LEGAL AND INSTITUTIONAL CHALLENGE FACING E-COMMERCE IN TANZANIA: CASE STUDY OF LAW OF CONTRACT ACT AND SALE OF GOOD ACT

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CERTIFICATION

The Undersigned certify that he have read and hereby recommend for examination a Dissertation entitled, **Legal And Institutional Challenge Facing E-Commerce in Tanzania: Case Study of Law of Contract Act and Sale of Good Act;** in partial fulfilment for the Award of Masters Degree of the Open University of Tanzania.

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Professor D. Mellor

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I, **Zahra Abdallah Maruma**, do declare hereby that this Dissertation is my own original work and that is has not been presented and will not be presented to any other University for a similar or any other degree award.

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Date

DEDICATION

This work is dedicated to my lovely family especially my husband for his moral and material support and my little daughter for her tolerance during the time she needs me and I was not there for her.

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ABSTRACT

This study presents an assessment on the existing commercial laws in Tanzania particularly the Law of Contract Act and the Sales of Goods Act, whether they ensemble with Information and Communication Technology (ICT) revolutions. The practicing of electronic commerce in Tanzania today is very common. Tanzanians enter into commercial agreements within the country and outside the country through online transactions via internet. While online commercial transactions are flourish speedily the existing commercial laws are said to become a major challenge to e-commerce. The Sales of Goods Act enacted before independence in 1986 and Law of Contract Act enacted in 1961 after independence which are the main laws of the country govern contracts together with principles established by courts of the land through case laws is still enforce contracts so far and there is no any amendment of the said laws apart from the technology advancements which changed the modes of contractual arrangements today. The said laws have been analysed herein to see as to what extent they are in support and not support of e-commerce in Tanzania.

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LIST OF ABREVIATIONS AND ACRONYMS

ATMs	Automated Teller Machines
B2B	Business to Business
B2C	Business-to-Consumer
CAP	Chapter
C2C	Consumer-to-Consumer
CISG	The United Nations Conventions on Contracts for International Sales of Goods
Et al	et alia (and others)
Ibd	ibidem (in the same place)
ICT	Information Communication Technology
LL.M	Legum Magister (Master of Laws)
Ltd	Limited
Op. cit	Opera citato (as cited earlier)
Pp	Page
TLR	Tanzania Law Reports
UNCITRAL	United Nations Commission on International Trade
USA	United State of America
www	World Wide Website

LIST OF LEGISLATIONS

INTRENATIONAL INSTRUMETS

Convention on the Use of Electronic Communications in International Contracts, November, 2005

UNCITRAL Model Law on Electronic Commerce (1996)

The United Nations Conventions on Contracts for International Sales of Goods.

FOREIGN LEGISLATION

The Electronic Communication and Transactions Act No. 25/2002 of South Africa.

Electronic Transaction Act, 1999 of Singapore.

Electronic Signatures in Global and National Commerce Act (''E-SIGN'')

Uniform Electronic Transactions Act (UET)

LOCAL LEGISLATIONS

The Arbitration Act [Cap 15 R.E 2002]

The Evidence Act [Cap.6, R.E 2002]

The Interpretation of Laws Act [Cap 1, R.E 2002]

The Law of Contract Act, [Cap.345, R.E 2002]

The Sales of Goods Act, [Cap.214, R.E 2002]

The Hire Purchase Act No. 22 of 1966.

The Land Act, No. 4 of 1999.

Bills of Exchange Act, 1931

Copyright and Neighbouring Rights Act 1999,Cap.218

Fair Competition Act, 2003 Cap. 285

Tanzania Communications Regulatory Act, 2003

The Tanzania Communications (Consumer Protection) Regulations, 2005

CHAPTER ONE

1.0 INTRODUCTION

Information and Communication Technology (ICT) has revolutionized the way business and commerce are transacted globally and Tanzania in particular. ICT has become enabler in every sector of the economy in simplifying the way business is conducted. Momentous commercial and business transactions are not only made faster, but the volume of goods and services that are transacted have multiplied many times over. The countries' economies grows bigger through the application of ICT as the World Bank survey reveal that approximately 50 developing countries suggest that "firms using ICT see faster sales growth, higher productivity and faster employment growth."[1]

The business practices are no longer depends on paper based system. Currently business transactions are conducted via online, websites and other electronic modes. Tanzania has become smaller in terms of commercial and business transactions are concerned, just like the world has become even smaller. It is the application of ICT that has facilitated that integration and interconnectedness which we now take for granted. Often people are used electronic transactions in alternative to the traditional transactions. It is very common these days to find people do marketing and buying goods and services online like buying of cars via internet, order of e-books from Amazon. Accessing of bank services through Automated Teller Machines, making of electronic payments through mobile

[1] Khalil et al. The Next Decade of ICT Development: Access, Applications and the Forces of Convergence. Washington, DC: The World Bank Group. pp 7

banking, Visa cards and Master cards just mention the few. Despite of all these technology advantages still there are legal obstacles and predictability on commercial laws which challenge the validity of these electronic transactions as well as online consumer protection.

Countries all over the World continue to evaluate their existing commercial laws to fit in the current practices of business to ensure the promotion of electronic commerce and consumer protections.The Convention of the United Commission on International Trade Law (UNICITRAL) in respect of the electronic communications in international contracts (CUECIC) established rules which are uniform for the purpose of eliminating those obstacles which could result on the operation of international transactions. Other countries like Singapore have adopted some of the provisions in their domestic laws for the purpose of smooth implementation of electronic transactions[2].

Tanzania cannot be left behind by this move of evaluating the existing basic commercial laws in examine to what extent the said laws especially the Law of Contract Act and the Sales of Goods Act challenged the application of electronic transactions.

[2] Eliza Karolina MIK "Evaluating the impact of the UN Convention on the use of Electronic Communications in the International Contracts on Domestic Contract law – The Singapore Example" International Law Association Chinese (Taiwan) Branch Yearbook (2012) http://works.bepress.com/elizamik/21/

1.1 Background to the Problem

The development of new technology had changed the way today's commercial transactions are conducted. Information and Communications Technology has substituted the traditional ways of conducting business which geared to the rapid growth of economy to the developed countries. ICT has become an enabler of simplifying the ways of conducting businesses.

Currently we are witnessing how the use of ICT had replaced the traditional ways of conducting businesses whereby a number of institutions had improve their services operations by application of ICT to simplify and remove the harder's and bureaucracy business processes. The practicing of electronic commercial transactions domestically and internationally these days is very common in Tanzania. People are used to do their businesses online like buying of cars from Japan, order books from Amazon via internet, using credit cards for payments at supermarkets and online shopping, accessing banking services by the using of mobile banking services such as payments of domestic bills, school fees, government revenues and other private businesses. Transfers of cash money through the mobile phones such as M-Pesa, Airtel-Money, Tigo-Pesa and Easy-Pesa as well as accessing other banking services by using mobile phones such as requesting for bank statements, withdraw of cash money through Automated Teller Machines (ATM's). all these are the products of the use of ICT.

As said earlier that while developed countries have taken full advantage of ICT revolution to grow their economies. Tanzania being one of the developing countries has not taken full advantage of e- commerce. This is because of the

existing commercial laws in Tanzania are said not to support the application of electronic commerce. The ongoing discussions revealed that the existing commercial laws do affect the application of e-commerce in Tanzania. However they did not specifically indicate as to what extent the said laws do not support electronic transactions in Tanzania.

It is a cardinal principle of the law from the maxim *ubi societas,ibi ius,ibi ius societas* Meaning that where there is a society there is law and where there is law there is society. The respective maxim indicating that law must reflect the reality of the existing of a particular society in a particular time. With the new technology the laws as well should go with changes resulted from the new technology. Therefore the existing commercial laws cannot continue to lag behind the new era of technology advancements and continue to create obstacle to e-commerce in Tanzania. E-commerce includes any consumer or commercial transaction conducted over the Internet for the sale of goods, lease of licensing of services and transfer of software or other information[3].

Principally commercial transactions are contract in nature as they are involving contractual arrangements like normal contract but in different modes. E-commerce includes transactions conducted electronically. A transaction is defined as an agreement, communication or movement carried out between separate entities or objects in exchange of item and money[4]. In that case electronic transactions are

[3] Michael L. Rustad, (2009). Internet Law. Thomson Reuters business. pp130
[4] Daudi Mwita Nyamaka,(2011). Electronic Contracts in Tanzania: An Appraisal of The Legal Framework. Pp 26

agreements subject to the Law of Contract and Sales of Goods Act as the main commercial laws. The existing commercial laws in Tanzania were enacted since 19th century for the purpose of regulating commercial transactions mainly based on paperwork system. The said laws contain principles which are used to determine the validity and invalidity of commercial transactions such as offer and acceptance, free consent of the contracting parties and writing and signature requirements. It is a principle of contract law that an agreement to be enforceable by law it should be made by free consent of competent parties over the lawful object with a lawful considerations[5]. To what extent these requirements provide a room for electronic transactions when it comes to the requirements of enforceable contract under the law of contract is critical to electronic environment.

On the other hand the Sales of Goods Act speaks of the transfer of the ownership in property in goods. The law requires the absolute transfer of property in goods. Then how does this principle accommodate electronic transactions in the context of sales of goods and services online. All these are going to be analyzed in this research to see to what extent the principles applied under the law of contract and Sales of Goods Act challenging application of e-commerce in Tanzania.

1.2 Statement of the Problem

The current commercial laws in Tanzania were enacted a long time ago during 19th century before and after independence of Tanzania prior to the era of new technology however they are still enforcing business transactions which were

[5] Section 10 of the Law of Contract Act,[Cap 345 R.E2002]

particularly based on the traditional ways of face to face transactions or paper based transactions. The said laws are suspected not to fit with the new technological development on the use of ICT for commercial transactions conducted online which based on paper less system. Tanzania being one of the common law countries does not yet embark to enact laws in relation to e – commerce. The law Reform Commission of Tanzania is currently looking for the review of legislations so as to give room for smooth application of electronic commerce[6] .The outcome of the ongoing discussions reveal that there is a need of legislation for electronic transactions.

The current Law of Contract Act and Sales of Goods Act The Law of Contract Act as well as the Sales of Goods Act are said do not recognize electronic transactions. However the said discussions did not reveal to what extent do the existing commercial laws are supporting the electronic transaction which this is the basis of this dissertation to analyse a number of legal issues to be resolved concerning contracts on the aspect contract formations; offer and acceptance, competence of contracting parties, freedom of contract, the use of e-agent, invitations, writing and signature requirements as well as consumer protection in the ambit of ecommerce.

1.3 Objective of the Study

The main purpose of this research is to evaluate to what extent the existing commercial laws in Tanzania in the light of electronic commerce – based

[6] Cyber Security in Tanzania –Country Report "Discussion paper on the introduction of a legal framework for electronic commerce in Tanzania page 10".

practices are cater for the existing modern technology and the way businesses are conducted today's in the aspect of contracts and protection of consumer. As we are aware that Electronic commerce cuts across and integrates Tanzanian commerce with international commerce; this research shall seek to draw lessons from other countries already fully implementing e-commerce. The study will also look to the challenges and complications of ecommerce faced by the common law countries like Tanzania which are already adopted the Convention on their commercial domestic laws for the purpose of taking a caution to Tanzanian commercial laws.

1.5 Significance of the Research

This research considers the strengths and weaknesses of commercial laws of Tanzania, highlighting areas that require reforms to achieve the objective of promoting e-commerce so as to enable Tanzanians and other investors to be legally secured and protected on online business transactions. Highlight commercial laws from other jurisdictions already embarked to electronic commerce their achievements and challenges and provide recommendations for the suitable way for Tanzania to embark on legal framework which would cater for the existing technological society.

1.5 Research Hypothesis

The hypotheses of this study are following:

i. To what extent the existing commercial laws in Tanzania are provides a room for the new era of technology in the context of ecommerce.

ii. Whether the existing practices of ecommerce in Tanzania requires

intervention of new legislations.

iii. Whether there is a need for review, repeal or adopting Convention[7] to the existing commercial laws.

iv. If it is not possible for the existing commercial laws to apply to the current electronic transactions.

1.6 Research Methodology

The methodologies used in this research included the review of the existing commercial laws in Tanzania and those of other jurisdictions already embarked to the establishment of electronic commerce legislations. Review of case law related to e commerce to ascertain the legal position of electronic transactions as well as researched online materials on the aspect of e - commerce.

1.7 Scope of the Study

The research covered the area of commercial laws in Tanzania mainly the Law of Contract Act of 1961 and the Sales of Goods Act of 1989. The reason for this is due to the fact that both laws which have been enacted a long time ago before and after independence are still regulating contracts and sales transactions together with consumer protections matters to date even to this new era of technology whereby the use of ICT has become the common way of doing businesses in replacement of traditional system which based on paperwork. For that reason this research geared to highlight the weakness of the existing laws and recommendations on the way forward on the context of ecommerce.

[7] Convention on the Use of Electronic Communications in International Contracts, November, 2005

1.8 Literatures Review

Despite of the limited number of literatures related to electronic ecommerce on the aspect of contracts and sales of goods. The available literatures I was able to review enhanced much in demonstrating to what extent the existing legal framework do not support the new technological innovations as discussed herein. This should drew attention to the legal systems of Tanzania as far as e-commerce is concerned.

Contract Laws is among the areas affected by the implementation of ecommerce in Tanzania[8]. This article focused on common law principles on application of postal rule on communication of offer and acceptance and how it is affected by e-commerce. This pursue this research to go further in detail to analyse whether the law of contract Act of Tanzania applies the postal rule on the communication of offer and acceptance in the contracts formation. The said provision seems to depart from the common law principle of postal rule which is also raises a question on whether the provision is suit for electronic contract or not.

The Law of Contract Act[9], the principal law for contracts in Tanzania adopting common law principles. The review of the Act was particularly on the part of contract formation. Section 2 of the Act provides for the definitions of offer, acceptance, agreement and contract indicate the similarities with the standards requirements of electronic on contracts. However there are dissimilarities on

[8] The 20th Century has witnessed rapid and new innovative available at http://www.Irct.go.tz/?wpfb_dl=113

[9] Cap,345 R.E 2002

certain points on the issues of electronic environment on the aspect of modes of communications as well as the issue of invitation to treat.

Section 4 of the Act[10] provides for the time when acceptance becomes effective that is when contract is said to be concluded. The issue comes on time and place of contracts on the aspect of electronic environment. Other provisions are section 13 and 14 of the Act which concerned with the consent of the contracting parties. Free consent is a centre core of these provisions whereby if there is no *consensus ad idem* there is no contract. This is a very critical when it comes to electronic commerce whereby contracts are concluded at a distance where parties have no room of face to face meeting. Then the main issue in this provision is determination of meeting of minds whereby this research is going to look on the principles of consent to see whether they can apply to electronic transactions.

Section 11[11] of the Act also concerns with the competence of a party into contract refers to a person. This drew attention on whether the machine like a computer, Websites can be a party to a contract when it comes to the electronic business transactions whereby a party into a contract is not necessarily be a person. This research is going to analyse whether the term "person" can include machines like computer and database as competent party into a contract. Moreover section 134[12] of the Act dealing with agent and principal. This section in providing definition who is agent and principal refers to a term "person". This research is going to

[10] Ibid
[11] Ibid
[12] Op cit, Cap 345 R.E

analyses whether the term "person" does include e- agents like computer, websites and other web networks.

Contract Law, commercial law and customer law commented by Alan[13] that are all apply to e- communications generally but the unique and unusual circumstances of Internet are not covered by traditional laws satisfactorily. The response of those legal problems arises from the practice of ecommerce can be dealt with by the application of standard legal principles. However Mr. Alan did not specify the traditional laws he was talking about. This research is going to pick from there whereby traditional Law of Contract Act and the Sales of Goods Act are the centres of discussion in respect of legal position of electronic communications in Tanzania. Dr. Abdulhadi[14] discusses the traditional contract principles on contract formation and compare with electronic modes of contract formation. This research is going deeper to highlight the comparisons between the principles of contract under the Law of Contract Act with the electronic principles of contract formation.

Sarah[15] discussed major issues that should be taken into account in formulating e-commerce related laws and regulations reference to e-commerce development in Asia provide over view on implementation of e-commerce law. The paper

[13] Davidson, A, (2009), the Law of Electronic Commerce, Cambridge University Press, at Pp 1-7.
[14] Dr. Abdulhadi M. Alghamdi, The Law of E-Commerce: E- Contract, E- Business, Authorhouse, (2011).available at http://books.google.co.tz/books?id=Jg4Kl6jwP2cC&pg=PA1&dq=e+commerce+and+its+challenge+on+Law+of+Contract&hl=en&sa=X&ei=09j0UeTkIoLPtAbTw4HoBw&ved=0CEEQ6AEwAw#v=onepage&q&f=false
[15] Sarah Muller and Annelie Schoenmaker, (2007) Legal Implications of E-Commerce: Basic Issues, Initiatives and experiences in Asia. Staff working Paper, UNESCAP(2007) available at http://www.unescap.org/tid/publication/swp207.pdf

discussed the legal infrastructure of e- Asian as an example of a regional initiative to harmonize the legal basis for e-commerce. It alerts that there must be a consistency between national legislative and regulatory framework. This research is going to discuss whether there is a need of formulating new legislation of e-commerce in Tanzania.

Eliza[16] challenging the implication of Model Law[17] to contract law with the reference to Singapore country which adopted some of convection provisions into her domestic law. She cantered on the complications of implementation of the provisions to contract law for the countries based on common law as Singapore. This research will highlight the cautions to be considered by Tanzania if opting to adopt model law provisions to its domestic laws.

Jane[18] in her paper discussed the strengths and weaknesses of European Union and US law reforms in respect to electronic commerce and highlight how far the reforms approaches raised problems to the substantive principle of contract law. This research is going to relate the reform approaches in relation to reforms which will be

[16] MIK,Eliza Karolina, "Evaluating the Impact of the UN Convention on the use of Electronic Communications in International Contracts on Domestic Contract Law- The Singapore Example" (2012).Research Collection School of Law(Open Access).Paper1070.Available at http://ink.library.smu.edu.sg/sol_research/1070

[17] The United Nations Commission on International Trade Law (UNCITRAL)

[18] Jane Kaufman Winn and Jens Haubold, Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective. Available at http://www.law.washington.edu/Directory/docs/winn/Electronic_Promises_Revised.pdf

Nditi N.N.N[19] indicates that in UK consumers can be protected against several risks in e - contracts through offline laws which are same applicable to online law. He did not explain how Tanzanian laws provide from that perspective this research going to look to what extent the commercial laws[20] of Tanzania do provide consumer protections for electronic commercial transactions.

The Sales of Goods Act[21] which regulate the sales transactions in Tanzania is speaks of itself to govern only offline transactions it is only apply to tangible goods as per definition under section 2 of the Act[22]. Section 3(1) stipulates very clear that a sale involves transfer of ownership. The Act also does not apply to the supply of service contracts. Another area is Section 6 of the Act which insists on writing requirement whereby it requires a sale contract to be in writing when the value of subject matter is two hundred shillings or more. The said requirement is an obstacle to e- commerce for the sales of goods through online whereby consumer and supplier exchange communications electronically. This leads a researcher to analyse as to whether there is a need to amend or to repeal the entire Act so as to accommodate electronic sales as well.

Juwana[23]discussed how the new cyber age has affected Indonesia due to the practice of ecommerce activities whereby several industries running their operations via Internet. His paper concentrated on the structure of Indonesia and

[19] The University of Dar es Salaam, Tanzania, The Law of Contract pp 14
[20] [Cap,214 and 345 of ,R.E ,2002]
[21] [Cap 214, R.E 2002]
[22] Ibid.
[23] Juwana, H,(2003), "Legal Issues on Ecommerce and E-contract in Indonesia", A Paper Presented at the 8th General Assembly of the ASSEN Law Association: ASSEN Laws in the 21st Century, held in Singapore on 29th November-2nd December 2003.

the impact of the existence Dutch Colonial laws which is similar situation in Tanzania. This research review the common law principles which are the main source of the law of contract act in Tanzania which were not covered by Juwana.

Aida[24]observe that Africa is in danger of being left behind on a new and growing worldwide of ecommerce, internet and e-business. He contended that companies and the private sectors in Africa have not been active initiators of ecommerce. This research is going to show how the companies and other sectors in Tanzania are good actors and prosper actors of ecommerce practices.

CHAPTER TWO

2.0 IDEAL LEGAL FRAMEWORK EXISTING IN TANZANIA FOR ELECTRONIC CONTRACT AND SALES OF GOODS

2.1 Introduction

Tanzania is a common law country. Most of its laws are originated from common law principles. The existing commercial laws govern particularly contracts and sales of goods are enacted on the way back in 19th Century. Contracts are governed by the Law of Contract Act of 1961 which currently is Cap 345 R.E 2002.The said Act contains common law principles as well as doctrine of equity which are the main sources of the law[25] however the decisions of the courts of law in England are not binding to Tanzanian judicial decisions but are only persuasive[26]. The Sales of Goods Act of 1986 currently Cap.214 R.E 2002 was

[24] Aida, O.M, et al, (2005), "Ecommerce Challenges in Africa: Issues, constraints and opportunities", Tunis

[25] Section 2 (3) of the Judicature and Application of Laws Act Cap.358 R.E 2002

[26] See the case of Juwata V. Kiuta, Civil Appeal No. 29/1987 (Unreported) held that the court may depart from its own decision and maintained that the foreign decisions are only of persuasive value.

enacted in the year 1986 after the repealed of the Sales of Goods Act of 1936 the Act is still regulating sales transactions in Tanzania to date. Looking to the life span of the two laws there is no doubt they were enacted before the technological revolutions in early 20th Century. The said laws are basically based on paper based systems which ensured the certainty and validity of the traditional commercial transactions in Tanzania.

The emergence of new technological development resulted to the use of Information and Communications Technology as the enabler of improving the ways of conduct businesses has substituted the ways of doing business whereby commercial transactions are no longer based on paper works. The use of electronic modes such as internet, website and other networks have become the modern modes of communications, source of information's and conducting businesses. This comes under one umbrella of e-commerce. The growth of economy in developed and developing countries currently is influenced by the application of e-commerce. Electronic commerce is defined as a commercial exchange system via computer networks including internet, websites and other electronic modes[27].This means that e - commerce involves the use of technological advances to promote exchange of business transactions[28] among computers and humans or traders and customers over digital network in cost effective and speedy manner.

[27] See Tanzania ICT policy
[28] Mackenzie P.D.E-commerce Law-China http://www.perkinscoie.com/resource/ecomm/prc.htm

There are number of various types of ecommerce such as business - to - business (B2B) whereby customer is another enterprise or department within the same enterprises, business –to- customer (B2C) involves the delivery of product to end users, consumer-to-consumer (C2C) which involve buying and selling between individuals and consumer-to-business (C2B) whereby customers flash prices of goods and services they are willing to buy from businesses.

All in all the term ecommerce includes commercial communications concluded through exchange of communications over internet and other forms of transactions such as the use of Automated Teller Machines (ATM), Credit cards, VISA cards etc[29]. Basically electronic transactions are contracts in nature they are subject to the commercial laws particularly the law of contract as well as the sales of goods and services. As discussed above that the Law of Contract Act and the Sales of Goods Act are tailored for commercial transactions in Tanzania which are mainly based on paper systems. The practice of ecommerce posed a question on whether the said laws are sufficiently enough to carter for electronic transactions or the intervention of ecommerce would require for the new legislation[30]. All these questions are going to be analysed in the coming chapters concerning the challenges facing e-commerce in Tanzania.

2.2 General Concept of E - Commerce in Tanzania

Tanzania is one among the beneficiaries of the development of new technology. Currently the use of ICT is no longer a luxury practice but it has become the

[29] Dr. Abdulhadi,Op cit,at pp 1
[30] Eliza Mik, op cit at pp 8

enabler of simplifying the way businesses are conducted. According to World Bank report of 2012 a number of internet user in Tanzania was 4932534.86 in 2010[31]. Electronic commerce currently being practiced in Tanzania through commercial transactions conducted online whereby a number of Tanzanian citizens are selling and buying through online transactions domestically and internationally.

A number of institutions such as banks and private companies are improving and qualify their functions and services through the use of electronic modes such as internet, website and other networks for searching of commercial information, marketing and buying of products online, buying of electronic air tickets, the payment of bills electronically, transfer of cash moneys through mobiles services, accessing of bank services such as ATMs and electronic payments through credit cards. Basically all these transactions are commercial in nature involve contractual arrangements but in electronic forms different from the traditional contracts.

Although these electronic transactions are commonly practiced in Tanzania but they have been done in the absence of any clear legal framework. There is evidence that these electronic transactions have not been rated by the government policy[32]earlier. The existing commercial laws enacted a long time ago during 19th century are still regulating commercial transactions in Tanzania based on traditional system of paper works for contracting processes. This is debatable

[31] Internet User in Tanzania available at http://www.tradingeconomics.com/tanzania/internet-users-wb-data.html

[32] Oreku. G.S, et al (2009), "State of Tanzania E-Readiness and Ecommerce in Information Technology for development", Vol 14 (4) 302-311,published online 25 June 2009 available at http://www.tandfonline.com/doi/pdf/10.1002/itdj.20090

when it comes to ecommerce which based on paper less transaction and raise a doubt whether there is any room for electronic transactions in the existing commercial laws.

2.3 Contract Formation under the Law of Contract Act

The law of contract as indicated above based on common law principles which provide guidance for contractual arrangements. The said principles are used to determine the validity or invalidity of a contract.

Contract is defined as an agreement enforceable by law[33]. Agreement is defined as set of promises[34] forming consideration. The said agreement may be oral or written, bilateral or unilateral. Thus a contract can be oral or in writing except for the contracts which are mandatory required to be in a certain prescribed formal such as contracts for higher purchase[35]. The contracts under prescribed formal cannot be valid unless the conditions are fulfilled as in *Pandit v.Sekawa*[36]. The court held having not invoked the agreement into a written form as the law required, there was no enforceable contract between the parties.

Considering the above decision besides the requirements under the other laws[37] or wishes of the contracting parties that a contract should be in a certain formal, there is no any formal requirement to create a contract under the existing Law of

[33] Section 2 (1) (h) of the Law of Contract Act, Cap.345 R.E 2002.
[34] Section 2(1) (e) supra
[35] Section 6 of the Hire Purchase Act No.22 of 1966.
[36] 1964 (2) A.LR Comm.25
[37] Section 64(1) of the Land Act, 1999 and section 36- 40 of the Act,1999 .

Contract Act[38]. Contract may be in oral or writing form and it is binding to the contracting parties so long they intend to create legal relationship between them.

The law of Contract Act under section 10[39] provides that all agreements are contracts provided they have been made from free consent of the parties competent to contract for a lawful consideration with a lawful object. Basically free consent of the parties, lawful subject matter and consideration together with the intention to create legal relations are the main requirements of the contract under the law of contract.

2.3.1 Freedom of Contract

Freedom of contract is principal requirement of contract formation. This is refers to the theory of *consensus ad idem* that is meeting of minds. Section 10[40] requires for the agreement to a contract should be made by free consent of the competent parties over a lawful object. The important issue of the above provision is centred on the free mind of the parties. If no *ad idem* between the contracting parties there is no contract. This has been supported by the case of *Star Services Co. Ltd v. Railways Corporation*[41]. The court held that the existence of a valid contract presupposes that the contracting parties were *ad idem* to the terms of the contract and each of them willingly accept those terms. This requirement for can easily be identified under the traditional agreement where there is a direct meeting of minds because of the access of face to face transactions between the contracting parties

[38] [Cap 345,R.E 2002]
[39] Ibid
[40] The Law of Contract Act,[Cap 345,R.E 2002}
[41] (1989)1 HC.

but it is difficult when it comes to electronic environment where parties contracted at a distance and much more sometime one or both of the contracting parties are e-agents and not a person as the provisions[42] of the law of contract act refer to a term person. Then this rise the issue on the validity of consent on electronic transactions whether there is ad *idem or not*. This is going to be discussed in detail on the coming chapter on the challenges of ecommerce.

2.3.2 Intention to Create Legal Relations

Intention to create legal relationship is another important aspect in determination of validity of a contract. Agreement is said to be a contract if it has an intention to create legal relations and must be distinguished from social and domestic agreements in Jones v. Padavatton [43] as well as commercial agreement. However in the aspect of commercial context there is presumption under the law that agreement intend to create legal relationship as decide in the *Esso Petroleum v Customs & Excise*[44]whereby promotion was made by Esso that any person purchasing four gallons of petrol would get a free coin from their World Cup Coins Collection. Then the issue was whether the promotion was intended to create legal relation and if the coins were for resale. The court held that there was

[42] Section 2 and 134 of the laws [Cap 345 R.E 2002]

[43] [1969] 1 WLR 328 Court of Appeal. In this case Plaintiff, a mother of defendant promised defendant to pay her $ 200 per month for the purpose that her daughter left her job and go to London for bar study. The earlier plan was failed after defendant discovered the said amount was less than she expected and would only afford to rent one room for her and her son. Plaintiff then decided to buy a house for her daughter to live in and rent out some rooms and the income to be used for her maintenance. The daughter got married and did not complete the study. Her mother sued for the possession of the house. The court held that the agreement was purely a domestic agreement which raises a presumption that the parties do not intend to be legally bound by the agreement.

[44] [1976]1 WLR 1 House of Lords

an intention to create legal relations and the coins were not for resale they were offered in a commercial context.

Going through the above sections it is clear that contractual agreements should come out from two limbs of offer and acceptance which communicated from one party to the other and an agreement to become a contract there must be a legal relationship created between offeror and offeree[45].

2.3.3 Offer and Acceptance

An offer includes any statement express to do or abstain from doing something with a view to obtain an assent of the other to do or abstain. This means any statement can be termed as an offer if it entails terms which intend to establish legal obligation against the person who made it. This is celebrated in the case of *Carlill v. Carbolic Smoke ball Company*[46] where the court held that plaintiff sued defendant for his advertisement that anyone who will still succumb to influenza after using defendant medicine according to instructions for a fixed period would be offered 1000 pounds.

Therefore an offer depends on particular case provided it expresses a reasonable term which intends to establish legal relationship. However offer should be distinguished from invitation to treat such as advertisement for sale or display of goods in shop shelves. In the case of *Pharmaceutical Society of Great Britain v.*

[45] See the case of Carlill v. Carbolick Smoke Ball Co [1893] 1 QB 256 Court of Appeal. Held that plaintiff was entitled to the reward as the advert constituted an offer of a unilateral contract where the requirement of acceptance can be by performance and it was not necessary to be communicated to the offeror

[46] (1893)1 QB 256

Boots Cash Chemists[47] where it was held that the display of goods did not constitute an offer. On the other hand the law requires offer to be in clear terms[48]. There must be an intention to be bound by the parties. An offer should also be distinguished from an invitation to treat[49]and advertisement although some of the advertisement can be treated as offer as it was decided in Carbolic case (supra)[50].

Therefore regardless of the mode which an offer can be made it is only essential that it entails the reasonable terms under which a reasonable man believed in it and act on that belief. Then the person who made another person to believe cannot deny the obligations arise from the acts of the believed person as decided in Carbolic case as stated above. From that point of observation since the Law of Contract Act is silent on the mode of communicating an offer. I do not see any misunderstanding when it comes to electronic transactions whereby the exchanges of promises are made electronically. In my view since it does not contravene with the principles of an offer then an offer communicated electronically can still has the same legal value as an ordinary offer communicated offline.

On the other hand the prime principle requires offer and acceptance to be communicated to the parties into a contract as stipulated under section 4[51]. Moreover offer and acceptance must be communicated to the person intended to[52]. However the law of contract itself is silent on the modes of communications.

[47] (1953)1 QB 401
[48] Section 38(2) Cap.345,R.E 2002
[49] Fisher v Bell [1961] 1 QB394.Held goods on display in shops are not offers but an invitation to treat.
[50] Ct Supra
[51] Op cit
[52] Section 3 Cap 345 2002

Again the crucial point is effective communication between the contracting parties irrespective of the modes of communications.

Coming on the second limb of agreement acceptance. It is defined an assent to the offer whereby under section 2(b) of the Act[53] meaning that offerees' assent must be communicated to the offeror according to the terms of the offer. It should be unconditionally and when acceptance indicates new terms to an offer it should be taken as counter offer subject to acceptance as it rebuff the original proposal. Additionally silence will not mean acceptance as decided in the case of *Felthouse v Bindley*.[54]However sometimes an offer can be by perfomamcne as in the case of *Carlill v. Carbolic Smoke ball Company*[55]whereby an offer was made to the public and its acceptance was by the way of performance.

Observing the above position acceptance to an offer must strictly comply with the terms of an offer. In *Stella Masha v. Tanzania Oxygen Limited*[56] Whereby the court held that in order for an acceptance to constitute an agreement, it must in every respect meet and correspond with the terms and conditions of the offer.

[53] Cap 345, R.E 2002. "when the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted".
[54] [1862] EWHC CP J35 Court of Common Pleas. Whereby there was an offer made to purchase a horse on condition that if the offeror is not heard from the offeree by the weekend offeror would consider the horse to be his. Court held that there was no contract. Silence cannot be acceptance.
[55] Op cit
[56] (2003) TLR 64

2.3.2 Time when a Contract is Made

It is a general rule that once acceptance has been made a contract is said to be formed. Therefore there is no contract if acceptance is not communicated to the offeree. However the acceptance is not necessarily be in expressed form to the person who made it. Sometimes acceptance can be by impliedly made as in the carbolic's case. Time is a crucial element for the determination of competency of an acceptance. Time is also determine when the obligations of the contracting parties became effective as well as when risks passes from one party to the other.

According to the Law of Contract Act[57] stipulates when communication of offer and acceptance completed. Looking to the provision cited above, acceptance becomes effective when it comes to the knowledge of offeror. This provision however is not based on postal rule as in celebrated case of *Adams v. Lindsell*[58]. Whereby the court held that a contract came into existence at the moment a letter of acceptance was placed in the post box. The general rule is that once a letter of acceptance properly addressed, stamped sufficiently and put in post, a contract is then said to be formed.

Under the Law of Contract Act, I agree with Prof. Nditti[59] that the provision of section 4 is departed from the common law principle. Acceptance under section 4(1) (b) become binding against offeree at the time it comes to the knowledge of offeror the same way can be revoked at the time revocation is known to the

[57] Section 4 (2) of the Act,[Cap 345,2002] "communication of acceptance complete when the said communication put in the course of transmission and is out of the control of the acceptor or at the time it comes to the knowledge of offreror".
[58] Op cit
[59] See Nditti N.N.N, op cit, at pp 43

offeror.

Time of acceptance is another area of controversial in relation to traditional contracts as well as electronic commerce especially for the distance contracts. The completeness of an acceptance under the traditional system is subject to a number of factors depending on the nature of business transactions as arguable in *Brinkibon Ltd v. Stahag Stahl Gmbh*[60] that the time when such a message becomes effective depends on a number of factors including normal business practice, etc as well as the modes of communications in determination of whether acceptance is based on general rule or exceptional rule. The same position can also be on the aspect of ecommerce as it is going to be discussed in the coming chapter.

Analysing the above discussed legal positions for contract formation based on traditional system and compared with electronic contracts. I do not see much of differences between the two concepts except for the modes of contracting processes. Electronic agreements look similar to traditional agreements in terms of requirements and they can become valid contracts so long there are offer and acceptance made through free consent of the competent parties for a lawful object. The common misunderstanding that traditional paper based system hinders the electronic commerce to me has no direct justification on the view that the electronic modes of contracting do not change the validity of the agreements contracting electronically as argued by Eliza[61]. It is my strong observation that as far as the law of contract Act is concerned, the principles under traditional law can

[60] [1983], 2 AC pp 34
[61] Eliza Mik, op cit at pp 8

apply to electronic environment as well.

Therefore it is my point of view that, the notion that model laws introduced to remove paper based hindrances to the electronic commerce has no direct validity as far as the Tanzania law of contract act is concerned. The provisions of the law with deep interpretations are not contrary with the standards of electronic transactions. There is no any predictability of the said provisions to be applied to ecommerce as it is going to be discussed in the next chapter.

2.4 Legal Framework for Sales of Goods in Tanzania

The Sales of goods Act is the one dealing with the sales transactions in Tanzania, however it is only dealing with offline transactions and no sufficient legal effect for selling and buying of goods on distance transactions. Currently the ones who transacted online are at risk of their business in case of any disputes arise from the transactions conducted online because the existing law was enacted before the innovations of new technology in 1986. The main purpose during that time was to facilitate commercial exchange of goods and considerations.

Sale includes bargaining and sale with inclusion of delivery[62]. Derive from that provision sale involves the exchange of property with money. Therefore it entails agreement between the seller and the buyer. A Contract of Sale has been defined under section 3(3) of the Act as contract whereby a property in goods is transferred from a seller to the buyer. From that definition a sale has two

[62] Section 2 of the Sales Act [Cap 214,R.E 2002]

scenarios. One is the transfer of property in goods from the seller to the buyer and another scenario is exchange of money with property in goods.

Going by the above definition the midpoint of sale is the transfer of the full property ownership in goods from the seller to the buyer. This is very challenging when it comes to electronic commerce which includes e –agent as intermediaries between the seller and the buyer. The question is whether the transfer of property in goods is between the seller and agent or a buyer or seller.

Another question is the subject matter of the sale when it comes to ecommerce. Section 2 of the Act[63] stipulates very clear in defining the term "goods" as a personal chattels with exclusion of money. This includes an article or commodity in a tangible form. The basic substance in sales of goods is tangible goods and not intangible. Electronic commerce sometimes dealing with the digital goods such as software whereby only license is exchanged between the owner of software and licensee could Does digital goods amount to a sale under the existing law?

The Sales of Goods Act also requires the descriptions of goods to be clearly stipulated which on online transactions the details of transactions such as descriptions of goods can become difficulty due to the nature of websites displays. Under the performance of the sale contract the law also under section 36 of the Act[64] requires the seller to provide the right to examine the goods bought. This is also critical angle to digital goods like software licenses for instance shrink-wrap

[63][Cap 214,R.E 2002]
[64] Op cit

whereby the software license covered by shrink-wrap cover indicating the breaking of it constitute an acceptance to the software license terms.

Like the law of contract which requires the terms of a contract to be certain and unambiguous the Sales of Goods Act also requires the terms of bargaining and settle of a sale or conditions of agreement to sale insisted to be clear otherwise it the contract for sale will be enforceable. The issue is whether the said requirement can fit for electronic environment where the acceptance is equivalent to just a clicking of a button. Form the above analysis the Sales of Goods act do require some amendments to accommodate the ecommerce as Germany had done instead of enacting a separate sales law it decided to completely revised its contract law[65]

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[65] Jane, op cit at pp 13

CHAPTER THREE

3.0 LEGAL AND INSTITUTIONAL CHALLENGES FACING E - COMMERCE IN TANZANIA

3.1 Challenges Facing E-commerce in Tanzania

It has been a discussion for a long time all over the global that the new innovations which lead to the simplifying the ways and means of conducting business transactions through the internet faced a challenge from the existing commercial laws which are seen to be an obstacle to the application of e-commerce. However it had not been discussed to what extent the said laws provide a room for electronic transactions. This chapter is going to analyse how and to what extent the existing laws challenge the application of ecommerce.

Electronic contracting processes as discussed above seems not to be different from the traditional contracting processes. The uniqueness and unusual circumstances of internet are said not adequately covered under traditional laws[66]. I am strongly opposed the above statement on the fact that before jumping to that conclusion it is better to analyse the existing technological situation visa a vi the existing principles of law to see whether the provisions of the laws accommodate technological advancement or not. My finding on that is focused on the interpretation of the existing laws which I am strongly defending that, there is a need of a wider interpretation of the existing principles of law in respect of ecommerce is concerned as discuss hereunder.

[66] See Davidson, A,(2009), the Law of Electronic Commerce, Cambridge University Press, at Pp 3-7

This could answer the question whether the practice of ecommerce could real need interaction of new legislation of electronic transactions or the existing principles and law structure should remain intact[67].

3.1.1 Freedom of Contract on Electronic Transactions

As discussed earlier that the basic requirement of a contract is free consent that is *consensus ad idem* .The principle of contract under the common law usually is that the involvement of human decision in making offer and acceptance is used to determine the intention or a will of the parties into a contract that is called "meeting of minds". The provisions of section 10[68] provides for the essential requirements to a contract including agreement made by free consent of the competent parties over a lawful object. The important issue of the above provision is pointed on the free mind of the parties.

Nditi N.N[69] in his book asserts that *consensus ad idem* is an essential requirement for an agreement to became a contract. This has been supported by the case of *Star Services Co. Ltd v. Railways Corporation*[70] . The court held that the existence of a valid contract presupposes that the contracting parties were *ad idem* to the terms of the contract and each of them willingly accept those terms. Basing on the above authority if no *ad idem* between the contracting parties there is no contract. Under the electronic transactions "meeting of minds" for the parties into

[67] Jane, Op cit at pp 24
[68] The Law of Contract Act,[Cap 345,R.E 2002}
[69] General principles of Contract Law in East Africa at 174
[70] (1989)1 HC.

agreement cannot easily to be identified as a result that such transactions are questionable if they do fall under the traditional doctrine of free contract or not based on sections 10 and 13 of the Tanzania Law of Contract Act.

The question of legal value arises into two scenarios, one is when it comes to electronic agreements contracted at a distance where there is no room for face to face interaction and second is where an offer and acceptance made by the programmed computer systems with no involvement of human interactions to make a decision.

In the first scenario this is not a novel situation telegraph was used for commercial agreement and it was rated a valid contract[71] besides there was no face to face interactions but instantaneous communications amount to face to face interaction suffice the consent of the parties as decided in *Entores v. Miles Far East Corporation* [72]It was held that, telex to be analogous to contracting face to face or over the telephone. This can also be applied to agreements through emails and website transactions provided there are sufficient and clear terms of agreements understood by the contracting parties especially for Shrink-wrap and browse-rap agreements are the kind of contracts exclude the room of meeting of minds and electronic contractual process can bind the other party before the said party is well understood the terms of the contract due to the manner and conditions of acceptance set for online contracts.

[71] Davidson, Alan, op cit, at Pp 20-28
[72] (1955) 2 QB 327 (CA)

Furthermore it is not only human interactions can be determined the meeting minds of the parties into a contract. There are other factors to determine the consensus ad idem as said in *Boulder Consolidated Ltd v. Tangaere*[73] held that the basis of a contract is not subjective intent of the parties alone but their objective and apparently manifested intend.

Therefore besides the "meeting of mind" the objective theory can be used to determine the validity of contract in case of distance contracts provided there is intention to create legal relationship. It is my considered opinion that this should be extended to electronic contracts as well as in *Gurney Consulting Engineers v. Pearson Pension Property Fund Ltd*[74]. It was stated that general English law adopts an objective theory of contract formation, i.e, the governing criterion is the reasonable expectations of honest or reasonable man.

Another scenario of "meeting of minds" is concerned with the involvement of e agents such as Websites or database searches as the parties into a contract. A term "person" as stipulated under section 2 (1) (a), (b) and (c) of the Law of Contract Act[75] include a company, public body, corporate, a body of persons with the exclusion of machine like programmed computers or robot and other e - agents. The term agent under section 134[76] of the Act as well refers to a human being and not a database, website or a machine like programmed computer.

[73] [1980] 1 NZLR 560,567(CA)
[74] [2004] APP.L.R 09/02
[75] Op cit.
[76] Cap 345,R.E 2004

This has been discussed under the two consent theories to see whether they can apply to electronic transactions to amount *ad idem* to electronic contract that are subjective theory and objective theory. Under the subjective theory the inner will of a person is the crucial point to be determine. Therefore apparently this theory cannot be applied to electronic agents since it is impossible to determine inner will of a machine.

Comes to the objective theory whereby the consent can be determined by the party statement or conduct so long reasonably understood by the other party. On this juncture since the e – agents has been instructed to make an offer or acceptance through programmed computer a party should be presumed to be bound by the act of e- agent acting on that behalf. This is also apply to traditional principles when a person is bound by the terms of contract which he signed without reading it[77]. This is equivalent to strict rule that a person decide to use e- agents should bear risks of using such a device.

Therefore, taking into consideration the fact that the use of programmed computer, website or database assigned to do a certain task on behalf of either a party in contracting processes. It is the finding that the said machine is considered to be an agent of the principal party like in traditional contracts provided it performs exactly what was tasked for. A mere assumption that there was no meeting of minds for electronic agreement since there is no human involvement into electronic contract has no value noting that there is no deference between a

[77] Saunders v. angalia Bldg Soc'y [1971] 1 App.Cas.1004

normal agent and e-agent on the nature of tasked performed. It is my observation that this theory should be extended to the issues of meeting of minds pertaining to e- commerce.

Therefore basing on the above discussed views the involvement of e- agents on the formation of contract electronically cannot simply invalidated because of indirect involvement of human decision. What should be considered is the will of the parties to direct the e-agent to act on their behalf.

3.1.2 Ascertain of Offer and Acceptance on Electronic Transactions

As discussed earlier that E-commerce involves commercial transactions executed through internet which are basically contracts in nature. On electronic transactions offer and acceptance are transmitted via internet either by pressing an offer to the website or sent to a particular recipient .Therefore commercial contract can be concluded online although performance of the contract can be channelled through normal ways like delivery of goods or supply of services. Sometimes both steps of formation and performance of a contract can be executed online for instance in case of software goods.

According to M/s Sarah and her fellow colleague observed that contract under traditional law is usually concluded by either by shake of hands or signatures. Then the question is offer and acceptance communicated electronically whether an electronic contract is legally binding and to what extent can be used as evidence of dispute. The law of evidence[78] under section 61 provide for the definition of

[78] The Law of Evidence Act Cap 16 R.E 2002

original document. Since the computer generated documents are created under a certain uniform still can meet the requirement of original documents and there is no harmful to use them as original documents as decided in the case of National Bank of Commerce v. Milo Construction Co. Ltd and two others[79]. Computer printouts were admitted as evidence in court.

Additionally looking to the provision under section 4 of the Law of Contract Act[80] the said provision is silent on the modes of communications. The provision only requires effective communication between the contracting parties. Considering the above position of the law there is no doubt that an offer and acceptance communicated electronically cannot invalidate any contract formed electronically simply because of the mode used. This is also discussed above in the case of *Entores* (Supra).What is to be consider is that there is an offer made by one party and it is accepted by another party[81]contain therein intention to create legal relationship.

3.1.3 Time When a Contract Became Effective

As a general rule acceptance is said to be communicated when it comes to the knowledge of the offeror. Under the Law of Contract Act acceptance is said to be become effective when it communicated to the offeror[82]. Exception comes when offeror waive the need for communication then applies the postal that acceptance is effective once it has been put in a post mail.

[79] (1991) TLR 165 CA.
[80] Op cit
[81] Section 13of the Law of Contract Act, op cit
[82] Section 4,Op cit

The communication of acceptance is still arguable on ecommerce. It is urged that since the transmission of communications between the parties are go-between internet provider as snail mail then the postal rule should applied and on the contrary it has been as well urged that the general rule should apply[83] so long there is possibility to trace whether an email has been sent or not. The case law suggest that time of communication depends on a number of factors affects the communication such as customary the business practices, projections of the parties and other court assessments should consider[84].

Considering the above arguments stated above the noted point is that the determination of the time in which an acceptance is became effective is only when the need arise. I therefore of the view that this is not a threat to ecommerce since the important point is there is no hard and fast rule when the issue arise the court will way out based on a number of factors in its determination.

3.1.4 Invitation to Treat

The legal position in Tanzania an invitation to treat is not an offer but it is only expose the willingness to invite the other party to make an offer as in GLB & *Associates Ltd v. Director of Wildlife Ministry of Lands, Natural Resources and Tourism and two others*[85] the legal position laid down is that tender advertisements are not an offer but an invitation to treat. The same principle is in

[83] Bradgate R, et al, (2009), Commercial Law: Legal Practice Courses Guide, at Pp11
[84] Brinkbon Ltd v. Stahag stahl GmbH [1983],2 AC 34
[85] [1989]TLR 95 (HC)

Pharmaceutical Society of Great Britain v. Boots Cash Chemist (Southern) Ltd[86] the court ruled that invitation to treat is a call for the other party to make an offer and enter into negotiations. Thus a display of goods for sale on shelves is only invitation, a contract is concluded at the counter upon the acceptance of payments. Therefore under common law legal position is that an invitation to treat does not amount to an offer except for certain circumstances it can be a binding contract as in *Harvela Investment Ltd v. Royal Trust of Canada (CI) Ltd*[87]. The court held that since defendant made clear that they were going to accept the highest tender it was an offer and defendants were in breach of contract by not accepting the person who made the highest tender.

This is the same position on the aspect of ecommerce. According to Polanski on whether a website should be treated as an offer or just a mere invitation to treat, he viewed that the structure of the website will determine the issue[88]. I totally agree with Polanski idea that the nature of a particular advertisement on a website will determine the presentation to be an offer or invitation to treat. The position which is also applicable under the common law notion could apply to electronic commerce.

[86] [1953] 1 QB 401
[87] [1986] AC 207
[88] Polanski, P. P, 'Customary law of the Internet: in such for a Supernatural Cyberspace Law', IT & Law Series, 13 Laiden Netherlands (2007) at Pp 26

3.1.5 The Best Evidence Rule

The best evidence under the common law is primary evidence[89] that is production of original documents for court inspection. Section 69[90] requires the proof of signatures or handwriting for disputes of alleged signature or writings of the documents. Then the issue comes on online transactions when the dispute arises whether the document or signature made through electronic modes retrieved from its source could be considered as primary or secondary evidence.

In Tanzania the judicial system do recognize the electronic evidence as decided in the case of *National Bank of Commerce (supra)* whereby court admitted computer printouts processed through easy bank computer program as evidence against plaintiff. Therefore since electronic documents can be retrieved from its source could suffice the requirement of original form so long its authenticity is not disputed. This is only a matter of interpretation of the provisions of the law in wider sense.

3.1.6 Jurisdiction Boundaries

Under the common law principles geographical boundaries could determine the place of contract .This is different on ecommerce whereby contractual transactions via internet is borderless. Parties from different countries can contract through internet. This posed a challenge on where the contract is said to be concluded and which law should be applied especially in Tanzania where the law is silent on this. Unlike Tanzania in USA and Canada looking on the issue of jurisdiction on

[89] The Law of Evidence Act Cap.6 R.E,2002
[90] Ibid.

electronic commerce reasonableness depending on circumstances is the test to that effect[91].

Circumstances such as the location of the content provider, the host server, intermediaries, end user, minimum contact or purposeful availment test are factors to be considered to determine the issue of jurisdiction. Recently the principle was set out in internet case of Calder v. Jones[92] jurisdiction was determined on the basis of actual impact of the action in locality. In case of Tanzania since the law is silent and take into consideration each jurisdiction differ in terms of national laws. I think the substantial connection test[93] should apply to the situation where the issue of jurisdiction arose. However this is not a permanent solution there should be harmonization of laws across jurisdictions to solve the problem of jurisdiction diversity.

3.1.7 Consumer Protections

Consumer protections on online transactions is a serious challenge to ecommerce in Tanzania .People are currently practice commercial transactions online at their own risk since the existing laws do not provide any kind of protection for online businesses. It is obvious that when you talk about sales of goods you must touch the aspect of consumer protection. Consumer protection is subject to a number of laws depending the nature of transactions. For the purpose of this research

[91] Geist, M, (2001), "is There a There There? Towards Greater Certainty for Internet Jurisdiction", Berkeley Technology Law Journal 1345,1406 available at http://aixl.outtawa.ca/~geist/geistjurisdictionus.
[92] 465 U.S 783 (1984)
[93] Society of Composers, Authors and Music Publishers of Canada Assn. of Internet Providers,[2004] 2 S.C.R.427,2004 SCC 45

consumer protection is particularly concerns the commercial context. Under the contract of sale a general principle is that the buyer and the seller presumed to be on the same position of common intentions in bargaining transactions.

However sometimes it happens when a buyer or seller due to ignorance, haste or inferior bargaining enters into a transaction with insufficient knowledge of the terms of contract or unsatisfactory to the goods descriptions. All these indicate for the need of protection which are covered under the rights to the buyer against the seller such as discussed below; Un-ordered goods delivered to the buyer as a general rule should be treated as an offer to the buyer whereby he may examine them and accept upon satisfaction of the goods, however he is not bound to return the goods.

Under the common law in respect to the sale of defective goods the principal liable is the seller but manufacture liability comes under strict liability on the goods sold via a retailer[94]. More the issue of guarantee which is always between manufacturer and retailer or in a separate document attached to the goods which sometimes contains elimination of manufacturer's common law liability and sometime purport to exclude seller's liability as well.

The issues at what time the risk passes from the seller to the buyer is still critical, the right for the buyer to examine and reject the goods sold through online is still undetermined. Moreover section 6 (1) of Sales of Goods Act[95] requires a sale of product valued at Tsh. 200/= and above to be in writing and signed. In case of

[94] Donoghue v. Stevenson [1932] A.C.562
[95] 1936,Cap214 R.E 2002

sales online wherever dispute arise the place of cause of action, the law to be applied is still critical. All these scenarios gave challenges to electronic commerce.

3.1.8 Signature and Writing Requirements

As discussed in the previous chapter the law of contract does not require any formal of contract. A contract can be in any manner provided it complies with the requirement provided under section 10[96] of the law of contract act. It can be oral contract, written or contract by performance. Therefore nonexistence of writing and signature on electronic transactions cannot invalidate the agreement. However the requirements of signature and writing vary according to the requirements of the particular law depending on the nature of transactions such as the disposition of land and hire purchase transactions[97] requires the transactions to be in writing and signed by the respective parties. A sale of goods valued at two hundred shillings to be enforceable should be in writing and signed by principal party or his agent[98].

On That basis it is clear that authentication of transactions required to be in writing will be by a personal signature affixed on the peace of document. All these are for the purpose of authentic of a particular document, an evidence that the signer is the one responsible for the document signed and legal consequences will

[96] [Cap 345, R.E 2002], "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object…..
[97] Land Act ,1999 and Hire Purchase Act, 1966
[98] Op cit.

be against him[99] as well as the way of finalizing a commercial transaction. These scenarios however become difficulty on the online transactions where parties have no chance for exchange signed documents hand to hand. On e- environment electronic signature is used to assure the parties into agreement true identity of the party contracted with taking into consideration the possibility of frauds and hackers on electronic environment. Parties into commercial agreements request assurance of data exchange to be authentic.

Considering the above statement the issue is not a signature but the authenticity of the signature. Therefore from the point of the observation so long the law of contract does not insist signature as essential document any sign used to identify the owner of that sign can be suffice to validate the electronic transaction as far as signature is concerned.

3.1.9 Competence of the e-Agent as a Party into Contract

The involvement of e-agent into ecommerce is a controversial since the provision of law refers a party into a contract to be a person and not a machine. A term "person" as stipulated under section 2 (1) (a), (b) and (c) of the Law of Contract Act with the exclusion of machine like programmed computers or robot and other e - agents. The term agent under section 134 of the Act as well refers to a human being and not a database, website or a machine like programmed computer. On ecommerce computer can accept offer on internet contracts. This is contrary to

[99] Section 69 of the Law of Evidence Act, Cap 6, R.E 2002.

sections 2(1) (a), (b), (c) and 134 of the law of Contract Act[100] whereby a competent party under that section refers to a person and not a machine. However this was argued differently by Nimmer that in ecommerce a computer programmed can make an offer or acceptance and the intention of a contract analyses in respect of e - agents which is full automated with contract process[101].

This was supported by the old case *State Farm 1 Auto Ins. V. Brockhurs*[102] the court held the company bound by the contract concluded through the computer programmed by the company. Then with the extension of the principle on the decision above I am of the considered view that the issue whether the exchange of offer and acceptance through computers made without the intervention of human decisions cannot invalidate the agreement. This is due to the fact that even if the principle of contract under the common law requires for involvement of human decision in making offer and acceptance this does not mean only inner will can be used to determine the "meeting of minds". There are numbers of factors to determine the consensus ad idem as said in Boulder *Consolidated Ltd case*[103] whereby the objective theory can be used to determine the validity of contract in case of distance contracts provided there is intention to create legal relationship. It is my considered opinion that this should be extended to electronic contracts as well as in *Gurney Consulting Engineers v. Pearson Pension Property Fund Ltd*[104]. It was stated that general English law adopts an objective theory of contract

[100] Op cit.
[101] Nimmer, R.(1996), Electronic contracts: Part I', Computers & Law,7 (1):36,at pp 36
[102] Cir (1972) 453 F.2d 533,10th
[103] Op cit at Pp
[104]

formation, i.e, the governing criterion is the reasonable expectations of honest or reasonable man.

Under the objective theory as discussed in earlier chapter the consent can be determined by the party statement or conduct so long reasonably understood by the other party. The e – agents has been instructed to make an offer or acceptance through programmed computer a party should be presumed to be bound by the act of e- agent acting on that behalf. This is the same as to traditional principles when a person is bound by the terms of contract which he signed without reading it. Therefore, taking into consideration the fact that the use of programmed computer, website or database assigned to do a certain task on behalf of either a party in contracting processes. It should be considered as an agent of the principal party like in traditional contracts provided it performs exactly what was tasked for since there is no deference between a normal agent and e-agent on the nature of tasked performed. Therefore basing on the above discussed views the involvement of e- agents on the formation of contract electronically cannot simply invalidated because of the use of e-agent. There should be a wider interpretation of an agent including e-agents.

3.2 Institutional Challenges Facing E-commerce in Tanzania

A number of institutions in Tanzania are now using electronic systems for the running of institutional transactions. The use of credit cards for payments in supermarkets, payments and accessing of bills in private companies and other

government companies like dawasco, Tanesco, buying of e-air tickets etc are very common. A number of people in Tanzanian are using mobile money service to access financial service in their daily transactions such as paying bills, buying pre-paid services and cash transfers.

The use of master card, credit and visa card for payments and transfer of moneys domestically and internationally as alternative to traditional modes of payments is very common to day. Companies providing communication services such as Vodacom, Tigo, Aitel and Zantel provide as well the service of money transfer through mobile phones such as M- Pesa, Airtel money, Easy- Pesa and Tigo – pesa in replace of banking transfers. About three hundred million people with no formal financial accounts are accessing their needs through mobile services.

All these involve contractual agreements between the client (customer) and supplier (institutions). Although the modes of payments of goods and services as well as money transfers is done electronically, still there are some challenges faced by the institutions in order to secure the legal security and protections of clients the user of those transactions. There is no legislation to operate electronic signatures which is explicit of consent of the card owner prior transaction to be considered valid. This is a critical issue when it comes to the need of proof of dispute arise on the authenticating signature in dispute. However it is said electronic signature is a challenge. In my view that signature is not a challenge by itself. The challenge is authenticity of the signature which is critical on the issues of fraud determination and all other stealing associated with credit cards.

The practice of cash transfers through mobile phones such as Airtel Money, Tigo – Pesa, Easy – Pesa, M-Pesa the companies providing that service still facing the challenge on security on whether the transactions are real done by proper or authorized persons so that to make the default party liable for any breach occurred on transaction process. This however is not a challenge to ecommerce if the uniform process can be used to determine and identify the authorised person. This is not the problem of law but it is a problem of the system.

Consumer protection against frauds, privacy and safe transactions and data keeping are among the areas need a legislations to regulate institution to adhere with the principles of data protections need only the clear statement of the laws as we have seen the sales of goods act was tailed to accommodate offline transactions but there is no problems on contract law. Unreliable network and unstable electronic payments lead to lack of trust and breach of contracts between the customers and institutions for not providing services they agreed. This is also not the problem of law but it should be addressed by the reliable networks.

There is no law govern e- tailing in Tanzania although her citizens practiced a lot on selling through internet. E- Tailing is the selling of retail goods[105].This is a common form of B2C transactions whereby computer programmed to take orders from customers through web sites. A good example is amazon.com whereby people can order a book online. Auto-by-Tel[106] is also not protected under the

[105] Op cit at pp 27
[106] Ibid

existing commercial laws in Tanzania. The institutions and customers selling or buying cars through web sites are not bound to either or the law of contract or Sales of Goods Act.

In view of the above discussed challenges facing institutions on ecommerce most of them are due to the systems deficiencies and not the laws as exposed. However to avoid confusions the law should specific states the positions of electronic payments to eliminate all risks involved on those transactions. The courts should use modern approach in interpreting the laws sufficiently enough to provide for protections for electronic transactions currently till the time need arises.

3.3 Lessons from Developed Countries

International the UNCITRAL model law had been introduced to provide guidance to national legislators to enact provisions which will remove encumbrances of the paper based requirements to the electronic transactions. Other countries looking for the ways of encouraging electronic commerce into their jurisdictions by having comprehensive legal system some of them adopt provisions of UNICTRAL and other used it as guidance for reviewing their laws. Just mention the few nations including the European Union implemented the directive on Electronic commerce into their national laws, Singapore enacted Electronic Transaction Act[107] to regulate electronic transactions, U.S enacted the Uniform Electronic Transaction Act for similar state laws. Australia enacted Electronic

[107] 1999,

Transactions Act, 1999 and Malaysia are among the countries adopted model law fully or partially to their laws for electronic commerce.

The Model Law discusses the issue of writing as a legal requirement, whereby Article 6[108] provides that this will be electronic document will suffice the requirement provided its contents will be accessible when required. It is also contains guidance on electronic standards on the aspects of contract formation through the use of automated system, time and place of contract, signature requirement and issues of originality. Ideal the UNCITRAL model law is neutral in technology aspect and do not recommend the countries to go away with the traditional paper based system. It's only analyses the basic functional of both paper based system and electronic transactions.

Article 11[109] does not change the modes of exchange offer and acceptance as they are under the national law. It is only expand the duty for online parties to transaction to make sure that they send acknowledgment upon the receipt of communications. Looking the Article there are no much difference with traditional principles found in national law[110]. What more needs required under Article 11 is double affirmation from the parties into a contract. In German this has been covered under section 130(1)[111] whereby the general principles is that a

[108] UNCITRAL Model Law on Electronic Commerce (1996)

[109] Article 11 (1) "Member States shall ensure,……..that in cases where the recipient of the services places his order through technological means, the following principles apply; the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means- the order and the acknowledgment of receipt are deemed to be received when the parties to whom they are addressed are able to access them'.

[110] Section 4, Cap. 345 R.E 2002

[111] German Civil Code

contractual declaration deemed to be received when it reach the sphere of addressee and he is expected to read it. From this guidance a number of jurisdictions through the provisions of UNCITRAL drafted their national laws to determine the issue of contracts arises from the applications of e- commerce.

On consent and enforceability of electronic agreements such as of browse wrap agreement in U.S the courts consider the primary issue on whether consent can be implied by the conduct of the browser. In this court looks on sufficient notice and reasonability of consent involve on the basis of conduct. In *Register.com v Verio Inc*[112] The court noted that terms and conditions of use of a WHO IS web service were clearly posted to Plaintiff's Website and the defendant act of performing a search inquiry following the statement "by submitting this query, you agree to abide by these terms" constitute consent to the terms. The court therefore upheld enforceability of those terms and conditions.

In *Specht v. Netscape Communications Corp*.[113] In this case the end user license agreement contain arbitration clause terms of agreement were available to the defendant website via hypertext link and users were asked to review and agree to the terms before downloading or using the software but they could proceed without providing express agreement. The issue in this case was whether the terms of license on Netscape's website were binding the user download the software. The court held that in such circumstances a reasonable internet user would not

[112] 126 F. Supp.2d 238 (S.D.N.Y 2000): aff.d 2004 WL 103400 (2nd Cir.2004).
[113] 206 F. 3d 17 (S.D.N.Y.2001): aff.d 306 F.3d 17 (2nd Cir.2002)

have known the existence of license before downloading the free software. Therefore defendant's terms were held unenforceable.

The above discussed cases pointed up how ICT posed a challenge to the current existing laws in many jurisdictions regardless of advance technology they have such as in U.S still the traditional principles of commercial laws not tall with electronic commercial practice. On web- based contracts and Shrink- wrap agreements are similar to the contracts of adhesion which are treated as ticket cases in Tanzania[114] whereby the legal principles apply that of unfair terms[115]which do not bind the adhering party. These agreements deny an opportunity of one into a contract to examine terms and conditions of a contract until contract had been concluded and the item for consumption has been opened. These cases can be dealt with by case laws.

Section 19(1), (2) and (3) of the Law of Contract[116] provides where a consent to a contract was obtained by undue influence or duress such a contract become voidable[117] . However in another countries such as South Africa[118] shrink – wrap agreements have legal force but in Tanzania still it is the discretion of the court whether to enforce or not. Therefore there is a need of clear law like in U.S.A the principles contained in the Uniform Electronic Transactions Act, 1999 that provides a contract enforceability can not to be denied simply because it is

[114] Cooper Motors Corp. Ltd v. Arusha International Conference Center [1991] TLR 165 (CA)
[115] Star Service Stations Co. Ltd v. Tanzania Railway Corporation [1989] TLR 1 (HC)
[116] Op cit.
[117] Slus Brothers (E.A) v. Mathias & Towari Kitomari [1980] TLR 294
[118] Pistorius, T, (1993). "The Enforceability of Shrink-wrap Agreements in South Africa", 5 South African Mercantile Law Journal,1-19.

electronic form or signed electronically, were developed from case laws. As it has been pointed out earlier in the previous chapter, the legal position in Tanzania in respect of invitation to treat does not amount to an offer. Focusing the style and modes in which terms are displayed in websites it is very difficult for someone to differentiate whether it is an offer or invitation to treat.

On electronic commerce to determine whether advertisement is an offer or an invitation to treat depends on interactive or automated nature of the website. On non-interactive website advertisement may be considered to be an offer. However sometimes in interactive websites to determine whether the advert is an offer or invitation to treat should depend on the nature of goods displayed as sometimes include a click wrap agreement. B. Fitzgerald, et al[119] pointed that the terms and conditions displayed on website should be specifies whether an offer is being made or an invitation to treat.

Therefore there should be a clear law as in Australia where the legal position on invitation to treat is very clearly that, unless it indicates the intention of the party making the proposal to be bound in case of acceptance a proposal made on the internet or open network is considered to be invitation to make offers to those who access the network[120]. Terms of Contract on electronic agreements as discussed above in shrink-wrap agreements should be clear expressed and sufficient to whoever access them as the contractual terms under the traditional agreements .The terms to agreement should be incorporated by reference through hyperlink in

[119] Internet and Ecommerce law, Thomson Law book Co,2007,p 489
[120] See Section15B of the Electronic Transaction Act, 1999.

standard required. In Canada the Supreme Court in *Dell Computer Corp. v. Union des consommateurs*[121]The Court emphasizes that the terms and conditions must be reasonably accessible and opined that hyperlinked documents meet the standards.

In Australia where the electronic business failed to provide for disclosure requirements invite fine from public authority. In German the position is different whereby a web page which do don't provide sufficient terms to the customer, the customer at any time discovered any deficiencies in goods may withdraw from the contract[122]. The requirement of signature and writing for commercial transactions should be reconsidered in the existing commercial laws especially section 6 of the Sales of Goods Act[123]. The laws should include electronic signature as well. Moreover writing requirement should be suffice by the retrieve electronic document from original source. The introduction of electronic signature using digital camera, iPhone or any graphic software should be encourage to promote e - commerce in Tanzania so long it is possible to recognize the identity of the person singed it.

Cross border of electronic transactions resulted to applications of several principles and tests in the process of addressing the issue as discussed above. However, since each jurisdiction has its own law it would be an endless discussion to reach on consensus agreement. The only solution is to harmonize the law which will be applicable across a number of jurisdictions depend the agreement upon

[121] 2007 SCC 34.
[122] Jane, Op cit at pp14
[123] Op cit

them[124] whether to adopt a unified document on electronic commercial transactions.

[124] Gregory J. D (2005) Internet Jurisdiction: Where Are We Now? Presentation to the Toronto Computer Lawyers, available at www.tclg.org/meetings/2005_nov.ppt

CHAPTER FOUR

4.0 NEW LEGAL FRAMEWORK TO SUSTAIN E-CONTRACTS AND SALES OF GOODS AND SERVICES IN TANZANIA AND CONSUMER PROTECTION IN THE CONTEXT OF PROPOSED ELECTRONIC COMMERCIAL LAWS

4.1 Introduction

As discussed above that commercial laws are said to be an obstacle to e-commerce to all most worldwide and a number of jurisdictions are try to review their national laws to ensure the implementation of e-commerce. The first question to be asked is to what extent the existing commercial laws do affect e-commerce[125]. The answer to it derives from the analysis of the existing laws as done in the previous chapter to see to what extent the e-commerce face challenges due to the principles of the existing laws as well as the lessons from other jurisdictions in addressing the challenges concerned.

As Tanzania being one of the common law countries. In deciding on new legal frame work to sustain the e-commerce it should worn itself from the experience faced by other countries especially common law countries like Singapore which embarked to the enactment of electronic Transactions Acts by adopting some of the Model law provisions into its national law.

Much more as discussed in the previous chapter the existing commercial laws are providing a room for electronic transactions to a large extent except for few areas which need the law to be adjusted accordingly as discussed here below;

[125] Eliza Mik, op cit at pp 2

4.2 The Requirement of Writing and Signature as a Challenge to Ecommerce

The requirements of writing and signature as discussed in the above chapter are not challenge to ecommerce since the requirement may come from other laws and not the law of contract. The law of contract by itself under the common law allow intention to be manifested in any manner[126] . Looking to the existing Law of Contract Act[127] is silent on the manner of contracting. A contract can be in writing, orally and by performance so long there is intention to create legal relation. Therefore the new transacting environment changes nothing in formal and such requirements are exceptional not a rule.

Therefore signature and writing requirement cannot invalidate the electronic agreements done via emails or websites as a general rule in English Law no formalities are required for the creation of a contract.[128] I therefore shake hands with Eliza that the electronic transacting process did not need the new legal position to validate the said transactions because they have the same value as those protected under the Act. In case of writing and signature requirement are necessary then electronic signatures as well as electronic documents retrieved from its source can have the same value as the traditional one so long their authenticity are not questionable.

4.3 Communication of Offer and Acceptance to Ecommerce

On the issues of offer and acceptance in respect of e-commerce. Since an offer can be any statement with an equivocal suggestion intend to create legal relationship,

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[126] Eliza Mik, op cit at pp 9
[127] Section 4[Cap 345,R.E 2002]
[128] Stephen Smith & P.S. Atiyah, Atiyah's Introduction to the Law of Contract (6th ed.2006) pp 96

if the terms contained therein are accepted by the other party to form a contract[129]. Provided the legal requirements suffice a valid offer therefore statements made through emails request for the goods or services should be treated as offer with legal effect.[130] The law of contract act is silent on the mode of communication unless it is prescribed under the terms and conditions of acceptance as in *Hotel Travertine limited & two Others v. National Bank of commerce Ltd*[131] where it was held the appellant's letter did not constitute an acceptance of the offer because it was not the mode of acceptance the respondent had prescribed in the offer.

4.4 The Competence of E-agent as a Party into Contract

The doctrine of Contract Law based on communication between the natural persons. The most important point is to review the definition of the term "person" under section 2 (1) (a) and (b)[132] and other e-agents as well as Interpretation of Laws Act[133] to include e-agents under the definition of the inanimate things. This will wash away the possibility of a party to a contract to contend the liability simply because the electronic agent acted without human input. This was not a new scenario it had been even discussed in the case of *R v. Masquid Ali*[134] that since mechanical means replace human effort the law should be bound to take cognizance. This was also held in the case of *McCaughn v. American Meter Co*[135].

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[129] Section 2 (a) and (b), Op cit.
[130] See Bradgate R, et al, (2009), **Commercial Law; Legal Practice Courses Guide**, at P11.
[131] (2006) TLR at pp133
[132] The Law of Contract Act, op cit.
[133] Section 4,Cap 1 R.E,2002
[134] (1966) 1 QB 688.
[135] 67 F 2d. 148,149 (US Court of Appeals, 3rd Cir)

that a slot – vending machine which is fulfilled automatically the functions of selling ,product delivery and price collection was capable of concluding a contract without….human control, agency, work, and exercise of will power.

Considered the above authority the electronic agents have the character of human nature such as intelligence, pro activeness and autonomy to act therefore it can replace human power. It is therefore my proposal e-agent should not be considered as communication tool but should be treated as normal agent act under the Principal directives as the provision of section 134 requires instead of enacting a separate act for electronic transactions act to cover the issues of E-Agents as many jurisdictions did[136].

4.5 Freedom of Contract on Electronic Transactions

On the aspect of Freedom of Contract the concept of "meeting of minds" for contracts by e - agents can be determined by consent theory by the application of objective theory as discussed above. As long as under the objective theory a consent to a contract can be determined by the party statement or conduct so long reasonably understood by the other party. There is no any difference when e – agents has been instructed to make an offer or acceptance through programmed computer. A party should be presumed to be bound by the act of e- agent acting on that behalf. This is also apply to traditional principles when a person is bound by the terms of contract which he signed without reading it[137]. This is equivalent

[136] The Uniform Electronic Transactions Act,1999 .provides in part, that e-agents may enter into binding agreements on behalf of their principals.
[137] Saunders v. angalia Bldg Soc'y [1971] 1 App.Cas.1004

to strict rule that a party cannot deny his obligation simply the act was done by someone else on his behalf with his direction. This is the same to a person decide to use e- agents should bear risks of using such a device. There is no need to enact a law contain the provision of status of e- agent as Canada did to eliminate argument that the use of an electronic agent indicate a lack of consent and therefore prevent formation of a contract by introducing United States Uniform Electronic Transaction Act[138] . The clear interpretation of the existing law could enough sustain the use of e-commerce by applying a subjective theory to determine the consent of the parties into electronic contract since that an action of e- agent programmed used by people regardless of human review will bind the user of e - agent.

4.6 Online Consumer Protections

The sales of Goods act is one which provide consumer protection in Tanzania in the aspect of commercial transactions. However the said Act is not much detailed on the protection of consumers. The electronic commerce requires a law which will influence attractive business environment on the accuracy and accessibility of contract information in the aspect of assurance of quality of goods to be supplied readiness of the buyer and the seller to the contract. For the effective and protection of consumer's rights it requires strong legal framework in order to secure legal atmosphere on electronic transactions.

[138] UETA,1999

The approach like that of German could be adopted by the Tanzania legislative body. Germany found that it could be unsatisfactory to have two systems of sales law and decided to review their existing laws of contract to cover electronic concept instead of having implementation of directive on distance selling[139] as separate law to enforce online consumer sales.

The use of Pay-pal payments systems which is equivalent to cheque or money order or the use of escrow agent where the money be holed at the agent hands till the delivery of goods to the buyer can be the solutions for online sales contracts. The issue of frauds is at higher risks for sale contracts online when the seller request payments before the delivery of goods as well as a possibility of a third party to intervene the transactions processes only requires a strong law of security.

4.6 Time of Communication on Electronic Transaction

Acceptance to an offer is said to become effective when it is communicated to the offeror and once it is communicated a contract is formed. The major issue arises at this point is concerning with time. Time is crucial element when discussing an effective acceptance. It determines the stage where parties' obligations become effective and when the risk passes from one party to another.

According to postal rule contract is said to be formed when acceptance put in the course of transmission beyond the control of offeree, this is posting point. In *Bryne v. Van Tienhoven* case (supra) and well cemented by Nditi N.N.N that

[139] Directive 97/7/EC,[1997] O.J.L 144/19,

where an offer was made by post and it was expressed that acceptance should be made by the same mode. The sending of acceptance by just leaving it at post office for transmission even if never reached to the offeror will create a binding contract.

The only issue is the time of receiving the acceptance which is subject to a number of factors to be determined. The issue is similar to electronic contracting process and it has been recommended that since the contracting processes involved intermediary like in traditional mail the postal rule could suffice the requirement and when the issue arises its determination will be subject to a number of factors like in traditional way. However this common law rule was set differently under the Tanzanian Law of Contract Act .Under section 4 of the Act stipulates that where offeree posts an acceptance letter and become out of the control of the offeree the offeror is bound instead of offeree. This section is contradictory with common law position in the sense that a contract is concluded as far as an offer has been made that communication of proposal is complete when it comes to the knowledge of the person to whom it is made.

On the other hand offeree is not bound before acceptance comes to the knowledge of offeror. This do not match with postal rule. Moreover in Tanzania acceptance can be revoked by faster means before it comes to the knowledge of offeror as unlike common law where the revocation by speeder mode has no legal value regarding the postal rule. Therefore postal rule is also denies the right to the offeror to revoke the offer even by fast mode such as telephone. But acceptance

through fax or telephones becomes effective when received by offeror. The Law of Contract Act of Tanzania in this juncture departed from common law.

On the other hand under the reception theory a contract for distance transactions is said to be concluded at the time acceptance reached to the offeror even if it was not read. This applied to international contracts for sales of goods as provided under Article 15 (1) and 18 (2) of the convention whereby offer and acceptance become effective at the moment it reaches to offeror and offree. There is no consensus opinion on the time when a contract is said to be concluded. This can be left to the different approach basing on particular factors and nature of the transaction concerned as decided in *Brinkbon Ltd v. Stahag stahl GmbH*[140] The crucial point to be considered is the fact that there is one party makes a proposal to another who accepts the proposal and these can be considered as meeting minds of the contracting parties.

4.7 Best Judicial Practice towards E-Commerce

One among the sources of laws is case laws through decisions of the Courts of the land. Judicial decisions in various cases shows to what extent the judicial system is contrary to the existing laws which hinder the growth of ecommerce in Tanzania as discussed hereunder; The decision in *National Bank of Commerce v. Milo Construction Co. Ltd and two others*[141]whereby court admitted computer printouts processed through easy bank computer program and inflexible computer

[140] Op cit
[141] Op cit at pp 55

program and used them as evidence against plaintiff who failed to prove the exact amount borrowed by the defendant from him.

The case of Tanzania Cotton Marketing Board v. Corgecot Cotton Company SA[142] is the crucial for the recognition of advanced technology like electronic transactions modes. In this case the term "registered post" should be widely interpreted to account the current development in communication modes technology practiced today. The court did not dispute the award forwarded to Registrar through internet in compliance with rule 4[143] which requires arbitration award to be forwarded to the Registrar by registered post.

Basing on the above authority Nsekela, J (as he then was) emphasized the need for judiciary to adopt changes caused by technology revolution[144].

From the above judicial experiences it is possible to set in motion reform of the existing commercial laws to promote e commerce in Tanzani

[142] [1991] TLR 165 CA.
[143] Arbitration Rules of 1957
[144] Trust Bank Tanzania v. Le Marsh Enterprises Ltd and Others. The case of 2000 (unreported)

CHAPTER FIVE

5.0 FINDINGS, RECOMMENDATIONS AND CONLUSION AND

5.1 Findings

Findings of this study are following:

(i) Morden approach like judiciary approaches as discussed herein on interpretation of the existing laws towards electronic transactions is the best practise to accommodate the application of ecommerce in Tanzania instead of using conservative approach in interpreting the laws and/or adopting of the new laws unnecessarily.

(ii) On the validity of electronic transactions as discussed above cannot be invalidated simply because of the mode used to conduct such commercial arrangements. The Law of Evidence Act[145] has clearly define original documents under which since the computer generated documents are essentially create under a uniform process they can be classified as original documents. This is very important in the view of modern forms of creating documents.

[145] [Section 61 Cap.16 R.E 2002]

(iii) We are aware that the Law Reform Commission of Tanzania is presented a bill concerning electronic transactions but to date the bill has not yet passed. May be this is because of the limited knowledge exists in this field. It is my humble recommendation that instead of having experience challenges as Singapore did, before rushing to the enactment of the new laws sufficient analysis should be done as it have been done in this research which shows there is still a room for electronic transactions into the existing commercial laws. Meanwhile the existing contractual principles should be continued to apply in solving the disputes arises and from that perspective we can see whether the existing laws are technologically neutral or not the position which is not yet revealed.

(iv) There is no need of enacting new law since the problem of misconceptions that the existing laws do not support the application of ecommerce was created by inadequate knowledge of electronic transactions and communications. The conservative approaches adopted that the existing commercial laws hinder the application of electronic commerce in Tanzania should be detached away by the injecting proper IT training to institutions and other organisations at large.

(v) All in all a closer look should be done before embarking to any legal step which will create further uncertainty on legal area and to avoid duality regime of contract laws. Any additional complication to a contract of law such as introducing new provisions of electronic transactions without a sufficient research will lead to increase of uncertainty. It is better to leave substantial contractual issues to common law developments.

Tanzania is not an Island which can be left behind with the technological advancement, the laws should simultaneously match with current living society of new technology whereby electronic transactions via internet are the channels of doing business transactions in Tanzania. Going through the research it is quite clear that the existing commercial laws do provide a room for ecommerce with exception to the few issues which should be considered to extend the interpretation to cover the context of ecommerce. We have seen how the modes of offer and acceptance do not affect the application of ecommerce and the consent theory and objective theories can be used to determine the principle of consensus ad idem which are the basic requirement of contracts under the Law of Contract Act.

On the other hand we have seen how the Sales of Goods Act is critical challenge when it comes to the transfer of property ownership in goods which is the basic principle of the sale. Therefore in considering whether sustainability of ecommerce need intervention of new legislation. The response to this hypothesis is negative in my perspective. The need of wider interpretation of the existing principles of laws to update the existing laws would meet the requirements of electronic environment and sustain the growth of ecommerce in Tanzania. In the view of my finding the third hypothesis has been proved that it is possible for the current law to apply to electronic transactions with few observations which could be dealt by the courts of the land to determine the issue arises.

5.2 Recommendations

The UNCITRAL model law as said earlier is not recommends the countries to go away with the traditional paper based system. It's only analyses the basic functional of both paper based system and electronic transactions.

Going with the above scenario every society establish the laws according to the needs of that particular society at respective time. Moreover it is unreasonable for international legal instrument to be used as a template for domestic purpose. Always there is a different between the rules governing international transactions and those governing domestic transactions. The commercial laws of Tanzania are still enforceable to both traditional commercial transactions as well as electronic transactions except for the few scenarios as discussed on the above chapters which do not need the adoption of new law. The experience should be drawn from Singapore experience whereby in 1998 Singapore enacted the first electronic Transaction Act to provide legal foundation for electronic signature. The said act was repealed and re- enacted again in 2010[146].From the point of that standing the following recommendations can sustain the applications of e-commerce in Tanzania.

[146] Eliza Mik, op cit, at pp 13

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