

1. INTRODUCTION:

The 20th Century has witnessed rapid and new innovative technologies with fundamental changes in the way commerce takes place¹. Those e-commerce changes and the inception of Internet² that has been a subject of great interest attracting many people requires regulatory changes. The digital revolution has brought fundamental change to communications and fuelled dramatic developments for the new digital economy (WIPO 2000 Paragraph 1). The efficacy offered by the digital technology has opened up enormous potentials for participation in international trade for countries through e-commerce.

The global development of e-commerce might be stymied by old laws enacted at the time when it was still at best a figment of a few technologist's imagination hence require uniformity rules. Electronic commerce –business conducted over the computer network is growing explosively. It can be argued that the current commercial laws are likely to be affected by these rapid e-commerce changes, inviting alternative regulatory approaches that would not impede e-commerce while advancing and ensuring consumer protection interests. E-commerce through digital revolution offers great opportunities for economic growth.³

1.1 E-commerce defined;

E-commerce has various definitions⁴. E-commerce can be defined as a commercial exchange system, which makes use of the computers, and communication network advances. It is the use of production information in electronic forms instead of paper, for business or government operations. This suggests that e-commerce means using technological advances to promote everything involving the exchange of business information among computers and humans or traders and customers.⁵

¹ Tauzin.B. State impediment to E-Commerce: September 26,2002
<http://energycommerce.house.gov/107/hearing> 18/3/03

² The Internet Is a Global Matrix Of Interconnected Computer Networks. (Currie 2000:50)
They allow Computers to communicate in a Network. (Fitzgerald, 2000:5)

³ Koffi Anan, UN quoted in UNCTAD 2001 at iii

⁴ WIPO report carries a 4 page Annexure compiling 10 different definitions

⁵ Kaetzal L.J E-commerce and IP on the Internet 1996 page 186
http://fire.nist.gov/bfrlpubs/build96/art_033.html 26/2/03

E-commerce as a concept includes commercial activities undertaken online, including international trade transactions, advertising and domestic business –to-consumer (B2C) and business to business (B2B) transaction to mention a few⁶.

As a network e-commerce has been defined as sale or purchase of goods or services conducted over computer-mediated networks. The goods and services are ordered over those networks, but payment and ultimate delivery of the goods/services may be conducted on- or offline.⁷

Some scholars regard e-commerce as other business activities such as marketing and advertisements, Currie (2000:9) and Timmers (1999:XV)

In this discussion e-commerce can be termed as commercial transactions⁸ over digital networks (whether open⁹ or closed networks¹⁰) to increase delivery speed and reduce operational costs through computer-to-computer transactions and web-enabled mobile phone communications¹¹..

1.2 Types of Electronic Commerce;

Classification of e-commerce depends on the nature of the transaction. When transaction is done between businesses, it is called business-to-business e-commerce.¹² Under B2B e-commerce, the customer is another enterprise or another department within the same enterprise.

The second type of e-commerce is called business-to-customer e-commerce (B2C). It refers to the placing of finished goods/services to end-users i.e. customers who can be corporate entities or individuals. In consumer-to-consumer (C2C) individuals buy and sell from one another, for instance in auctions; and consumer-to-business (C2B) where consumers post prices at which they are willing to buy goods and services from businesses. (UNCTAD 2001:84)

⁶ Mackenzie P.D E-commerce Law –China <http://www.perkinscoie.com/resource/ecommerce/prc.htm>
26/02/2003

⁷ OECD defined e-commerce i.e. the ‘Networks’ over which relevant activities are carried out; the ‘Processes’ that ought to be included within the general domain of e-commerce . See UNCTAD 2001: 6

⁸ Commercial transactions may comprise but not limited to selling and purchase.

⁹ The term ‘open network’ means a network, such as the Internet, using non-proprietary protocols.

¹⁰ An illustration of ‘closed network’ is electronic data interchange (EDI)

¹¹ In what is now referred to as m-commerce where commercial transactions are done through mobile electronic facilities such as mobile telephones.

¹² It is also referred to as B2B e-commerce

1.3 Advantages of E-commerce;

E-commerce offers advantage over the traditional commerce. Under e-commerce information flows more quickly and in more directions than in the orthodox commerce giving businesses opportunities for accessing more markets at low cost and with minimal capital investment. The information flow improves competitiveness and customer services,¹³ reducing transaction costs and overheads while avoiding traditional limitations of restricted access to information. (WIPO, para 207)

For commerce involving physical products, the Internet functions as a global system facilitating sales, in which the placing of an order and the making of payment can take place online, while the goods themselves are delivered separately through a postal or other delivery service.¹⁴ E-commerce saves time hence saving money¹⁵ and the risk of lost or damaged documents is reduced when documents are transmitted electronically.

2. How does E-commerce affect Commercial Laws in Tanzania:

The rapid growth of e-commerce over the world has put the country in the position of facing challenges and effects to her various commercial laws and other related laws. Her legal system is mainly based on common law. Regulatory steps to secure electronic transactions such as digital signatures, reforms to contract law, dispute settlement and others have not yet been promulgated. The basic Commercial laws in Tanzania are derived from the 19th century .The laws were designed to facilitate paper-based transactions¹⁶. Despite the changes and regulatory reforms made by the country since independence, most of the laws enacted since British Colonial rule before the 1960s are still in force.

2.1 Contract Laws:

This is one of the areas which can be affected by the development and use of e-commerce. The Law governing Contract in Tanzania applies postal rule for the communication and revocation of offer and acceptance as laid down in the case of *Adams v. Lindsell*¹⁷ and *House Fire Insurance v. Grand*¹⁸ .The general position of

¹³ Companies can attend to most of customers quicker..

¹⁴ Intangible products can be distributed instantaneously through the Internet that as a system to promote sales, but also as a system to effectuate the delivery.

¹⁵ Kaetzel I.j, E-commerce and IP on the Internet page 186, NIST Gaithersburg.

¹⁶ Bwana J. Challenges facing Regulation of e-commerce in Tanzania p 67

¹⁷ (1818) 1 B & Ald.681

¹⁸ (1879) L.R.4EX.DN.26

Common Law is that where the communication is made by post the contract arises on the date the letter of acceptance is posted in due course. Signer L.J argued that:

*“ the acceptor in posting the letter has put it out of his control and done an extraneous act the matter, and shows beyond all doubt the each side is bound.”*¹⁹

Section 4(2) of Tanzania Law of Contract provides that”

The communication of acceptance is complete:

(i) “as against proposer, when it is put in the course of transmission to him as to be out of the power of the acceptor .

(ii) „ acceptor when it comes to the knowledge of the proposer” .

The position in Tanzania which seems to depart from the Common Law postal rule, means that where an acceptor posts his letter of acceptance so that it is out of his power, then the proposer is bound. That is to say the contract has been concluded in as far as proposer is concerned but the acceptor is not bound until his acceptance comes to the knowledge of proposer. On the other hand revocation of an acceptance is complete as against the person to whom it is made. ...when it comes to his knowledge²⁰. These rules are likely to be affected by e-commerce.

2.2 Distance Contracts

Under E-commerce we now have the so called the distance selling contracts using distance communication through Internet. A distance selling contract is any contract concerning goods and services concluded between a supplier and a consumer under an organized distance sales or service provision scheme run by the supplier, who for the purposes of the contract, makes exclusive use of one or more means of distance communication up to the moment at which the contract is concluded²¹.

Some of the questions to be posed in this discussion are for instance when using Internet, when is communication deemed to be an offer and to bind the offeror?. When is the acceptance is deemed to be effective? The problem which might be observed in online contracts how to determine the rule as regards to instantaneous communication which should apply or whether the postal rule is the more appropriate analogy (so that dispatch of the accepting email or response form is effective)²².

¹⁹ ibid

²⁰ Section 4(3) LCO Tanzania.

²¹ Turban E; Electronic Commerce Sweet and Maxwell Publishers, London 2002 at page 30-31

²² Edward L. Law and the Internet, Regulation Cyberspace 1977 at p.

Due to the nature of our laws and limited computer legal knowledge for our courts the courts could face a dilemma in answering the following legal issues. For instance in Cyberspace contracts, where the contract is actually formed, how is it formed and what ways can acceptance be communicated? Can a computer accept an offer and send a contract? If a person wishes to buy a book through for instance Amazon.Com and makes an offer online, can the merchant's Web server accept the offer and create the contract?. One can also imagine that where A sends an email to B, when is the contract really formed and who is bound by it, the sender or the receiver? Some scholars have argued that the moment the merchant sends back the e-mail to the buyer, the contract is formed on the merchants side²³. In *Thornton v. Shoe Parking*²⁴, Denning L.J suggested that

*“ [The customer] was committed at the moment when he put his money into the machine. the contract was concluded at that time.... the offer is made when the proprietor of the machine holds it ...the acceptance takes place when the customer puts his money into the slot”*²⁵.

On the other hand the Computer might respond to the e-mail sent but suppose the other party server has a problem. How can the parties have knowledge as to whether their communication is effective? The US Court in *State Farm l Auto Ins.v. Brockhurs*²⁶ could also be relevant on this point.

In this case the Court ruled that since the computer only operates as programmed by the insurance company, it was bound by the contract formed. Based on these two precedents, like English courts our courts would also probably decide that a web server, as an agent of the online business, can make both offers and accept offers in order to create contracts. The proposed distance selling regulations will focus on protecting consumers who purchase goods and services over the Internet. Unlike Tanzania, English Law protects consumers in numerous ways by off-line laws which are applicable to the on-line world²⁷.

The other problem to be observed in online business such as auction is when an offer is accepted and when revoked. Most of the Tanzania laws such as Contract Law and Sales of Goods 1979 provide that the sale by auction is complete on the fall of the

²³ Turbac C. E-commerce 2002 at p 80

²⁴ [1971] 1 ALL E .R 686

²⁵ ibid at p.689

²⁶ Cir (1972) 453 F.2d 533, 10th

²⁷ These Laws includes The Sales of Goods Act 1979, The Supply of Goods and Services Act 1982, The Consumer Protection Act 1987 etc.

auctioneer's hummer²⁸. People dealing in online auctions contract might receive the wider protection of Consumer legislation as there is no auction home²⁹. It has been pointed out that in many on-line auctions there is a purported contract.

On the other hand, airlines are now using Internet sales and e-tickets as a means of reducing distribution costs and serving money in terms of ticketing paperwork and staffing. The said travelling area needs to be regulated to protect the customers or consumers and other beneficiaries.

These digitized services, digital information and cyberspace is also one of the area need to be covered by our laws. The other online aspects which need a review is advertisement, evidence and security.

From the above argument one can observe that most of the Laws in Tanzania are based on off-line and do not accommodate online contracts. Furthermore the laws provide that the contract document must be signed handwritten, therefore there is no room for the supply of digitized products. The effect of this can be observed where the dispute arises between the parties dealing on online contract as to the performance then the court and lawyers might be in a hard position to determine which law could apply. There is therefore need to reform our current commercial laws and introduce – e-commerce rules so as to cope with the current world trends.

2.3 CONSUMER PROTECTION:

The Consumer Protection, the Sale of Goods, and the Supply of Goods laws:

The Laws related to the above subject matter protect consumers on off-line laws only which hardly apply to the online business when it comes to the matter of distance contracts. The laws do not protect the consumers against any risks involved in distance selling and buying business because when these laws were passed the online or distance contracts were not in practice in Tanzania. In UK consumers can be protected against numerous risks in distance contracts by way of off-line laws which are equally applicable to the online law³⁰. The Sales of Goods Act³¹, The Supply of Goods and Services Act³² and Consumer Protection Act 1987 offer a remedy to the defective products etc.

²⁸ Nditi.N.N. , The university of Dare salaam, Tanzania, The law of Contract page 14

²⁹ Opcit at p. 45

³⁰ Ibid p 30

³¹ Cap 214 (1979)

³² 1982

It should be remembered that in e-commerce contracts e.g distance contracts parties (supplier & consumer) do not come face to face prior to the conclusion of the contract³³ .

The laws in Tanzania neither cover distance selling contracts nor recognize Cyber space or digital signatures. What the laws say is that, the contract must be in writing and duly signed or authenticated before a witness. With e-commerce this arrangement? Is no longer applicable hence affecting the former laws which have to face changes and reforms to accommodate e-commerce principles. There is a need for our country to introduce distance selling regulations. These laws will focus on protecting consumers who purchase goods and services over the Internet.

2.4 Banks and Financial Institutions Laws:

Banks are now using new technology through online service whereby people can open online Account Bank. The effects of e-commerce can also be observed in the laws related to the Banking or financial transactions. The new methods of payments for goods and services under e-commerce which can be seen as a logical development of conventional cheques related to Bills of exchange can affect the Bills of Exchange Law. The combined definition of a bill of exchange and a Cheque has to be affected. The combined definition of Bills of Exchange and Cheques under UK Bill of Exchange Act 1882 which is in parimateria with Tanzania can be summarized as follows.

“An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person... to pay on demand.....a sum.. in money... or to bearer”³⁴.

All these elements are now contained in electronic analogy of the cheque through the use of sophisticated Cryptography and cyberspace allowing the creation of digital signatures.³⁵ However to enable digital money to replace cheques in Tanzania, a new legislation has to be introduced like the UK did.³⁶ Section 31 and 32 and 84 of the Bills of Exchange³⁷ Act is also subject to review and amendment to reflect digital technology. Under digital technology (cyberspace) the requirement of writing and

³³ Instead they use telephone sale, mail order , email, facsimile etc

³⁴ Section 3

³⁵ Turban E. E-commerce 2002 at p 168

³⁶ ibid 2000 Act

³⁷ The Bills of Exchange Ordinance CAP 215

signature with regard to negotiation of bills provided under the current law will be different.

Moreover the new mode of electronic funds transfer (SWIFT) between financial institutions from one country to another can also affect the Commercial laws related to financial Institutions in Tanzania such as Banking and Financial Institution Act 1991 and Bank of Tanzania Act 1995 .These laws have to be amended to accommodate the new electronic communication, services, payment and transfer of money. Furthermore the new e-commerce money transfer such as the use of VISA, Master Card, Credit, and Cards which is now universally accepted as payment mechanism is becoming alternatives to conventional bank transfer apart from overtaking personal cheques³⁸ hence affecting commercial laws. People can use on-line payment through internet using these cards. Different from use of a Cheque, the payment by EFTPOS is effected by the giving of instructions by the buyer to his or her bank to make the payment to the retailer³⁹.

The Trade and Consumer Credit lack e-commerce regulatory framework calling for changes. The laws will be affected by the development of e-commerce as they have to be changed to overcome the probable risk such as security, transaction costs, limitation of users and privacy over the internet or online contracts.

2.5 Jurisdiction problem;

The determination of the applicable jurisdiction where parties are in dispute can also be a problem to the courts as to which law will apply in case of such dispute or it could be difficult to answer the issue as to where do things happen on the net or web?, whose laws apply?, how do you enforce civil rules or foreign judgment under current laws against a party in e-commerce?. This is due to the fact that e-commerce business seems to be that contracting parties and customers are likely to be from overseas⁴⁰ and the current municipal laws are hardly applicable and hard to enforce and difficult to apply remedies unless they are amended. .

³⁸ ibid

³⁹ ibid at p 111

⁴⁰ ibid page 115

2.6 Other areas that need a regulatory frame work.

Electronic Commerce is a wide area. It does not only cover online or distance contracts but it is more than that. The aspect related to Domain names in cyberspace is also important to be regulated to curb cybersquatting offences. It has been noted that there is inherent conflict between trademark Law and Domain name system⁴¹. While trademarks are covered by the law, Domain names are not covered. Experience from other Jurisdiction shows that some other countries has introduced judicial remedies in Domain Names disputes. A good example can be USA whereby trademark holders were given specific statutory protection against cybersquatting in 1999 through the enactment of *The US Anticybersquatting Consumer Protection Act (ACP)*⁴². The said law is aimed at protecting consumers and bussiness by prohibiting the bad faith and abusive registration of distinctive marks as Internet domain names with the intent to profit from the goodwill associated with such marks⁴³.

3 The way forward:

Having seen the above lacuna and other legal problems facing E-Commerce, the Law Reform Commission of Tanzania is intending to review and research on the laws related to this area which is being affected by rapid development of e-commerce. The rationale behind is to protect the consumers and facilitate business transactions. The Commission will further recommend on the enactment of the new laws to cover this crucial area which has a high impact on the economic development in Tanzania and East Africa in general. Some of the countries in East Africa have gone far by introducing e-commerce law. A good example is Uganda which is now having a bill on the e-commerce law. There is also a need for East African Community to have Model Law on E-Commerce. Our country will also need to regulate this area given the rapid computer use.

⁴¹ See the case of *Pitman Training Limited et al v.Nominet U.K* [1997] F.S.R 797 [1998] Tr.L.R 173.The case concerned conflict on the domain names www.pitman.co.uk and pitman.co.uk .See also *Nissan Motor Co.v.Nissan Computer Corp* 89 F.Supp 2d 1154 (C.D Cal.2000)

⁴² Sharrock L.M, The future of Domain Name disputes resolution: Crafting practical International legal solutions from within the UDRP Framework

⁴³ Ibid

4. Laws to be reviewed;

1. Laws of Contract Ordinance
2. The Bill of Exchange Ordinance CAP 215
3. Sale of Goods Ordinance
4. Banking and Financial Institutions Act

5. Conclusion.

The foregoing discussion has revealed that the use of Electronic commerce and online contracts is growing very fast in the world. While some countries have adopted the new laws to cover this area, Tanzania is far behind in this area. Most of her legislation are offline oriented hence need to be changed to focus on online. The rationale behind is to protect consumer and boost our economy. The Law Reform Commission is looking forward to reviewing, researching and to come up with the reform recommendations.

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