**IMPACT OF E-COMMERCE ON THE LEGAL REGIME IN TANZANIA: A CASE STUDY OF THE LAW OF CONTRACTS IN TANZANIA VIS-À-VIS ON-LINE CONTRACTS MADE IN DAR-ES-SALAAM REGION**

**AMALIA LUDOVICK MUSHI**

**DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIRMENTS FOR THE MASTER OF LAW IN INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS (LLM IN IT & T) OF THE OPEN UNIVERSITY OF TANZANIA**

**2014**

**CERTIFICATION**

The undersigned certifies that he has read and hereby recommends for acceptance a dissertation titled “**Impact of E-commerce on the Legal Regime in Tanzania. A Case Study of the Law of Contracts in Tanzania vis-à-vis on-line Contracts made in Dar-es-Salaam Region”** in partial fulfillment of the requirement for the Masters of law in Information Technology and Telecommunications Law (**LL.M IT & T**) of the Open University of Tanzania(OUT).

…………………..…………………..

Professor David Mellor

(Supervisor)

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I, **Amalia Ludovick Mushi,** declare that this dissertation is my own original work and that it has not been presented and it will not be presented in any other institution for a similar or any other degree award.

………………..……….………….

Signature

Date…………………………….

**DEDICATION**

This dissertation paper is dedicated to my beloved parents Mr. Ludovick Mushi and Mrs. Dorothy Ludovick Mushi for their special attention and extra care to me since my childhood. May God bless them. My dedication is also extended to my husband Marcel John Kisoka, my sons Erick-Mbeshere & Edwin Mapendo, my daughter Maria Stella who encouraged and supported me by all means for the whole time of my studies.

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**ABSTRACT**

The objective of this study was to make an analysis on the impact of e-commerce on the contracts made in Tanzania. The specific objectives are to identify the problems that surface the on-line contracts made in Tanzania which contradicts the provisions of the Law of Contract Act of Tanzania. Additionally the study looked at other laws which are affected by the on-line contracts made between the public, private, and international organizations in Tanzania give recommendation and conclusion. The researcher selected Dar –es –Salaam Region the capital city of Tanzania as the areas of study because most government departments are found in Dar-es-Salaam and many business activities being public or private are carried out in the same city therefore it is easy to access necessary information. The study found that the legal system of Tanzania is mainly based on common law principle where the formation of contract requires four main elements namely; offer, acceptance, consideration and intention to create legal relations. The foregoing elements are badly affected by modern technology that necessitates use of on-line business transactions. The problem is amplified by the legal requirements for writing and handwritten signatures in relation to offer and acceptance. Where in e-contract, contract as an agreement is created and signed in electronic form. Under traditional rules of contract which is rigidly applied in Tanzania, contracts for sale of any goods shall not be enforceable unless memorandum in writing of the contract is made and signed. The study found out that although the government of Tanzania has effected some amendments in the Law of Evidence to enable the documents produced electronically by computers and other electronic devices which can produce bank documents in the like manner; this is insufficient because only bank documents are recognized by such amendments.

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**ABBREVIATIONS**

ATMs Automated Teller Machines

CAP Chapter

ECTA Electronic Transactions Communications Act

Ed Edition

EDI Electronic Data Interchange

EULA End User License Agreement

Ibid ibidem (in the same place)

ICT Information Communication Technology

TCRA Tanzania Regulatory Authority

JALA Judicature and Application of Laws Act

LL.B Legum Baccalaureus (Bachelor of Laws)

LL.M Legum Magister (Master of Laws)

NCCUSL National Conference of Commissioners on Uniform State Law

Op. cit Opera citato- (as cited earlier)

Pp Pages

PW Plaintiff’s Witness

R Republic

SME- Small Medium Enterprises

UCC Uniform Commercial Code

UETA Uniform Electronic Transactions Act

UCITA Uniform Computer Information Transactions Act

UK- United Kingdom

UNCITRAL The United Nations Commission for International Trade Law End

UNCTAD United Nations Conference on Trade and Development

USA United States of America

Www World Wide Website

**CHAPTER ONE**

1. **INTRODUCTION**

This study is an the development of technology which brings in rapid growth of electronic business transaction arrowed the world including developing countries in which Tanzania is among them in carrying out electronic business transactions, on cannot avoid carrying out electronic contract. In electronic contract, counteract are signed electronically in soft copies without using hand copies. The growth of electronic commerce has brings challenges in different territories including Tanzania due to the fact that, our laws still fours paper based transaction in which contracts to be in writing an a paper and manuscript signature is needed there too.

This physical world environment of handling commercial contracts on business transactions is affected by the coming of on line business transaction in which business are conducted electronically while the existing laws favours traditional rules of contracts as the case here in Tanzania. This is a big challenge to those business parsons who are operating electronic commerce including concluding contracts on line here in Tanzania while there is no any law up to now which is providing on those transaction concluded on-line.

**1.1 Background of the Problem**

In the past 20 years, the world has experienced a rapid growth of on-line business transactions. This has brought challenges in different countries especially the developing ones including Tanzania. Generally, the legal system in Tanzania is mainly based on common law principle[[1]](#footnote-2). History tells us that the basic Commercial law in Tanzania is derived from 19th Century and they are mainly based on English legal system. These laws were designed to facilitate paper based transactions that require the use of documents, written notices and manuscript signatures.

Most of laws that deal with contracts provide for certain legal requirements which might only apply on the physical world environment[[2]](#footnote-3). Normally under common law the formation of contracts requires four main elements namely; offer, acceptance, consideration and intention to create legal relations[[3]](#footnote-4). These elements might be affected by the development and use of on-line business transactions.

There will be no doubt that the use of electronic communication using computers represented a big challenge. In this area problems are greater in connection with legal requirements for writing and hand written signature than in relation to offer and acceptance. Generally, a contract is any agreement that can be enforced by the law between two or more persons to do or abstain from doing some act or acts with intention of creating legal relations.

The laws governing contracts are one of the areas which can be affected by the development and use of e-commerce. An e-contract is defined as an agreement created and signed in electronic form. No paper or other hard copies are used[[4]](#footnote-5). Although many countries in the world have adopted electronic means of concluding business contracts, Tanzania is still using or applying traditional rules.

For example today Tanzania strictly applies traditional rules for communication and revocation of offer and acceptance and when the communication of revocation comes to the knowledge of the offeree[[5]](#footnote-6). Another example is found in the sales of goods legislation[[6]](#footnote-7) which provides that contracts for sale of any goods shall not be enforceable by action unless the buyer accept part of the goods or unless some note or memorandum in writing of the contracts is made or signed to be charged or by his agent in that behalf.

These legal requirements under the so called of-line laws presuppose legal problems and banners to e-commerce development. It might be difficult to implement e-transaction if effective cyber laws are not promulgated in Tanzania. In such a position it is evident that, unscrupulous traders may take advantage and obtain profit through cheating as there is no law in Tanzania which governs on-line business transactions. This study intends to address the problem and seek for the immediate solutions.

* 1. **Statement of the Problem**

Absence of on-line or cyber laws creates a big challenge in business transactions in Tanzania, undoubtedly the development of the digital technology from which electronic communication using computers are applied. In this area problem are greater in connection with legal requirement for writing and hand written signature than in relation to offer and acceptance[[7]](#footnote-8). It is unfortunate to see the laws governing contracts and other related transactions in Tanzania and other developing countries that strictly apply traditional postal rules for communication and revocation of offer and acceptance as laid down in landmark cases in Europe in 1870’s.

It is very much discouraging to see that while developed countries are enjoying services done through e-commerce timely and with a reasonable security enshrined in their legislations, Tanzania is still applying traditional ways of enforcing legal contracts: There is a need to address this gap and create awareness to the responsible authority to act promptly. This study intends to make an analysis on the impact of e-commerce on the legal regime in Tanzania specifically on the contracts made under the Law of Contract Act[[8]](#footnote-9) in Dar es Salaam region.

* 1. **Research Objectives**

The main objective of this study was to make an analysis on the impact of e-commerce on the contracts of Tanzania specifically on the contracts made in Dar es Salaam region. The specific objectives are:-

1. To identify the problems that surface the on-line contracts made in Tanzania which contradicts the provisions of the in place legislation.
2. In addition the study will look at other laws which are affected by the on-line contracts made between the public, private and international institution in Tanzania including Investment law, Land laws, Sale of goods law and Telecommunication law.
3. At the end of the day the study will give a recommendation and what should be done to rescue the situation in Tanzania.
   1. **Significance of the Study**

It was hoped that the study will promote an informed debate on the subject at the governmental and academic level in dealing with challenges facing the business community of Tanzania in electronic world vis-à-visthe in place law of contract in Tanzania. In addition the study will serve as reference to other researchers interested in related topics and also provide educators with inputs on good practice in e-commerce.

**CHAPTER TWO**

**2.0 LITERATURE REVIEW**

**2.1. General Concept on E-Commerce**

Richard Jones and Subhiajit Basu[[9]](#footnote-10) states that, E-commerce encompasses all businesses conducted by means of computer net work and it reflects a paradigm driven by two primary factors against wide range of converging technology development and emergence of the so called knowledge economy. They explained further that recent advance in telecommunication and computer technologies have moved computer networks to centre of the international economics infrastructure. Every one with a computer and connected to the internet has become a potential player and potential market for the e-entrepreneur.

These technological developments have gone hand in hand with a trend predominantly in the developed world. This new paradigm is already having a significant impact on the way in which people lead their lives. It has been proved that e-commerce transactions to date have taken place in countries with advanced economies and infrastructure. For developing countries e-commerce offers significant opportunity. According to Mambi[[10]](#footnote-11); the great concern on the need of regulating cyberspace and the use of internet has been there since the revolution of ICT. It is believed that German was the first country in the world to introduce computer specific legislation in 1970. The said computer specific statute which was enacted by the German state of Hase was in the form of a Data Protection Act. This was followed by more statutes based on e-commerce and cyber crime in the 20th century. According to TURBAN[[11]](#footnote-12) the so called new media in the 20th century witnessed rapid and new innovative technologies in line with the use of internet, bringing fundamental changes in the way things happen.

**2.1.1** **History of** **Internet Use**

Internet use in Africa has been rapidly growing over the past few years which made the continent the world fastest growing internet market; Tanzania Communication Regulatory Authority (TCRA) has explained that, by May 2004 Africa had 12 million internet users[[12]](#footnote-13). Indeed the use of computers and other related devices has resulted in fundamental changes in the way business transaction and communication takes place in the world. Forms of agreement including contractual agreement are created using computers. Technology on electronic Banking has introduced Automated Teller Machines (ATM) and Electronic Fund Transfer[[13]](#footnote-14). The recent mobile commerce (M-commerce) that facilitates payment and banking by mobile phones has been promoting the growth of M-commerce. The use of e-mail and Electronic Data Interchange (EDI) has been increasing rapidly over the world facilitating transaction and communication.

**2.1.2 Impact of E-Commerce on the Laws**

The development of digital technology in line with e-commerce has a greater impact on commercial laws and other related areas of the law. There are also other areas of the law such as tort law, company law, the law of Agency and competition law, which have specifically restrictive provisions on trade practices that have also been greatly impacted by ICT hence the need for reformation. For instance under tort law the breach of duty by a person, giving rise to tort liability can happen in both the physical world, by words, or under cyber space such as defamation by a website, email or negligent advice communicated electronically[[14]](#footnote-15). Furthermore, a breach of duty of care under cyber space especially e-commerce that is slightly to give rise to action in negligence would definitely be action by data subject against a data controller or user of data storage. This can be more challenging, giving rise and more concern on legal issues and e-security as internet always allows and encourages free speech which can in most cases lead to e-defamation.

The competition laws or anti-trust laws are also being affected by the growth of e-commerce specifically protection of consumers and other small entities. With e-commerce, there is no doubt that consumers doing business on line are at a higher risk than physical world consumers if there is no clear and effectively legal framework to protect the rights against misleading, deceptive conduct, false representation and other related conduct which may be done easily under cyber space reaching more people.

Anti competitive and restrictive practices such as price fixing, abuse of dominant position and mis use of market power can occur easily under e-commerce[[15]](#footnote-16). ICT offers unprecedented ways to establish new relationships between businesses across boarders and markets and hence new opportunities for businesses in developing countries to grow and thrive within their regions and beyond. This is particularly important for SME’s (Small and Medium Enterprises) for it has been harder for them than larger enterprises to reach distant markets and find partners there.

**2.1.3 Sectors Benefited by E-Commerce**

However electronic commerce will not benefit all economic sectors to the same degree or in the same ways. It is mostly likely to transform and benefit sectors that have information intensive activities and products are services that can be used or even delivered electronically. These sectors include:-

1. Financial services
2. Education
3. Professional services such as consulting and
4. Government services.

The tourism industry, of critical importance to many developing countries, is also being transformed because all the information needed for tourist to make the choices can be shared electronically. But there are many ways even sectors with heavy or fragile or volatile products can benefit by transforming how they do business with their customers and suppliers: setting prices, pricing orders, improving many business, processes such as product design (and collaboration), customer support and product documentation distribution[[16]](#footnote-17).

The florist industry is an example of one with very fragile and perishable product that use e-commerce tools well adapting to electronic auctions between buyers in Amsterdam and seller’s world wide including East Africa[[17]](#footnote-18). Analysts agree that there is potential gain from e-commerce for businesses and there are many cases were such benefits have been achieved. They also agree that we are just at the beginning of seeing and understanding the changes in markets and businesses that will be enabled by the internet and ICT.

Lloyd[[18]](#footnote-19) argues that the main aspect of the phenomenon of ICT which seems to carry a more considerable legal significance is that data becomes almost a totally pliable commodity with expanding market for multimedia product whereby a single CD may contain recording of sound, text, music and moving images that has legal implication. The lack of legal guidance in the field of e-commerce may derive from customary limitation to computer data as immaterial information.

Electronic equivalence to physical places and objects and the difference between rules and regulations applicable to immaterial information on the one hand and a person’s protected custody of digital data and documentary evidence on the other hand are in most countries including Tanzania hardly mentioned[[19]](#footnote-20). Due to the foregoing it is recommended that there is a need to introduce effected cyber laws to regulate e-commerce and protect consumers.

**2.1.4** **How E-Commerce Affect Business**

Payne E.J[[20]](#footnote-21) contends that the government context for e-commerce affect business in three ways:-

1. How the government itself uses e-commerce
2. How the government services law and regulations affect businesses and
3. The use of e-commerce techniques.

In most countries the government is the largest buyers of goods and services, many governments also make sure to buy a share of their goods and services from domestic firms. For example, if a government begins to use e-procurement techniques to do so it can provide an important incentive and training to business firms. It is contended further that several governments in developing countries like Romania, Philippines and Chile are implementing or planning e-commerce projects of their own for public procurements[[21]](#footnote-22).

According to chapter six of UNCTAD secretariat[[22]](#footnote-23), governments are beginning to focus on the main policy, regulatory and legal constraints facing businesses as they try to use e-commerce. For instance, most laws governing commerce did not anticipate electronic transactions. Governments also have to clarify when and how electronic transactions and electronic signatures can be recognized as legal. Moreover, Governments must also clarify legal jurisdiction in any disputes over electronic transactions:

1. What laws govern such disputes?
2. What jurisdiction has authority over them?
3. Laws and regulation are also needed to address issues regarding data privacy, cyber taxation and how customs duties will be handled with such transactions.

The development professional can turn to many sources of information on such legal and regulatory constraints[[23]](#footnote-24). It is contended further that business firms in each developing country will face a different set of such constraints.

**2.2 Meaning of E-Commerce**

There is no one perfect definition of e-commerce as there is no legal dictionary that has attempted to define e-commerce to date. According to WIPO e-commerce is defined as a use of technological advance to promote everything involving the exchange of business information among computer and human traders and customer. E-commerce is explained to be the use of the internet and the web to transact business. More formally, focus on digital commercial transaction between and among organizations and individuals[[24]](#footnote-25).

**2.2.1 Components of E-Commerce Include**

1. Digitally enabled transaction. This includes all transactions mediated by digital technology this means transactions that occurred over the internet and web.
2. Commercial transactions; involves the exchange of value (e.g. money across organizational or individual boundaries in the return of product and services. Exchange of value is important for understanding the limits of e-commerce because without an exchange of value no commerce occurs[[25]](#footnote-26).

**2.2.2 Benefits of E-Commerce**

Firstly, e-commerce information moves very quickly and under directions than in the traditional commerce. This gives businesses opportunities to access more market at low cost and with minimum capital investment and little stuff. Information flows improves competitiveness and customers services, reduces transaction costs also avoids traditional limitation of restricted access of information[[26]](#footnote-27).

By using electronic means of communication information between business organization and individuals are easily transmitted and business is carried out at large. Secondly, electronic commerce helps to save time and money and the risk of loss or damage documents is reduced when documents are transmitted electronically in a form of data message or attachment. The innovation and the use of Electronic Data Interchange (EDI) facilitate the placing and dispatching of orders between commercial undertakings[[27]](#footnote-28).

Another benefit is that, e-commerce offers greater opportunities to both business and consumers at a cheap rate[[28]](#footnote-29). When transacting electronically there is no necessity for the business persons to meet with their consumers thus serving both transport cots and time. Also the businesses reach wider area in which customers also get chance to make a choice of both goods and services from a wider range from suppliers electronically than using traditional means.[[29]](#footnote-30) Moreover, expounding the importance of the internet for commercial transactions, a United States President (as he then was) noted as follows:

As the Internet empowers citizens and democratizes societies, it is also changing the way business is conducted: entrepreneurs are able to start new businesses more easily by accessing the Internet's worldwide network of customers; world trade involving computer software, entertainment products, information services, professional consulting, financial services, education businesses, medical diagnostics, advertising, and technical services is increasing rapidly as the Internet dramatically lowers costs and facilitates new types of commercial transactions; engineers, product developers.

Managers thousands of miles apart can collaborate to design and manufacture new products more efficiently; businesses can work more efficiently with their suppliers and customers; consumers have greater choice and can shop in their homes for a wide variety of products from manufacturers and retailers all over the world, and they will be able to view these products on their computers or televisions, access information about the products, and order and pay for their choices, all from their living rooms[[30]](#footnote-31).

T.I Akomolede[[31]](#footnote-32)expounded that ‘The objectives of e-commerce are legion. They include the facilitation of international co-operation through trade, making goods and services available to consumers all over the world irrespective of distance, the expansion of the consumer base for manufacturers or producers of goods and services, and a reduction in the costs of service delivery by delivering these electronically. … The objectives of e-commerce underscore its importance in the emerging global community. With the effect that today's consumers are able to have access to goods and services in the remotest parts of the world without having to see the sellers. The traditional buying and selling process is being gradually replaced by internet trading, especially in more advanced countries. …’ According to Renaud Sorieul[[32]](#footnote-33), e-commerce also increases the volume of business transactions that can take place any day due to the fact that goods and services can be ordered.

**2.2.3 Disadvantages of E-Commerce**

Disadvantages of e-commerce depend on the existing policies and legal framework of a certain nation or state. The greater challenge can be seen on the whole question of privacy and intellectual property rights; online shoppers are always visiting various website such as Google etc. which advertise and facilitate business on line under unregulated cyberspace[[33]](#footnote-34). The question of verification and authentication of e-documents and more importantly identification of parties to the transaction electronically might pose a great challenge.

The question of e-security and privacy can be a great concern to the development of e-commerce. Hackers and other related e-culprits might be a threat to the parties who are doing business online as they might be able to illegally intercept the transaction and direct the money to their account if there is no effective electronic security supported by cyber laws.

**2.2.4 Activities which result into Cybercrime**

Observing on ICT security, Bainbridge, D.I[[34]](#footnote-35) states that further advent of computer technology has brought many kinds of opportunities and some of these not surprisingly are of criminal nature. Computers may facilitate the connection of old fashioned crimes such as fraud or counterfeiting, and new activities which are potentially criminal have been created for example computer hacking (gaining access to a computer system without permission). Contrary to popular belief, the law in general is reasonably well equipped to deal with computer crime, although it must be said that in this respect, the criminal law is fragmented and poorly organized.

It was further stated that the choice of offence with which to charge someone suspected of a computer related crime is not always a simple matter. This is largely because the criminal law takes little account of a computer technology directly and few criminal offences have been created to deal specifically with the phenomenon of computer crime. The biggest stumbling block, in practice tense, is detection and a considerable amount of thought must be given to the security of any computer system as in this case prevention is better than cure.

It has been established that the greatest threat to a computer system comes from the employees that is from within. This is evidenced by what happened in Chicago whereby the transfer of US D 70 Million involved the employee of the National Bank of Chicago. The diversity of criminal activities associated with computers is remarkable and has given rise to a new vocabulary that is computer hacking, time bombs, logic bombs and viruses. Other forms include blackmail, forgery and counterfeiting and other offences found under copyright[[35]](#footnote-36).

The types of activities described as a computer fraud can be considered to be of two main types:-

1. Data frauds and
2. Programming fraud

In the first type; an authorized data is entered into a computer or data that should be entered is altered or suppressed. The main distinguishing factor in this type of a fraud is that it is computer data, either input or out put data which is tempered with. According to Bainbridge data fraud is the most common type of a computer fraud and it is relatively easy to carry out. A person dishonestly entering an instruction causing the computer system to transfer money from one account to another is an example of this type of fraud. The person entering the instruction may be an employee or may be an outsider who has gained access to a computer system without permission. If the person involved is an employee he may be authorized to enter such instructions but has entered a particular instruction beyond the scope if authorized to do so, with a view to defraud his employer.

Regarding alteration of input data are data which is legitimately entered into a computer is intentionally altered for instance a data preparation, employee entering overtime hours, worked by employees into the company computer system for calculating wages, falsely increased those hours so that some of the employees receive more wages than they were entered to. This form of fraud is very common easily done and hard to detect unless periodic check are made. As regard suppression of data it applies to out put data for example printed reports generated by a computer system. This report may be suppressed simply by tearing them up or not printing them out or if printed they may be altered the motive behind being to hide some criminal activity.

In regarding to hacking, it is defined as accessing of a computer system without the express or implied permission of the owner of that computer system[[36]](#footnote-37) a person engaged in this activity is known as a computer hacker and may be motivated by the mere thrill of being able to out wit the computer system contained in a computer. A hacker may gain access remotely using a computer in his own home or office connected to a telecommunications network. It is also observed that the hacker might be tempted to steal money or direct the computer to have goods sent to him.

In the case of ***R V Gold[[37]](#footnote-38)***the House of Lords highlights the problem of computer hacking and the danger of people gaining access to computer files without authorization. In this case it was conclude that computer hacking was not a criminal activity parse. The computer industry was mostly dissatisfied with the scope of criminal law and the perceived lack of haste on the part of parliament to act however as it stands the law is not completely impotent when it comes to computer hacking and there are some areas of criminal law which might be available with which to combat computer hackers.

According to Bainbridge[[38]](#footnote-39) the Gold case (supra), the wrong choice was made and he posed a question to the effect that if a hacker has broken into a computer system what can the criminal law do? Criminal offences which may be relevant are those contained in the English Theft Act of 1968, The Criminal Damage Act of 1971 and where these fail civil law can offer assistance in the area of law of confidence and copyright law. After the Gold decision the English Law Commission came up with recommendations for changing the Criminal law to deal with hacking. In its report of October 1989 they recommended three new offences; unauthorized access to a computer which covers computer hacking.

The second offence is unauthorized access to a computer with intent to commit or facilitate the commission of a serious crime. The third offence is unauthorized modification of a computer material this crime would be committed if a person intended to modify a data. As regards computer viruses it is stated that a person who deliberately introduces computer viruses to a computer system will usually be guilty of a criminal damage or attempted of a criminal damage. According to Bainbridge[[39]](#footnote-40).The purpose of virus is to disable a computer system or to corrupt program or files and make them unusable. The implications for the management of a computer system are two fold:-

1. having a hierarchy of back up version of important programs/data
2. making sure that software obtained for the computer system is from a reputable source.

As regard to computer blackmail, this is well defined under section 21[[40]](#footnote-41) where it is stated that a person will be guilty of a blackmail if with a view to gain for himself or another or with intent to cause loss to another he makes any unwarranted demand with menaces. Incase of computers a person would be guilty of blackmail if inserts a “time bomb” into a computer system and demanded money in return for details of how to disable the time bomb. If the owner of the computer system have already discovered and removed the time bomb when demand is made it makes no difference the offence has still being committed.

The foregoing position shows the crimes which are likely to be committed by users of computers globally. If no action is taken by lonely governments, regions or group of nations there might be a big loss both economically and socially.

**2.3 On-Line Contracts and Paper Based Contracts in Different Jurisdictions**

**2.3.1** **Meaning of On-Line Contracts**

Online contract is a contract that governs the use of a Web Site by netizens of the Site, and it publishes it on a Web Site. So, if the netizens want use the web, they must agree on the contract that sometimes and usually referred to as “terms of use agreement”[[41]](#footnote-42)

**2.3.2** **Essentials of an electronic contract**

As in every other contract, an electronic contract also requires the following necessary ingredients:

**2.3.2.1** **An offer needs to be made**

In many transactions (whether online or conventional) the offer is not made directly one-on-one. The consumer ‘browses’ the available goods and services displayed on the merchant’s website and then choose what he would like to purchase. The offer is not made by website displaying the items for sale at a particular price. This is actually an invitation to offer and hence is revocable at any time up to the time of acceptance. The offer is made by the customer on placing the products in the virtual ‘basket’ or ‘shopping Cart’ for payment.

**2.3.2**.**2** **The Offer Needs to be Accepted**

As stated earlier, the acceptance is usually undertaken by the business after the offer has been made by the consumer in relation with the invitation to offer. An offer is revocable at any time until the acceptance is made.

**2.3.2**.**3 There has to be Lawful Consideration**

Any contract to be enforceable by law must have lawful consideration, i.e., when both parties give and receive something in return. Therefore, if an auction site facilitates a contract between two parties where one person provides a pornographic movie as consideration for purchasing an mp3 player, then such a contract is void.

**2.3.2**.**4 There has to be an Intention to Create Legal Relations**

If there is no intention on the part of the parties to create legal relationships, then no contract is possible between them. Usually, agreements of a domestic or social nature are not contracts and therefore are not enforceable, e.g., a website providing general health related information and tips.

**2.3.2**.**5 The Parties must be Competent to Contract**

Contracts by minors, lunatics etc are void. All the parties to the contract must be legally competent to enter into the contract.

**2.3.2**.**6 There Must be Free and Genuine Consent**

Consent is said to be free when there is absence of coercion, misrepresentation, undue influence or fraud. In other words, there must not be any subversion of the will of any party to the contract to enter such contract. Usually, in online contracts, especially when there is no active real-time interaction between the contracting parties, e.g., between a website and the customer who buys through such a site, the click through procedure ensures free and genuine consent.

**2.3.2**.**7 The Object of the Contract Must Be Lawful**

A valid contract presupposes a lawful object. Thus a contract for selling narcotic drugs or pornography online is void.

**2.3.2**.**3 There Must be Certainty and Possibility of Performance**

A contract, to be enforceable, must not be vague or uncertain and there must be possibility of performance. A contract, which is impossible to perform, cannot be enforced, e.g., where a website promises to sell land on the moon[[42]](#footnote-43).

**2.4.3** **Procedures Available for Forming Electronic Contracts Include**

(a) E-mail: Offers and acceptances can be exchanged entirely by e-mail, or can be combined with paper documents, faxes, telephonic discussions etc.

(b)Web Site Forms: The seller can offer goods or services (e.g. air tickets, software etc) through his website. The customer places an order by completing and transmitting the order form

(c) Online Agreements: Users may need to accept an online agreement in order to be able to avail of the services e.g. clicking on “I accept” while installing software or clicking on “I agree” while signing up for an email account[[43]](#footnote-44).

**2.3.4** **Types of Electronic Contracts**

Online contracts can be categorized into different types depending on their bases;

**Email-Based Contracts** It is explained that, Email system has now been the most attractive means of communication among users and it is currently a means of creating effective and binding legal relations[[44]](#footnote-45). However, emails are technologically based on client server, where a sender’s server sends a message to the receiver’s mail server and in that course of communication the electronic mail travels through a number of servers before reaching the recipient and may even be stored in a server before sending it.[[45]](#footnote-46) In this the challenge is on when the contract is said to be concluded.

**2.3.2**.**3 Web-Based Contract**

Are standard form contracts which may also be referred to as contracts of adhesion.[[46]](#footnote-47)

Forms of web-based contracts include;

**(a)** **Click-Wrap Agreement**

A click wrap agreement (also known as a "click through" agreement or click wrap license) is a common type of agreement (often used in connection with software licenses). Such forms of agreement are mostly found on the Internet, as part of the installation process of many software packages, or in other circumstances where agreement is sought using electronic media. The name "click wrap" came from the use of "shrink wrap contracts" commonly used in boxed software purchases, which "contain a notice that by tearing open the shrink-wrap, the user assents to the software terms enclosed within."[[47]](#footnote-48)

In this type of online contract, users get chance to read the terms of the agreement before accepting them.

**(b)** **Shrink Wrap Agreement**  
The term “shrink wrap agreement” refers to the purchase agreements that are attached to shipped products, usually bound by shrink wrap (plastic wrapping) that contain terms and conditions. Shrink wrap agreements can include the following terms:

1. Licenses
2. rights of use
3. fees and payments
4. forum clauses
5. warranties and
6. limitations of liability.[[48]](#footnote-49)

It is stated that; the controversy around shrink wrap agreements is the fact that the terms of the agreement cannot be read until the consumer has paid and accepted the package, and has opened the product by taking off the shrink wrap, which then states that opening will constitute acceptance of the terms[[49]](#footnote-50).

Once software is purchased it has to be shrink wrapped in which terms and conditions are made available either inside the container or during the process of downloading it is accompanied by an End User License Agreement (EULA). Apart from being a software license, EULA also acts as a contract between the producer and the user of the computer software to specify the limits of use granted by the owner. It is explained that without taking into consideration on when or how it was installed. The EULA becomes in effective immediately at the time of purchase.[[50]](#footnote-51)

**2.3.5 Paper Based Contracts**

A contract is defined as a legally binding agreement. Agreement arises as a result of offer and acceptance, but a number of other requirements must be satisfied for an agreement to be legally binding.

1. There must be consideration ( unless the contract is by deed)
2. The parties must have an intention to create legal relation. This requirement usually operates to prevent a purely domestic or social agreement from constituting a contract ( see also honour clause)
3. The parties must have capacity to contract
4. The agreement must comply with any formal legal requirements. In general, no particular formality is required for the creation of a valid contract. It may be oral, written, partly oral or partly written, or even implied from conduct. Certain transactions are, however, valid only if effected by a deed ( for example transfers of shares in British ships) or in writing ( for example promissory note, contract for the sale of interests in land, and guarantees that can at law only be enforced if evidenced in writing)
5. The agreement must be legal ( see illegal contracts)
6. The agreement must not be rendered void either by some common/law or statutory rules or by some inherent defect such as operative mistake (see void contract). Certain contracts, though valid, may be liable to be set aside by one of the parties on such ground as misrepresentation or the exercise of undue influence (see voidable contracts)[[51]](#footnote-52).

From the definitions above one can clearly see the distinction between online contracts and traditional contracts; that electronic contracts are executed electronically through interconnected networks while ordinary contracts are executed traditionally. That is terms and conditions are written on a paper and agreement is concluded by signing up of the parties agreeing to the given terms and conditions. Therefore it is obvious that laws to govern the electronic contracts are expected also to be different from those which were governing paper based contracts to accommodate the difference between these two contracts.

2.4 **Electronic Contracts in East African Countries**

**2.4.1 General Overview**

In Africa, a number of countries have endeavored on designing and formulating ICT policies, however majority of the African countries are still in the initial process of development of cyber legislation enactment. Most of African countries for instance Tanzania has only draft Bills which have not yet passed into law. Angeline Vere explained that around the fifty (50) countries in Africa, only about five (5) countries have moved ahead of other African countries and have enacted cyber legislation to guide the area of electronic activities[[52]](#footnote-53).

It has been explain that despite of all this Africa still lags behind in internet usage relative to most other parts of the world. Internet usage has witnessed phenomenal growth over the past decade and there were an estimated 110, 931, 700 internet users in Africa as of June 2010, representing 10.9% of the African population[[53]](#footnote-54). An increasing number of Africans now utilize social networking websites like Face book with one estimate putting the figure at 17.6 million as of August 2010[[54]](#footnote-55).

**2.4.2 Position under East African Community Protocol**

The Framework for Cyber laws (“Framework”) was prepared by the East African Community EAC Task Force on Cyber laws in 2008, comprising representatives from the Partner States and the EAC Secretariat, with the support of UNCTAD. The Framework contains a series of recommendations made to the governments of the Partner States about reforming national laws to facilitate electronic commerce; to facilitate the use of data security mechanisms; to deter conduct designed to undermine the confidentiality, integrity and availability of information and communication technologies; to protect consumers in an online environment, and to protect individual privacy. The Recommendations are designed to harmonize the law reform process between the EAC Partner States, as well as reflecting international best practice[[55]](#footnote-56).

**2.4.3 Electronic Contract in Kenya**

In Kenya, e-commerce is carried out as it is done in other countries around the world. However, in Kenya before the enactment of the law dealing with e-transactions, computer print outs were regarded as hearsay evidence which entails that, “an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a fact asserted”[[56]](#footnote-57).

In this book it was argued that the evidence status of a compute print out was taken to be the same of the evidence of a photocopy of a forged cheque. In general there was no supportive law in Kenya which recognized the use and applicability of electronic transactions including electronic contracts[[57]](#footnote-58). Currently, the government of Kenya is working to develop policies that recognize electronic commerce and electronic contracts to protect rights of the parties into contracts.

Anthony Okulo in his paper[[58]](#footnote-59)explained that through the Electronic Transactions Bill of 2007, it provides for the validity and enforceability of any digitalized information. Moreover, it was stated in The Electronic Transactions Bill[[59]](#footnote-60)where the law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in electronic version that is accessible and intelligible so as to be useable for subsequent reference.

In the definition section, section 4[[60]](#footnote-61) meaning of the word such as advance electronic signature, agreement, certificate, computer service and system, electronic form and record were added. Part VI A of the Kenya Communication Amendment Act No. 1 of 2009 covers the Electronic Transactions. Under section 83 G[[61]](#footnote-62) electronic records are recognized which renders the existence of electronic contracts.

Section 83K[[62]](#footnote-63) is providing that, the intention of the parties to the contract may also be expressed through electronic messages and no one shall deny its legal effects, validity and enforceability of the formed contract on the ground or reason that it is in the form of an electronic message. Moreover, under section 83 P of The Kenya Communication Amendments Act No.1 of 2009 recognize the electronic signatures; since signature is among of the foremost component to validate the contract between the parties, then by recognizing the existence of the electronic signature the law directly accept the existence of the electronic contract.

Thus, The Kenya Communication Amendments Act[[63]](#footnote-64) is providing for enforceability of electronic contracts as stipulated under sections 83G, 83J and 83 P. By looking on all these provisions of the law, it is clear that the law is providing on the existence and enforceability of electronic contracts. From the above therefore, Kenya has made a further step ahead compared to Tanzania on the issues of electronic contract transactions as they have already having the enactment (Kenya Communication Amendment Act No.1 of 2009) which covers electronic transactions; while up to now Tanzania have no specific law at hand to cover the electronic contract transaction issues.

**2.4.4 The Electronic Contract in Uganda**

The Republic of Uganda has enacted The Electronic Signatures Act, 2010. The Act is already in force as it was assented on the 17th February, 2011; it regulates the use of electronic signatures and to provide for other related matters concerning electronic contracts including:-

1. Use of electronic signatures and regulation.
2. Criminalization of unauthorized access and modification of electronic signatures.
3. Determination of minimum requirements for functional equivalence of electronic signatures.
4. Modernization and harmonization of the laws relating to computer generated evidence.
5. Amendments of the current laws to provide for admissibility and evidential weight of electronic communications[[64]](#footnote-65).

Furthermore, Uganda has The Electronic Transactions Act (Act No.8 of 2011).

Electronic Transaction means a transaction of either commercial or non-commercial nature communicated electronically by means of data messages and includes the provision of information and e-government services[[65]](#footnote-66).

In general, The Act provides for the use, security, facilitation and regulation of electronic communications and transactions; encourage the use of e-Government services and provide for related matters;

1. The Act creates a light handed regulatory regime for electronic transactions.
2. It facilitates the development of e-commerce in Uganda by broadly removing existing legal impediments that may prevent a person from transacting electronically because of omission in the traditional laws.
3. It makes provision for functional equivalence, thus paper transactions and electronic transactions are treated equally before the law.
4. It establishes rules that validate and recognizes contracts formed through electronic means.
5. It sets default rules for contract formation and governance of electronic contract performance.
6. It defines the characteristics of a valid electronic writing and an original document.
7. It supports the admission of computer evidence in courts and arbitration proceedings[[66]](#footnote-67)

From the provisions above therefore it is clear that issues of electronic contracts are covered under Ugandan’s laws.

**2.4.5 Electronic Contracts in Rwanda**

The Rwanda Electronic Transactions Act[[67]](#footnote-68) is covering e-transactions issues in Rwanda; however exception circumstances are provided in section 1 that the issues of:-

i. a will;

1. negotiable instruments;
2. a power of attorney
3. docommercial agreement related to immovable property of any interest in such property;
4. certificate of transfer of immovable property;
5. authentication documents or any document deemed authentic[[68]](#footnote-69) are not covered under this law.

**2.4.6 Position in Burundi**

Report fromTask Force on Cyber laws of 2008, comprising representatives from the Partner States and the EAC Secretariat, with the support of UNCTAD state thatBurundi is yet to develop its cyber laws[[69]](#footnote-70). Therefore, Burundi has no legislation on cyber law up to now.

**2.4.7 Electronic Contracts in Malawi**

Malawi has finished drafting new Information and Communications Technology (ICT) Bill expected to completely overhaul its approach to this new technological phenomenon[[70]](#footnote-71). The final draft of the ‘Electronic Transactions and Management Bill 2013’ which Biztech Africa has seen encompasses eleven issues that will fill the gaps that have been haunting operations in Malawi’s ICT sector. It has been further explained that, in the order of presentation in the Bill, issues tackled include the legal recognition of electronic messages, Proceedings applicable to the conclusion of electronic contracts, legal responsibility of various actors, Consumer protection with respect to e-commerce, Taxation, Online financial services and Encryption.

The Bill has also dealt with the issues of Cyber criminality, Data protection, omain name and E-Government. In its preamble, the Bill acknowledges that the development of the information society has registered considerable progress in the ICT sector. “Most important steps of these changes are networks digitalization, components miniaturization and more recently the development of the Internet and mobile telephones,” it says.  Regarding to these opening words in the Bill, Malawi is convinced that its predominantly agro-based economy can rapidly grow and diversify through participation in the information society and that in order to fully benefit from the information revolution, Malawi needs to modernize various sectors of its economy using ICT[[71]](#footnote-72).

It is explained more that, the main objective of the Government of Malawi: the Bill is to provide on benefit from a true technological leap which may speed up its economic growth by enabling the development of new economic activities due to the implementation of a secure legal framework regulating the use of ICT. Upon realizing that Malawi’s current legal framework’s applicability does not provide economic actors and citizens with a secure and reliable legal environment which is however essential to the development of electronic transactions; Government has decided to come up with the Bill which of course will culminate into law. “Consequently, the Government wishes to enact a Bill which will enable the development of the information society in the country within a legal framework,” the introductory remarks of the final draft Bill states matter of fatly.

The Bill is providing; current legal and regulatory texts shall remain applicable to situations involving ICT but nevertheless, ICT has created new legal issues which require specific legal answers. Under ‘Legal recognition of electronic messages’ the bill says this recognition does not exist as such in the current legal framework in Malawi, whereas it is a condition to the development of electronic transactions in the country.  It is provided further that “Any written document and any signature should be possibly created and stored in an electronic manner.   Electronic documents should have the same legal probative force as paper documents,” On the ‘Proceedings applicable to the conclusion of electronic contracts’ the Bill observes that rules regulating the conclusion of contracts need to be specified and clarified in order to ensure security with respect to electronic transactions.

While under ‘Legal responsibility of various actors’ the bill says: with respect to the Internet, as it is the case regarding television, radio, or written press, the freedom of speech should be limited by certain principles of public order. The Bill defines precisely the responsibility of technical service providers and editors of online contents. Consequently, the Bill provides for specific obligations lying on professionals regarding the display of information and online advertising.

The Bill has also tackled the run-away issue of ‘Taxation’ where it is explaining to detail the circumstances under which value added tax and customs fees can apply to e-transactions. On ‘Online financial services’ the Bill spells the importance and the specificity of the risks of these services which it says have driven the Government to introduce very strict provisions regulating the online provision of financial and banking services.

The Bill also looks at ‘Encryption’ where specific provisions have been laid down to ensure the security of digital economy. It also deals with the issue of ‘Cyber criminality’ where it sets out the principles for combating crimes in the e-environment and establishes a dedicated institution, the Malawi in full first and abbreviate Computer Emergency Response Team (“Malawi CERT”), to fight against cyber threats and attacks.

The Bill is also providing ‘Data protection’ with specific provisions in order to regulate online collection of personal information regarding users and imposing systematic information on the purposes of the data processing and the rights of the data subject. Nevertheless, the government of Malawi has announced the completion of the drafting of the electronic legislation called 'E-bill', which now awaits input from institutions and individuals before parliament passes it into law[[72]](#footnote-73).

Gregory Gondwe[[73]](#footnote-74) gives ten (10) areas of focus on the draft as follows here under

The first area focuses on 'legal recognition of electronic messages', which the Bills acknowledge does not exist as such in the current legal framework, whereas it is a condition to the development of electronic transactions in the country. The Bill will therefore seek to enforce that any written document and any signature should be possibly created and stored in an electronic manner while ensuring that electronic documents should have the same legal probative force as paper documents.

The second point of focus by the bill is what it is calling 'proceedings applicable to the conclusion of electronic contracts' - where it is specifies and clarifies rules regulating the conclusion of contracts in order to ensure security with respect to electronic transactions. The proposed law also seeks 'legal responsibility of various actors' with respect to the internet. It observes that as it is the case regarding television, radio, or written press, the freedom of speech should be limited by certain principles of public order. The Bill defines precisely the responsibility of technical service providers and editors of online contents.

The third point is that; The Bill's chapter three of Part III, which has the headline 'Online user's protection and liability of intermediaries and content editors', defines who the editors are in Section23.The draft bill describe operators as intermediary, who are any legal or physical person or any entity that provides electronic communications services consisting of the provision of access to communication networks, as well as storing or transmission of information through communication networks.

One other area the draft bill demands is that the persons editing online public communication services on a non-professional basis may, for ensuring their anonymity, solely make publicly available their name as well as the name and address of the intermediary service provider. The qualification as editor of an online public communication service, the draft bill says, does not exclude the qualification as intermediary service provider and both qualifications may apply distributive to each activities exercised by the same person. It is hoped that with such information, and more demanded in this section, legal responsibility of various actors will be enforced.

The fourth area deals with the 'Consumer protection with respect to e-commerce'.   
Professionals regarding the display of information and online advertising," says the draft bill. "Online purchase of services or goods requires the adoption of specific provisions in addition to classical consumer rules. Consequently, the bills provides for specific obligations lying on The fifth aspect captured in the draft legislation is on 'Taxation' where it says the bill will detail the circumstances under which value added tax and customs fees can apply to e-transactions.

This is immediately followed by 'Online financial services' and the importance and the specificity of the risks for these services, the bill says, have driven the government to introduce very strict provisions regulating the online provision of financial and banking services. The draft bill has also looked at Encryption as a way of including specific provisions that will ensure the security of digital economy. In particular, the bill provides for the legal framework regulating encryption in conformity with international best practices. The eighth area the bill has tackled is cyber criminality, where it sets out the principles for combating crimes in the e-environment and establishes a dedicated institution, the Malawi CERT, to fight against cyber threats and attacks.

The other area is 'Data protection' and the bill says it provides for specific provisions in order to regulate online collection of personal information regarding users and imposing systematic information on the purposes of the data processing and the rights of the data subject. In the previous draft, government omitted 'E-Government' which appears in the draft legislation. Last point is that; the bill reminds administrators to oblige and do their best efforts to promote the development of online public services and facilitate the use of ICT in the Republic of Malawi.

Gregory explained furthermore that, The Republic of Malawi is convinced that its predominantly agro-based economy can rapidly grow and diversify through participation in the information society, the bill points out. It is stated that, in order to fully benefit from the information revolution, the Republic of Malawi needs to modernize various sectors of its economy using ICT. The government's main objective is to benefit from a true technological leap which may fasten its economic growth by enabling the development of new economic activities - thanks to the implementation of a secure legal framework regulating the use of ICT.

The current legal framework applicable in the Republic of Malawi does not provide economic actors and citizens with a secure and reliable legal environment which is however essential to the development of electronic transactions, observes the government in the draft statement. It says consequently, the Malawian Government hopes once this bill is enacted it will enable the development of the information society in Malawi within a legal framework. [[74]](#footnote-75)

**2.5 Electronic Contract in South Africa**

**2.5.1 Essentials of Valid contracts under South Africa**

It is explained that, electronic contracts are only valid if they meet the requirements (essentials) of contracts. The essential for a valid contract under South African law are that there must be a valid offer and acceptance, and consequently a meeting of minds or consensus between the contracting parties. Where only one party has contractual capacity, a ‘limping contract’ which can only be enforced against the party with capacity will be formed.  The contract must be legal or lawful and be capable of performance; otherwise it will not be enforceable. Generally, there are no prescribed formalities for the conclusion of a contract. However formalities are prescribed for certain contracts such as the sale of land[[75]](#footnote-76)

In South Africa the law governing electronic contracts is Electronic Transactions Communications Act (ECTA) 2002. It is explained that the time and place of conclusion of contracts are important because they relate to jurisdiction and applicable law. Section 22 of ECTA provides that the reception theory applies to electronic transactions. ECTA also provides for when data messages are to be considered as sent and received, as follows:

Sending: S. 23(a) provides; a data message must be regarded as having been sent by the originator, when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee. Reception: S. 23(b) provides; a data message must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee.

Furthermore, ECTA provides for where a data message is taken to be sent from and received. Section 23(c) provides that a data message must be regarded as having been sent from the originator’s usual place of residence or business and as having been received by the addressee, at the addressee’s usual place of residence or business.

Section 25 of ECTA provides for the attribution of data messages. A data message is considered to have been sent by the originator if he sent it himself or it was sent by his authorized agent or an automated system programmed by the originator himself or his authorized agent (unless it can be shown that the automated system did not function properly.) Section 26(1) of ECTA provides that the agreement is valid upon receipt of the acceptance and it is not necessary for the addressee to acknowledge receipt.

It was further provided that online contracts may be concluded in various ways. These ways are categorized by the manner in which the purchaser is presented with, and assents to, the terms and conditions of the sale such as shrink wrap, click-wrap and browse-wrap contracts. These categories refer to the way in which the contracts are concluded and not the content thereof. It was stated that whilst each of these types of concluding a contract that is shrink wrap, click-wrap and browse-wrap contracts are valid and can create binding contracts, some contracts may be voidable if the buyer’s attention not drawn to terms and conditions.

The seller or provider is required to take reasonable measures to bring the content thereof to the attention of the consumer and to highlight unusual or unexpected terms. The consumer must also be given an opportunity to accept or decline the proffered terms and conditions[[76]](#footnote-77). In South Africa as explained above they have already enacted the law (Electronic Transactions Communications Act (ECTA) 2002) which covers electronic contract issues. Regardless on how sufficient the law is.

**2.6 Electronic Contract in Developed Countries**

**2.6.1 Examples of United Kingdom and European Union**.

The Model Law on Electronic Commerce was adopted by UNCITRAL in 1996. Its purposes are to help states enhance their legislation with respect to electronic communications and to serve as a reference aid for the interpretation of existing international conventions and other instruments in order to avoid impediments to electronic commerce[[77]](#footnote-78). As stipulated under Article 1, the law ‘applies to any kind of information in the form of data message used in the context of commercial activities’, but allows for exceptions to be made by individual countries.[[78]](#footnote-79) The ‘writing’ and ‘signature’ related provisions are contained in Chapter II, entitled ‘Application of Legal Requirements for Data Messages’. Articles 6 and 7 are intended to take the focus off of the mode of communication and place it on the fulfillment of traditional functions of writing.[[79]](#footnote-80)

UNCITRAL determined that data messages can satisfy the traditional functions and therefore are ‘functionally equivalent’.[[80]](#footnote-81) This is significant because it recognizes that future developments and applications are unforeseeable.[[81]](#footnote-82) This is preferable to deeming specific communications writings because mere definition of terms will be either too broad to comprehend or too narrow to develop new applications. It is stipulated under Article 6 that where a law requires information to be in writing, a data message is sufficient if it is accessible to be used for subsequent reference. Article 7, dealing with signature requirements, allows for any method that identifies a person and indicates that person’s approval of the information contained in the data message, so long as that method was as reliable as was appropriate for the purpose for which the data message was generated or communicated.

The use of functionally equivalent language such as this leaves the Model Law requirements broad enough to allow for new technologies and applications which can meet the traditional purposes of writing and signature requirements. This general ‘framework’ approach is more conducive to broad international acceptance than a detailed regime of mandatory rules.[[82]](#footnote-83) From the above therefore it is clear that issues of electronic commerce which basically includes electronic contracts have been dealt with since many years back in United Kingdom.

**2.6.2. Electronic Contracts in United States**

Currently in United State, W. Harry Thurlow[[83]](#footnote-84) explained that the traditional writing and signature requirements found in the United States have steadily been eroded by legislation judicial interpretation.[[84]](#footnote-85) For example, the Uniform Commercial Code defines ‘writing’ as ‘any intentional reduction to tangible form’.[[85]](#footnote-86) There are also cases in which electronic substitutes for pen and paper have been found to meet Statute-of-Frauds-type legislative provisions.[[86]](#footnote-87) Some authors argue that slight changes in various legislative schemes, such as using the term ‘record’ instead of ‘writing’, coupled with the ability of US courts to adapt a body of case law through analogy between past authority and present conditions is entirely sufficient to keep law abreast with technology.[[87]](#footnote-88)

The expansion of statutory definitions by the courts through interpretation and analogy may eventually establish a coherent set of rules; however, a more pro-active approach is to legislate in the area taking into consideration the broad picture of efficiency and consumer protection. When dealing with the validity of agreements, and in particular those with an international aspect, the business community needs positive legislation to feel secure.[[88]](#footnote-89) This point is made in the international business context. There is certainly a case to be made for self-regulatory measures; however, in light of the varying degrees of legal recognition of electronic forms and signatures discussed below, universal acceptance will require some legislative support. After states will have agreed that electronic documents and signatures are legally enforceable, the procedures and standards of care in maintaining the infrastructure will no doubt be industry led.

The need for a coherent set of rules that would promote certainty, predictability and security gave rise to action by US authorities at both state and federal levels. Proposed and enacted legislation to respond to electronic contracting capabilities are heavily influenced by the UNCITRAL Model Law on E-Commerce and reflect the functional equivalent method to writing requirements.[[89]](#footnote-90) At the national level, the Electronic Signatures in Global and National Commerce Act, known generally as E-Sign, took effect October 1, 2000.[[90]](#footnote-91) E-Sign grants electronic contracts the same legal validity as written ones by stating that form may not be the sole basis for denying the document or signature validity.[[91]](#footnote-92) E-Sign preempts state laws to the contrary as an interim measure ensuring that electronic documents and signatures have equal legal standing with handwritten signatures and records until such time as the individual states have adopted uniform legislation.[[92]](#footnote-93)

In July of 1999, the National Conference of Commissioners on Uniform State Law (NCCUSL) approved the Uniform Computer Information Transactions Act (UCITA) and the Uniform Electronic Transactions Act (UETA) as model laws to be adopted by the states.[[93]](#footnote-94) UCITA applies to computer information transactions and has been adopted in several states.[[94]](#footnote-95) With respect to contract formation, UCITA recognizes ‘authentication’ even if in electronic form,[[95]](#footnote-96) and provides that electronic contracts are valid if it is shown that ‘the party against which enforcement is sought authenticated a record sufficient to indicate that a contract has been formed and which reasonably identifies the copy or subject matter to which the contract refers’.[[96]](#footnote-97)

UCITA takes contract validity liberalization further by supporting the ability of electronic agents to make binding contracts for their human masters. This includes, for example, electronic data interchange (EDI), networks which allow computer-to-computer exchanges of information in order to create contracts without human involvement during the formation process.[[97]](#footnote-98) Acceptance and validity are satisfied if the medium is ‘reasonable in the circumstances’.[[98]](#footnote-99) It is quite apparent that UCITA is intended to operate in a similar fashion to UNCITRAL’s Model Law on E-Commerce through reliance on functional equivalency and avoiding specific technological requirements.

UETA broadly applies to electronic records and signatures in commercial or government transactions.[[99]](#footnote-100) While its starting point for contract validity is first a matter of functional equivalence, UETA goes beyond the UNCITRAL Model Law on E-Commerce by explicitly deeming electronic signatures and documents to be in satisfaction of laws requiring signed and/or written contracts.[[100]](#footnote-101) It is important to note that again the proposed law is not technology specific and therefore, just like the UNCITRAL Model Law on E-Commerce, leaves the door open to functional equivalence.

The provisions of UETA are meant to compliment existing state laws rather than supersede them as in E-Sign, as well as to provide a more comprehensive scheme.[[101]](#footnote-102) Legislation based on UCITA has been adopted in Maryland and Virginia, with introductions scheduled in eight other states in 2001.[[102]](#footnote-103) UETA is infiltrating state legislatures at a much faster rate with the number of states that adopted similar legislation with minor amendments approaching 40 as well as several more scheduled to introduce.[[103]](#footnote-104) Despite the widespread influence UCITA and UETA have over US law reform, the approach of the individual states remains somewhat ‘ad hoc’.[[104]](#footnote-105) Some states recognize an open class of electronic authentications if they meet certain functional equivalence criteria, while others require digital certificates provided under specific rules.[[105]](#footnote-106)

Despite some matters which are not yet certain due to daily development of technology it is clear that in United States issues of electronic transactions are well covered by the laws. In the Law of Contract Act[[106]](#footnote-107), under Section 2(h) contract is defined to be an agreement enforceable by law. Section 2 (e) defines an agreement to be every promise and every set of promises forming consideration for each other.

**2.7 E-Commerce Vis-À-Vis Law of Contract in Tanzania**

**2.7.1 General Overview**

It has been pointed out that Tanzania is not left alone in this era of electronic world. Very often we see business persons communicating through mobile phones, using M-banking services, importing and exporting goods electronically. In order to get rid of losses which could result due to actions of unscrupulous business persons the government need to intervene sooner.

Tanzania has ICT policy which highlights that globalization and the pervasiveness of ICT, and especially the internet have given rise to new type needs, rights and vulnerabilities[[107]](#footnote-108). In terms of legal framework the ICT policy clearly states that the government will review existing laws and regulations in order to repeal or adjust those that are not conducive to the healthy growth of the ICT industry and enact new ones that take account of issues associated with internet governance and convergence of telecommunication broadcasting and information systems. It stipulates further that the government will set up legal regulatory frameworks that are appropriate to the ICT sector taking into account that electronic transactions are also susceptible to electronic criminality. In addition the policy stipulates that the government will promote business in electronic form in a secure environment and put in place a legal framework to provide a guiding principles, rules and legislation.

The vision of the Policy is Tanzania to be come a hub of ICT Infrastructure and ICT solutions that enhance sustainable socio-economic development and accelerated poverty reduction both nationally and globally while the mission is to enhance nation-wide economic growth and social progress by encouraging beneficial ICT activities in all sectors through providing a conducive framework for investments in capacity building and in promoting multi-layered corporation and knowledge sharing locally as well as globally.

Surprisingly, the policy was put in place in 2003 which is about eleven years now but no any law regarding cyber space has been enacted to date. According to Bwana, J[[108]](#footnote-109) in 2007 the government of Tanzania amended the Law of Evidence Act vide Act No. 15 of 2007(Written Amendment Act, 2007) to recognize the admissibility of electronic evidence.

The statement by Bwana (supra) was later on amplified by the High Court of Tanzania (Commercial Division) in 2011 in the case of Exim Bank (T) Limited V Kilimanjaro Coffee Company Limited Commercial Case No. 29 of 2011 and Trust Bank Tanzania V Le Marsh Enterprises Ltd and Others, (2000), (unreported). Where the court held that, a computer print out is a bankers book under the law of evidence Act and thus admissible. This underlined the point that the law must abreast of technological changes that acknowledge electronic evidence. The facts of that case are as follows:-

The preliminary objection has been raised by the learned advocate for the defendant against application made by learned Counsel for the Plaintiff for tendering Print out statements extracted from an account operated by the defendant at the Plaintiff bank as an exhibit in court on two grounds namely:-

1. PW1 who is also the head of the Plaintiff bank has not proved before the court that the print out statements in the entries of the alleged bank accounts were made in the usual and ordinary books of accounts of the Plaintiff bank in the usual and ordinary course of business of the bank and that the statements were in the custody or control of the Plaintiff bank pursuant to section 78 of The Tanzania Evidence Act ( CAP 6 R.E. 2002)
2. That no proof that the printed out statements were examined with the original entries and certified to be correct as required by section 79 of The Tanzania Evidence Act (supra) .

In rebuttal, Counsel for the Plaintiff argued that since PW1 was under oath his testimony is enough to prove that printed out statements are ordinary entries in its bank account in the course of the Plaintiff banking business which are still in the custody of the Plaintiff’s bank and therefore the provisions of section 78 and 79 of The Law of Tanzania Evidence Act were complied.

In rejoinder it was submitted that nothing has been said regarding section 79 of Tanzania Evidence Act and no certificate shown by PW1 to that effect. It was insisted that proof must come from the Plaintiff. The words “Banker’s book” under section 78 and 79 of Tanzania Evidence Act (supra) refers to book used in the ordinary business of a bank therefore copies of entries in the bankers books are prima facie evidence of the entries or of the matters, which prove that;

1. The book was at the time of making of the entry one of the ordinary books of the banks,
2. The entry was made in the usual and ordinary course of business and
3. The book is in the custody of the bank.

In his opinion, the presiding Judge explained that bankers books includes ledgers, day-books, cash-books, Account books, and all other books used in the ordinary business of a bank whether kept in a written form or as print outs or data in a floppy, disc, tapes or any other form of electronic-magnetic data storage device. He said that he listened carefully from the sound recording devices to the testimony of PW1 and regarding the statements of accounts which is the subject matter in the ruling but he did not hear a single word from the mouth of the Plaintiff saying that the statements of accounts were not in control of the Plaintiff’s bank.

It was further stated that to the best of construction of sections 78 and 79 of Tanzania Evidence Act (supra) if a witness want to rely and tender print out statement of any entry or its copy; he must have proof that the book was at the time of making the entries on the ordinary books of the bank and the entry was made in the usual and ordinary course of business in the book is in the bank. Another question is how such proof can be given in the court? Section 78(2) of Tanzania Evidence Act (supra) is providing that the proof may be given orally or by an affidavit of a partner or officer of the bank.

Written Laws (Miscellaneous Amendment) No.2 of 2006 is allowing admission of electronic evidence and e-records in the banking business system under banker’s books pursuant to the Tanzania Evidence Act. Furthermore, Act No. 15 of 2007 amended section 40 by adding section 40A which now provide for the admissibility of electronic evidence in Criminal proceedings. It is said that electronic evidence must be authenticated because of the potential for unauthorized transaction or of the processing of such evidence. However, no provision categorically dealing with the admission of electronic evidence in civil cases and this is still raw issue in Tanzania.

Judge Nyangarika cited the case of Carolyn Parker V James Parker (1954) page 15, where Lord Denning said that;

*“If we ever do everything which have never been done before we shall not get anywhere as the law still stand still whilst the rest of the world goes on and that will be bad for both”*

In addition the Judge explained further that since the print out statements are to be certified and maintained by the bank in a written form two (2) conditions must be met:-

1. The print out statement must be with a certificate written at the foot of that print out that it is a true copy of such entry and that the entry is contained in one of the ordinary books of the bank and was made in the ordinary course of business and that such a book is still in the custody of the bank.
2. A certificate that the print out statements were obtained by electronic process which itself ensured the accuracy of the print outs, dated and subscribed or signed by the Principal Accountant or Manager of the Bank. It was revealed further that, the court of Appeal of Tanzania in the case of Tanzania Cotton Markets Board V Cogecot Cotton Company, SA (1997) TLR 165 (A) it was pointed out that :-

*“The law cannot be and is not ignorant of modern business practices (methods) and must not shut its eyes to the mysteries of computer”*

The court state further that, the issue here is whether the print out statements which are actually electronic documents or records originating from the bankers books are admissible as evidence in court. It was stated further that the provisions of section 78 and 79 of Tanzania Evidence Act (supra) is plain and unambiguous that electronic generated information in the firm of print outs have to be accompanied by:-

1. A certificate to the effect that it is a print out of such an entry by the Accountant or branch manager of the relevant bank.
2. A certificate by a person in charge of a computer system containing a brief discretion of a computer system and particulars of ;
3. The safeguards adopt by the system to ensure that data is entered or that any other operation is performed by an authorized persons.
4. All safeguards adopted to prevent and detected an unauthorized change of data
5. The safeguard available to retrieve data that is lost due to systems failure or any other reasons.
6. The manner in which data is transferred from the system to the removable media like floppies, disc, copies or other electronic magnetic data storage devices.
7. The mode of verification in order to ensure that data had accurate transferred to such reasonable media.
8. The mode of identification of such data storage devices.
9. The safeguard to prevent and detect any tampering with the systems and
10. Any other facts which will vouch for the integrity and accurate of the system.

The court expounded further that, there must be a further certificate from the person in charge of the computer system to the effect that to the best of his knowledge and belief, such computer system, operated properly at the material time when he was provided with all the relevant data and the print out in question represents correctly or is appropriately derived from the relevant data. In addition it was stated that, in this case, no evidence showing that the print out statement originates from the Plaintiff’s books and that the banker’s book was at the time of making of the entry they were in the ordinary books of the Plaintiff’s bank.

Further, there is no proof shown or statement given that the entries were made in the usual and ordinary course of business of the Plaintiff and that are still in the custody or control of the Plaintiff. Also, no proof that the print out statement were examined with the original entries and were found to be correct, as well as certificate of accountant or manager and that of in charge of computer system containing brief description of computer system showing that the statements were not tempered with and were correct in every respect.

It was Held that;

*“The test provided for under section 78 and 79 of Tanzania Evidence Act (supra) have not been met by PW1 so as to admit the print out statement as exhibit in court. The objection is therefore sustained and the prayers to tender print out statements of accounts were refused”.*

**2.7.2 Security for transactions made electronically in Tanzania**.

In this point it is submitted that at this time Tanzania needs a law to provide security for transactions made electronically both locally and internationally. Transaction security in any contract seems to be a barrier to the development of E-commerce; parties are required to be able to use techniques to ensure that the business conducted online is secured. The most reliable method is through CRYPTOGRAPHY and DECYPTION TECHNIQUE. Cryptography uses sophisticated mathematical alogarithms particularly a technology known as Asymmetric cryptography.

The most popular useful method of encryption for general message is key 1271 Cryptography that is encryption and decryption technique involve the use of two keys: public key and private keys both of which are mathematically linked. One key is used for encryption and the other one is used for decryption. Each user has a pair of key of which a private key is kept secrete and public key is open to all. Thus if (X) wants to send a message with (Y’s) public key and send it to (Y); the message can only be decrypted using (Y’s) private key which is a secret and only known to (Y). Thus only (Y) would be able to access the message. However, cryptography may hamper national security as detection of espionage activities by government authority become more difficult.

This is why certain countries such as USA do not allow export of encryption software of key length more than 56 Bits. The above survey of literature has demonstrated that the society in Tanzania is very much far ahead of legal regime in terms of business transactions made by business community. However, no study has been conducted to measure the impact of on-line businesses vis-à-vis the legal regime in Tanzania specifically on the Law of Contract Act Cap 345 R.E. 2002.

This study intended to address this knowledge gap.

**CHAPTER THREE**

**3.0 RESEARCH METHODOLOGY**

**3.1** **Introduction**

This chapter gives an overview of the research design, area of study, sampling technique, data collection instrument, analysis procedure and problem encountered in the study.

**3.2** **Research Design**

Research Design is defined as the basic plan that guides data collection and analysis phases of research project[[109]](#footnote-110). The study applied qualitative method which is concerned with revealing what is happening, seeing new insight and assessing the phenomenon in the new light[[110]](#footnote-111). The approach was explosive because not much was known on the issue and hence the researcher sought to know the country’s position on the paperless contract entered by businessmen daily.

The study was on the impact of ecommerce on the legal regime in Tanzania, a case study of the law of contracts in Tanzania vis-à-vis the online contracts made in Dar-es Salaam Region. A case study is a strategy for doing research which involves investigation of a particular contemporary phenomenon within a real life context using multiple source of evidence[[111]](#footnote-112). The strategy was of a particular interest to the researcher because she wished to gain a rich understanding of context of the research. In addition the researcher elected to apply qualitative method because of the nature of the study which needs logic to get what is real.

**3.3** **Study Area**

The study was carried in Dar-es-Salaam Region which is the business and administrative centre of Tanzania. The selection of this Region was indeed based on the fact that Dar-es-Salaam Region constitutes more than 40 per centum of the GNP of the national income. In addition, the researcher found that it would be easy for her to access some documents and data from different Ministries, Organization and other institution whose headquarters are located in Dar-es-Salaam City.

**3.4** **Study Participants and Selection of Respondents**

The researcher visited key areas in Dar-es-Salaam where she conducted interview with selected office bearers. These includes Central Government specifically the Ministry of Communication and Technology; Ministry of Commerce Trade and Markets, The High Court of Tanzania(Commercial Division), Government Agencies, Academic Institutions and other stakeholders who play important role in making paperless agreement in their day to day business activities.

Essentially, in qualitative research no attempt should be made to randomly select the respondents as it would be impossible or unfeasible[[112]](#footnote-113). In this study snowball sampling technique was employed. This approach is commonly employed in qualitative study and is defined as a technique for finding research subjects through which the researcher can develop increasing set of study of respondents[[113]](#footnote-114). Therefore in this study individual business persons who perform business/contracts online, Ministries, institutions, organizations and courts which take litigations regarding online contracts or transactions which is also known as paperless business conflicts were selected, interviewed and subsequently asked to identify other firms or institutions which conducts paperless contracts or transactions and or affected by online businesses due to the fact that our legal system and laws are still in traditional form which is mainly paper based system. It is worth noting that the nature of the study being qualitative explorative there was no predetermined sample size.

The appropriate number of participants was determined by theoretical saturation of acquired information process which was determined by exhaustion of the resources emergences of the research[[114]](#footnote-115). In this study, the researcher managed to interview some business persons from a popular market styled as “Kariakoo Market” a commercial centre situated at the Central part of Dar-es-Salaam region who own car deports which store imported motor vehicles obtained through online transactions directly or through agents of foreign motor vehicle manufacturers or and sellers.

Also the researcher interviewed private business organizations conducting electronic networking marketing such as quest net, GNLD and Oriflame which are importing healthy products, food supplement products and cosmetics products through online transactions. The respondents were selected on the basis that they could make a point dramatically or because they were important. The researcher intends to use qualitative approach to perform this research.

**3.5** **Data Collection Instruments**

This study used the researcher as a primary instrument in data collection. The role of a researcher as the primary data collection instrument necessitated the identification of the personal values assumption and biased at the onset of the study. The researcher used qualitative data collection method namely; interviews, participatory observation and documentary evidence as the main sources of data collection. Regarding the primary data collection, the study largely applied interview and participatory observation methods.

**3.6** **Data Collection Process**

Data collection process involved face to face interview using questions prepared by the researcher. In order to control line of questioning repeated interviews was conducted, although certain businesses were inevitable in this study every effort was made to ensure objectivity. Essentially probing questions in the data collection processes focused on proving the research problems and objectives. The main reason for so doing was to find out that what was happening and sought new insights into research problem[[115]](#footnote-116).

**3.7** **Data Analysis**

In analyzing the data collected in the study an investigative approach has been applied. The researcher tried to evaluate the sense of the phenomenon of the study by contrasting replicating and classifying the stake holders (the communication and Trade and Commerce Ministries) events characteristics and behavior.

On the other hand the study put a big effort to ensure that enough information about the online contracts and paper contracted is obtained during the Data analysis. The data were organized chronologically and reviewed repeatedly. External validity was ensured by providing rich detailed description so that anyone interested will have solid framework for comparison.

**3.8** **Reporting the Findings**

In this study the results have been presented in a descriptive and narrative form. Narrative text is the most frequent form of display for qualitative data[[116]](#footnote-117). The researcher adopted the foregoing observation and therefore the result is presented in a descriptive narrative form.

**CHAPTER FOUR**

**4.0 FINDINGS, ANALYSIS AND INTERPRETATION**

**4.1 Introduction**

This chapter presents the findings, analysis and interpretation of the finding in respect of the interview conducted by the researcher with the stakeholders of paperless contracts and or ICT in Dar-es-Salaam Region. The overall objective of the study was to measure the impact of online businesses vis-à-vis the legal regime in Tanzania specifically on the Law of Contract Act[[117]](#footnote-118).

The specific objectives of the study are to identify the problems that surface the online contracts made in Tanzania which contradicts the provisions of the in place legislation. In addition the study looked at other laws which are affected by the online contracts made between the public, private and international institution in Tanzania including Investment law, Land laws, Sale of goods law and Telecommunications law.

One of the areas which are affected by the use of e-commerce is the law governing contracts. In Tanzania the law governing contracts applies postal rules for the communication and revocation of offer and acceptance as lay down in the case of *Adams v Lindsel*[[118]](#footnote-119). The general position of common law which is applicable in Tanzania is that communication by post is effected on the date the letter is posted in due course.

The study has revealed that there is no legal basis for electronic contracts in Tanzania. According to the Respondents the major problems are the ascertainment of e-contract terms and the other party in the contract with the focus to consent i.e. consensus ad idem requirements and capacity to contract and other formalities on e-contract are not provided under the law of contract of Tanzania.

The respondents expounded further that the existing laws in Tanzania do not consider cyber contracts and as such there is no specific legislation to govern electronic transaction; makes it difficult to respond sufficiently to technological changes[[119]](#footnote-120). It was stated further that e-commerce involves e-contracts and the business community in Tanzania enters into contractual arrangement with external world via websites or e-mail in which case electronic environment is not suitable in terms of laws and technology. The respondents observed further that the requirement of consent i.e. consensus ad idem in the Law of Contract of Tanzania has become a challenge in electronic contract because some e-agents are involved to contract. There has been a challenge and a question has been raised as to whether e-agent can amount to consent of the other party to the contract.

According to Nangela[[120]](#footnote-121), E-agents are not included in the definition of laws in Tanzania to mean a person and hence a problem. The respondents state further that there is mismatch between the existing regulatory frameworks on one hand and cyber contracts specifically on the issue of contract terms and consensus ad idem on the other hand. It was stated further that the existing laws favors a traditional way of contracting i.e. paper based contracts.

As regards laws that insist on enforceability of contract in writing the Respondents mentioned such laws as the Law of Contract Act (Cap 345 R.E. 2002), The Sale of Goods Act (Cap 214 R.E 2002), The Land Act, 1999 (Cap 113 R.E.2002), Companies Act No. 12 of 2002, The Land Registration Act (Cap 334 R.E 2002) and Registration of Documents Act (Cap 117 R.E.2002).

The study revealed that under the Sale of Goods Act signatures and writing requirements are generally understood as evidence that signatory approves the document contents otherwise the document is rendered irrelevant; for example section 9 of the Sale of Goods Act stipulates that a contract for sale of any goods shall not be enforceable by action unless the buyer accepts parts of goods so sold and actually receives the goods or gives something in earnest to bind the contractor in part payment or unless some note or memorandum in writing and signature to this statute does not explain the matter in cyber world. The study found that it will be impossible to transact online under such a situation.

**4.2** **The Overview of the Laws Governing Contracts Made in Tanzania**

A contract is a promise or a set of promises the breach of which the law gives a remedy or the performance of which the law in some way recognizes as a duty[[121]](#footnote-122). In Tanzania the definition of contract is given under section 2(h)[[122]](#footnote-123) which states that a contract is an agreement enforceable by law. The law states further that when a person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted becomes a promise.

**4.3** **E-Commerce and the Real Estate Laws in Tanzania**

The study has revealed that there are some provisions of the Land Act of Tanzania which do not allow dealing in land electronically such as disposition, transfer or conveyance. Section 25 of Land Act stipulates for the procedure for application for right of occupancy which states that an application for a right of occupancy shall be submitted on a prescribed form and accompanied by a photograph signed by the applicant or duly authorized representative or agent of the applicant. Section 27 of the same law provides that the commission for land shall make an offer in writing and shall be in prescribed form and signed by the commissioner or an authorized officer and shall bear an official stamp and be delivered or sent by registered mail to the applicant or his duly representative or agent.

The study discovered that acceptance of offer of right of occupancy should be in writing and shall be in a prescribed form and must be signed by the applicant or his duly authorized representative or agent. It was revealed further that a document which does not comply with the provisions given above shall have no effect whatsoever as an acceptance in writing. The study revealed further that any instrument/document effecting any disposition shall consist of signature effected by the parties signing it or affixing a thumbprint or other mark which shall evidence his personal acceptance of that instrument.

As regard to Land Registration Act[[123]](#footnote-124) the study found that no disposition i.e. sale or conveyance of land can be registered unless there is furnished to the registrar a certificate in writing by the Commissioner for Land signifying his approval to the disposition. It was stated further that section 92 of the same law describes about the manner of execution of deed to the effect that a deed shall be deemed to have been executed if signed and delivered by a natural person and sealed with common seal of a corporation and delivered. As regard attestation it is stated that a deed shall be deemed to be attested if when signed by a natural person either as a party thereto or on behalf of a corporation not having a common seal it is attested by an authorized witness[[124]](#footnote-125).

**4.4** **E-Commerce Under Company Law**

The study revealed that company law[[125]](#footnote-126) of Tanzania is another area impacted by the development of technology especially e-commerce. Generally, all companies intending to do business are required under companies’ laws to register their names. For example section 6 of the Act provides that every firm or person required by company Act to be registered shall send by post or deliver to the registrar at the registrar office a statement in writing in the prescribed form containing the business name, the general nature of business and principal place of business.

Section 7 of the same law provides for the requirement of signature on the statement to be signed by persons registering such company. The respondents in this study revealed that these provisions do not give room for e-commerce due to requirement of writing, signature and use of post as mode of delivery of a statement to the Registrar. Most Respondent suggested that the foregoing provisions need to be amended to accommodate the development of ICT specifically the use of e-commerce.

**4**.**5 Comments from Business Community**

The study revealed that the business communities of Tanzania feel that they are very far ahead of the legal regime of Tanzania. The reason behind this assortment is that in Tanzania many business persons do business online but there is no law that can guide them or secure them in case of mistrust between parties to ecommerce contracts.

The study revealed that the technology advancement has changed the way communication in business is done. The growth has been positively utilized by mobile phone companies; for example within the period of 10 years mobile phone companies such as TIGO, VODACOM, AIRTEL and ZANTEL have introduced electronic fund transfer as a simplified banking system. The study found out that the mobile communication sector is growing very fast in Tanzania. It was stated that by 2010 Tanzania had some 20 million mobile phone subscribers and it is believed that the growth in mobile phone users is sky rocketing and is expected to grow to 36.6 million by 2015. The business Community of Tanzania observed that lack of fully operational legal and Regulatory framework jeopardize the security of customers.

As regard to on-line contract the study revealed that Tanzania laws do not cover on-line contracts. It was stated that Law of Contract Act of Tanzania (supra) does not provide a room for an agreement concluded between parties either partly or whole by means of data messages. This law recognizes written contracts and dully signed or authenticated before a witness. The business community lamented on the legality of contracts made between local business person and their counterpart in DUBAI or CHINA which is done regularly and or daily. It was revealed that it is known that a website operates automatically according to a set of instructions and without supervision.

In this situation acceptance of an offer does not clearly specifies the situation. The respondent urged the government to look upon other jurisdictions (other countries) where such problems have been well addressed. They cited an example of South Africa under Electronic Communications and Transactions Act No. 25 of 2002 (ECTA) which lays foundations to enable e-mail contracts. It provides that a data message must be regarded as having been received by the addressee that is when the complete data message enters information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee.

**4.6** **Efforts Made so Far by the Government of Tanzania and Other Public Institutions against the Pressure Exerted by Online Transactions**

The study revealed that online business specifically the mobile Banking, and transaction made through mobile phones are regulated by Tanzania Communications Regulatory Act 2010 but in reality the legislation does not cover all this. It was stated further that any problem concerning fraud on mobile phones could be solved by Tanzania Communications Regulatory Authority Act (TCRA). One wonders whether the same can act effectively to deal with hackers and other cyber crimes. It was revealed further that telephone companies cannot be considered as Banks or Financial Institutions covered under Bank and Financial Institution Acts (Cap 342 R.E. 2002).

The study revealed that M- banking technology can be a new platform for money laundering and terrorism related activities in Tanzania. Electronic money payment initiatives are in many cases based on the electronic commerce concept. This legal gap provides loopholes for offenders to commit offences. Officials from the Ministry of Telecommunication and TCRA observed that incase of online fraud TCRA has no authority to deal with the offender but only with the Internet Protocol (IP) provider. These providers are companies like Vodacom, Tigo, Sasatel, Uhuru one and the likes. They observed further that there is a need to enact law which can deal with the offender on the spot.

The Attorney General Chamber observed that in the pipeline is initiative to prepare three (3) draft bills which would be tabled before the cabinet and later on forwarded to the parliament for approval. They mentioned the first bills as ELECTRONIC TRANSACTION BILL which is believed to cover or fill all gaps found in the in place Law of Contract of Tanzania. The second bill is Computer and Cyber Crimes Bill which will deal with crimes committed on line. It is expected that the three draft Bills will be presented in the parliament before the end of the year 2014.

The study revealed that the government of Tanzania has amended Evidence Act[[126]](#footnote-127). The amendment was effected through Miscellaneous Amendment Act No.15 of 2007. Before the amendments the principles under the law of evidence assumed existence of paper based records and documents and assumed that these documents and records should bear signatures for legal recognition. On the documentary evidence the law of evidence demanded production of the best evidence which is the original documents or record if the original is proved to have been lost or destroyed; where court allowed parties to adduce secondary evidence which is a copy of the original document or records.

It is noted that under electronic transactions particularly through computer technology business persons and consumers can use computer to create, transmit and restore information in electronic form. The study revealed that this scenario raised a number of challenges for principle of evidence particularly those governing admissibility of documentary evidence and authentication.

The study revealed that under the amendment on the Evidence Act of Tanzania, it allows the admissibility of electronic evidence. Section 76[[127]](#footnote-128) of the Evidence Act was amended by adding a definition after the phrase Bankers book to appear as follows; “ Bankers books include ledgers, cash books account books and any other records used in the ordinary business of the bank or financial institution, whether the records are in written form or DATA MESSAGE or kept information systems including but not limited to computers and storage devices, magnetic tape microfilm, video or computer display screen or any other form of mechanism”.

It was revealed that the new amendment law has brought fundamental changes as far as legal status and can be admissible as evidence before courts. All in all the Respondent stated that the amended Evidence Act has not really cured the problem of legal certainty and admissibility of electronic evidence because the law mainly based on electronic evidence from banking transactions under criminal proceedings.

The study found that it might be difficult to apply such evidence where the only available evidence to be applied in cases related to civil and other related cases or proceedings is electronic evidence(e-evidence). The law should recognize the admissibility of electronic evidence adduced from any computer or information system and other related devices be it transaction, communication or cyber crimes rather than basing on financial transaction only. Officials from Commercial Courts of Tanzania commented that there is no specific legislation that covers e-commerce in Tanzania.

The study revealed that in absence of such law consumers will be in dilemma. It was pointed out that it is vital for Tanzania to have sufficient and comprehensive legal framework on information and data protection laws. It was revealed that part VI of Electronic and Postal Communication Act 2020 provides for penalties for offences relating to electronic communication as opposed to electronic commerce. It was explained that the offence of theft is defined under section 258 of Tanzania Penal Code[[128]](#footnote-129) In case of information two objection lie to relevancy of charges of theft that is taking and depriving the owner of the property of his ownership unless the information is held on some storage device that is also removed it is difficult to see how requirement of TAKING and CARRYING AWAY or requirement of depriving the owner of the property can be satisfied.

It was pointed out that without having a cyber law in place criminals will end up being acquitted because under Article 13(6) of the Constitution of the United Republic of Tanzania; it is provided that no person shall be punished for any act which at the time of its commission was not an offence under the law and no penalty shall be imposed which is heavier than the penalty in force at the time of the commission of the offence.

Officials from Non governmental Organization (styled NGO’s revealed that they have received complaints from individual business persons especially those dealing with importation of motor vehicles and motor vehicles accessories in that they have lost a lot of money on making transactions online. They stated further that exporters of motor vehicle and accessories take advantage of absence of law covering online businesses in Tanzania. The study revealed that most reported cases indicated that exporters defaulted in delivering cargos to sent money to exporters through transactions made online. One finds that there is a breach of contract on the part of exporters but importers fail to sue the exporters due to gaps found in the law of contracts of Tanzania.

**CHAPTER FIVE**

**5.0 CONCLUSION AND RECOMMENDATIONS**

**5.1 Introduction**

This chapter presents the conclusion as well as recommendations emanating from the findings of the study. The intention of the study was to identify the impact of e-commerce on the legal regime in Tanzania, basing on the contracts made online vis-a-vis paper based contracts in Dar-es-Salaam Region. The chapter starts with the conclusion for the fore going objectives followed by recommendation and finally an analysis for areas for further study.

**5.2 Conclusion**

**5.2.1** **E-commerce Transactions in Tanzania**

Findings of the study reveal that there are only transactions made in Dar-es-Salaam by business community involving the government through G2G, P2G, and P2P. Technology advancement managed to change the way people live, communicate, work, learn, do research, buy and sell, receive and send money and how they entertain themselves. For example, it has been observed that the mobile communication sector is growing very fast in Tanzania.

Researchers found that by 2010 Tanzania had more than 20 million mobile phone subscribers and it is believed that the growth in mobile phone users is skyrocketing and it is expected to grow to 36.6 million by the year 2015; however the study identified legal challenge coped with adoption of electronic commerce namely the on-line contracts, legality of m-banking, money laundering, consumer protection, cyber crime and theft information.

The study revealed that Tanzanian laws do not cover online contracts. The Law of Contract Act Cap 345 R.E 2002 does not provide a room for an agreement concluded between parties, either partly or whole by means of data messages. It was found further that the in place law of contract in Tanzania recognizes written contracts and duly signed or authenticated before a witness. The study came across some laws which are parallel or work hand in hand with the law of contract in Tanzania. These include the Land Act Cap 113 R.E 2002, The Land Registration Act (R.E 2002, Cap 334), and The Companies Act No. 12 of 2002.

Under the Land Act and Land Registration Act any disposition or sale of land which is effected contextually is effected through prescribed manner and this must be finalized through issuance of certificate in writing and this must be signed by the Commissioner for Land. It was stated that many provisions of laws in Tanzania insist on physical or off-line transactions that are geared towards the use of paper based method, the requirement of the presence of physical persons writing and use of manuscripts signatures (not e-signatures) for authentication purposes.

For example, section 92 of the Land Registration Act CAP 334 R.E 2002, States that, a deed shall be deemed to have been executed if signed and delivered by natural person and if sealed with common seal of a cooperation and delivered. The study has revealed that the Government has played a very small role against the pressure exerted by the adoption of electronic commerce. As commented by Attorney General Office and the Ministry of Science and Communication, The Government is now preparing three bills, where only two of them were revealed to the researcher namely;

The electronic transaction bill and cyber crime bill which would be billed in the parliament probably by the end of December 2014. It has been pointed out that enactment of new law should go parallel with amendment of the in place laws. The study cautioned on the challenge that exists in part IV of Electronic and Postal Communications Act 2010 which provides for penalties on offences relating to electronic communication as opposed to the definition of theft under chapter of the laws of Tanzania- the Penal Code.

The Penal Code of Tanzania provides for two elements of theft under section 258(1) which states that; In order for a person to be liable for theft namely taking and total deprivation of ownership of the alleged stolen property. Under the Information Technology unless the information is held on some storage device that is also removed by the alleged offender it would be very difficult to prove the element of taking. It is concluded that there is a need to amend the Law of Contract in order to conform to the new technology specifically on the offer and acceptance which should be clearly defined. The issue of the presence of written document and signatures also is thoroughly observed. This legal gap provides loopholes for offenders to commit offences and also put the users in risk.

**5.3 Recommendations**

The development of digital technology has brought legal implications on contracts, offers, invitation to treaty and advertisement. Under cyber space it is possible to observe on-line advertisement where goods and services can be promoted and sold eventually on-line. On line business persons need to observe the five distinctions between the offer and invitation to treaty. It has been stated that there has been an increase in online fraud and other related cyber crimes. In order to reduce and probably get rid of these, there is a need to have a full operational legal and regulatory frame work which will address e-commerce issues, and set penalties for those who will be found going against such laws. Tanzania has a legal gap which needs to be filled as immediately as possible. It is recommended that, it is vital for Tanzania to have sufficient and compressive legal framework on information and data protection laws.

The study has revealed that there is a very wide gap in the law of evidence of Tanzania. Although the government through Miscellaneous Amendment Act no. 15 of 2007 Amended the evidence act, the findings is that; the amendment is insufficient because the amendment does not cure the problem of legal certainty on admissibility of electronic evidence from electronic banking transactions under criminal proceedings. The study found that it might be very difficult to apply such evidence where the only available evidence to be applied in cases related to civil and other related proceedings is electronic evidence.

It is recommended that, the law should recognize the admissibility of electronic evidence in whole save as found in any computer or information system and other related devices. The study found that the business community is doing business very blindly. Most of the business persons are conducting businesses such as importing goods like motor vehicles, heavy industry machines and other man made goods on line but they are really not secured as the law is not certain on on-line businesses. Some business persons failed even to answer some questions posed to them in regarding of security against the transactions made on-line.

The study recommends that the Government should take initiatives to educate people through training workshops, etc on the challenges, risks and benefits of on-line transactions. Generally, absence of the legal framework in Tanzania is likely to impede the growth of e-commerce due to lack of confidence amongst the people who would wish to conclude various transactions on electronic form.

The study has revealed that Tanzania has many outdated laws which provide for mandatory requirement of manuscript signatures. It is recommended that there is a need to expand the definition of the term “writing” and current legislation in Tanzania to include digital documents and electronic transactions in general. The study has revealed that there is a challenge for Tanzania on how to maintain a public key infrastructure and verifying or certifying authorities as a way of providing confidence against tempering keys and electronic signature in general. It is recommended that at initially the government should put it clear that certification authority would be under its supervision and not private sector.

We have gathered from the study that e-commerce has been growing at a very fast rate in the world starting from developed countries to the developing countries, the East African Community (EAC) member states inclusive. Transactions under cyber space are making geographical distance to cease thus creating jurisdiction problems.

This raises important legal issues for East African countries that lack effective legal framework to regulate transactions on cyber space. As it stands to date, of the five (5) countries which establish EAC only three(3) of them that is; Kenya, Uganda and Rwanda have established cyber law in their legal framework.

In the light of the foregoing, the study recommends all member state of EAC to ensure that each country has established an effective legal framework that accommodates on-line transactions.

In addition, the study recommends that the East African Member states should effect

recommendation made by the East African Task Force on Cyber laws of 2008 which directed all East African community member states to reform national laws to facilitate electronic commerce; to facilitate the use of data security mechanisms; to deter conduct designed to undermine the confidentiality, integrity and availability of information and communication technologies; to protect consumers in an online environment, and to protect individual privacy.

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44. E-contract is currently one of the factors that influence e-commerce all over the world, a person in Tanzania can easily order a vehicle from Japan and effect payment without seeing the other party in person, exchange of emails creates binding agreements, booking a conference room in London via email by a person in Kenya amounts to a legal agreement. [↑](#footnote-ref-45)
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46. A standard form contract (sometimes referred to as an adhesion contract or boilerplate contract) is a contract between two parties that does not allow for negotiation, i.e. take it or leave it. It is often a contract that is entered into between unequal bargaining partners, such as when an individual customer is given a contract by the salesperson of a multinational corporation. The customer is in no position to renegotiate the standard terms of the contract and the company's representative usually does not have the authority to do so. While adhesions contracts, in and of them, are not illegal per se, there exists a very real possibility for unconsconability. Standard form contracting reduces transaction costs substantially by precluding the need for buyers and sellers of goods and services to negotiate the many details of a sale contract each time the product is sold. On the other hand, there is the potential for inefficient, and even unjust, terms to be accepted by signatories to these contracts. Such terms might be seen as unjust if they allow the seller to avoid all liability or unilaterally modify terms or terminate the contract. Unconscionability (also known as unconscientiously dealings) is a term used in contract to describe a defence against the enforcement of a contract based on the presence of terms that are excessively unfair to one party. Typically, such a contract is held to be unenforceable because the consideration offered is lacking or is so obviously inadequate that to enforce the contract would be unfair to the party seeking to escape the contract. [↑](#footnote-ref-47)
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