘Standard-form contracts and democratic control of lawmaking power’ (1971) 84 *Harvard LR* 529 at 544. Also see Wilkinson-Ryan *op cit* note 147 at 173; Zacks *op cit* note 117 at 741.

²⁵⁸ Zacks *ibid* at 773–4.

The argument is that because it is both improbable and undesirable for consumers to read online contracts,²⁵⁹ it makes no sense to analyse how terms are presented in an attempt to establish whether there was assent.²⁶⁰

If assent no longer justifies the enforcement of standard terms, an alternative basis to legitimise their enforcement must be found. The most persistent of these is the so-called contract-as-product theory.²⁶¹ Leff was the first to argue that contracts of adhesion bear a closer resemblance to a product than a contract,²⁶² an observation that was echoed by Slawson soon thereafter.²⁶³ They argue that a standard form is presented to the consumer as an assembled ‘product’, and in the same way as a consumer is not expected to understand and inspect the mechanism by which, for example, a refrigerator operates, the consumer is also not expected to comprehend the content of the standard terms.²⁶⁴ Where the standard terms restrict the use of the product in a way which interferes with its expected utility, this restriction should be regarded as similar to a defect in the product limiting its use.²⁶⁵ Classifying standard terms as products would protect the consumer’s reasonable expectations,²⁶⁶ because ‘when a particular standard form had failed to serve the purposes which the buyer had good reason to expect it to serve, the failure would be a breach of warranty’.²⁶⁷

The main benefit of the contract-as-product theory thus lies in the fact that it relieves the consumer from the duty to read; or, conversely, negates the notion that terms (regardless of their substantive effect) are binding because of a consumer’s manifestation of consent.²⁶⁸ If the standard-form terms are not viewed as contractual in nature, it would give courts a wider power to exercise control over these terms in accordance with the law of torts.²⁶⁹

²⁵⁹ Wilkinson–Ryan *ibid* at 128.

²⁶⁰ *Ibid* at 128: ‘Consumer contracts are unreadable all the time, no matter how close or how far the link to the “Privacy Policy” is to the “Checkout” button.’

²⁶¹ See James P Nehf ‘Shopping for privacy online: Consumer decision-making strategies and the emerging market for information privacy’ 2005 *University of Illinois Journal of Law, Technology & Policy* 1 at 7–8.

²⁶² Arthur A Leff ‘Contract as thing’ (1970) 19 *Am U LR* 131.

²⁶³ Slawson *op cit* note 257; W David Slawson ‘Mass contracts: Lawful fraud in California’ (1974) 48 *S Cal LR* 1.

²⁶⁴ Slawson *op cit* note 263 at 17.

²⁶⁵ Leff *op cit* note 262 at 149–51; Slawson *op cit* note 257 at 546–7.

²⁶⁶ Slawson *ibid* at 523: ‘What is needed is a set of legal principles which reconcile the interests of issuers in setting such terms as they wish on an agreement and of the consumer in having his reasonable expectations fulfilled.’

²⁶⁷ Slawson *op cit* note 263 at 18.

²⁶⁸ See Slawson *ibid* at 15–16.

²⁶⁹ Radin *op cit* note 122 at 101 and ch 11; Hazel Glenn Beh ‘Curing the infirmities of the unconscionability doctrine’ (2015) 66 *Hastings LJ* 1011 at 1034:

In the nearly 50 years since its development, this theory has received some academic support,²⁷⁰ but has not enjoyed judicial approval.²⁷¹ South African authors have also not subscribed to this view, deeming it largely inconsistent with the distinction between personal rights and property.²⁷²

A more recent theory proposed by Kar & Radin, and which they refer to as shared-meaning analysis, suggests that boilerplate terms should not be viewed as contractual in nature, but rather as a form of ‘pseudo-contract’.²⁷³ They rely on the use of linguistics²⁷⁴ to argue that only terms which contribute to the parties’ shared understanding of their agreement should have contractual force;²⁷⁵ all other boilerplate terms they regard as ‘ride-along text’²⁷⁶ which does not form part of the shared meaning of the parties.²⁷⁷ This, they believe, will prevent the distortion of freedom of contract which occurs when a supplier is allowed to create a contract unilaterally²⁷⁸ in an environment which makes it impractical for consumers to read these boilerplate terms.²⁷⁹

The practical effect of their proposal is that only the core terms of a transaction would be enforceable, rendering most standard terms without legal effect and resulting in ‘the roiling of markets by precluding buyers and sellers from maintaining confidence in their agreements’.²⁸⁰ The authors

‘The boldest suggestion to reinvigorate unconscionability is to establish a parallel tort-based claim.’

²⁷⁰ See Radin *ibid* at 199.

²⁷¹ Moringiello *op cit* note 42 at 1314.

²⁷² See Gerhard Theodor Siegfried Eiselen *Die Beheer oor Standaardbedinge: 'n Regsvergelykende Ondersoek* (unpublished LLD thesis, Potchefstroom University, 1988) 51.

²⁷³ Kar & Radin *op cit* note 215 at 1135, 1166–7.

²⁷⁴ In particular the views of Grice (see *ibid* at 1144–54).

²⁷⁵ *Ibid* at 1155: ‘To determine whether a particular piece of boilerplate text contributes a valid term to a contract, one must therefore ask whether the text was ever entered into a linguistic exchange in a sufficiently cooperative manner to create a common meaning of the parties.’

²⁷⁶ *Ibid* at 1192.

²⁷⁷ They define the shared meaning as ‘the meaning that is most consistent with the presupposition that both parties were using language cooperatively to form a contract’ (at both 1146 and 1154).

²⁷⁸ *Ibid* at 1155, 1161: ‘The premises of freedom of contract — and also freedom from contract — suppose parties with equal capacities to define and enter into only those terms that both agree offer expected gains for each, trusting a well-functioning legal system to focus legal enforcement on their shared agreements. Assimilationists have not yet recognized the depth of the normative problems with construing pseudo-contract as contract and giving some parties — but not others — the unilateral right to shape aspects of “contracts” without producing common meanings to which both parties have actually agreed.’

²⁷⁹ *Ibid* at 1207.

²⁸⁰ Feldman *op cit* note 45 at 6.

do not address the common view that online contracts are essential,²⁸¹ and unless it can be disproved, this solution does not seem feasible.²⁸² They have also been criticised for envisioning an unworkable subjective approach to establishing consensus by requiring ‘actual agreement’.²⁸³ Part of Feldman’s criticism of Kar & Radin’s proposal of shared-meaning analysis is based on their failure to address the crucial reasons why objective considerations were introduced in contract law.²⁸⁴

Ben-Shahar also points out that consumers are just as ignorant with respect to the default rules.²⁸⁵ These rules might further prove more difficult to ascertain than those set out in the standard-form contract.²⁸⁶ Thus, declaring all boilerplate terms invalid will not solve the problem of consumer ignorance.²⁸⁷

Even though both of the theories discussed above (contract-as-product and shared-meaning analysis) are difficult to reconcile with the South African law of contract, this does not detract from the basic problem identified by the various scholars: by classifying these non-negotiated terms as contracts, they are afforded the same protection as negotiated contractual terms despite the absence of a bargaining process or meaningful assent. Therefore, these proposals aim primarily to address the fact that judges continue to pay lip-service to contractual freedom in evaluating the enforceability of standard terms.²⁸⁸ However, this can be done in a less

²⁸¹ See part IV(a) above.

²⁸² See Feldman op cit note 45 at 25–30.

²⁸³ Feldman ibid at 19–20, 52–63: At 63 he says: ‘Kar and Radin fully embrace the “unworkable” subjective theory as the foundation for their proposal’. See Kar & Radin op cit note 215 at 1138: ‘Without the presence of an *actual agreement* freely reached, the state is not easily justified in enforcing a contract, because instead of enhancing the parties’ freedom of contract, the legal system would be limiting it.’ (Emphasis supplied.)

²⁸⁴ Feldman ibid at 79: ‘The duty to read and understand a contract rests on sound legal and economic policies. As shown above, the authors’ rejection of the fundamental premise that the law holds a party responsible for reading and understanding its contract would impair the party’s exercise of autonomy and thereby undermine the stability and predictability of contracts.’

²⁸⁵ Omri Ben-Shahar ‘Regulation through boilerplate: An apologia’ (2014) 112 *Michigan LR* 883 at 887–8.

²⁸⁶ Ibid at 888.

²⁸⁷ Ibid at 892.

²⁸⁸ See *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 (5) SA 205 (WCC) para 32; *Wells v South African Alumenite Company* 1927 AD 69 at 73; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A) at 767; *Sasfin v Beukes* 1989 (1) SA 1 (A) at 9. Also see Hutchison op cit note 2 at 23; Graham Glover ‘Contract, good faith, the Constitution and duress: Contextualising the doctrine’ in Graham Glover (ed) *Essays in Honour of AJ Kerr* (2006) 110.

drastic and more doctrinally sound manner, for example by providing that certain terms are presumptively unfair.²⁸⁹

(c) *Disclosure-based solutions in general*

(i) *Effectiveness of disclosure as a means to ensure fairness*

Traditionally, regulation of standard-form contracts took one of two forms (or a combination of both) — either the content of the contract was regulated, or disclosure was mandated.²⁹⁰ Disclosure in particular is favoured by the legislature²⁹¹ because of its low implementation cost: ‘Requiring disclosure puts only a very minimal burden on firms, requires almost no judicial or regulatory oversight, and does not otherwise interfere with parties’ private ordering.’²⁹²

However, there is little evidence to show that increased disclosure has the intended effect, and most academics recognise its historic failure to ensure fairer contract terms.²⁹³ The reasons for this mostly relate to consumers’ failure to read²⁹⁴ or failure to comprehend²⁹⁵ the terms of standard-form contracts, and include the fact that consumers lack the necessary literacy or education to understand even simplified disclosures;²⁹⁶ that consumers are so overloaded with information that they cannot read and assimilate it all, and end up making worse decisions;²⁹⁷ that some consumers prefer to avoid decision-making (particularly relating to complex and unfamiliar subjects);²⁹⁸ and that disclosures cannot correct heuristic biases affecting consumers’ decision making.²⁹⁹ The problem can be summarised as follows: ‘Studies numerously testify that people don’t notice disclosures, don’t read them if they see them, can’t understand them if they try to read them, and can’t use them if they read them.’³⁰⁰

²⁸⁹ See Van Deventer *ibid* at 276–84.

²⁹⁰ Bakos, Marotta-Wurgler & Trossen *op cit* note 1 at 2.

²⁹¹ Ben-Shahar & Schneider describe just how prevalent disclosure as a regulatory technique is in all areas of the law (*op cit* note 247 ch 2). Also see Shmuel I Becher & Tal Z Zarsky ‘Seduction by disclosure: Comments on *Seduction by Contract*’ (2014) 9 *Jerusalem Rev Legal Stud* 72.

²⁹² Wilkinson-Ryan *op cit* note 147 at 137–8 (footnotes omitted).

²⁹³ Ben-Shahar & Schneider *op cit* note 247 at 43–51; Omri Ben-Shahar & Carl E Schneider ‘Coping with the failure of mandated disclosure’ (2015) 11 *Jerusalem Rev Legal Stud* 83 at 83.

²⁹⁴ See Van Deventer *op cit* note 5 at 230–2. Also see Ben-Shahar & Schneider *ibid* at 71–2; Wilkinson-Ryan *op cit* note 147 at 123.

²⁹⁵ See Van Deventer *ibid*.

²⁹⁶ Ben-Shahar & Schneider *op cit* note 247 at 8, 47, 80–91; Ben-Shahar *op cit* note 3 at 13.

²⁹⁷ Ben-Shahar & Schneider *ibid* at 51, 101–5.

²⁹⁸ *Ibid* at 67.

²⁹⁹ *Ibid* at 56–7, 110–12; Ben-Shahar *op cit* note 3 at 14.

³⁰⁰ Ben-Shahar & Schneider *ibid* at 55.

The main difficulty with a solution focused on disclosure is that the more information that is provided, the less likely it is that consumers will read it. Merely increasing the amount of information available to consumers will be ineffective and will most probably exacerbate the problem.³⁰¹

(ii) *Specific disclosure-related suggestions in the online context*

Various suggestions have been made in an attempt to circumvent the non-reading problem in online contracts. One category of solutions focuses on highlighting specific terms and making them easier to digest. Probably the most prominent of these is so-called ‘smart disclosure’, which encourages suppliers to place terms which consumers expect in a less noticeable place, and to highlight in a prescribed warning box those terms which consumers assume will be more favourable toward them than what is actually the case.³⁰² Porat & Strahilevitz propose a variation of this, which would see suppliers use information they possess about consumers to personalise the terms disclosed to those consumers.³⁰³ A less tailored use of the warning box is suggested by Preston, namely the creation of a table providing a summary of the terms similar to the ‘calorie and content’ box found on foodstuffs.³⁰⁴ Another suggestion, which also relies on selective disclosure, is the use of a score denoting the quality of the underlying terms.³⁰⁵ This may be used to circumvent the problem of information overload,³⁰⁶ but does not serve to inform consumers of individual terms.

Other proponents of disclosure as a solution in online contracts suggest that an additional manifestation of consent should be required — merely clicking once is not sufficient. For instance, it is suggested that only terms for which the consumer indicates consent in a specific manner (for example by initialling, which requires a more deliberate action)³⁰⁷ should be enforced.³⁰⁸ One of Kim’s suggestions broadly supports this view — she

³⁰¹ Oren Bar-Gill *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (2012) 36. Also see Robert A Hillman ‘Online boilerplate: Would mandatory website disclosure of e-standard terms backfire?’ (2006) 104 *Michigan LR* 837 at 850.

³⁰² Ayres & Schwartz op cit note 214 at 545–609.

³⁰³ Ariel Porat & Lior Jacob Strahilevitz ‘Personalizing default rules and disclosure with Big Data’ (2014) 112 *Michigan LR* 1417 at 1470–76.

³⁰⁴ Preston op cit note 212 at 580–82. A similar idea has also been proposed by Ben-Shahar op cit note 3 at 25–6.

³⁰⁵ Oren Bar-Gill ‘Defending (smart) disclosure: A comment on *More Than You Wanted to Know*’ (2015) 11 *Jerusalem Rev Legal Stud* 75 at 76. This is similar to the rating proposed by Ben-Shahar ibid at 22–4.

³⁰⁶ Bar-Gill ibid at 77.

³⁰⁷ Anthony M Balloon ‘From wax seals to hypertext: Electronic signatures, contract formation and a new model for consumer protection in internet transactions’ (2001) 50 *Emory LJ* 905 at 933.

³⁰⁸ Barnhizer op cit note 133 at 218.

argues that so-called tailored assent should be obtained, which means that sellers should ‘require the non-drafting party to click after each promise’.³⁰⁹

These suggestions rely on the assumption that disclosure can draw the attention of individual consumers to terms which would otherwise have gone unnoticed, and allow them to make a choice whether or not to accept those terms and thus continue with the transaction. However, a consumer’s failure to read is not the only factor leading to unfair terms. Reading a term does not automatically mean comprehending its consequence,³¹⁰ nor does it give the consumer the ability to influence the terms.³¹¹ Consumers are also generally apathetic towards contract terms *ex ante*,³¹² they do not believe that any of the long list of misfortunes provided for in the terms will befall them. Thus, even if the formation problem can theoretically be solved by proper disclosure, it might not influence consumer behaviour or lead to substantively fairer contract terms.³¹³

Furthermore, it is doubtful whether disclosure can succeed in rendering otherwise non-salient terms salient, in the sense that the consumer will factor those terms into their decision-making process. Certain terms, such as arbitration clauses and choice-of-forum clauses, are ‘arguably not susceptible to salience solutions’.³¹⁴ There is a high likelihood that, regardless of how many clicks are required, consumers will continue to do what they currently do: click to get rid of the terms and continue with the transaction, instead of clicking because they consent to the terms.³¹⁵

(iii) *The cost of disclosure*

Despite recognising the futility of disclosure as a means of ensuring fair terms, most commentators continue to support the idea that consumers must be granted an opportunity to study the terms before contract

³⁰⁹ Kim *op cit* note 33 at 196.

³¹⁰ See Ben-Shahar *op cit* note 285 at 890: ‘The ideal of informed consent is impossible to achieve when a true understanding of the decision requires experience, background knowledge, intuition, and technical mastery, which only experts have.’

³¹¹ See Ghirardelli *op cit* note 13 at 723; Leib & Eigen *op cit* note 133 at 96.

³¹² Ben-Shahar *op cit* note 3 at 25; Grundmann *op cit* note 3 at 166–7.

³¹³ Barnhizer *op cit* note 133 at 219 is of the opinion that ‘even the best quality assent likely will not improve the quality of the resulting contract.’ Also see Naudé *op cit* note 231 at 371, 377–8.

³¹⁴ Wilkinson-Ryan *op cit* note 147 at 136. Also see Margaret Jane Radin ‘What boilerplate said: A response to Omri Ben-Shahar (and a diagnosis)’ Public Law and Legal Theory Research Paper Series Paper No. 392 (2014) 4, available at <https://ssrn.com/abstract=2401720>, accessed on 20 October 2020; Margaret Jane Radin ‘Less than I wanted to know: The submerged issues in *More than I Wanted to Know*’ (2015) 11 *Jerusalem Rev Legal Stud* 51 at 57.

³¹⁵ See Hillman *op cit* note 301 at 844, who notes that methods of attracting attention to specific terms have not had particular success in traditional standard-form contracts.

conclusion,³¹⁶ and disclosure continues to feature prominently in consumer protection legislation.³¹⁷ Part of the rationale for insisting on disclosure is the general assumption that, even if it is ineffective, it can do no harm. However, Wilkinson-Ryan challenges this view, arguing that the cost of disclosure lies in its psychological effect: consumers (and to a large extent also courts) regard properly disclosed standard terms as binding.³¹⁸ She therefore identifies the problem as the fact that ‘the terms, afforded so little attention [by the consumer] *ex ante*, have too much weight *ex post*’.³¹⁹

Hillman similarly concludes that disclosure may aggravate unfairness (by leading to the enforcement of suspect terms), instead of alleviating it.³²⁰ Although requiring disclosure makes theoretical sense because it serves to satisfy the assent requirement, it is precisely for this reason that disclosure as a means of control is problematic:

‘Mandatory website disclosure would therefore reinforce Llewellyn’s conception of consumers’ blanket *assent* to reasonable standard terms ... [and] consumers who agree to a standard-form transaction after mandatory website disclosure would have a more difficult time complaining of hollow assent.’³²¹

Establishing whether there was assent and proper disclosure further acts as a distraction: instead of evaluating the merits of a specific term and determining what suppliers should be allowed to do, courts determine whether the consumer assented to the terms.³²² Requiring specific terms to be drawn to the attention of the consumer can ‘be a double-edged sword which may ultimately work against the consumer’, because it strengthens the argument for their enforceability.³²³ It could thus persuade

³¹⁶ See Ayres & Schwartz op cit note 214 at 561. Also see Wilkinson-Ryan op cit note 147 at 136.

³¹⁷ Ben-Shahar op cit note 3 at 10. See for example European Legal Studies Institute, Osnabrück University *Contribution to Growth: Legal Aspects of Protecting European Consumers* (2019) 33, where it is said that ‘consumer protection through information has been subject to criticism, as its overall effectiveness has been questioned; the Consumer Rights Directive proves that protection through information can also be pursued efficiently by consumers’. Disclosure is also mandated in the both the CPA and the ECTA (see notes 343 and 344 below).

³¹⁸ Wilkinson-Ryan op cit note 147 at 139–164; Meirav Furth-Matzkin ‘The harmful effects of unenforceable contract terms: Experimental evidence’ (2019) 70 *Alabama LR* 1032.

³¹⁹ Wilkinson-Ryan *ibid* at 164.

³²⁰ Hillman op cit note 301 at 839; Wilkinson-Ryan *ibid* at 165.

³²¹ Hillman *ibid* at 846 (emphasis in the original).

³²² Wilkinson-Ryan op cit note 147 at 170; Ben-Shahar op cit note 3 at 21.

³²³ Tjakie Naudé ‘The consumer’s “right to fair, reasonable and just terms” under the new Consumer Protection Act in comparative perspective’ (2009) 126 *SALJ* 505 at 510; Tjakie Naudé ‘Section 49’ in Tjakie Naudé & Siegfried Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) 49–5.

courts to place more value on freedom of contract when evaluating the enforceability of a term.³²⁴

Another concern raised by scholars opposed to heightened disclosure is that it not only fails in its purpose, but also ‘spare[s] lawmakers the struggle of enacting better but less popular reforms’.³²⁵ In other words, the argument is that even if disclosure in itself is not harmful, it is continually relied on as a method of ensuring fairness despite its proven ineffectiveness, and thus prevents the legislature from considering more effective means of regulation.³²⁶

(iv) *Reasons for the continued reliance on disclosure*

In response to the failure of disclosure to influence the contracting decision of consumers, and the possible risks associated with increased disclosure, some academics have questioned whether there is any reason to continue requiring that suppliers must disclose standard terms at all.³²⁷ Their argument goes further than merely advocating against heightened disclosure; instead, they propose that the assent requirement and the concomitant duty to disclose should be abolished in its entirety. However, at least two arguments support a continued insistence on assent and disclosure, despite the fact that consumers generally fail to read the terms.

The first relies on market forces to police standard terms. The idea that a so-called informed minority is sufficient to ensure fairness in standard-form contracts was articulated in 1979 by Schwartz & Wilde.³²⁸ Thus, if disclosure can succeed in achieving such an informed minority, market forces will ensure fairer terms in general.

It is not suggested that this abolishes the need for other forms of regulation. Empirical evidence indicates that generally no informed minority exists in respect of online contracts.³²⁹ The risk also exists, especially online, that suppliers can isolate the consumers who read the terms, and offer only them better terms (for example by using opt-out clauses).³³⁰ Most

³²⁴ See note 288 above.

³²⁵ Ben-Shahar & Schneider op cit note 247 at 11.

³²⁶ Ben-Shahar & Schneider op cit note 293 at 90.

³²⁷ See part III(f) above.

³²⁸ Alan Schwartz & Louis L Wilde ‘Intervening in markets on the basis of imperfect information: A legal and economic analysis’ (1979) 127 *U Pa LR* 630. Also see Bakos, Marotta-Wurgler & Trossen op cit note 1 at 6–7; Wilkinson-Ryan op cit note 147 at 134; Wijayasriwardena op cit note 4 at 14–5; Hillman op cit note 301 at 843.

³²⁹ Bakos, Marotta-Wurgler & Trossen op cit note 1 at 32; Wilkinson-Ryan *ibid* at 134. Also see *Berkson* *supra* note 48 at 383–4.

³³⁰ Ben-Shahar op cit note 3 at 19–20.

academics thus accept that market pressure in itself provides insufficient control over online contracts.³³¹

Despite this, there are isolated incidents where reputational risks — heightened by the use of social media³³² — successfully led to the reform of terms.³³³ It has been suggested that in the information age, consumer activism can play a greater role in ensuring fair contract terms.³³⁴ If an effective method exists of reporting and making other consumers aware of abusive behaviour or unfair terms offered by a supplier, suppliers may amend their contracts rather than suffer the reputational risk.³³⁵ Market mechanisms — which depend on proper disclosure of terms — can thus play a subsidiary role in strengthening the prevention of undesirable terms in online contracts.³³⁶

Secondly, consumer organisations could play an important role in policing terms, and adequate disclosure is essential to facilitate their role.³³⁷ The EU experience (where abstract challenges are allowed in terms of art 7(2) of the Unfair Contract Terms Directive³³⁸) illustrates how important this function can be. Grundmann indicates that actions brought by consumer organisations in Germany significantly exceed those

³³¹ See Hillman op cit note 301 at 843; Benoliel & Becher op cit note 165 at 2292.

³³² Becher & Zarsky op cit note 291 at 76 state that ‘the recent technological changes have substantially enhanced the opportunities available for interpersonal learning’.

³³³ See for example Tomio Geron ‘After backlash, Instagram changes back to original terms of service’ *Forbes* 20 December 2012, available at <https://www.forbes.com/sites/tomiogeron/2012/12/20/after-backlash-instagram-changes-back-to-original-terms-of-service/#50e8a65f2ede>, accessed on 20 October 2020; Sean Gallagher ‘Backlash prompts Eventbrite to drop demand to crash events, record them’ *Ars Technica* 23 April 2018, available at <https://arstechnica.com/information-technology/2018/04/eventbrite-rolls-back-policy-that-would-have-given-it-right-to-record-events/>, accessed on 20 October 2020; Alex Hern & Jennifer Rankin ‘Spotify’s chief executive apologises after user backlash over new privacy policy’ *The Guardian* 21 August 2015, available at <https://www.theguardian.com/technology/2015/aug/21/spotify-faces-user-backlash-over-new-privacy-policy>, accessed on 20 October 2020. Also see Robert Brendan Taylor ‘Consumer-driven changes to online form contracts’ (2011) 67 *NYU Ann Surv Am L* 371.

³³⁴ Barnhizer op cit note 133 at 224.

³³⁵ Shmuel I Becher & Tal Z Zarsky ‘Online consumer contracts: No one reads, but does anyone care?’ (2015) 12 *Jerusalem Rev Legal Stud* 105 at 120.

³³⁶ Eiselen came to a similar conclusion with regard to traditional standard terms: op cit note 272 at 476–7.

³³⁷ See Grundmann op cit note 3 at 166.

³³⁸ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (‘the Unfair Contract Terms Directive’). Also see Oakley op cit note 211 at 1066.

instituted by individual consumers.³³⁹ He further states that one of the main advantages of requiring a clear manifestation of assent is

‘not necessarily that consumers tend to take substantive note in a considerable number of cases, but that *the set of terms is thus ear-marked in a completely transparent way*. Consumer associations do not risk the possibility that a target of attack will be withdrawn once they open a law suit.’³⁴⁰

The need for an increased role of similar institutions in the South African context has also been recognised.³⁴¹ It is thus not argued that the obligation on suppliers to properly disclose terms, which is recognised in the common law,³⁴² as well as the ECTA³⁴³ and the CPA,³⁴⁴ should be abolished. However, relying on disclosure as a means of improving the content of terms by ensuring informed decision-making is a ‘dangerous line of reasoning’.³⁴⁵ In light of this, it is difficult not to endorse the view of the reporters of the Draft Restatement that more reliance should instead be placed on ex post facto review of the substance of terms.³⁴⁶ The manner in which a term is disclosed will then serve as one factor to consider in determining the fairness of a term.

V CONCLUSION

Obtaining informed consent to online contracts seems nearly impossible. Put simply, consumers are generally not interested in contractual terms ex ante, except for a few core terms. Prescribing specific disclosure could merely perpetuate the myth that the problem of unfair terms can be solved by providing consumers with the information needed, a solution which has been proven to fail. It also triggers the duty to read, thereby convincing courts and consumers that the terms are binding.

³³⁹ Grundmann op cit note 3 at 170.

³⁴⁰ Ibid at 171 (emphasis in the original). Also see Schulte-Nölke op cit note 250 at 122, who refers to this as the ‘pinpointing function’.

³⁴¹ See Tjakie Naudé ‘Section 52’ in Tjakie Naudé & Sieg Eiselen (eds) *Commentary on the Consumer Protection Act* (2014) at 52-3.

³⁴² It is required in terms of the common law that the terms must be provided before, or in conjunction with, contract conclusion (see *D&H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 (3) SA 593 (SCA) at 599 (discussed in Minette Nortje & Deeksha Bhana ‘General principles of contract’ 2006 *Annual Survey of South African Law* 178 at 189-91); *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd* 2002 (4) SA 408 (SCA) at 419 (where the Supreme Court of Appeal rejected the factual finding of the full bench in *Paltex Dyehouse (Pty) Ltd v Union Spinning Mills (Pty) Ltd* 2000 (4) SA 837 (B) that the terms were introduced after contract conclusion, although not disputing that such a finding would render the terms unenforceable)).

³⁴³ Section 43.

³⁴⁴ See s 50 read with s 22, as well as s 49.

³⁴⁵ Schulte-Nölke op cit note 250 at 120.

³⁴⁶ Reporters’ Introduction to the Draft Restatement at 3.

It is thus argued that there is little to be gained by insisting on stricter formation requirements for online contracts in general. The only possible exception is voluntary consent, as required in terms of the GDPR.³⁴⁷ However, this is only advisable for specific clauses and is not suggested as a general method to improve the quality of assent.³⁴⁸ McGowan states:

‘Because it is rational for consumers not to read forms they will not read them — they are smarter than that. The law could require them to incur formation costs, such as initialing every paragraph, or clicking separately on 10 different dialog boxes and voice-recording “I agree,” but it cannot ultimately require them to pay attention, much less understand. The nub of the problem is substance.’³⁴⁹

The common-law position, which requires that the consumer must be given reasonable notice of the terms, together with current legislation which provides that any written consumer agreement must be made available to the consumer in plain and understandable language, is sufficient.³⁵⁰ Prescribing further, more specific formation requirements could be counter-productive, because it removes the flexibility provided by the common law for judges to develop guidelines regarding sufficient notice. Instead, it is beneficial to recognise that the enforcement of online contracts is based largely on considerations of business necessity.³⁵¹ This can justify the introduction of stricter substantive control of the terms, as illustrated by the unconscionability doctrine in American law. American courts generally require a combination of procedural and substantive unconscionability,³⁵² and it has been said that these ‘two elements operate on a sliding scale such that the more significant one is, the less significant the other need be’.³⁵³ The introduction of stricter substantive control of the terms may ensure that

³⁴⁷ See part IV(a) above.

³⁴⁸ See Van Deventer op cit note 18 at 267–8.

³⁴⁹ David McGowan ‘Consumer contracts and the Restatement project’ *SSRN* 2 September 2019 at 15, available at <https://ssrn.com/abstract=3446802>, accessed on 20 October 2020.

³⁵⁰ See notes 342, 343 and 344 above.

³⁵¹ See part IV(a) above.

³⁵² Hillman & Rachlinski op cit note 214 at 457; Radin op cit note 122 at 124–5. Also see Para 5(b) of the Draft Restatement. See Graham Glover ‘Section 40 of the Consumer Protection Act in comparative perspective’ 2013 *TSAR* 689 at 689–97 for a discussion of the history and role of unconscionability in Anglo-American jurisdictions. He further criticises the South African legislature’s failure to appreciate this aspect of the doctrine when incorporating it into s 40 of the CPA.

³⁵³ *Comb v PayPal Inc* 218 F Supp 2d 1165 (ND Cal 2002) at 1172. Also see Daiza op cit note 65 at 226–8; Para 5(a) of the Draft Restatement: ‘In determining that a contract or a term is unconscionable, a greater degree of one of the elements in this subsection means that a lesser degree of the other element is sufficient to establish unconscionability’.

‘the law ... create[s] a deeply-rooted confidence of consumers that they will be protected by the state, by the courts, and by other mechanisms from any unfair disadvantage that comes from all standard contract terms under such a link on a website labelled “Terms” or something similar’.³⁵⁴

Additionally, two instances can be identified where the common-law position regarding the formation of online contracts may require attention. The first exception pertains to browse-wraps whose terms can only be accessed after the consumer has accessed the website (and the act of contract formation has thus been completed). In terms of the common law, their enforceability is currently uncertain.³⁵⁵ It would be possible for the legislature to clarify the situation, for example by providing that

‘the standard contract terms become valid and enforceable at the moment that the consumer opens the website, but would retroactively be considered as not having been adopted at all if the consumer leaves the site before a reasonable time for reviewing the standard contract terms has passed’.³⁵⁶

However, such a statutory provision might usurp the courts’ common-law powers of review. In other words, if a statute provides that browse-wrap terms of service will be adopted when a consumer visits a website for a specified time, courts might defer to the statutory provision, instead of following the common-law approach, which requires them to consider whether the supplier did ‘what was reasonably sufficient to give the [consumer] notice of the conditions’.³⁵⁷ Consequently, it is suggested that the courts should rather clarify the position using common-law principles, preferably by allowing for the adoption of a website’s terms of service provided in the form of a browse-wrap.

The second exception where moderate development of the common law is proposed is in the context of unexpected terms. Some protection is awarded against these terms, but the courts should be urged to recognise more readily that consumers’ mistakes as to the content terms are often reasonable.³⁵⁸ This could provide important protection to consumers’ reasonable expectations, and may further encourage suppliers to identify surprising terms and bring them to the attention of consumers. Again, this development can take place judicially.

³⁵⁴ Schulte-Nölke op cit note 250 at 122.

³⁵⁵ See Van Deventer op cit note 5 at 250ff.

³⁵⁶ Schulte-Nölke op cit note 250 at 125.

³⁵⁷ *Central South African Railways v McLaren* 1903 TS 727 at 735. Also see *King’s Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 645; *Durban’s Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A) at 991.

³⁵⁸ This is discussed in more detail in Van Deventer op cit note 5 at 252ff. Also see parts III(d) and III(f) above.