LEGAL AND EVIDENTIAL VALIDITY TO ELECTRONIC TRANSACTIONS IN COMMERCE AND FORMATION OF CONTRACT: TANZANIA PERSPECTIVE

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2013

CERTIFICATION

The undersigned certifies that he has read and hereby recommends for acceptance for examination a dissertation entitled "**Legal and Evidential Validity to Electronic Transactions in Commerce and Formation of Contract: Tanzania Perspective**", in partial fulfillment for the award of Masters of Laws Degree of the Open University of Tanzania.

.....

Prof. Bob Robert Clark

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Date

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DECLARATION

I, **Kassim Mmbaga Nyangarika**, declare that this Dissertation is my own original work and that it has not been presented and will not be presented to any other University for similar or any other degree award.

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Signature

DEDICATION

This Dissertation is dedicated to my family especially my wife, Sajira Juma Mmbaga for her support and encouragement, my supervisor, Professor Bob Robert Clark, for guidance throughout the research period and I also dedicate this work to my colleagues for advices as well as the commercial court staffs particularly my personal secretary and all librarians for assistance in one way or the other in the completion of this study.

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ABSTRACT

The internet is now an open network in e-transactions but in turn has made all stake holders in this field including courts to have a new outlook with e-contract and e-evidence. When a dispute arises on admissibility and validity of evidence in courts at this electronic age in respect of a business, be it small or big, done through internet by way of e-transactions, rules of e-transactions must be in place. The introduction of the new electronic technology has resulted into intra-jurisdiction issue(s), but has left Tanzania Laws behind.

International businesses through electronic technologies affect also national laws and dispute resolution mechanism. This study will try to show how technological advancement had an impact in our existing laws especially in deciding admissibility and validity of e-contract and e-evidence in courts after changes have been made in our laws so as to incorporate e- evidence in dissolving commercial disputes.

The research looks further on court approaches used in some of the cases in Tanzania which recognized and which refused electronic transactions before and after enactment of new rules or amendments of the law. In the process, the paper reveals colonial and post colonial laws together with guidance from other jurisdiction and international instruments used in dealing with digital evidence in order to go hand in hand with technology development.

Chapter one is introductory remarks which briefly deals with background of the problem, scope and significance of this study, research objectives and questions, hypotheses and research methodology. Chapter one also provides a literature review

from selected writers on the subject. Chapter two gives a comparison analysis of contract law in UK and Tanzania and recognition of digital evidence. Chapter three analyses the liability and types of paper based and digital contacts. The study in this chapter revisits our law of evidence and analyses concepts in traditional contracts as well as electronic contracts based on the approaches used by courts in admitting or rejecting digital evidence. The chapter also reveals legal implication of digital transactions in so far as courts are concerned and proposes approaches to the problems within the wider concept in the international conventions on trade.

Chapter four gives a brief picture of commercial contract in international and national level. This chapter also gives some thoughts on the importance of UNCITRAL Model Law especially on relevancy of CISG in the field of e-commerce. Further, this chapter discusses briefly on limitation and various approaches by courts in admissibility and validity of e-evidence and e-contract in Tanzania. Furthermore, the chapter reveals and analyses inconsistencies in approaches by our courts and suggests a comprehensive taxonomy on admissibility of digital evidence as used in other jurisdictions and principles involved in international instruments. Lastly, chapter four discusses a universal accepted classification on admissibility of digital evidence based in this study.

Chapter five shows the findings, recommendations and conclusion of the study as well as brief analysis of cross cases findings, issue of legislations challenges, intra-jurisdiction issues, policy matters and methodology of this research. Lastly, the chapter presents most comprehensive studies on the subject currently in vogue in other jurisdictions on digital transactions and future study to be done.

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The Bill of Exchange Act, 1952

The Consumer Credit Act, 1974 of England

The Electronic Funds Transfer Act, 1978 of USA

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

The Electronic Transaction Act 2000 and Regulations –the Information Technology (Miscellaneous Provisions) Act of 1998 of Mauritius

The Law of Property Act, 1925

The Unfair Contract Terms Act, 1977 of England

US Federal Rules of Evidence

INTERNATIONAL INSTRUMENTS

UNCITRALL Model Law on Electronic Commerce

UNCITRAL Model Law on Electronic Signature

UNCITRAL United Nations Commission for International Trade Law

United Nations Convention on Contract for International Sales of Goods

ABBREVIATIONS

ALL ER	:	All England Law Report
ATMs	:	Automated Tellers Machines
CA	:	Court of Appeal
CAP	:	Chapter
CISG	:	The United Nations Convention on Contracts for International Sales of goods
EAC	:	East Africa Community
EA	:	East Africa
EALR	:	East Africa Law Report
EACA	:	East Africa Court of Appeal
ED	:	Edition
EPOCA	:	Electronic and Postal Communications Act, 2010
EDI	:	Electronic Data Interchange
Et al	:	et alia (and others)
HOL	:	House of Lords
QBD	:	Queens Bench Division
HC	:	High Court
ICT	:	Information Communication Technology
Ibid	:	as referred above or before
TCRA	:	Tanzania Communication Regulatory Authority
JALA	:	Judicature and Application of Laws Act
LLB	:	Legum Baccalaureu (Bachelor of Laws)
LLM	:	Legum Master (Master of Laws)

LLM (IT&T)	:	Masters of Law in Information Technology and Telecommunications Law
TLR	:	Tanzania Law Report
Op. cit	:	Opera citato (as cited earlier)
QBD	:	Queens Bench Division
SADC	:	The Southern African Development Community
TLR	:	Tanzania Law Report
UK	:	United Kingdom
UNICITRAL	:	United Nations Commission for International Trade Law
MLEC	:	The Model Law on Electronic Commerce
MLES	:	The Model Law on Electronic Signature
USA	:	United States of America
WWW	:	World Wide Website

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the Problem

Almost every country in the world today is connected to an internet but there are challenges in making firm legislations for dealing with e- evidence , e-contract and other e-transactions especially when a dispute find its way to the courts. Even among those countries which do, still, conflicts and inconsistencies in the laws or rules themselves make it difficult or sometimes impossible to have such e-evidence or e-transactions admitted in courts. The use of electronic technology has become an issue which require an urgent attention of all nations as it applies all over the world. Despite some changes made in the existing laws, still there are some challenges which have to be addressed.

The study tries to see how best the current laws can be used or reviewed or changed to suit electronic environment in Tanzania in civil cases preference in commercial litigations to make electronic evidence and cyber contracts admissible and reliable evidence in courts .

1.2 Statements to the Problem

Some partial changes have been made in our law of evidence so as to allow admission and validity of cyber evidence and other digital evidence but critics have argues the changes made so far are restrictive and only applies to criminal cases and therefore do not apply in civil as well as commercial disputes. This study tries to analyse the truth of this proposition both in the existing laws, case laws and looks for the way forward.

1.3 Literature Review

Globalization on the use of e-contract or e-transactions and e-commerce or e-trade or other digital transactions in any part of the world will always have an impact in the existing laws and legal institutions of any given country. Technological innovation and development from any party of the world will have either a positive or negative impact on an existing law and institution of any nation whether it like or not.

Man has been so innovative in so many things that even the digital age is more complex than it used to be before and this reminds us the ongoing rival disputes in the famous world case of Apple versus Samsung [1] where innovation of highly advanced electronic technologies patents in computers is being vigorously contested.

There is a plethora of materials regarding e-contract, e-evidence, e-transactions and their impact in Tanzania. This study focuses much on the current status where some laws has been amended or reviewed and some new rules has been put in place so as to move with the technological advancement especially in e- contract, e-evidence and other e-transactions .

One of our famous and prominent writers who have written a lot in this area and especially on the status of cyber law and e-evidence in Tanzania is Adam J. Mambi[2] . In some of his works, this writer was of the view that the current laws have been

[1]Apple INC and Apple PTY Limited(CAN 002 510 054) versus Samsung Electronics Company Limited and Samsung Electronics Australia PTY Limited(CAN 002 915 648)[2011]FCA 1164

[2] Mambi, A (2006) " The status of cyber law in Tanzania", cyber Law Workshop for EAC, Kampala and A Decade of the Establishment of the Commercial Court Division: The role of the court on the legal changes towards the use of ICT[Electronic Evidence in the Administration of Justice in Tanzania] by Adam J. Mambi and next page of the preface to ICT Law Book, A Source Book for Information and Communication Technologies and Cyber Law, Adam J. Mambi, Mkuki and Nyota Publishers, Dar es Salaam, 2010.

designed to suit paper based transactions and therefore lacks regulatory steps to secure e-transactions especially in e-contract and e-commerce. However, our focus in this study is more on the current laws after some effort having been made to change or review or make some few new guiding rules to guide and facilitate e-transactions environments, an area which Mambi has not covered in his works.

Dr. Eve Hawa Sinare[3], and Andrew Mollel[4] , in their works, have dealt more with the problems of proof of e-transactions within the context of the existing legal framework in Tanzania and made suggestions so that our laws can go hand in hand with the new technology within the changing technology in the world wide market economy. An American writer, John S. Foster[5] observed that the lawfulness of electronic record which is either stored or exchanged can only have a legal backing if it passes the following tests, namely: authenticity, integrity, non-repudiation, writing, confidentiality and signature. In his book, Foster appears not to have put their hands more on statutes, while in this paper, we shall look at some of the statutes and also analyse some decided cases which tried to put life in our laws to remedy the situation of electronic technological environment in Tanzania.

I had an advantage of reading the studies made by Dr. Jabiri Kuwe Bakari[6] and

[3] "Electronic Evidence and its admissibility in Tanzania courts", Published, May, 2008, by Dr. Eve Hawa Sinare and Tanzania: " Admissibility of Electronic Evidence", 10th October,2005 by Dr. Eve Hawa Sinare

[4]The Legal and Regulatory Framework for ICT in Developing Countries and the Law of Evidence Act in Tanzania by Andrew Mollel.

[5]John S. Foster, ESQ, 1997-2000, "Electronic Contract and Digital Signatures: Liability and Legal issues," Atlanta.

[6] Legal Challenges Brought by Development of ICT in Tanzania, Abdallah Ally (Bsc. Education, LLB) Tutorial Assistant and LLM student, Economic Law, and Dr. Jabiri Kuwe Bakari (Sc. Computer Sc, Msc. Eng.)Data Communication, Ph.D) Lecture and Director, Institute of Educational Technology, The Open University of Tanzania

Abdallah Ally[7] on "legal challenges brought by the development of ICT in Tanzania" where they have touched the issues of formation of paper based contract and e-contract, cyber crimes and ICT risk management. However, this study will only deal with what is on the ground now in so far as the existing legal framework is concerned and the current changes made in order to allow digital environment, an area, which has not been specifically touched by the two authors.

Daudi Mwita Nyamala[8], has done an extensive studies on electronic contracts. He had reviewed various concepts both on paper based contracts and contracts based on cyber laws so widely and thoroughly. He also went ahead at lengthy regarding the application of e-contract, e-commerce and e-business. Thereafter he came to the conclusion that there is no specific law which governs cyber contract in Tanzania as the existing law gives only a general guidance. As such, he was of the view that courts may, if they wish, extend and develop some principles where necessary and apply them to fill up the gaps in our legal framework environment.

This study, however, focus more on the changes made so far in our laws and some decisions made by our courts in order to find out the best approach and best practice to the problem.Ronald J. Allen, Tim Fry, Jossica Notebaert and Jeff Van Dam, Boston University International Law Journal[9] in their work, suggests a new legal

[7]See supra note no. 6.

[8]Electronic Contract in Tanzania: An Appraisal of the Legal Framework, November,, 2011, From Selected Works of Daudi Mwita Nyamala, St Augustine University of Tanzania, SAUT, Faculty of Law, LLM Program.

[9]Reforming the law of evidence of Tanzania(part one): The social and Legal Challenges, North Western University law school in Boston University International Law Journal, of September, 14, 2012.

framework of governing the use of e-evidence and e-transactions in Tanzania. This study looks at the relevancy of these suggestions in the Tanzania perspective.

1.4 Research Objectives

Some studies conducted in this area have tried to show that there have been very little efforts in dealing with the problem of e-transactions and cyber crimes in our current legal system. This research will try to show that admissibility and validity of e-contract and e-evidence or e-record or other e-transactions does not always proceed along a simple linear path. In fact, it seldom does. It has a lot of challenges and does not necessarily depend on changing of the existing laws alone because the law will keep on changing every time with prevailing environments and technological development.

The study shows that the application of new technologies depends more on the attitude of judicial officers in dealing with new innovations. The question here does not depend solely on changing the laws so as to accommodate digital evidence but depends more how the court utilizes new technological in due course.This research uses case study based approach to show that, globally, the impact of technological development cannot be avoided by any nation.

The overall research question is: “Given the current changes or amendment in our laws, is there sufficient understanding of it and a consistence approach in dealing with e-evidence and e-contract and other digital evidence effectively. Further, as to what improvements are needed in our laws now”. In order to answer these questions, we shall focus on two more specific research questions:

i. To what extent are the current changes or amendments of our laws appropriate to the comprehensive consistence approach in the admission and validation of digital transactions in courts?
ii. To what extent can Tanzania borrow or assimilate foreign laws or rules in the admission and validation of digital transactions in courts of law.

1.5 Significance of the Research

In this digital age, all nations in the world use digital contracts and e-transactions to improve and enhance commerce both within and without. The main significance of this research is to study and analyses different approaches used other countries in comparison with our legal framework in developing laws or rules regarding admissibility and validity of e-transactions and digital contracts.

CHAPTER TWO

2.0 A COMPARISON ANALYSIS OF CONTRACT LAW IN UK AND TANZANIA AND RECOGNITION OF DIGITAL EVIDENCE

2.1 A Comparison Analysis of the Law of Contract in United Kingdom and Tanzania

It is rather difficult to give a definite answer as to what is a contract but the question is fundamental important. A contract is an agreement that involves one or more parties giving an undertaking or promise to the other with an intent to be enforced under a given law which clearly defines the rights and obligations of the parties[10]. An agreement which is enforceable by law is a contract[11]. Any valid contract will contain terms which are certain and complete. If the terms of the contract are uncertain or incomplete, the parties cannot be said to have reached an agreement in the eyes of the law[12]. Contract Law is primarily concerned with agreements that involve one party, or each party, giving an understanding or promise to the other.

Contract law governs questions like which agreements are likely to be enforced by law, what kinds of obligations are imposed by the agreement in question and what are the remedies which are available if the obligations are not performed by either party[13]. There is a difference in contract for the sales of goods and providing services

[10] Treitel, G., The law of contract, 10th Edition, at page 8 and the words of Lord Diplock, in the case of Gibson versus Manchester City Council [1979] 1 ALL ER 972[HOL]

[11] Section 2(h) of the Law of Contract Act of Tanzania [cap.345 R.E. 2002]

[12] Section 29 of the Law of contract(cap 345 RE2002) and Osterbay property Ltd. and Another v.Kinondoni Municipal Council and 2 Others and Patrick Rutabanzibwa and 2 others, civil Reference no.4 of 2011 at page 6[CA][unreported]

[13] HG Beale, WD Bishop and MP Furmston, Contract Cases and Materials, Third Edition, Butterworths London, Dublin , Edinburg, 1995

especially in software[14]. Software and information technology has changed the lifestyle of many people in the world. The business environment has now changed tremendously whereof e-commerce in terms of products and services can be transacted electronically via computer networks, internet and other digital devices. Tradition trading by use of paper based or writing contracts has changed and business can now be done through internet or other digital devices.

Before the cyber age, UK and Tanzania used to have rather similar laws of contract which makes sure that people have truly consented to a contract that binds them[15]. Generally, a contract is formed when one person makes an offer, and another person accepts it by communicating assent or performs the terms of the contract. If the terms are certain, the parties are presumed to have intended that the terms bind and are enforceable. A contract is not a contract if there is no consideration[16]. Consideration is something of value to a bargain as a pre condition to enforce a contract[17].

The terms of a contract must show the true intention of the parties and if there is a gap, the courts typically, imply certain terms to fill the gaps and sometimes the courts or legislature may intervene and may impose unfair terms in order to protect customers and employees who have weaker bargaining power.[18] A contract is not a contract if induced by fraud or misrepresentation or mistake and the innocent party may avoid it or claim compensation. Other contracts especially in software are so

[14] Sales of Goods Act, 1979 and Supply of Goods and Sales, Act, 1984 and Sales and Supplies of Goods Act, 1994[England]
[15] Sections 1- 9 of the law of contract of Tanzania [cap 345 RE 2002]
[16] Section 25 of the law of contract of Tanzania [cap 345 RE 2002]
[17] Section 1-3 of the law of contract of Tanzania [cap 345 RE 2002]
[18] English Contract Law-http;//pakilaw.com/lag

complex that they are only governed by some specific rules, be it in common law principles or other software principles and will depend on special rules or other specific statutes.

The existing law of contract in Tanzania resembles that of India as it originated from common law principles before the cyber age. By that time, commentaries from India and common law as well as decisions by competent Indian and English courts were undoubtedly of great value and assistance in our Law of Contract[19]. The only difference was that the laws in Tanzania were and are still in statutes while common law is unwritten and arises from precedents and case law as established by English courts. Its genesis was rooted from the activism of judiciary during the industrial revolution and went on changing upon being influenced by British membership in the European Union, specific statutes, international organizations and technological advancement.

2.2 The History behind the Law of Contract in Tanzania

English Laws of Contract, which were specifically applied in sub- continent of India, was also applied in Tanzania before cyber age**.** English authorities and analysis thereof used to be of great assistance in application of our Laws[20] by then. Thus, India Law of contract Act, 1872 applied in Tanzania before and post independence. After post independence period, some minor changes were made on the existing laws, especially on the names of the Legislations and contract law was changed from Contract Ordinance [cap 433] to Contract Act [cap. 345R.E2002[. The sales of

[19] Law of contract [Cap. 345 RE 2002][Tanzania]

Goods Act, 1931 remained unchanged to date. The Judicature and Application of Law Ordinance, now JALA allowed the principles of common law, doctrine of equity and statutes of General application which were effective in England as on 22nd July, 1920 with minor adjustment to be applied if they suit the circumstances of Tanzania . The impact of JALA to the law of contract is that some concepts, principles or jurisprudence from common law and equity developed in England before 22nd July, 1920 formed part and parcel of our sources of law.

2.3 Recognition of Digital Evidence in Tanzania

Electronic transactions in Tanzania have been growing fast in the recent years and efforts have been made by making changes in some of our laws in recognition[21] of some transactions carried electronically. For example, the law of evidence Act[22] has been amended by the introduction of Electronic Evidence Amendment Act, 2007[23] . Also our Civil Procedure Code has been amended by some new Rules[24] , which allows substituted services to be affected electronically by way of e-mail or facsimile.

Critics has argued that the amendments has resulted into ambiguity as it is not clear whether print out information or even information in the soft copy recorded or stored in a computer or other electronic devices per section 40A of the law of Evidence Act

[21]Electronic Evidence Amendment Act, 2007 found in the Written Laws Miscellaneous Act, 2007 and High
Court of Tanzania [Commercial Division] Procedure Rules [GN. NO 250 of 2012],
[22] Sections 40A, 76 and 78A of Evidence Act No. 6 of 1967[Revised Edition 2002]
[23] Electronic Evidence Amendment Act, 2007 found in the Written Laws Miscellaneous Act, 2007
[24]High Court of Tanzania [Commercial Division] Procedure Rules [GN. NO 250 of 2012],

[which appears to be limited to criminal proceedings and not civil proceedings] before being printed out or in any form are really admissible as evidence in court or not.

Although ICT in Tanzania faces some challenges in cyber crimes, still it has launched the National ICT policy of 2002 which shows that it has vision and mission in enhancing ICT sector. This study tries to examine how far the current existing legal frame work deals with the admissibility and validity of e-evidence, e-record, e-transactions and cyber commercial contracts.

CHAPTER THREE

3.0 LIABILITY AND TYPES OF PAPER BASED AND DIGITAL CONTRACTS

3.1 Liabilities in Paper Based and Digital Contracts

The development from traditional paper based contracts to electronic modes has been a major contribution to most national economies and youths employment in any given country. It is, however, argued that as importance of software increases, risks and complexity of its use also increases. Terms and conditions are cornerstone of every contract depending on the circumstances of each particular transaction. However, these have to be negotiated and concluded before and not after a dispute is referred to court. But, basic tenets of common law principles is that contractual rights can only be performed by those who are parties and if no contract exists, one has to look to non contractual remedies.

A liability in software differs with tangible products or goods and services. For example the defects in design or quality of a product may be seen in a product itself and this may happen during production but quality is a comparative phenomena. In order to establish whether one product is of inferior quality, there must be more than one product for comparison. Therefore, it is obvious that during production, some component of the same kinds might have defector of an inferior quality compared with others.

In software industry, the pages in a Microsoft website which describe the software package is a product but as of now there is a debate going on as to whether a supply of software should be regarded as a species of goods or a form of service. In Lee v.

Giffin[25] the job done by a dentist to make a set of dentures for a patient was held to be a sale because it had come to be a subject matter of sale but if for example, an advocate prepares a contract for his client, that will be deemed to be a service. The issue of goods and service was tested by the court in the case of Robinson v Graves[26] where a contract of an artist who painted a portrait of a client was held to be a service. It is, however, doubted how the two approaches can be taken as compatible, although, the later appears to be a more sound decision in the software context.

Every contract may be in existence in a particular context. For example, there are contracts for sells of goods or products or services to a customers or charterers of ship or employment or exchange of shares or sales or supply of products or services and the like, the list is endless. A contract for sales of goods or services may differ in remedies. Companies' shares, copyrights and patents are not goods.

3.2 Types of Contracts

Nyamala Daudi Mwita in his study[27], classified cyber contract as e-mail based, web based, click wrap, shrink wrap and browse wrap. These types are said to have been developed hand in hand with computing industry in the 1970s in order to replace paper based contract[28]. In e-mails contracts, a sender's server sends a message to the

[25] Lee v. Giffin [1861] I B & S 272
[26] Robinson v Graves[1835]KB 579
[27] Electronic Contract in Tanzania: An Appraisal of the Legal Framework, November,, 2011, From Selected
Works of Daudi Mwita Nyamala, St Augustine University of Tanzania, SAUT, Faculty of Law, LLM Program.
[27] Reforming the law of evidence of Tanzania (part one): The social and Legal Challenges, North Western
[28] Henrich (1995)"Harmonised Global Interchange UNICITRALs Draft Model Law for Electronic Commerce
Data Interchange" 3 web JCL part 1 from http://webvcl.ncl.ac.uk/article 3 htlm m 12/2/1

receiver mail server and in course of communication, electronic mail travels through a number of servers before reaching the recipient[29], and thus, issues like certainty of the terms may arise. Online contracts may limits or excludes essential liabilities or be against statutory rights especially against third parties products in websites or internet. A web based contract is a contract which does not allow negotiations and parties are not in equal bargaining strength as one party is called upon and invited, either, take a contract as it is or leave it[30].

A click wrap is found in internet as part of installation process especially in software packages where an agreement is made through electronic media but allows users to assent on the terms before accepting them[31]. In **Pro CD v. Zeidenberg 86 F 3 d 1447(71 K Civ.1996[32],** Zeidenberg bought a CD-Rom created by Pro CD which contained compilation of a telephone directory database. Upon purchase of CD-Rom, Zeidenberg installed software on his computer which created a website offering visitors the information contained on the CD-Rom at a price less than what Pro CD charged for the software.

Prior to purchase of the software or service, Zeidenberg might not have been aware of prohibited use or dissemination of the product or service without consent by Pro CD. But in order to be bound with the terms, the user or purchaser must be put on

[29] Edward, L, et al (1997)-Law and Internet: Regulating Cyber Space, Hart Publishing Oxford at 4 JSC Zestafoni Nikoladze Ferroalloy Plant v. Ronly Holdings Ltd [2004] 1 CLC 1146
[30] Steven v, Fidelity & Casualty Company of New York 58 cal. 2d. 862, 882 no. 10 of 1962 158 C 2D 862
[31] Richard G,(1996) " Computer Software Law and Legislation in United States
[32] Pro C sd v. Zeindenberg 86 F 3 d 1447(71 K Civ.1996
[32] Register. Com, Inc. v. Verio Inc. 356 F. 3d 393(2d Civ. 2004)

notice; otherwise, purchaser may not be bound by the terms[33].

In Register Com, Inc. v. Verio Inc[34], Register Com alleged that Verio has breached the terms of use of its data base but Verio defended that the terms were not binding since as a user could only access the database upon expressing consent to the terms. The court ruled in favour of Register Com. holding that contractual relationship could be formed whether or not users are required to expressly assent prior to use of the product or service if shown that there was similar past dealings between them.

The case of Specht versus Netscape Communications Corporation[35] gave what appears to be more appropriate elaboration of 'wrap license', in that, a click wrap license prevent the user by a massage portrayed on the computer screen that he must click first on an icon whether he assents to the terms or not. Shrink wrap agreement is a kind of a license containing terms and conditions which can only be read and accepted after opening the product by a user or customer. We 'wrap', 'click wrap' and 'browse wrap' terms are used to refer to license agreement in soft ware which is downloaded or used over the internet[36].

One of the grey areas in shrink wrap agreement is that the terms and conditions cannot be read until the customer or user has accepted what has been written after opening the package or product i.e. taking off shrink wrap signifies acceptance of

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[35] Specht versus Netscape Communications Corporation 150 F Supp. 2d 585(S.D.N.Y 2001)306 F 3d 17 (3d. Civ.2002)

[36] http:// en. Wekipedia.org/wiki/shrink-wrap-contract of 29/1/11

terms and conditions[37].The term "shrink wrap agreement" connotes the purchase agreement are attached to shipped products that normally contains the terms and conditions[38].

There is divergence of ideas regarding e-contracts. Thoughts emerged from court on whether customer consents terms in a shrink wrap upon payment and opening of package of products or services. One of these ideas is that at the stage of buying or opening, the customer or user has no knowledge of the terms until he reads them. A lot of factors are considered in determining each individual case and the tests might be that of a reasonable person put in the position of the parties in dispute. In USA, the case of Pro CD v. Zeindenberg[39] held, inter alia, that such contracts are enforceable, but, in Klocck v. Gateway, Inc[40] it was held, inter alia, that such contracts are not enforceable. These two decisions split on the question of consent with the former holding an objective consent while the latter required at least a subjective consent.

In the second school of thought, no comment was made on shrink wrap contract as a whole. But what is obvious is that when you buys software, such software is usually shrink wrap because the terms and conditions are made available only during the

[37] http://www.murdock.edu.au/elaw/issues/v g n 3/kunke/193 text.ntm# shrinks wrap 1020 license % 2 cases

[38]http://www.murdock.edu.au/elaw/issues/v g n 3/kunhttp://www.murdock.edu.au/elaw/issues/v g n 3/kunke/193 text.ntm# shrinks wrap 1020 license % 2 cases T

[39] Pro C sd v. Zeindenberg 86 F 3 d 1447(71 K Civ.1996) and Brower v. Gateway (2000) 246 A D 2d 246, 676 NYS 2D. 56

[40] Klocck versus Gateway, Inc. 104 F. supp. 2d 1332-Dist. Court. D Kansas 2000 & Specht versus Netscape
Communications Corporation 150 F Supp. 2d 585(S.D.N.Y 2001)306 F 3d 17 (3d. Civ.2002)

process of downloading accompanied with an end user license agreement. The recent courts decisions on the subject challenges and sometimes forces soft ware companies and retailers to allow the return of the newly opened software or enable customers to read the terms of license on the website before purchasing and opening the product or using the service[41].

This reminds me the case of Schnabel et.al v. Trilegiant Corp. et. al[42] where Trilegiant offered business programs online on discount of goods and services in exchange of membership fees upon enrolment . Schnabel enrolled himself online but was not on notice of the arbitration clause through the hyperlink before enrolling in the service offered by Trilegiant and an e-mail. In this web space, post transactions occurs when (i) sales offer page appears between check out and confirmation pages of the e-retailer from whom the customer intends to make a purchase, (ii) pop-up window which appears at the top of the confirmation page, and (iii) hyperlink or banners that are included directly on the confirmation page users.

The text states that upon clicking a "yes" button, the purchaser acknowledges that he has read and agreed the terms and conditions of the agreement. By clicking on the terms and conditions, the purchaser will be brought to a page that includes other terms, including the arbitration provision. Each newly enrolled member, will receive e-mail or/and written document with membership terms and conditions following his online enrollment in the service. Trilegiant was sued for unlawful, unfair and

[41] http:// www.legal match. Com. Law. Library/ article/shrin.wrap-agreements.html

[42] Lucy Schnabel, Edward Schnabel and Brian Schnabel, o/b/o, Themselves and al others similar situated v. Trilegiant Corporation Affinion, Inc., 2nd circuit, August Term 2011 Docket No. 11-1311-CV

deception practices. The suit was partly founded, in Electronic Communication Privacy Act. The thorniest issue was whether Schnabel has assented to the arbitration provision. The court, regardless of the law, held that the arbitration provision did not apply as the plaintiff contract with the defendant, though online evolving screen, the exact term were not included, which were to follow by e-mail or imply as addition term.

A browse wrap agreement provides a license on a website and the user of the site is required to give assent to the contract when visiting it. This kind of agreement differs with shrink wrap licenses and click wrap agreement. In Spetcht v.Netscape(supra)[43] the users of the site were required to download free software available on the site by clicking on a specific button labeled "download" but the user can only come upon an invitation to view the full terms of the programs license agreement availed by hyperlink if he scroll down on the page to the next screen. In this case, the plaintiff downloaded the software without seeing the agreement and was later sued for violating privacy and fraud statutes arising from the use of the software. The court ruled that a customer clicking on a download button does not communicate his assent to the contractual terms if the offer did not make clear that clicking on the download button would signify assent to those terms as he was not put on notice of these terms and therefore was not bound.

A browse wrap contract can be formed by use of a web page or a hyperlink or small disclaimer on the page. It can be enforced if the user assent to it but should be on a

[43] Spetcht v.Netscape Communication Corporation 306 F 3d 17(2nd Civ. 2002)

conspicuous place and state that there is an agreement. It must also state where it can be located. The court decides whether a browse wrap agreement would have been enforced on special facts and circumstances of each individual case. Following the decision in Spetcht case (supra)[44] , most lawyers take the view that the icon for the terms of user agreement must be placed on the upper left hand quadrant of the home page and that all visitors have to be channeled through the home page. In Ticket Master Corporation v. Tickets Com. Inc., the terms and conditions were situated at the bottom of the home page in small print but the court held, obiter dicta, that if the facts of the case show that the defendant had knowledge of the terms and impliedly agreed to those terms, then, a suit against such a breach might succeed.

In Hurbert Dell Corporation[45], Illinois Appellate Court ruled that if customers were repeatedly exposed to Dell products over a series of pages at a conspicuous hyperlink, visual effect would put a reasonable person on notice of the terms and conditions of a browse wrap agreement. Therefore, there is no a clear line rule that a given agreement is sufficiently conspicuous. In the premises, meeting of the mind in cyber contract is an intricate issue as some cyber contracts may bind a party although that party is not fully aware of the terms of such a contract due to anonymity of the parties as opposed to the traditional ones.

3.3 Elements of Contracts

The basic elements in a contract are offer and acceptance. An offer is an expression of willingness to enter to a contract on certain terms made with intention that it shall

[44] See supra note no. 43
[45] Hurbert Dell Corporation 359 111 App. 3d 976, 835 N.E 2d 113 (5th Dist. 2005)

become binding[46]. As long as it is accepted by the person to whom it is addressed, it become binding[47]. In order to convert a proposal to a promise, the acceptance must be absolute and unqualified and be expressed in some usual and reasonable manner unless the proposal prescribe a manner in which it is to be accepted and if the acceptance is not made in such a manner, it is not binding.[48] The performance of the conditions or terms of an offer is an acceptance.

However, communication of offer and acceptance on line is as complex as the contract itself. Therefore, issue(s) like blockage, congestion traffic and quality service are some of the grey areas for further research. Rules of offer and acceptance may be familiar but their application, especially in communication by electronic is often difficult. A response, for example, which introduces new term or qualifies any of the terms of offer, is not an acceptance but a counter offer which rejects the original offer. Such a counter offer will only become binding if accepted.

The difficulties arise on communications of offer and acceptance especially on e-communications systems because for it to become effective it depends on a number of factors. There is divergence of ideas on the time at which, for example, an acceptance sent by e-mail becomes effective[49]. It is argued that since an intermediary is involved as ordinary mail, the postal rule could be applied. Conversely, it is argued that the transmission is almost instantaneous and there is a way for a sender

[46] Specht versus Netscape Communications Corporation 150 F Supp. 2d 585(S.D.N.Y 2001)306 F 3d 17 (3d.
Civ.2002)
[47] See supra note no. 46
[48] Hotel Traventine Limited and two(2) others v. National Bank of Commerce Limited [2006] TLR 133[CA]
[49] Bradgate, R Op. Cit at page 12

to find out, whether or not an e-mail has been delivered or not, and therefore the general rule should apply[50]. In JSC Zestafoni Nikoladze Ferroalloy Plant v. Ronly Holdings Ltd[51], it was held that a fax is a form of instantaneous communication since if a message has not been received; the sender is informed by his machine. In this case, the court went further and stated that most machines also indicate to the sender whether the message has been effectively as distinct from only partly received. However, the court was quick to observe that the rule is not universal since no universal rule can cover all such cases but rather they must be resolved by reference to the intention of the parties, sound business practice and in some cases, by judgment as to where the risks should lie.

The theory on post mode of communication of acceptance was developed in the case of Adams v. Lindsell[52]. In this case, the court was called upon to decide when a contract is concluded where postal services are used as a mode of communication. The court ruled that unless there is another mode prescribed, an acceptance of a contract is concluded when a letter of acceptance correctly addressed with adequate stamp is posted in due course. Further, the term "posted" meant that the letter is put and received in the post offices and out of the hands of the offeree. [53] Lord Denning observed in the case of Entroes Limited v. Miles Far East Corporation[54] that once that is done, the contract is deemed to have been concluded as posting has taken place. In Bryne v. Van Tienhoven[55] it was observed that once an offer has been made

[50] Bradgate R, et al, op. cit.
[51] JSC Zestafoni Nikoladze Ferroalloy Plant v.Ronly Holdings Ltd[51].[2004] 1 CLC 1146
[52] Adams v. Lindsell(274) [1818] 13& Ald.681
[53] Chitty on contract, (2004), General Principles of Contract, 29th Edition, Sweet& Maxwell, London
[54] Entroes Limited v. Miles Far East Corporation[1955]QBD 327 at 332
[55] Bryne v. Van Tienhoven[1880] 5C.P.D 334at 348

by post, the acceptance should be in the same way**.**

In England, once a letter of acceptance is correctly addressed, stamped and posted, the contract is concluded and any revocation by a speeder means has no effect[56] but in Tanzania, the position in postal communication is different, in that, the communication of an offer and acceptance must be completed[57]. In other words, in England, once an offeree posts her letter of acceptance, the letter becomes out of her power and cannot recall, therefore bound. In Tanzania, the offeror is bound but the offeree is not bound[58]. Therefore, in so far as English law is concerned, the offeree is bound by the contract but in Tanzania, the offeree has a leeway and can rescind an acceptance by a speeder means before it comes to the knowledge of the offeror[59]**.** There is no hard and fast rule on this issue as each case will depend on the facts of each peculiar case at a particular time and circumstances.

Adam J. Mambi[60], citing Byne v. Tienhovern[61], in his work, raises jurisdiction issue(s) and comments that in determining time and place under cyberspace contracts, there is a problem as there are no boundaries and parties may communicate and form contract anywhere. Here, he argues, there may be a problem as to the places of resolving the disputes as there might be in different jurisdictions with different laws. But that cannot be avoided with the growth of e-commerce, as there is rapid use of e-contract globally.

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[56] Wenkhein v. Amdt (N.Z.) IJR 73 (1873), Morson v, Thoelke, 155, 50. 2d 889(1963) and A to Z Bazaars(Pty) Ltd. V. Minister of Agriculture [1974]((SA 392(c)
[57] Section 4 of the law of contract[ca. 345 RE2002]
[58] Section 4(1)-(3) of The Law of Contract [Cap 345 RE2002]
[59] Busoga Millers and Industries Ltd.v. Purshattan Patel 22 EACA 348
[60] ICT Law Book [Adam J. Mambi] op. Cit.
[61] Byne v.Tienhoven (1880)5 CPD 344.

In Ryanair Limited v. Billigfluege[62] , the defendant, a German company, raised a preliminary issue(s), regarding website exclusive jurisdiction in respect of screen scraping in Irish courts relying on the domicile rule in article 2 of Brussels Regulations (44/2007), but Hanna J, citing Benincasa v. Dentalkit (1997) ECJ 1-3767 held, *inter alia*, that Article 23 of Brussels Regulations allows parties to agree that their disputes shall be subject to the court of a nominated member state.

In this chapter, I shall deal only with the scope, nature, legality on various other issue(s) related to admissibility and evidential value of e-contract. English law of contract was similar with our law of contract although words used are slightly different with similar meaning and effect. For instance, our law of contract uses the word 'proposal' instead of offer, 'promisor' instead of offeror, 'promisee instead of offeree and 'promise' instead of contract or agreement.[63].

We can interpose at this point and states that an offer is distinguished from invitation to treat. For example in a shop where a customer has free access to what is in the shop and look at different items displayed therein, even with a price tag, is still an invitation to treat[64] and if a customer takes a product displayed in a shop to the till is making an offer, as the shopkeeper has discretion to refuse to sell the product or service[65].

An advertisement is an invitation to treat with a reserved price and is not considered

[62] Ryanair Limited v. Billigfluege.de.[High court ruling of 26.02.2010]-[Record NO.2009-79591]
[63] Section 2(a)-(j) of the law of contract of Tanzania[Cap.345 RE 2002]
[64] Fisher v. Bell [1961] 1 QB 394 and Pharmaceutical Society versus Boots Chest Chemicals [1953] EWCA, Civ.6
[65] Partridge v. Crittenden [1968] 1 WLR 1204.

as an offer. An invitation to submit a tender to bid is not considered as an offer, either. A person inviting tender have a duty to consider the submission if they arrive before the dead line. So the bidder, even though there is no contract, could sue for damages if his bid was never considered[66].An auctioneer who sell good in a public auction without a reserve price may be held liable to have accepted the highest bid[67]. Automated vending machine constitutes a standing offer[68] and it may be held to be an advisement.

If a contract is performed, there is no problem but where there are unforeseen events, then, the contract becomes very difficult or even impossible to perform and therefore finds its way to the court for redress. In such a situation, the court may release parties from their obligations. In case a contract is not substantially performed, then, the innocent party ceases its own performance and sues for damages so as to put parties in position as if the contract was not performed and innocent party mitigates losses but cannot claim remote harm.

The law is footed on the Principle that full compensation is paid for losses or injuries, be it pecuniary or not. In an exceptional circumstance, the law of contract goes further to require a wrongdoer to make restitution for their gain from breach of the contract, and sometimes may demand specific performance rather than monetary compensation. It is also possible that a contract may become voidable, depending on the specific type of that contract because one party may fail to make adequate disclosure or misrepresentation during negotiations.

[66] Black Pool and Fyde Aero Club V. Black Pool BC (1990) EWCA, civ. 13.
[67] Barry V. Davies (2000) EWCA Civ. 235 and Payne v. Cave (1789) 3 TR 148
[68] Thorton V. Shoelane Parking Limited (1971) 2 QB 163

If a party lacked real capacity to enter a contract, the agreement is considered as illegal and not enforced. In England as well as Tanzania, a person who is competent to contract must be at the age of majority and of a sound mind at the time of making the contract[69]. In common law as well as Tanzania, a contract is illegal if it contravenes a statute or is against public policy or the court regards it as immoral[70]. In Tanzania, an agreement to restrain a marriage other than that of a minor is void[71]. An agreement to restrain a lawful trade or profession or business or legal proceeding to enforce rights under or in respect of any contract by usually legal proceeding offends the law and therefore void[72].

In theory, the law of contract attempts to adhere to a principle that people should only be bound when they have given their informed and true consent to a contract[73]. In Tanzania as well as in England, a free consent is said to be free when it is not caused by duress or coercion, undue influence, fraud, misrepresentation or mistake. Mistakes has been qualified to only mistake as to any law not in force in Tanzania or Britain, which shall have the same effect as a mistake of fact[74].

The law of contract takes the view that when persons objectively manifest their consent to a bargain, then, they will be bound[75]. Once an offer is made, the general rule is that the offeree must communicate her acceptance in order to have a binding

[69] Section 11 and 12 of the law of contract [cap. 345 RE 2002]
[70] Section 23 and 34 of the law of contract [cap.345 RE 2002]
[71] Section 26 of the law of contract [Cap. 345 RE 2002]
[72] Section 27 and 28 of the law of contract [Cap. 345 RE 2002]
[73] Treitel, the law of contract, 2003, and J. Beat son, Anson's Law of contract (OUP 2002) 73.
[74] Sections 14, 15 , 16, 17, 18, 19 , 20 and 21 of the law of contract [cap 345 RE 2002]
[75] Smith versus Hughes[1971]QB 597 per Blackburn, J and Williams v. Walker-Thomas Furniture at 1350 F 20445[CA-AC 1965] per Wright, J citing the phrase ' objective manifestation of consent'.

agreement[76]. Notification of acceptance must actually reach a point when the offeror could reasonably be expected to know, although if the recipient is at fault for instance by not putting enough papers in fax machines for messages arriving in office, where one does not know how it should be printed, but all the same, the recipient will still be bound[77]. This goes for all methods of communication like phone or telex, fax or email, except by Post where it is complete when put on motion[78].

The most important feature in a contract is that there must be meeting of the mind in offer and acceptance[79]. The problem is how to address the issue of consensus ad idem in respect of online environment and web based contracts where possibility of negotiation is excluded. In England as well as Tanzania, an agreement exists when an offer is given and unequivocal acceptance of the terms and modes of acceptance are prescribed. Contract may be accepted by remaining quiet or by conduct[80]. However, the concept is somehow contested because (1) the court cannot read the minds of the parties, and (2) The contract is judged objectively and there is no room of questioning subjective intentions.

In this regard, the famous old English case on contract, Smith v. Hughes[81] , can be referred where Blackburn, J held, inter alia, held: "…If, whatever a man real intention may be, he so conduct himself that a reasonable man would believe that he

[76] Entores Limited V. Miles Far East Corporation (1955) EWCA Civ. 3.
[77] The Brimnes (1974) EWCA Civ. 15.
[78]Brinkbon Limited V. Stahag Stahi and Stahwarenhandels Geselistchait (1983) AC 34.
[79] Section 13 of the law of contact (cap 345 RE2002[Tanzania]
[80] Brogen versus Metropolitan Railway Company [1877] 2 AC 666
[81] Smith v. Hughes[1871] LR 6QB 597[QBD]

was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party terms…"

Parties must be ad idem otherwise there is no contract unless circumstances are such that a party is precluded from denying the terms. An offeror may waive the need to communicate acceptance expressly or impliedly [82]as where an Advertisement is made that if a customer or patient finds that a certain medicine does not cure certain decease after using it for certain period, the advertiser will pay the user of the medicine or patient or customer, a certain amount of money. Whether an offer has been made or accepted is an issue to be determined by a Court and the test is that of a reasonable person in particular facts and circumstances of each case.

In a unilateral offer, the offeror cannot revoke once someone has begun to act on the offer. An offer may be revoked before acceptance. The General rule is that revocation of the offer has to be communicated. When an offer is accepted with a condition, it is a Counter offer. For example, if, A make an offer to sell a car for let say US 10,000 and B replies to buy it for US 8,000 the price of US 8000 is taken to be a counter offer[83] .

Recently, Courts in England are no longer tied to what parties have subjectively intended, particularly, where those intentions obviously conflicts and have abandon

[82] Cartill v. Carbonic Smile Ball Co. (1893) 2 QB 256
[83] Hyde V. Wrench [1840] EWHC CH. J 90

its rigidity on offer and acceptance in a broader rule that parties needs to be substantial in agreement to the material point in contract[84]. *Consensus ad idem* or meeting of minds of one thing[85] means two consenting minds to make a contract binding[86]. Two or more person consent when they agree the same thing in the same sense[87]. Where an agreement is not certain or capable of being made certain, is void[88].

Trading electronically differs with paper based contracts because electronic commerce needs specific laws, principles and guidelines for the use of World Wide Web such as internet and other computer network at certain points to assist transfer, supply, marketing, processing of data, electronic data interchange [EDI], inventory management system and automated data collection systems. It is said that the use of ICT has brought tremendous changes in legal and businesses worldwide[89].

There are contracts that contain certain essential express terms such as mode of payments on fixed price or payment on stages or on completion or otherwise. Contracts may contain force majure or warranties on goods supplied or service to be performed regarding the subject matter of the contract and identity of parties. Therefore price or payments in a contract must be certain as the Court is not in a

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[84] Butter Machine Tool Co. Limited V. Ex-cell O Corporation Limited (1977) EWCA Civ. 9 and Gibson V.
Manchester CC (33) 1979) UKHL 6.

[85] Raffles V. Wichelhaus (1864) EWHC Exch. J 19

[86] Hardman and others v Booth[1861-73] ALL ER Rep Ext1847 at page 3 per Pollock, CB

[87] Section 13 0f the law of contract [Cap. 345 RE 2002]

[88] Section 29 of the law of contract [Cap. 345 RE 2002]

[89] Shaw M. J,[2009], Electronic Commerce: State of ICT, in Shaw et,al. [Editions],Handbook on Electronic
Commerce, Stringer-Verlag, Berlin, Germany (see also Kassim, S.R,(2000), Internet Usage of Commerce
Purposes in Tanzania, MBA Dissertation, University of Dar-es-salaam.

position to know what price or payments intended by parties or a reasonable price or payments[90]. An agreement to negotiate future contract in good faith may be enforceable[91]. Most promises in social sphere have legal consequences such as those between friends or son and parent or father and mother[92] . But contracts between couple on the verge of separation or friends in big transactions might have legal consequences[93]. In large agreement like sale of land[94] or leases or bills of exchange, calls for or require evidence in writing[95].

The law in Tanzania recognizes contracts requiring writing or execution in the presence of witnesses or registration of documents[96]. Modern commerce typically uses www in e-transactions includes wide range of technologies such as e-mail[97], e-retailers[98], e-bay com[99], EDI [Electronic Data Inter-change] and EFT [Electronic Funds Transfer].

Also gratuitous promise like gift as a matter of law of contract as it is legally binding because there is nothing in return in future. In sales of goods or services, there is an

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[90] Sales of Good Act, 1979 , Butcher Limited V. Republic (1929) UK HL 2 Baird Textile Holdings Limited
V. M&S Pic (2001) EWCA Civ. 274

[91] Welford V. Miles (1992) 2 AC 128

[92] Jones V. Padavatton (1968) EWCA Civ.4

[93]) Merritt V. Merritt (1970) AEWCA Civ. 6 and Parker V. Clark (1960) IWLR 286

[94] Section 64 of the Land Act [Chapter 113 of the Laws of Tanzania, Revised Edition, 2002] and Sections 31, 32 and 33 of the Village Act [Chapter 114 of the Laws of Tanzania, Revised Edition, 2002]

[95] Law of property (Miscellaneous Provisions) Act 1989[section 2(1)] , Law of property Act, 1925[sections 52& 54(2), Consumer Credit Act, 1974[sections 60 & 61] and Bills of Exchange Act, 1852[sections 3(1) & 56]

[96] Section 10 of the law of contract [Cap. 345 RE 2002]

[97] Kessler, M(2003) "More shoppers Proceed to check out on line"[http://en.wikipea org/wiki/Electronic commerce]

[98] Nissan Off, Daniel (2006) "Future shop: How the new Auction Culture will Revolutionize the way we Buy, Sell and Get the things We Really Want", Penguin Press, pp-246 [http:// en.wikipedia.org/wiki/ Electronic Commerce.

[99] Seybold, Pat,(2001), Customers, Com: Crown Business Books[http://en.wikipedia.org/wiki/ Electronic . Commerce

express or implied warrant [also called guarantee] that the product is satisfactory or service rendered is within the standard accepted or terms that binds the seller and protects the consumer, in that, the product or service will be satisfactory for the purpose or standard required.

A warrant is a promise that the product or service meets the expectation or is of good working standard and there will be a room for either repair or replacement or repudiation. For example, a refrigerator is expected to keep food cold. If a product does not work, or the service is not in the standard as expected, this constitutes breach of implied terms. A warrant in respect of goods or services applies on the retailers or approved distributors who concludes the contract [not manufacturers] and the buyer. Contracts must also take into account liability on negligence upon causing death or causing pollutions or public nuisance and are bound by legislation. Directors of companies involved are also liable and may be imprisoned once a company is found liable.

3.4 Cyber Contract

Software technology is changing so fast and has a lot of complexity especially on sales of goods or services through internet. The technological development in telecoms has brought some legal changes in the law as parties may conclude contract on line as we now have e-contract, e-commerce, e-banking, e-court, e-learning, e-business, e-library, e-government etc. These changes have to go hand in hand with a new legal framework. In England, Electronic Communication Act, 2000, empowered the minister responsible to perform some function with a view of going hand in hand with new technology. In Tanzania, there is no such a specific law like in England.

The standard forms of contract for manufacturer of software are aimed at excluding or limiting or minimizing liabilities which sometimes are essential and against statutory rights in selling third party products. In some of them, the users are not in equal bargain strength as he had to read, understand and accept the standard disclaimer terms already set before use and it is difficult to detect defects at that stage. For example, if a disc is sold or hired by a computer with a defective program, there is a prima facie breach under the terms of fitness for purpose. One could describe the supply of information or downloaded software over the computer or mobile telephone system as a sale of service but sale of CD/DVD containing music or/ and video is a sale of goods[100].

English law is still unclear whether supply of software should be classified as goods or as service and therefore it is difficult for supplier to know what terms have been implied into a contract for the supply of software and what remedies are available to the customer in case of problem with the software. In one case, the Court of Appeal of England[101] held that when a software is supplied together with a medium on which it is stored(for example a disk) then this falls within definition of goods under the Sales of Goods Act, 1979[102]. For purpose of interest, Sales of Goods Act, 1979 gave definition of goods before digital age. If a software is purchased over internet and downloaded to a customer computer, is classified as a service as implied in Supply of Goods and Service Act, 1982[103].

[100] Fur dynamics Systems Plc v. Automation Ltd[06.09.1998][Lord Penrose]
[101] St. Albans City and District Council versus International Computers Limited[1996] ALL ER 481
[102] Sales of Goods Act, 1979[Britain]
[103] Supply of Goods and Service Act, 1982[Britain]

Our Government is advised to consider the approach under European Directive[104] where "digital content" means data which are produced and supplied in digital form such as computer programs, applications, games, music, video or text, irrespective whether they are accessed through downloading or streaming, from tangible medium or any other source. Tangible medium like CD or DVD is considered as goods within the meaning of the Directive[105] but digital content which is not supplied on a tangible medium for purposes of the Directive is neither classified as sale of goods nor service.

Software or internet service providers must observe the usual standards that exist and comply with quality of functionality, reliability, usability, efficiency, maintainability, portability and detailed guidelines regarding the information on the out cover, in that, the software package has to be shown to enable the potential user or / and purchaser or customer so to access the applicability of the package like hardware and software requirement for updates, maintenances , design , repairs license provisions, safety, and the like.

If there is no contractual relationship, then, a tort of negligence might arise on duty of care, breach of that duty, loss as a result of such breach. The loss, however, must not be too remote and the nature of such a loss must give rise to a claim of compensation. It is very difficult to hold the seller or manufacturer liable as there are two available possible defenses on software. One is that the software supplied was the only standard available at the time or that the producer did its best in its capacity,

[104] Article 2(11) of European Directive 2011/83/ EU –Recital 19
[105] See supra note no.104

and two, that there is no more to be done as that is the only technology available at the time and if there is any defect, then it was unexpected.

CHAPTER FOUR

4.0 COMMERCIAL CONTACTS IN INTERNATIONAL AND NATIONAL LEVEL

4.1 Commercial Contracts at International Level

The United Nations Convention on Contracts for International sale of goods (hereinafter to be referred as CISG or Convention) is an international Trade Treaty adopted by 78 states as at 24th February, 2012[106]. The scope of the convention is limited to the rights and obligations of buyer and seller in a contract. The Convention is said to be of benefit because it is the unification of international trade law, increase trade between nationals, remove legal obstacles and promote international trade[107]. It is also argued that CISG improves legal environments in which international trades conducted by increasing legal certainty and reducing transaction costs[108]. But CISG has been criticized that it does not apply on validity of contract on its clauses as the law governing contracts is necessary when issue(s) of validity arises.

Critics also argues that legal standards is hardly good for legal certainty because although vague rules do not provide precise answers, a contract in an international instrument are likely to be interpreted differently by different courts thus jeopardizes harmonization field. Further, is that CISG cannot be authoritatively interpreted by a single superior court of all contracting states because each state interprets its provision but none of this interpretation is final and binding on the other as different

[106] UNCITRAL, website
[107] America Journal of Comparative Laws, Volume 17, Issue 2, Spring 2009, Unification of Law, 457-478, 10513/acl 2008.0013, Wednesday, April, 2009
[108] See supra note no 102.

interpretation through domestic approach makes certainty illusory. It is argued that countries like U.S, Australia and Canada share an English law heritage but have adopted CISG while UK is not a member[109], thus, there is very little case law concerning CISG in those countries. In contrast, European Union members have reported a disproportionally large numbers of CISG cases[110].

It has been observed that one of the benefits of CISG is that it is intended to regulate trade practices and rules which are used in the international trading by the parties to regulate their dealings[111]. The reason why UK has not ratified the CISG is said to be that it believe that its law of contract is superior. Globalization and Liberalization of Commercial law, is said, needs CISG.

It is said the UK has deprived the world of the reputable talents of British judges and lawyers in matters of interpretation of the CISG so as to influence harmonization of judicial decision in the same way as common law has in commonwealth countries but most countries applying common law now shifts and adopts international instruments such as CISG in replacing UK as a model as what matters in modern days is the context of international sales contract which is reflected in the CISG[112]. Courts in England are attuned to its legal history in common law and dislike to apply

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[109] CISG Database- http:// www.cisg.law.pace.edu/cisg/intro.html

[110] UNILEX, International case law and Bibliography on the UN Convention on contract for the International
Sale of Goods[Transnational Publishers, Inc.(September, 2000]

[111] Gesa Baron, do the UNIDROIT principles of International Commercial contract forms new LEX Mercatorial in
page database on CISG and International Commercial Law at http://www.cisg.law.inc

[112] IBA's International Business lawyer at page 487, December, 2001 and section 11. B.2 of John Linareth, The Economic of Uniform laws and Uniform law making,948, Wayne law Review 1389 (2003)

law like CISG that has not been created from within and also feels that the convention might conflict with well established common law principles[113].

It is argued that one of the differences between common law and CISG is that CISG eliminates the parole evidence rule[114] which is a less felicitous result of CISG[115]. English jurists argue that despite the none-ratification, it does not mean that there have not been ruling on the CISG decision by English Courts or arbitral tribunals, particularly the latter, as London is an important International arbitral Centre. English jurists says that English Court are only not aware of such decision and invites parties involved in such proceedings to bring to the attention of these decisions to English Court so that they could also share in the interpretation of the CISG[116]. There are some references in decision of members of CISG, where English jurists were added and where relevant, common law decisions were applied together with others which are not members[117]. Arbitral Tribunal applies CISG to international sale of goods regardless whether a party to the dispute is a contracting state or has chosen CISG.

Arbitral tribunal may apply CISG, whether or not; arbitration takes place in a contracting state. Even if a state is a member of CISG, there are instances, where

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[113] Lord Denning,Buchanan & Co. Ltd [1977]WLR 107

[114]John P. Mcmahon, Applying the CISG: Guide for Business Managers and Counsel, in PACE DATABASE ON THE CISG and INTL. COM. L.C [Feb. 2001], at http://www.cisg.law.pace.edu/cisg/guide.html

[115] MCC-Marble Ceramic Centre, Inc. versus Ceramica Nuova D Agostina, 144,F.3d. 1384,1387-92[11th civ. 1998- http://www.cisgw3.law.pre, edu/cases/980629u/html

[116] http://www. cisg.law.pace.ed/cisg/text/schedule. html)

[117] Medical Marketing versus Internationale Medico Scientifica, 1999,U.S. Dist. Lexis 7380, 1999WL 311945(E.D.
La) and Zapata Hermanos versus Hearthside Banking, 2001 U.S. Dist. Lexis-15191,2001, WL 1000927 (N.D,111]

members will not adopted the CISG subject to authorized declarations. For example, the Scandinavia states (Denmark, Finland, Norway and Sweden] pursuant and Article 92, declared that they would not be bound by Part II of the convention (Formation of the Contract) and pursuant to Article 94, the entire convention would not apply to inter Scandinavia trade between parties from these countries. The declaration restricts the role of private international law in determining the applicability of the CISG when both contracting parties do not have their relevant places of business in Contracting State.

It is common that contract is a private law by the consent of the parties and may expressly provide as a term of their contract that the convention shall not apply to their contract. For example, Canada has ratified the convention with an exception which provides that the parties may exclude the convention by expressly providing in the contract that the convention does not apply it[118]. Similarly, section 7(1) of Newfoundland Act[119] allows the parties to exclude the convention by expressly providing in the contract that the law of the province or another jurisdiction applies or does not apply to it.

All these may lead to much confusion in the convention as well as the international community businessman as any interpretation given may only prevail to a member state but it would cut little ice outside those who are not members. But all those appears to be interpretation and not declaration authorized by convention. Various nations have taken different ways in implementation of the CISG. In Norway for

[118] Bu c-81 of Canadian Parliament
[119] section 7(1) of Newfound land Act

example, enacted an Act containing both domestic and international provision. In Israel, it had been made clear that international sales contracts concluded prior to the date of ratification of the convention, previous law shall apply[120]. Thus, the 1964 Hague sales and formation convention continued to apply in Israel[121].

In East Africa, only Uganda and Burundi had ratified the CISG. As at 24 February, 2012, the **CISG, UNCITRAL** reports that only 78 states have adopted the CISG[122]. Berthold Goldman defined the international rule as set of general principles and customary rules spontaneously referred to or elaborated in the framework of International trade without reference to a particular national system of law[123].

It has been argued by scholars that the convention offers the possibility of including aspect of domestic law which may be accepted by the contracting parties to the international environment[124]. There are arguments that the convention requires flexibility and sensibility to the legal and background of each party from domestic law which by nature is biased towards its own legal tradition[125].

It is a fact that before coming into force of the convention, courts in each countries decided dispute arising in Trans border trade and that the Trans national trade was

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[120] Albert H. Kritzes, pace law school Institute of International Commercial law – last updated March, 26, 2012

[121] See supra note no. 119

[122] UNCITRAL, Website

[123] Berthold Goldman, the applicable law, General Principle of law, the Lex-mercotoria, in contemporary problems in international arbitration, 113, 116, Julan DM, lew, Ed.1987.

[124] Formesa Baron, Do the UNIDROIT Principles of international commercial contracts a new lex mercatoria in pace database on the CISG and International commercial Law[June, 1998], at http://www.law.pace.edu/cisg/biblo/baron.html

[125] See supra note no. 124

based on a common origin and faithful reflection of the mercantile Customs. Tran's trades were not administered by Professionals judges but the merchant themselves and therefore its procedures were speedy and informal which had emphasized the freedom of contract and decision of cases *ex-aequo et bono*[126]. Therefore, it is argued that there is no much different as the convention is modeled on much the same principles as the old one[127].

Critics argues that CISG is not a real law as there is no agreement about what forms part of it and what is excluded and therefore CISG is vague and incoherent and any decision based on it is arbitrary. One writer called Keith Haslet in his book[128], calls it, an elusive and often frightening subject and therefore cannot be the law governing contracts as it evaporates as a law as soon as a dispute arises as well as when a question of applicable law is raised[129]. CISG is even regarded as a state free contract which is believed to be a contract without law[130] as an unpredictable anarchy creature that exists only in the minds and expectation of the parties[131]. Since it is an informal arrangement between parties, it is argued that it is not a contract at all[132].

Further, it is argued that a stateless contract is nothing but a miracle, as any enforcement or dispute resolution, has to take place in particular jurisdiction and therefore the law of a particular domestic legal system need to apply[133]. A contract

[126] See supra note no. 125
[127] See supra note no. 126
[128] Keith Highet, The Enigima of the Lex Meecatoria, 63, TUL.L.rev.613, at 613[1989] at 614
[129] See supra note no. 128
[130] See supra note no. 129
[131] See supra note no. 130
[132] Keith Highet, The Enigima of the Lex Meecatoria, 63, TUL.L.rev.613, at 613[1989] at 614
[133] See supra note no. 132 at page 615

under CISG is seen in a sense that there is no single definable body of law which has equal legal authority applicable and interpreted in every jurisdiction[134].

The purpose of CISG was to provide a legal framework that contracting countries could adopt as their law governing the international sale of goods. But CISG is built on the notion of freedom of contract, which means that parties can agree to contract out of CCISG and any of its provision as well as excluding the application of the convention. In a sense, CISG, compromises its position as a statute which depends on the good will of the parties for it to remain within the confines of the international legally valid framework. CISG under Article 95 also allows contracting states to make a declaration whereby they may decide not to be bound[135]

Be as it may be, the truth will remain that apart from the terms, the parties are at liberty to choose the law which will apply in case a dispute arises and thus this kind of choice is better suited to arbitration than litigation. I say so because, in most cases, the courts of law, will apply domestic law rather than international law principles.

In effect, this is another way in which contracting states may avoid CISG, if one of the trading parties does not carry on business in a contracting state. A state can adopt CISG as a state law while contracting parties can choose to contract out of CISG and out of domestic statute law. But the ability to reach a compromise may be considered as a counterproductive to the focus of CISG which rests on the hands of those using

[134] See supra note no. 133 at page 628

[135] Article 95 of the United Nations Convention on contract for the International sale of goods 1978, UN.
Doc.A/conf.97/19[entered into force on January 1, 1988]

it especially businessmen and legal communities. But in order to resolve challenges now faced in our laws, there is a need to assimilate UNCITRAL MODE LAW of 1996, to guide us in the enactment of our modern electron law or rules on e-commerce and assist our national legislations by use of set-up international accepted rules which are intended to remove legal obstacles and increase legal predictability to our e-commerce environment. These international rules provide that both paper and digital information be treated equal for purposes of fostering international trade efficiently. In that regard, paper based communications may be considered as equivalent to e-communication to fulfill the same purposes.

4.2 Proof and Admissibility of Digital Contracts in Courts

If a contract is concluded electronically, the issue of electronic evidence comes into play. The word evidence connotes the means by which facts are proved. An information recorded or stored or retrieved from a document or other hard or soft ware's devices as evidence is usually as contentious and acrimonious as the litigation itself especially when the opposite party raises an objection to prevent electrically generated evidence.

There has been erroneously perception that electronic evidence is not admissible but the general rule is that each and every fact which is relevant to the fact in issue is generally admissible in court as evidence. However, under paper based evidence, best evidence rule applies; and a party must produce primary evidence during trial. If primary evidence is not available, secondary evidence upon fulfilling all requirements as provided by the law may be accepted. But secondary evidence can only be accepted if the issue(s) of custody and reliability has been fulfilled.

On the other dimensions, electronic evidence means information recorded, stored, processed or retrieved either from a computer, internet or other electronic devices. Most developing nations like Tanzania have not yet updated or expanded all its standard paper based general rules to enable admission and validation of electronic generated evidence including cyber contract.

4.3 Electronic Technologies and the Law

There is a saying that law is always behind technology. A good law is that which can foresee signals for its safe landing or at least is that which go hand in hand with technological development. Technology development arises as human being strives to control environment so as to easy up life.

As people demands increased in daily needs, societies embarked on trade of goods and services in order to survive. In early stages, trade was in the form of barter trade system which was conducted orally by exchange of goods or services. As trade increased, mode of trade changed and contract especial in exchange of goods or services for consumption or other purposes emerged. Thus consumer arrangements were by way of contracts. The aim was to do business in respect of goods or services and growth of trade in different societies led to the exchange of items and later information as goods or services for value or money. Consumers bought information as goods or services for their own use thus become end users of information or goods or services.

The early contracts were done orally but later in writing. Nowadays, electronics is one of modes for contractual arrangements. But the new technologies of electronics

have posed some challenges on admissibility and validity of e-contract or e-evidence in courts using the existing laws even after changes or amendments

4.4 Judicial Approaches in Dealing with Evidence in Tanzania

The first decision in Tanzania which tested the admissibility and validity of e-evidence is Tanzania Cotton Marketing Board case[136] while the Court of Appeal was construing the phrase "registered post" in Rule 4 of the Arbitration Rules, 1957, and held that "registered post" should be interpreted widely enough to take into account the current development in communication technology that has taken place since 1957 when the rules were enacted to date. In that case, DHL courier services, which were not in existence in 1957 when the postage rule in the Arbitration Rules was promulgated was considered to be the modern mode of postage and thus falling within the words "registered post" in Rule 4 of the Arbitration Rules, 1957.

Indian Evidence Act was enacted in 1875 from which our current law of evidence derives its origin but the modern methods of making e-mail by computers were not in existence. Given technological revolution in information communication which has been sweeping the world since the last century, the highest court of our land, could not afford to hide behind old ways of communicating by refusing to accept other types of electronic documents such as e-mail, which may carry electronic information capable of being stored on computers and printed out. Therefore Court extended the definition of *"document"* under section 3 of the Evidence Act by interpreting it broadly to cover evidence generated by computers including e-mail,

[136] Tanzania Cotton Marketing Board vs. Cogecot Cotton Company SA [1997] TLR 165

subject of course, to the general evidentiary rules on documentary evidence found in Part III of our Evidence Act[137]. This position of the court of appeal appears to be in line with the Modern Law on Electronic Commerce by providing equal treatment to paper based as well as electronic information by removing legal obstacles and increasing legal predictability for electronic commerce.

The second case is Trust Bank case[138], which dealt with the issue "whether or not, computers print-out in a banker's book under the Evidence Act could be admitted in court as evidence. In this case, the Judge observed that, in absence of the law which guides the admission of e-evidence, the court will find ways of dispensing justice even in very difficult circumstance for legal guidance. Again, it appears, also, that the court could as well have embarked on the principle functional equivalence under which electronic communications may be considered equivalent to paper based communications[139].

In other jurisdiction, there is dearth of statutory provisions and case laws, which deals with the admissibility of electronic evidence in civil proceedings generally. There are opinions that since first task of the Court in dealing with admission of electronic evidence is to examine the existing provisions and construe them broadly, if possible, in order to establish a set of rules to guide admissibility of electronically stored information generated for use in court of law as evidence in civil proceedings,

[137] The Law of Evidence Act [Chapter 6 of the Laws of Tanzania, 2002].
[138] The Trust Bank of Tanzania vs. Le-Marsh Enterprises Limited and two others, Commercial Case No.4 of 2000 (unreported)
[139] UNCITRAL MODEL LAW, 1996, on the Modern Law on Electronic Commerce

then, if the existing laws are not applicable, then digital evidence cannot be admitted.

The third case is that of Lazarus Mirisho Mafie case [140] which came up with another different approach on the subject. In this case, the argument was whether the amendment of Evidence Act brought by Written Laws (Miscellaneous Amendments) (No.2) Act of 2006}, dealt with a" restrictive approach" as there was no guidance on electronic evidence and e-records in the banking business system under the Banker's Books in the Evidence Act. It was argued that the restrictive approach was most probably ushered following the decision in Tanzania Cotton Marketing Board versus Cogecot Cotton Company SA [141] and Lazarus Mirisho Mafie [142] . In this case, it was further explored that a subsequent amendment to the Evidence Act by the Written Laws (Miscellaneous Amendments) Act [Act No.15 of 2007], which amended section 40 of the Evidence Act by adding section 40A only related to "admissibility of electronic evidence in criminal proceedings.

Further, it was argued that the 2006 amendment to the Evidence Act, affected by Written Laws (Miscellaneous Amendments) Act No.15 of 2007 was confined only to civil proceedings for e-mails or computer printout in the course of banking business. It is very difficult to alter or forge a paper based record that has been stored in a physical secured place such as a safe but a stored electronic record is vulnerable and is subject to deterioration caused by either virus or impact of magnetic, electrical, or electronic interference and software bugs. Since data in an electronic record can be

[140] Lazarus Mirisho Mafie and M/S Shidolya Tours and Safaris vs. Odilo Gasper Kilenga alia Moiso Gasper, Commercial case No. 10 of 2008 [High Court of Tanzania-Commercial Court] [unreported]
[141] See supra note no. 140
[142] See supra note no. 141

deleted, its integrity can be challenged during admissibility. There is no gain saying that electronic record can easily be edited, modified, deleted and transferred in seconds worldwide to recipients who will not be able to tell which the original version is.

The underlying concept under our law of evidence is relevancy of such evidence to the facts in issue. In relation to electronic evidence, a party seeking such evidence to be valid and admitted has to lead sufficient facts or proof to support a finding that the matter in question is what its proponent claims. Authentication of electronically stored information may require even greater scrutiny than that required for the authentication of *"hard copy"* documents but this does not mean that this position will abandon the existing rules of evidence which applies in court generally on admissibility.

In general, electronic records merely stored in a computer raise no computer-specific authentication issues. If, however, a computer processes data rather than merely storing it, as was in Lazarus Mirisho Mafie case[143], a computer printout or e-mail statements, may raise authentication questions. In the case of Lazarus Mirisho (supra)[144], an America case of Jack R. Loraine and Severly Mack [145] was adopted where Judge Grimm[146] observed that although courts today have more or less resigned themselves to the fact that "we live in an age of technology and computer

[143]Lazarus Mirisho Mafie and M/s Shidolya Tours and Safari v. Odilo Gasper Kilenga alia Moiso Gasper, Commercial Case No. 10 of 2008 [High Court of Tanzania-Commercial Court] [unreported]

[144] See supra note no. 143

[145] Jack R. Loraine and Severly Mack v. Markel American Insurance Company, Civil Action No.Pwg-06-1893

[146] See supra note no. 145

use" where e-mail communication now is a normal and frequent fact for the majority of the population, people tend to reveal more of themselves, for better or worse, than in other more deliberative forms of written communication and that there are many ways in which e-mail evidence may be authenticated by direct or circumstantial evidence. Further, it was observed that an e-mail message has a distinctive characteristic, including its contents, substance, internal patterns, or other distinctive characteristics and that taken in conjunction with circumstances may be sufficient for authentication.

It is common knowledge that digital evidence like printouts of e-mail messages ordinarily bear the sender's e-mail address providing circumstantial evidence that the message was transmitted by a person identified in the e-mail address because in responding to an e-mail message, the person receiving the message may transmit a reply using the computer's reply function, which automatically routes the message to the address from which the original message came. The use of the reply function indicates that the reply message was sent to the sender's listed e-mail address. The contents of the e-mail may help to show authentication by revealing details known only to the sender and the person receiving the message. It is therefore argued that e-mails may even be self-authenticating. Courts in the US have recognized this rule as a means to authenticate ESI, including e-mail, text messages and the content of websites[147] by allowing the authentication of an e-mail entirely by circumstantial evidence, including the presence of the defendant's work e-mail address, content of which the defendant was familiar with, use of the defendant's nickname, and

[147] United States v. Siddiqui, 235 F.3d 1318, 1322-23 (11th Cir. 2000)

testimony by witnesses that the defendant spoke to them about the subjects contained in the email.

Judge Grimm[148] discussed in detail some distinct but interrelated evidentiary issues that govern electronic evidence to be accepted at a trial as an exhibit. One is relevancy hurdle to overcome by establishing admissibility of ESI upon demonstrating that it is relevant as defined in Evidence Act. The phrase "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The burden is that a party seeking an ESI to be admitted in evidence must provide authenticating facts or other evidence that the party wish to proffer in support of its case whether through testimony, affidavit, admission or stipulation.

The arguments regarding authenticity may also be looked on as a tactic to discredit e-evidence as piece of evidence and make it inadmissible. Use of electronic information like an e-mail in Court have an audit trail of analyzing the issues relating to authenticity which the opposite party has raised in relation to the computer generated records. In civil or commercial cases, it may be done by way discovery where the documents are in possession, power and control of the parties and it relates to an issue in dispute especially if e- evidence is pleaded when exchange lists of documents and authenticity is specifically disputed by the other party.

In criminal proceedings, the burden of proof is much higher than in civil

[148]Jack R. Loraine and Severly Mack v. Markel American Insurance Company, Civil Action No.Pwg-06-1893

proceedings, therefore, it will always be necessary for the party seeking admissibility of a particular evidence to be able testify on the history, source and authenticity of a document, especially if it is in digital form. In an old case of Gerald Ngaiza vesus Issa Ibrahim[149] regarding admissibility of evidence it was held that paper evidence without proof of source and authenticity should not be admitted. The same position was also in D. Hussein v. Republic[150]. Therefore there is no much difference on authenticity in the admissibility and validity of digital as well as paper based information to be received in court as the tests applies.

It is the laws that whenever a court of law is called upon to exercise its discretion on admissibility and validity of evidence, the court properly directing its mind on the relevant law, will always exclude doubtful evidence. In criminal proceedings, a prosecutor or a party in civil litigation will always need to be prepared to offer further evidence about the source of electronic evidence, it's processing and storage it has undergone since it was first recorded.

In an English case of R v.Robson and Harris[151], it was observed, inter alia, that "a person producing a record as evidence must describe its provenance and history so as to satisfy the judge that there is a prima facie case that the evidence is authentic. Our Evidence Act does not contain any express provision on authentication and identification of electronically stored information as in Kenyan Evidence Act. It is therefore argued that it is only upon meeting the tests set out in the new section 78A

[149] Gerald Ngaiza v. Issa Ibrahim [1974] LRT13[HC]
[150] D. Hussein v. Republic[1975] LRT 191[HC]
[151] R v. Robson and Harris [1993] ALL ER 225

(1) of Evidence Act inserted by section 36 of the Amendment Act No. 2 of 2006, that the evidence can be received in court.

The hear say rule is another hurdle which must be cleared while introducing electronic evidence. Hearsay issues are pervasive when electronically stored and generated evidence is introduced. According to Paul R. Rice[152], hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted by the out-to-court declaring. It is offered into evidence through the testimony of a witness to that statement or through a written account by the one who declares. The hearsay rule excludes such evidence because it possesses the testimonial dangers of perception, memory, sincerity, and ambiguity that cannot be tested through oath and cross-examination.

Cases involving electronic evidence often raises issue whether electronic writings constitute “statements”. That is, where the writings are non-assertive, or not made by a “person". The courts in the United States have held that they do not constitute hearsay, as they are not "statements[153]. But another question that must be answered in determining whether evidence is hearsay, is whether the statement is offered to prove its substantive truth or for some other purposes. Once that question has been determined, the court has to find out whether such evidence falls into the definition of hearsay because it is a statement uttered by a declarant and offered for its substantive truth. The final step in assessing whether it is hearsay is to see if it is excluded from the definition of hearsay.

[152] Paul R. Rice “ Electronic Evidence: Law and Practice, 262 ,(Aba Publishing 2005)
[153] United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003)

In Siddiqui [154] it was ruled that email authored by a party who want to tender it was not hearsay. It is argued that where a party in a case intends to offer electronic evidence, he must determine whether the original writing rule is applicable, and if so must be prepared to introduce an original, a duplicate, or demonstrates that one of the permitted forms of secondary evidence is admissible as the original writing rule has particular applicability to electronically prepared or stored writings, recordings or photographs.

Judge Grim[155]observed that "Computer-based business records commonly consist of material originally produced in a computer. It is thus apparent that the definition of "writings, recordings and photographs' in our Evidence Act[156] includes evidence that is electronically generated and stored. Traditionally, the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings.

The admissibility of electronic evidence depends whether it would unfairly prejudice the party against whom it is offered, confuse or mislead the jury or unduly delay the trial of the case or interject collateral matters into the case. In some fraud actions, if a signature is at issue, then, it is obviously better to produce the original document rather than an electronic image or even a photocopy of it. There has been a lot of

[154] United State v. Siddiqui, 235 F. 3d 1318, 1322-23(11th Cir. 2000)
[155] Weinstein at § 900.07[1] [d] [iv].
[156] Section 3 of the Law of Evidence Act [cap 6 RE 2002] where the word document if defined

arguments over the admissibility of electronically generated evidence which can lead to investigations into the computer system which produced the paper on which the e-mail statements is produced, the method of its storage, operation and access control, and even to the computer programmers and source code used.

In Tanzania, the shortcomings in the existing law on the admissibility of electronic evidence in civil proceedings are as explored in various case laws cited earlier on the subject in Tanzania. In Trust Bank of Tanzania (supra)[157] it was observed that "the law must keep abreast of technological changes as they affect the way of doing business and therefore the court has a duty to take into account technological changes that affects the business worldwide. But it has been argued that it would have been much better if the position was clarified beyond all doubt by legislation rather than judicial intervention.

This study has tried to shown that under the existing laws, admittance of electronic evidence in civil proceedings can still be considered in the light of UNCITRAL Model Law through Modern Law on Electronic Commerce as there are general accepted international rules which aims at removing legal obstacles and increasing legal predictability on electronic commerce where paper based and electronic based contract or evidence should be treated equally.

In Jack R. Loraine case[158] it was observed that even United States of America lacks comprehensive analysis of interrelated evidentiary issues associated with electronic

[157] See supra note no. 140 ,143
[158] Jack R. Lorain and Beverley Mack vs. Markel American Insurance Company Civil Action No.PWG-06-1893

evidence. Our courts, as shown earlier on, may lead the way by filling the lacunae in the existing laws on admissibility of electronic evidence in civil proceedings and extends that which the legislature has already done in lines with UNCITRAL Model Law especially under Modern Law on Electronic Commerce and if possible apply the underlying principles which will suit our circumstances at this digital age.

Fitzgerald, in one of his works "Salmond on Jurisprudence[159], insists that rules to be applicable should be those found in the existing law and the Court may only admit such e- evidence after "setting down new rules on admissibility and validity of digital evidence. As said, there are divulgences views on the subject. In Kenya, United States, Philippines and United Kingdom, electronic rules already exists and one writer by the name of Cathy Mputhia in one of his work titled "When Digital Evidence is Admissible" discusses at length some the provisions in the Kenyan Evidence Act particularly section 65[160] which allows admittance of digital evidence for use at trial.

In Trust Bank case[161] section 5 of the English Civil Evidence Act of 1968 was approved on admissibility of statements produced by computers, and our court took a very bold step in allowing a computer print-out as part of a banker's book under our Evidence Act to be admitted in court as evidence**.** It is worth noting, however ,that in England, the Civil Evidence Act of 1995 has greatly simplified and relaxed the law

[159] Fitzgerald, Salmond on Jurisprudence,11th Edition, (1966) reproduced in Introduction to the Legal Systems of East Africa

[160] section 65 of the law of Kenya Evidence Act

[161] The Trust Bank of Tanzania vs. Le-Mar5h Enterprises Ltd and two others, Commercial Case No.4 of 2000 (unreported)

as found in the English Civil Evidence of 1968, by encompassing electronic documents without mentioning either *"documents'* or *"computers',* under its section 13 which stipulates that:-*"document" means anything in which information of any description is recorded, and "copy'~ in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;"*

English Civil Evidence Act of 1995 allows admission of copies of any degree of remoteness from the original although the English law which was referred in Trust Bank case[162] has since undergone some further development in England. Though Trust Bank case[163] is yet to be confirmed or reversed by the Court of Appeal of Tanzania, it forms an inspiration on how a court can embark on judge-made law. Electronic evidence or record within the meaning assigned under section 3 of our Evidence Act appears might be an important debatable issue about its admissibility in evidence in civil litigations.

In Jack R. Loraine case[164] it was observed that the quality of an e-mail being a computer generated record as evidence may be admitted depending authentication to convince the court. Authentication means that e-evidence is what it purports to be and is authentic and has not been altered since the date it was created or retrieved as it might have many originals stored in different electronic locations.

Critics [165] argue that authentication may be by direct evidence from the creator in

[162] See supra note no. 161
[163] See supra note no. 162
[164] . See supra note no. 158
[165] . See supra note no. 154

the form of an *"audit trail"*, that is, showing how the original document (e-mail, printout etc) was turned into an electronic image stored in the computer system from where it was retrieved and then produced to the court. An audit trail in the senders' computers systems by encryption technology transmitting all electronic communications through an intermediary[166]

4.5 Challenges on Admissibility and Validity of E-evidence and Cyber Contracts in Tanzania

The three cases of Tanzania Cotton Marketing Board[167], Trust Bank Tanzania Ltd[168] and Lazarus Mirisho Mafie[169] might be seen as a challenge faced in admissibility and validity of e- evidence in court even after the legislature had amended the law. In order to soften the application of electronic environments in courts, the latest changes of the law in Tanzania is Rules 17 and 58 [170] which are very loud that evidence may be taken without the presence of a witness in the court room through video link or conference.

This mode was tested in the case of Saifi Impex Limited[171] which was concluded recently on 19.10.2012 where oral testimonies and exhibits were recorded through video conference link in Belgium and accepted in court as evidence. However, the position of e-court by way of video conference is yet to be confirmed by our highest

[166] See supra note no. 158
[167] Tanzania Cotton Marketing Board vs. Corgecot Cotton Company
[168] See supra note no. 161
[169] See supra note no. 140, 143
[170] Rule 58 of High Court (Commercial Division) Procedure Rules, 2012[Government Notice No. 250 of 2012]
[171] Saifi Impex Limited v. Arpadis Chemicals NV, CRDB Bank PLC and MG Trade Services(India) Private Limited Commercial Case No.15 of 2010[HC][unreported]

court of the land since the matter is now in the Court of Appeal for final decision.

Previously, there was also another criminal matter involving Professor Costa Ricky Mahalu[172] which was partly conducted and concluded through video conference or link where witnesses gave their testimony in the case while in Italy. This case is also on appeal before the High Court of Tanzania [Dar –es-salaam- Main Registry] and may as well go to the court of appeal. The case law position in Tanzania regarding electronic evidence in some respects is not settled. But as of now the new rules[173] in commercial court allow witnesses to give evidence through a video link.

There is a recent decision in Dodsal Case[174] where pleadings were struck out for containing scanned signatures which were held not to be recognised our Laws despite having submitting an affidavits which was likewise held to have contained scanned signature instead of originals on its verification clauses. The principal officer of the claimants company signed the pleadings in Saud Arabia and an objection was raised. Although the matter is now on appeal, it is a well established principle that the object of signature and verification is to fix upon a party responsibility and guarantee of good faith.

In Transgem case[175] a claimant has not signed the plaint but undertook to sign it later and Plat J held that signing was a matter of procedure so the defect or omission does not affect merit of the case or jurisdiction of the court. Under MLEC and MLES

[172] Economic Criminal Case NO.1 of 2007 between Republic v. Professor Dr. Costa Ricky Mahalu and another decided by the Resident Magistrates Court of Dar es salaam at Kisutu
[173] Rule 58 of High Court[Commercial Division] Procedure Rules,2012
[174] Dodsal Hydrocabons and Power [Tanzania PVT LTD & 3 Others v. Hasmukh Bhagwanji Masrani, Commercial Case NO. 42 of 2011[HC][Makaramba, J][unreported] at page 20
[175] Transgem Trust v. Tanzania Zoisite Corporation Limited[1968] H.C.D NO.501

could also called as an aid to remove the legal obstacle, if any, on the fundamental principle of non discriminatory or and functional equivalent and technological neutrality.

Fortunately, we are not at cross road as suggested, and we may as well resort to UNCITRAL Model Law, 1996, for guidance especially the Modern Law on Electronic Commerce in order to facilitate e-commerce within and without. MLEC comprise of international accepted rules which removes legal obstacles in national legislations and thus, increase e-commerce among states and businessmen. For instances, these set of rules provides for equal treatments for both paper based and electronic based information. Equal treatment is very important, as in our case now, because it enables us to use both paper based communications as well as digital communications simultaneous in an equal play ground in courts. The Modern Law on Electronic Commerce [MLEC] contains fundamental principles of non-discriminations, technological neutrality and functional equivalent which are regarded as the founding elements.

The principle of non discrimination ensures that a paper based evidence or digital evidence should not be denied of its legal validity or enforceability solely on the ground that it is either in paper or an electronic form. Technological neutrality ensures that neutral provisions or rules are adopted with respect to technology used so that any future technological development would not necessarily need lawmakers. The functional equivalent principle make conditions which ensure that electronic communications may be considered equivalent to paper based communications. In other words, the principles make sure that electronic communications and traditional

communications fulfil the same roles sought to be achieved in international trade. MLEC also resolves issues regarding formation and validity of contract concluded digitally. It faces challenges attributed to contract entered by electronic means, acknowledgment receipts, time and place of receipt of data messages. In this regard, certain provisions of MLEC have been amended by Electronic Communication Convention so that it can go hand in hand with electronic commerce especially in connection with carriage of goods which is now complimented by UN Convention on contracts for the international carriage of goods, either wholly or partly by sea[176].

[176] "The Rotterdam Rules"

CHAPTER FIVE

5.0 FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Findings and Recommendations

The research was conducted by documentation, interview and review of some rulings and judgment in some cases in Tanzania. However, there were limitations in this study as the interview was on selected persons and the review of cases involved few and relevant cases which dealt with e-transaction or some cases which partly have transacted electronically.

The study was also partly done on Questioners and interview of some selected resource persons and few Government Officials especially state attorneys from the Law Reform Commission, Attorney Generals Chambers, private Advocates, bankers e-government agency official and other interested stake holders. The result of the research is as shown in Appendix-1 pinned in this paper.

This study has revealed that a lot of efforts have been made by the Tanzania Government so far in terms of policies and amendment on some of our laws and establishment of e-government. There are also efforts done by the legislature, Law Reform Commission, Tanzania Communication Regulatory Authority and the Courts in Tanzania to install and build e-transactions environment but still a lot need to be done.

This study had shown and analysed the best practices to be applied in combating the challenges on the admissibility and validity of e-evidence, e-contract and e-transactions in courts of law. The paper further identified the areas which need

improvement and those which need special attention by the relevant institutions or organs. The study was intended to answer the overall research question that as " to what extent are the existing laws and taxonomies of cyber laws in general appropriate in the admissibility and validity of e-evidence and cyber contracts in courts of law in Tanzania".

The review of case laws used and questionnaire method employed were investigated and analysed in this study and its findings proposed solutions on the challenges regarding the admissibility and validity of e-transactions as shown in appendix 1. Out of 17 persons interviewed, almost all of them suggested that we have to make new laws for digital and other e-transactions in Tanzania by looking from developed systems in other countries.

There is unified approach on how the legislations in other jurisdiction align with these challenges especially in Europe, US and Far East countries. Laws enacted in those countries assisted e-record or e-contract or e-evidence or e-transaction to be utilized in courts but in Tanzania we have to look on UNCITRAL Model Law, 1996, for guidance especially on fundamental principles adopted in Modern Law on Electronic Commerce.

5.2 Conclusions

This study dealt with admissibility and evidential value of e-contracts as well as e-evidence and other e-transactions. Questions on the establishment of authentication and accreditation authority, authentication service providers, register for cryptography providers and establishment of domain names are the matters to be

addressed in future researches. After analysis of the questionnaire responses, the study embarked on a follow up interview designed to identify challenges in our existing laws on admissibility of e-transactions and awareness of relevant legislations amended so far in Tanzania. As part of this study, the responses are pinned at the end of this paper as Appendix 1 to signify the fact that there is lot to be done to create awareness on cyber laws, e-transactions as most people interviewed prefer the enactment of express laws on the admissibility and validity of e-evidence and other e-transactions in courts.

The wholly study show that electronic technology application go hand in hand with in born challenges therefore solutions to the issues like illegal access , interference with data and computer systems, use of illegal devices and publication of immoral and obscene materials must be attended. The laws and procedure in dealing with cyber crimes must also be put in place.

The findings of a recent case[177] show that digital or scanned signatures are not recognized in our laws but the case is now on appeal before the Court of Appeal for decision. Although, we do not know what the court of appeal will rule regarding that issue in the case, this position signifies that a lot has to be done in our laws regarding the validity and admissibility of e –evidence and other e-transactions. All in all, there are lot to be done in collection, use, disclosure, retention, processing, security and disposal of data. There a lot more to be done before a favorable atmosphere exists for e –transactions in Tanzania. Thoughts regarding offices of data collection and privacy data needs to be considered as well.

[177]See supra note no. 174 at page 20

The questions addressed in chapter 4 regarding the challenges of admissibility and validity of e-contract, e-evidence and e-transaction were investigated and analyzed. The chapters then proposed a unified approach. The intention is to reveal how legislation in other countries aligns with these challenges. In doing so, some countries with experiences have been highlighted. In addition to the legislation enacted in these countries it was not possible in this paper to cover every article or legislation for each country and therefore the UK and USA featured more. But additional information which was made available by the Government through TCRA, the Law Reform Commission and other sources, both academician and non-academician were included for purposes of illustrations. These opinions can partly be seen in Appendix-1.

Generally, the method of this dissertation is considered exploratory, descriptive and comparative so as to identify and compare the approaches used in UK and USA in admissibility and validity of e-contract, e-evidence and other e-transactions. Administering written questionnaire and interviewing were used and a follow up provided a depth understanding in several qualitative areas. There are also case study approaches within cases analysis which were useful and provided comparison and contrast in rich details.

A connected computer can access a website anywhere in the world and likewise businessmen by use of electric contract can enter into contract with other businessmen located in different countries. Law is regarded as an important tool of resolving disputes and therefore, it is important to have specific rules for dealing

with e-contracts, e-evidence and other e-transactions so as to help a conducive and sustainable environment for investments especially in this age when our country has invited huge investments from all over the world. However, in the time being, UNCITRAL MODEL LAW, 1996 on electronic commerce, can be considered and / or adopted as initial measures in the process of enactment new rules on admissibility and validity of digital transaction in courts.

Before I pen off in this chapter, I must say that I still remember the address of Lord Denning in Packer v. Packer[178] that:" ...If we never do anything which has never been done before, we shall not get anywhere", as the law will stand still whilst the rest of the world goes on and that will be bad for both".

This research shows presently that there is a need to develop our laws as a step further by setting some guidance and standards for recognizing admissibility and validity of electronically stored evidence in civil proceedings in line with other countries. In India, Pakistan, Bangladesh, Burma, Ceylon, Malaysia and Singapore, there have been significant changes on admissibility and validity of e-evidence as the gap of the original fundamental doctrines of the best evidence rule, the necessity of direct evidence, prohibition of hearsay evidence, precedence of documentary evidence, concept of a document and privileged communications beyond disclosure have been interwoven so as to abridge with the advancement with information technology. In these countries, the issue of admissibility and validity of e-evidence and cyber contract has brought changes in other laws as well.

[178] Packer v. Packer [1954] p. 15

Most Africans countries are in early stages of cyber legislation enactment[179]. Of the over fifty countries in Africa only five countries have moved ahead of others[180]. We are yet to see how Tanzania can put itself on the right legal framework in the admissibility and validity of e-evidence, e-contract and other e-transactions in courts. It can be done if we play our part.

[179] Angeline Vere (2009): Legal and Regulatory Framework for the Kwnowledge Economy: Economic
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[180] See supra note no.179

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