CHALLENGING OLD PERCEPTIONS — THE CLASSIFICATION OF WEBSITE ADVERTISEMENTS ACCORDING TO SOUTH AFRICAN CONTRACT LAW

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SUMMARY

South African law draws a distinction between offers and invitations to treat. Although the intention with which a statement is made is usually cited as a controlling factor in determining its proper classification, there are a few cases in which the classification of a declaration into either an offer or an invitation to treat is done by rules of law with very little concern for the intention of a party. Such is traditionally the case amongst others with advertisements and displays of goods on windows or shelves in a self-service store. The classification of these scenarios into invitations to treat is usually premised on certain perceptions at common law, such as the need to protect traders from the risk of inundation by purchase orders, and the right of traders to select their customers. With electronic commerce on the rise, tradesmen today prefer to advertise their goods and services online through websites. Some of these websites go beyond traditional advertising. They can finalize sale transactions, and even perform contracts without any human review on their side. These novel features in trading websites challenge the old conceptions of the common law of contract concerning the proper classification of advertisements and self-service stores. Hence the question arises whether a typical model of a modern trading website constitutes an offer or an invitation to treat. In light of the foresaid technological developments, it is important in the digital age to reconsider the position of the law, and to develop it where necessary with a view to accommodating electronic contracts.

1 INTRODUCTION

In recent years, the Internet has transformed from a simple medium of communication into an active forum of commerce.[1] Ever opportunistic, businessmen are increasingly becoming aware of the benefits of trading online through websites, as opposed to traditional brick-and-mortar stores. The internationality of the Internet promises unlimited clientele, as trading websites can be accessed by anyone with connection to the Internet.[2] Moreover, modern trading websites have the benefit of fusing traditional advertising with transaction-processing capabilities.[3] Traders nowadays do not merely advertise goods on these websites, but can also automatically conclude transactions with buyers through them.[4] In this way, online traders are able to capitalize on labour costs by replacing human cashiers with websites.[5] In case of merchants offering virtual products, such as digital books, software and music, it is also possible to perform contracts through websites by allowing customers to download those items.

The aim of this paper is to critically discuss the issue whether website advertisements are offers or invitations to treat. Because of its ramifications for both online traders and buyers, this is an issue which is increasingly becoming important in law.[6] Following traditional contract law, if website advertisements are found to be offers, the inevitable conclusion is that purchase orders placed by customers on those websites will qualify as acceptances which will result in binding agreements. On the other hand, if website advertisements are found to be invitations to treat, purchase orders will not qualify as acceptances, but rather as offers which online traders can accept or reject at will. The classification of website advertisements is, however, not as simple as the classification of advertisements in traditional media has come to be in law. As shall be illustrated in this paper, a typical model of a modern trading website challenges the old perceptions of the common law of contract, concerning some of the justifications which have

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1 Edwards and Waelde *Law and the Internet: A Framework for Electronic Commerce* (2000) 17.

2 April and Cradock *E-business: Redefining the Corporate Landscape in South Africa* (2000) 19.

3 Gringras *The Laws of the Internet* (1997) 17 18; P *SA Merc LJ* 282 286.

4 *Pravo. Zhurnal Vysshey Shkoly ekonomiki* 204 208; Fry 2001 37 *Idaho LR* 237 261 262. Websites capable of transaction processing capabilities are known as electronic storefronts.

5 2002 2003 7 *Uniform Law Reform* 699 700, discussing how modern contracting technologies are replacing employees in companies.

6 This will usually be the first issue in determining the validity of a contract, concluded through January 2009 http://go.warwick.ac.uk/ jilt/2008_2/snail (accessed 2016-08-12) 6. Nuth *Electronic Contracting in Europe, Benchmarking of National Contract Rules of United Kingdom, Germany, Italy and Norway in Light of the EU E-Commerce Directive* (2008) 34, refers to this as the most controversial issue in electronic-commerce law because of its consequences.

been used by courts in classifying advertisements into offers or invitations to treat.

2 OFFER AND INVITATION TO TREAT

An offer is a proposal stating clearly and unequivocally the terms upon which the offeror is prepared to enter into contract with the offeree.[7] An offer is distinguished from all other similar proposals by the intention with which it is made, being a serious and deliberate intention that its mere acceptance will result in a contract.[8] An offer that is made with the aforesaid intention has been described as an unconditional,[9] or a firm offer.[10] Therefore, to constitute an offer, a statement of the price at which a dealer is prepared to sell an item must be made with the intention that its mere acceptance by the offeree will result in a contract.[11] The intention to be bound is usually taken to be lacking in simulated contracts,[12] in statements made from motives of gratitude,[13] statements made at social occasions, such as family gatherings,[14] and statements of readiness to do business on certain terms.[15]

Advertisements of goods in the press are generally considered as invitations to treat.[16] The essence of the doctrine of invitation to treat is that a trader who advertises a price at which he is prepared to sell an item, invites members of the public to make offers to him for the purchase of that item.[17] These offers he is at liberty to accept or reject at will.[18] The main difference between an offer and an invitation to treat is that, while an offer is made with a serious intention that its mere acceptance, will result in a binding agreement. An invitation to treat, on the other hand, is not made with the intention that its mere acceptance will result in a contract.[19] Advertisements are therefore mere statements of willingness to do business.[20] This was held to be so in the case of *Crawley v R*.[21] In that case,

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7 Kerr *The Principles of the Law of Contract* (2002) 64; Hutchison and Du Boise in Du Boise (ed) *Wille's Principles of South African Law* (2007) 741; *Jurgens v Volkskas Bank Ltd* 1993 (1) SA 214 (A) 218I J.

8 Joubert *General Principles of the Law of Contract* (1987) 39; Christie *The Law of Contract in South Africa* (2001) 33; Van Der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract General Principles* (2012) 49.

9 *Heyter v Ford* 1895 10 EDC 16 69.

10 *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) 633D.

11 *Hottentots Holland Motors (Pty) Ltd v R* 1956 1 PH K22 (C).

12 *Kilburn v Estate Kilburn* 1931 AD 501; *Bosman v Prokureursorde van Transvaal* 1984 (2) SA 633 (T).

13 *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

14 Coaker and Zeffertt (eds) *Wille and Millin's Mercantile Law of South Africa* (1984) 9-10.

15 *Rhoodie v Morkel* 1976 (4) SA 989 (A); *Efroiken v Simon* 1921 CPD 367; *Furguson v Merensky* 1903 TS 657.

16 Hutchison (ed) *Wille's Principles of South African Law* (1991) 413.

17 Visser, Pretorius, Sharrock and Mischke (eds) *South African Mercantile and Company Law* (1997) 32.

18 Joubert *General Principles of the Law of Contract* 39.

19 Trietel in Beale (ed) *Chitty on Contracts* (2008) 148.

20 Visser, Pretorius, Sharrock and Mischke (eds) *South African Mercantile and Company Law* 32; Sharrock *Business Transactions Law* (2001) 50.

21 1909 TS 1105.

a trader advertised a brand of tobacco on a placard outside his shop. Crawley purchased the tobacco, and came back for more soon thereafter. The shopkeeper, however, refused to serve him a second time around, after which Crawley refused to leave the shop until he was served with the tobacco. As a result, Crawley was charged with unlawfully and wrongly refusing to leave the shop when requested to by the owner. In defence, Crawley argued, amongst others, that a valid contract for the sale of the advertised tobacco had been concluded between him and the shopkeeper; therefore that he was entitled to remain in the store until the contract had been performed by the shopkeeper, selling him the tobacco. The court held that an advertisement by the trader of the price at which he is prepared to sell an item did not constitute an offer, but an invitation to treat. As a result, such a trader is not bound to sell to anyone who walks into the shop with a view to purchasing the item. He retains the right to accept or reject offers made by any member of the public.[22]

The doctrine of invitation to treat is not only limited to advertisements. It is applicable to a number of scenarios including the display of goods in the window of a shop,[23] or on shelves in a self-service store. That the display of goods on shelves in a self-service store constitutes an invitation to treat was held to be so in English law in the matter of *Pharmaceutical Society of Great Britain v Boots Cash Chemist*.[24] In that case, the court held that the conduct of a customer who picks goods in a self-service store with a view to purchasing them amounted to an offer. The contract of sale is concluded

accepts the purchase price.[25] In American law, the same has been held to be the correct position of the law by the court in *Lasky v Economy Grocery Stores*.[26] It was held in that case that a customer in a self-service store had a right to replace an item which he had already selected into a shopping basket. This indicates that the mere picking of an item by a customer in such circumstances does not result in binding contract between the parties.

Although the intention with which an advertisement is made is usually cited as a controlling factor in determining its proper classification, courts and commentators have largely paid lip service to that rule. The classification of advertisements and self-service stores into invitations to treat is one of the few stereotyped situations in which the distinction between an offer and an invitation to treat is done *prima facie* by the law.[27] The

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22 *Crawley v R supra* 1108. It was therefore held that Crawley had unlawfully and wrongfully remained in the shop.

23 The doctrine of invitation to treat is usually applicable to a wide number of scenarios including tenders, price tags, catalogues, public auctions and circulars. Regarding the classification of window displays in English law, see *Fisher v Bell* [1961] 1 QB 394.

24 [1953] 1 QB 401.

25 See case as discussed by Sharrock *Business Transactions* (2001) 51; *Jurnal Ungang-undang and Masyarakat* 79 81.

26 (1946) 319 Mass 22 - *The American Journal of Comparative Law* 235 236.

27 Trietel in Beale (ed) *Chitty* 150, stating that classification under this stereotyped situation is done by rules of law with little regard to the subjective or objective intention of a party.

doctrine of invitation to treat is primarily based on certain perceptions of the law, which often have very little to do with the real intention of a party. With regard to advertisements of goods to the public, it is said that such should be classified as invitations to treat because of the need to protect a trader from being inundated with purchase orders.[28] Understandably, a typical trader has limited stock, and would for that reason be placed in a position of great difficulty if he was forced to perform on all orders placed by members of the public for an advertised item.[29] That this is the basis of the doctrine of invitations to treat, was made clear in English law in the matter of *Partridge v Crittenden*,[30] in which Lord Parker was of the view that the rule holding advertisements to be invitations to treat does not apply where the trader is a manufacturer, as opposed to a retailer or wholesaler. The above reasoning is also relevant in relation to self-service stores. Apart from concerns over limitations of stock, it has also been suggested in relation to self-service stores that such should be considered as invitations to treat, because traders under such circumstances have impliedly reserved the right to choose their customers. Winfield mentions that, if such a right is not implied into the conduct of the shopkeeper, he would be compelled to contract with his ling drunkard, or a ragged and verminous tramp .[31]

3 THE CLASSIFICATION OF WEBSITE ADVERTISEMENTS IN SOUTH AFRICAN LAW

The South African Electronic Communications and Transactions Act 25 of 2002 (ECTA) does not address the issue at hand. Although it was normal before the United Nations Convention on the Use of Electronic Communications in International Contracts 2005 (UNECIC) for electronic commerce legislation not to provide for the issue of the classification of website advertisements, there is now a growing practice towards a legislative approach to the matter. The UNECIC proceeds on a general presumption that website advertisements are invitations to treat.[32] For a website advertisement to qualify as an invitation under the UNECIC, the

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28 *Crawley v R supra* 1108; *Grainger & Son v Gough* 1869 AC 325 334; Weeramantry *The Law of Contracts: Being a Treatise on the Law of Contracts as Prevailing in Ceylon and Involving a Comparative Study of the Roman-Dutch, English and Customary Laws Relating to Contracts* (1967)109.

29 See *Grainger & Son v Gough supra* 334.

30 1968 2 All ER 421.

31 *Law Quarterly Review* 499 518; Joubert *General Principles of the Law of Contract* 40, mention in fn 31 that a trader can select his customers based amongst others on their state of dress, health or intoxications.

32 more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly

This provision has been transposed in art 10(2) of the SADC Model law on Electronic Transactions and Electronic Commerce, which forms the regional legal framework for electronic contracts in the Southern African Development Community region.

following conditions must be satisfied: firstly, it must not be made with an intention that its mere acceptance shall result in a contract.[33] Secondly, the advertisement should not be addressed to one person or a clearly defined group of people. It must be generally accessible to members of the public.[34]

The silence of the ECTA, however, does not introduce any difficulties concerning the proper classification of website advertisements. As a general rule, the ECTA does not exclude the application of the common law of contract to electronic transactions.[35] It is conceivable therefore that the classification of website advertisements into offers or invitations to treat, will follow the settled principles of the South African common law of contract. In light of the foregoing, one can say it with little fear of contradiction that, in approaching the issue, South Africa courts will follow the precedent of *Crawley v R* to hold that website advertisements are invitations to treat, or at least that such will be their starting point in analysing the matter. This has already been suggested by the South African Consumer Goods and Services Ombudsman in *Price on Webstore*.[36] In that matter, a consumer purchased on a website a coffee machine for R655. Four days after the first purchase, he returned to the same website to purchase several other items to the total value of R10 530. Unfortunately, the website was not meant to be accessed by the general public, and the specials advertised thereon were for illustrative purposes only, wherefore the trader refused to perform the contracts. The issue for decision was whether valid contracts had been concluded between the parties. The case was properly decided on the basis of the law of mistake, under which it was found that the prices at which the items were advertised, were so low that the consumer reasonably ought to have known that they were mistakes. The law of mistake aside, having noted the relevance of the common law and the decision of *Crawley v R* to the matter before it, the Ombudsman noted that:

> transactions, namely that the website owner is merely inviting offers from members of the public and it is the customer who makes the offer. According to Van der Merwe and Janse van Vuuren:
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> accepted. The acceptance of the order will often be manifested merely by the dispatch of the goods to the purchaser. No legal relationship exists between the parties before the acceptance, and an offer may be revoked at any time before then
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> On this analysis, if a website owner made a mistake regarding price, it would not be binding the website owner needs only refuse the offer.

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33 The intention with which a website advertisement is made will mainly be deduced from the words

Journal of International Commercial Law and Technology 160 170; *Potchefstroom Electronic LJ* 80.

34 It is not clear whether this provision is intended to exclude trading websites which require International

Journal of International Commercial Law and Technology 112 116.

35 S 3.

36 (201502-0086) [2015] ZACGSO 1 (11 May 2015).

It is clear therefore that South African law on the issue is in line with the international legal framework for electronic contracts. On the face of it, there is much sense in holding online advertisements to constitute invitations to treat, as opposed to firm offers. As with their counterparts in traditional stores, online retailers require equal, if not a slightly higher protection from the risk of being inundated by purchase orders. The need for such protection in online retail trade is made slightly higher by the internationality of the Internet. In traditional retail sales, the store of a trader who advertises a product at a low price, will mostly be crowded by buyers from his geographical location. In online retail sales, however, low prices can be viewed and taken advantage of by anyone across the globe that comes across the website. This in effect increases the risk of online traders being inundated with purchase orders.

In case of automated-trading websites, that is, websites capable of processing and accepting purchase orders without any human review, such have been likened to self-service stores.[37] For the fact that automated-trading websites allow customers to put into electronic shopping baskets the items advertised thereon, to pay for those items by entering their credit card numbers, and to submit their purchase orders for processing,[38] they very much resemble traditional self-service stores.[39] Following the classification of self-service stores at common law, the mere conduct of a customer who selects goods with a view to purchasing them from such a website, does not result in a contract. A purchase order placed by a prospective customer on an automated website amounts to an offer to purchase. The trader still retains the right to either accept or reject that order. The supplier is therefore not bound to deliver goods to any buyer who has placed a purchase order on his website.[40] Although automated websites are usually programmed to send out acknowledgements of receipt for every purchase order placed by a customer, such messages are generally not regarded as acceptances.[41] Therefore, a contract under such circumstances will be formed when the trader delivers the ordered item(s) as a sign of his acceptance of the purchase order. However, a contract may be formed instantly where an automated reply clearly indicates the intention of the trader to accept a purchase order. For instance, in the matter of *Chwee Kin Keong v Digilandmall.com Pte Ltd*,[42] the High Court of Singapore held that an

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37 See Sasso 2016 *Pravo. Zhurnal Vyssshey Shkoly ekonomiki* 204 208, mentioning that Sometimes the process is very similar to what would happen in an actual self-service shop, except that the cashier would be the electronic agent . For their ability to finalize sale transactions, automatic vending machines too, have been likened to self-service stores; see *Israel LR* 467 470.

38 For a description of how the process of shopping on automated websites operates, see Fry 2000 2001 *Idaho LR* 239 240.

39 Mulcahy *Contract Law in Perspective* (2008) 65, mentions that the display of virtual shelves of a website can by analogy be treated as an invitation to treat in the same way as the goods on the shelves -service store.

40 Nuth *Electronic Contracting in EU, Benchmarking of National Contract Rules of UK, Germany, Italy and Norway* 36.

41 Nuth *Electronic Contracting in EU, Benchmarking of National Contract Rules of UK, Germany, Italy and Norway* 43 44.

42 [2004] 2 SLR 594.

automated reply was a valid acceptance,

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Automated responses have also been construed as valid acceptances in Germany.[43]

4 A CRITICAL ANALYSIS OF THE DOCTRINE OF INVITATION TO TREAT

As a general matter, the doctrine of invitation to treat is very difficult to justify. The rationale of this doctrine, whether in relation to advertisements or self-service stores, appears to be motivated in the main by the public nature to believe , it is only when there is a possibility of the general public making purchase orders that a trader stands a risk of running out of stock to supply the demand. In this way, the doctrine appears to be premised on the misconception that the form in which a trader chooses to make a declaration, will determine the question whether that declaration is an offer or an invitation to treat. It is, however, admittedly wrong to proceed on an assumption that the mere fact of publishing an advertisement publicly renders it an invitation to treat. In English law, in the matter of *Carlill v Carbolic Smoke Ball Company*,[44] it was held that a firm offer could be made to the general public. In that case, a company which was in the business of manufacturing medicinal products advertised in the press that it was offering to pay a reward of £100 to anyone who, having used, as directed, lic sm caught influenza. Mrs Carlill used the product as directed, but caught influenza, wherefore she claimed the reward. It was held that the advertisement was a firm offer, and that Mrs Carlill had validly accepted that offer by satisfying the requirements for a reward. That public advertisements may be offers has also been recognized in South African law.[45] For instance, in the *American Swiss Watch Company* cases,[46] South African courts have authoritatively stated that public advertisements for rewards are offers. Noting therefore that the public nature of an advertisement does not *ipso facto* render it an invitation to treat, it is said that there is no inflexible rule that public advertisements cannot be offers.[47]

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43 See in Campbell (ed) *Law of International On-line Business*, *A Global Perspective* (1998) 394 395. See also cases The Legal Effect of Input Errors in Automated Transactions: The So _2/pistorius2 (accessed 2016-08-2005) http://www.niclawgrp.com/Resource-Materials/Monthly-Memo/Online-Advertising-Error-Liability.shtml (accessed 2016-08-12).

44 [1893] 1 QB 256 (CA).

45 *Fraser v Frank Johnson & Co* 11 SC 63 66.

46 Namely *Bloom v American Swiss Watch Company* 1915 AD 100; *Lee v American Swiss Watch Company* 1914 AD 121; *Sephton v American Swiss Watch Company* 1913 CPD 1024. Although advertisements for rewards are firm offers made to the general public, it is only the first person who satisfies the conditions for the reward who is entitled to receive it, see Roberts (ed) *Wessel's Law of Contract in South Africa* (1937) 61.

47 Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract General Principles* 49 50.

Moreover, the doctrine of invitation to treat is also rendered difficult by the clear divergence existing between its rationale and its practical legal effect. As will be recalled, the practical legal effect of the doctrine of invitation to treat is that a trader who advertises a price at which he is willing to sell an item, can either sell to or turn down any member of the public who wants to purchase that item. Some of the reasons on which it is suggested that a trader can turn down a customer, *eg* his dress code, are morally and legally difficult to justify. This legal effect strikes one as arbitrarily out of step with its rationale. In our view, the policy of protecting traders from the risk of being inundated with orders was never intended to operate so arbitrarily. On the contrary, its operation is logically dependent on the availability of stock from which orders can be satisfied. It cannot be said therefore that a trader who still has loads of stock from which he can satisfy purchase orders needs the protection of the law against being inundated with purchase orders. It is only when his stock for that item has been depleted, thus leaving him with no source from which to satisfy orders, that the real need to protect him arises. If a trader who still has stock turns down a customer, it must not be arbitrarily, but rather for a reason which is justifiable in law.

Furthermore, the doctrine of invitations to treat is even more troubling for the reason that it favours the protection of the interests of traders over their customers. A store is properly a place for bargaining, and whenever parties bargain, the law should not arbitrarily intervene on behalf of one party, while paying little or no regard to the moral rights, interests and reasonable expectations of another. True, society has an interest in public traders being protected from the risk of inundation by purchase orders. However, a case can also be made that society likewise has an interest in protecting the moral right of members of the public, who reasonably relying on an advertisement, walk into a store to purchase the advertised item, to be served if stock is still available.[48] Indeed, it is said that many people will sympathize with the customer who is turned away arbitrarily and without a good reason by a trader, also that society frowns upon the practice of discriminating between customers by selling goods under the counter.[49]

5 WEBSITE ADVERTISEMENTS AS FIRM OFFERS

A typical model of a modern trading website will qualify as more of a firm offer or an invitation to treat. As mentioned above, modern websites can go further than traditional advertising by processing and accepting purchase orders. While this feature admittedly renders them similar to self-service stores, the justifications which have been employed by courts in classifying self-service stores as invitations to treat, do not appear to have any relevance to automated websites. The main difference between automated websites and self-service stores is that in the case of automated websites, the cashier is not a human being but rather a computer programme.[50] Although a simple computer programme, its role in running the electronic

48 *SALJ* 246 251.

49 Unger - 1953 16 *The Modern LR* 369 371.

50 Sasso 2016 *Pravo. Zhurnal Vysysshey Shkoly ekonomiki* 208.

storefront justifies its being personified as a cashier.[51] As mentioned above, one of the reasons why a display of goods in a self-service store is held to constitute an invitation to treat, is that the storekeeper is understood to have reserved the right to choose his customers, without which reservation he would be forced to deal with his worst enemies, greatest trade rivals and competitors. When the cashier is a computer, software-programmed to process and accept orders automatically, the owner of such a website has tacitly waived his right to choose his customers.[52] This waiver, it is argued, renders advertisements on interactive websites as firm offers.[53] That the holding out of an automated machine as being ready to accept money from the public, constitutes a firm offer, was affirmed in English law by Lord Denning in the matter of *Thornton v Shoe Lane Parking*.[54] In that case, Lord Denning was of the opinion that the placing of an automatic parking machine at the entrance of a parking lot constituted an offer which was accepted when a customer placed money into the slot of the machine in order to gain entrance. The impression that advertisements on interactive websites are firm offers becomes even more fortified when the website is also programmed to perform orders, for example, by allowing customers to download information, music or virtual files.[55] In this way, modern websites challenge the perception at common law that the display of goods to the public must be classified as an invitation to treat, because the trader has reserved to himself the right to exercise choice over his customers.

Apart from the fact of automation, website advertisements present a challenge to the common law when the trader offers to sell virtual goods. That the nature of goods advertised on a website may have a bearing on the matter, has been suggested by the High Court of Singapore in *Chwee Kin*

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51 emise of Wolmer *versus* *SALJ* 545 553 suggests that, in dealing with advanced automated machines, such should be personified according to their role in the transaction.

52 In online commerce, it would seem that choice of a trading partner on the contrary lies solely with the buyer. Online traders are generally prepared to contract with anyone who chooses to place an order on their websites http://works.bepress.com/elizamik/7/ (accessed 2016-08-14) 72. It is conceivable, however, that the software may be programmed to exercise choice on behalf of its user. Liegl, Bräutig *Law of International On-line Business* 394 suggest that the software may be programmed, amongst others, to determine /her purchase order in that case.

53 Commenting on the same issue, although in relation to automatic vending machines, Christie, *Obiter* 518 524, A type of sale which is very common but which, not unnaturally, has not attracted the attention of the courts, is a sale by means of an automatic vending machine. In contrast to the usual situation when goods are displayed for sale in a shop, the controller of the machine must be understood to be making the offer because he/she has put it out of his/her power to exercise any choice in the conclusion of the contract, and the customer accepts by his/her conduct in inserting his/her coin or doing whatever else the writing on the machine invites him/her to do . For those who argue that the mere fact of automation does

International Journal of Law and Management 42 46.

54 [1971] 2 Q.B. 162 169D.

55 See Netzle and Hayer in Spindler and Borner (eds) *E-Commerce Law in Europe and the USA* (2002) 566.

Keong v Digilandmall.com Pte Ltd. In that case, Rajah CJ, mentioned in *obiter* that a trader who advertises goods online, may be seen as making a firm offer. He observed that the Internet was mainly concerned with the supply of information, which is naturally a limitless product. The judge continued to state further that there may be no need to distinguish amongst and therefore to apply different rules of offer and acceptance to the advertisement of information and physical goods online. He went further to state that the inability of prospective buyers in online advertisements to view the physical stock available with the trader, may give the impression that he is offering to sell an unlimited supply of goods.[56]

At the outset, it is important to illustrate the extent to which we agree with the foregoing sentiments. It does not seem to us that the ability of a customer to view the physical stock available with a trader has anything to do with the issue whether an advertisement is an offer or an invitation to treat. At common law, catalogues and advertisements of goods in newspapers are regarded as invitations to treat, notwithstanding the customers not being able to view the physical stock available at the trader . Therefore, the inability of online customers to view the physical stock available at the trader may be likened to the inability of customers to view stock available at the trader in all other relevant forms of advertisements. Another difficulty with the above statement is re the possibility that, because of the failure of prospective buyers to view the physical stock available at the online trader , he may be considered as making an offer to sell an infinite supply of goods. It does not make sense why that should be so. A reasonable online buyer, it is submitted, understands well that an online trader acquires his stock in exactly the same way as his traditional counterparts, *ie* from a third-party supplier; therefore that online traders can also run out of stock.

However, when the goods in issue are virtual products, the presumption that an online trader who advertises goods on a website, makes an offer to sell an infinite supply of goods, becomes relevant. Virtual goods are those which can be delivered electronically, such as digital books.[57] The general view, with which we are in full agreement, is that website advertisements for the sale of virtual goods should be regarded as firm offers because of the irrelevance of the need to protect online traders selling such items while being inundated with orders.[58] Indeed, when an online trader offers to sell virtual goods, he does not stand the risk of stock depletion because he supplies his customers with copies of relevant files, and so long as the original files exist in his information system, he can never run out of stock, even if he were required to supply the entire population of the world. We do, however, acknowledge that in certain circumstances (especially when the

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56 *Chwee Kin Keong v Digilandmall.com Pte Ltd supra* par 96.

57 Chissick and Kelman *Electronic Commerce Law and Practice* (2002) 69; Kelman *Electronic Commerce: Law and Practice* (2002) 69 70.

58 Bainbridge *Introduction to Computer Law* (2000) 268; Stone *The Modern Law of Contract* (2002) 55.

vendor purchases virtual goods from another supplier), it would be possible that the stock of virtual goods could be artificially limited.[59]

The veracity of the view that a typical model of a modern website may be more of a firm offer than invitations to treat is increasingly being recognized internationally. For instance, the European Community Directive on Distance Selling has been interpreted by some to hold that website advertisements are offers.[60] Article 7(2) of that Directive provides that, where an online supplier fails to perform his end of the contract due to the unavailability of stock, he must inform the customer of that fact as soon as possible, and must make a refund to that customer. The use of the word contract in this provision has been interpreted to suggest that the Directive regards website advertisements as offers, which will result in valid contracts every time customers place their purchase orders.[61] That website advertisements are offers has now been recognized in some parts of Europe, including Portugal. Portuguese contract law is codified in the Portuguese Civil Code.[62] The Portuguese Civil Code does not contain any formal definitions of offer and acceptance.[63] However, the general scheme of this law follows the German Bürgerliche Gesetzbuch.[64] Following general principles of German contract law, Portuguese law usually draws a distinction between offers and

treats newspaper advertisements, shop-window displays or prospectuses as invitations to treat (*invitatio ad offerendum*) [65] That notwithstanding, the Portuguese Decree Law adopts the view that an online offer for goods and services,

, is a firm offer.[66] It has also been suggested regarding the law of Switzerland, which also recognizes the difference between offers and invitations to treat,[67] that website advertisements will qualify as offers, where goods can be obtained

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59 This could happen when the vendor has only a limited number of the goods assigned to him. This limitation will normally occur when there is some market-related need to induce artificial scarcity (also referred to as rivalrousness) of the digital goods. See Apps, Movies and Music *European Property LJ* 206 210. The vendor can easily protect him or herself in such a case by specifying in real time how many of the offered digital goods are still available (in exactly the same way in which the stock availability of tangible goods can be indicated).

60 EC Directive on Distance Selling 1997/7/EC.

61 Nuth *Electronic Contracting in EU: Benchmarking of National Contract Rules of UK, Germany, Italy and Norway in light of the EU E-Commerce Directive* 35.

62 Portuguese Civil Code1966.

63 See Country Repor -Business -mannheim.de/daten/edz-h/gdb/06/portugal.pdf (accessed 2016-08-13) 8.

64 Rego and De (undated) http://www.mlgts.pt/xms/files/Publicacoes/Artigos/2013/PLO_-_Margarida _Lima _Rego_-2-.pdf (accessed 2016-08-13) 183.

65) http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/TenancyLawProject/TenancyLawPortugal.pdf (accessed 2016-08-13) 15.

66 Decree Law No. 7/ 2004, of 7 January 2004, art 32.

67 See art 7 (2) of the Swiss Code of Obligations 1911.

directly on the website by downloading them, and where the website is programmed to automatically accept offers.[68]

6 RECOMMENDATIONS

The classification most proper under South African contract law in light of the challenges introduced by website advertisements is not immediately clear. We are of the opinion, however, that in approaching the issue, South African law must avoid formulation of an inflexible rule that website advertisements are either offers or invitations to treat. Online retail trade is only now picking up in South Africa.[69] There is therefore a need to establish trust and reliance between online traders and their buyers so as to nurture, and not discourage, its growth. The growth of online retail trade in South Africa cannot be achieved through a rigid rule of invitation to treat which permits traders to accept or turndown purchase orders at will, while disregarding the interest of buyers. Neither can this trust be achieved through a rigid rule which enjoins traders to perform purchase orders despite limitations of stock, as would be the case if website advertisement were held to be offers. The classification of online orders must therefore be done in an equitable manner, *ie* in a manner which strikes a fair balance between the interests of the parties. These interests can be summarized as follows: although online retailers are willing to perform their end of the bargain, they require legal protection against being inundated with purchase orders when they have ran out of stock. Online buyers, on the other hand, require the protection of the law against being turned down arbitrarily by traders who still have stock to perform purchase orders. We recommend as a fair approach that website advertisements should be classified as offers made to the general public to sell until stock is depleted. In this way, online retailers should be forced to perform on purchase orders, subject only to the availability of stock. Such a classification, it is submitted, strikes a fair balance between the competing interests of the parties to an online-sale transaction.

Joubert is, however, of the view that there is no justification for implying a term concerning the availability of stock into public advertisements, and furthermore that it falls outside the province of the courts to amend the law in this manner.[70] It is very difficult to appreciate the veracity of this argument. On a proper analysis, it is clear that all the reasons which have been employed by courts to justify the doctrine of invitation to treat, are in themselves no more than terms implied by law into declarations contained in advertisements. The need to protect traders who advertise goods from inundation by orders, and the right of those who display goods in self-service stores to choose their customers, are clearly terms implied by law into advertisements. These terms are usually implied by the law into

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68 *E-Commerce Law in EU and the USA* 566.

69 S. 2015 http://www.cnbcafrica.com/news/southern-africa/2013/07/29/online-presence-growth-expected-for-safrica-retail/# (accessed 2016-08-09); IT News Africa - commerce is on the Rise in South A http://www.itnewsafrica.com/2015/03/study-reveals-that-e-commerce-is-on-the-rise-in-south-africa/ (accessed 2016-08-09).

70 See Joubert *General Principles of the Law of Contract* 40 fn 34.

advertisements with very little regard to the actual intention of the trader who made the advertisement. If the law can imply terms in this manner into advertisements, it is not clear why it cannot similarly imply a term as to the availability of stock where appropriate. In German law, a term concerning the availability of stock is usually implied into contracts concluded by vending machines *via* the principle of offers *in incertam personam*.[71] German law considers declarations made through vending machines as offers made subject to the availability of stock;[72] wherefore it is said in jurisdiction that a

provided there is an availability of goods .[73] Seeing the similarity between vending machines and modern commercial websites, contemporary German scholars have suggested that the same principle should be extended to website advertisements.[74] Although this rule appears to be limited only to vending machines in German law, it is interesting to note that it is in actual fact a general rule of European contract law. The Principles of European Contract Law 1998 provide as a general matter that the public advertisement of goods constitutes an offer to sell or supply advertised products at the

[75] Interpreted in the context of European electronic-commerce law, this provision may be used to hold that website advertisements too are firm offers made, subject to the availability of stock.

7 CONCLUSION

The aim in this paper was to discuss the classification of website advertisements under South African contract law. As demonstrated herein, the classification of website advertisements challenges the old perceptions of traditional contract law concerning offers and invitations to treat. The ability of modern trading websites to automatically accept purchase orders, even to perform contracts on their own, necessitates a change of attitudes concerning accepted differences between offers and invitations to treat. It is also foreseeable that in the near future, innovations in Information Technology will produce even more complicated websites which may further challenge the settled common-law rules concerning offer and acceptance. Until such time that the issue of this paper is discussed and authoritatively determined by a court of law, the course which the law will ultimately adopt will remain speculative. Until then, it is advisable for online traders who have

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71 For a detailed definition of this principle, see Otto *Germany and South Africa: A Comparative Study of their Concepts of Contract Law and Mistake* (Unpublished Masters dissertation, University of Stellenbosch 2004) 36 37.

72 *Law of International On-line Business* 395.

73 *Artificial Intelligence and Law* 111 121.

74 See Liegl, Bräutigam, N rr, Stiefenhofer and Munich in Campbell (ed) *Law of International On-line Business* 395; Wetting and Zehendner 2004 12 *Artificial Intelligence and Law* 121.

75 Art 2(102)(3). For a discussion of this rule in comparison to the CISG and the national laws of the member States of the EU, see Remarks on the Manner in Which the January 2002 http://www.cisg.law.pace.edu/cisg/text/peclcomp14.html (accessed 2016-08-11).

both the means and resources, to protect themselves from onerous obligations by making it clear that they are only prepared to sell items advertised on their websites, subject to the availability of stock. Moreover, online retailers must always ensure that, once they run out of stock for a specific item, they take down the advertisement of that item from their websites, lest they be held to have given the impression that they have stock available to satisfy purchase orders for that item.