

**THE IMPACT OF ICT IN CONTRACT FORMATION AND
E-COMMERCE DEVELOPMENT IN TANZANIA**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENT FOR THE DEGREE OF THE MASTER OF LAW IN
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2013

CERTIFICATION

The undersigned certify that he has read and hereby recommend for examination a Dissertation entitled “**The Impact of ICT in Contract Formation and E-commerce Development in Tanzania**” in partial fulfillment for the Award of Master of Law Degree of the Open University of Tanzania.

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DECLARATION

I, **Chikwido, Noel John** 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 a similar or any other degree award.

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Date

DEDICATION

This work is dedicated to my Beloved Parents; my Mother Pilli Kapilima and my father John Chikwindo whom tirelessly cared me and showed me the importance of pursuing this noble profession.

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ABSTRACT

The Impact of ICT in Contract Formation and E-commerce Development in Tanzania is the title of this dissertation. This title was chosen basically focusing on the undisputed fact that the use of ICT has currently rapidly increased to the fact that at least every day life has been next to impossible to an individual without the use of equipment such as mobile phones, computer, laptop, automatic machine used in a particular system etc. We daily communicate and normally we either send or receive information in various forms. Communication has shifted from the old paper based to the modern electronic form in such a way that e-mails, websites, EDIs, mobile phones, etc have been highly used as the most preferred ways of communication particularly between those who are far away from each other. Internet has catalysed the speed of communication as it has now been faster, efficiency and trustworthy. This dissertation has five chapters whereby chapter one contains the basic concepts on ICT and Contracts, second chapter on the development of communication process, third chapter, contract formation practices, fourth chapter, electronic contract formation and the findings of the study. Lastly is chapter five which presents the conclusion and recommendations. In the dissertation, it has been found that among others, ICT revolution in Tanzania has not been fully legally recognized and that, what is present in the country is the application of electronic communication by Tanzania particularly those in urban areas without being protected by any strong law. ICT has made the government to initiate a number of national ICT projects so as to rescue the country from continuing being backward in the utilization of the electronic communication to facilitate government activities, electronic contract formation safety and e-commerce development in the country.

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ABBREVIATIONS

3G	Third Generations
4G	Fourth Generations
AG	Attorney General
ARPANET	Advanced Research Projects Agency Network
BC	Before Christ
BT	British Telecom
BTS	Base Transceiver Station
CD	Compact Disc
CISG	Convention on International Sales of Goods
CUECIC	Convention on the Use of Electronic Communications in International Contracts
DSL	Digital Subscriber Lines
EDI	Electronic Data Interchange
EFDs	Electronic Fiscal Devices
EFP	Electronic Fiscal Printer
eGA	e-Government Agency
EPOCA	Electronic and Postal Communications Act
ESD	Electronic Signature Device
ETR	Electronic Tax Register
EU	European Union
GPO	General Post Office
GSM	Global System for Mobile Communications

HTML/XML	Extensible HyperText Markup Language
ICT	Information Communication Technology
ID-	Identity Card
IEEE 802	Institute of Electrical and Electronics Engineers Standard 802
LL.M	(Latin <i>Legum Magister</i>) Master of Laws
LL.M in IT &T:	Master of Laws in Information Technology and Telecommunications Law
MCST	Ministry of Communication Science and Technology
MIS	Management Information System
NICTBB	National Information Communication Technology Broadband Backbone
NIDA	National Identification Authority
PC	Personal Computer
PDA _s	Personal Digital Assistants
PGO	Postmaster General
S.A	South Africa
SAM	Secured Access Module
SIS	Strategic Information System
STI	Science, Technology and Innovation
TANZICT	Tanzania Information Communication Technology
TCP/IP	Transmission Control /Internet Protocol
TCRA	Telecommunication Regulatory Authority
TIC	Tanzania Investment Centre
TRA	Tanzania Revenue Authority

TTCL	Tanzania Telecommunications Company Ltd.
T	Telecommunication
TV	Television
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNECE	United Nations Economic Commission for Europe
UN	United Nations
USA	United States of America
USD	United States Dollars
UTP	Unshielded Twisted Pair
WLANs	Wireless Local Area Networks
WTO	World Trade Organization
WWW	World Wide Web

CHAPTER ONE

1.0 INTRODUCTION

1.1 Introductory Remarks

It is the undisputable fact that communication plays a vital role in our daily lives. It is through communication we daily engage in the social, political, economic and cultural activities in the various aspects of human life. The means of communication have been developing rapidly from the industrial revolution where we have seen how postal communication played a great role towards development of the modern electronic ways of communications whereby internet has been taking a significant part in our daily activities.

Today, be it in the developed or developing countries, we are directly or indirectly affected positively or negatively by electronic communications and thus, electronic contracts and a number of electronic commercial transactions in particular, have been concluded daily. Internet has influenced and facilitated the modern ways of communication in every aspect in such a way that we are changing from the traditional ways (i.e analogy ways of communication) to the modern ways of communication i.e digital ways of communication)

For the better understanding of the modern ways of communication, it is important to have a simple knowledge and meaning of the terms “*Internet*”, “*World Wide Web (WWW)*” and “*Wireless Communications*”. Internet refers to the physical network that links computers across the globe. It consists of the infrastructure of network servers and communication links between them that are used to hold and transport

information between PCs and web servers.¹World Wide Web (WWW)” is the most common technique for publishing information on the internet. It is accessed through web browsers which display web pages of embedded graphics and HTML/XML - encoded text. Wireless communications refers to electronic transactions and communications conducted using mobile devices such as laptops, personal digital assistants (PDAs) and mobile phones (and fixed access platforms) with different forms of wireless connection.²

The revolution brought by Information and Communication Technology (ICT) has changed the ways of forming contracts as well as the ways of doing business, strategies for searching markets, advertisements, the ways of inviting customers to treats and the way commerce in general is being conducted. According to Dave Chaffey, Information and Communication Technology (ICT) refers to the software applications, computer hardware and networks used to create e-business systems.³

The United Republic of Tanzania is one of the members of the United Nations (UN) since 14 December, 1961.⁴ Being one of the members of the UN and as a result of globalisation, Tanzania cannot isolate itself from the global changes particularly in various global economic changes as well as advancement in science and technology. In 2005, in fact as the result of massive involvement of electronic communications in contract formations and e-commerce developments in the world, the United Nations issued a special Directive known as “2005 - United Nations Convention on the Use

¹ Definition taken from the book entitled E-Business &E-Commerce Management, Strategy, Implementation and Practice (2009) by Dave Caffey, Pearson Education,4th Edition, p.4

² Ibid

³ Ibid

⁴ <http://www.un.org/en/members/> as visited on 9th June, 2013 at 19:00 hrs East African time.

of Electronic Communications in International Contracts”⁵

The Electronic Communications Convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. The Convention is an enabling treaty whose effect is to remove those formal obstacles by establishing equivalence between electronic and written form contracts. Moreover, the Convention serves additional purposes further facilitating the use of electronic communications in international trade.⁶

Thus, the Convention is intended to strengthen the harmonization of the rules regarding electronic commerce and foster uniformity in the domestic enactment of UNCITRAL model laws relating to electronic commerce, as well as to update and complement certain provisions of those model laws in light of recent practice. The formation of contracts features in all areas of our lives. Every day we unconsciously enter into a variety of contracts. Contracts are so prevalent that the ordinary man or woman in the street does not realize the legal complexities of the transaction into which they are entering. The evidence of a *consensus in item*, or a meeting of the minds achieved by a clear and unambiguous offer and an unqualified acceptance of that offer are the basis of contract formation.⁷

⁵ http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html

⁶ Ibid

⁷ As written in a Paper by Andrew D. Murray, *Entering Into Contracts Electronically: The Real WWW*, Department of Law, London School of Economics

As electronic communication spurs globalisation and as the number of cross-border transactions soar, the consistency of legal rules both domestically and internationally will be essential to the proper functioning of commercial markets.⁸ Tanzania is one of the developing countries in which her citizens have been using electronic communications in a number of dealings for both domestic and international transactions. In such communications, the citizens have been entering into a number of electronic contracts directly or indirectly knowingly for few citizens and unknowingly for many of them due to legal complexities involved therein. The contract formation principles as described in the Law of Contract Act and the Sale of Goods Act⁹ have been affected by the modern ways of communication and the way citizens have been forming electronic contracts as the result of ICT revolution.

1.2 Background of the Problem

There are four main eras in which technological evolution has passes through up to the current ICT and Internet age. The first era is *data processing*. The era took place from the 1960s onwards and mainly used mainframe computers and mini-computers. In this era, the main objective was to improve operational efficiency by automating information based processes. Computers were only used by major corporations such as airlines. Hardware and programming were very expensive and could only be justified for organizations that had a significant amount of transactions daily.¹⁰ The second era was that of management information system (MIS). The principle aim of this era was to increase management effectiveness and efficiency by satisfying

⁸ The Columbia Science and Technology Law Review; Contract Formation in an Internet Age, Vol. X by Amelia Rawls, 2010

⁹ Cap 345 R.E 2002 and Cap 214 R.E 2002 respectively

¹⁰ Dimitrios Buhalis, eTourism; Information Technology for Strategic Tourism Management, FT Prentice Hall, p.11

organizational information requirement. It commenced in 1970s and used local data processing linked to information resources to support decision –making.¹¹

In 1980s, the strategic information system (SIS) era aimed at improving competitiveness by changing the nature or conduct of business. Since the late 1990s a fourth and more profound era has been emerging, the network era, in which intra- and inter organizational networking has proliferated. Local area networks and wide area networks as well as the internet, intranets and extranets have revolutionized communication. In this era, ICTs are used as indispensable tools for almost all business functions from production to marketing as they facilitate quick communication; reliable and timely information transfer and retrieval; integration of the different divisions within organizations; flexibility of product specification; sharing of information and achievement of common objectives.¹²

From the above paragraphs, it is clear that the modern internet age and ICT revolution are the products of a number of evolutions which took place in the processes of developing a quick, efficient, reliable and most trusted ways of electronic communication. Therefore, it will be seen that, the modern electronic communication age was preceded by a number of past ways of communication such as by using post-office which created postal rule in contract formation. The basic principle which was established as far as traditional contracts are concerned is the fact that contract is said to be formed when there is communication of acceptance.

¹¹ Ibid

¹² ibid

Communication of acceptance can be done by using spontaneous or non-spontaneous ways of communication. Today, Electronic communication allows parties to compress immense of data and to send thousands of documents back and forth faster than the blink of an eye.¹³ This shows how the modern ways of communication have been so fast in such a way that the postal rule which has played a significant role since industrial revolution despite of its existence as a valid rule, it is not applicable spontaneous communications.

Despite the fact that there has been a shift from traditional ways of contract formation to the modern electronic ways, the basic elements of contract such as offer, acceptance, intention to create legal relations and consideration to mention few, still remain to be valid in any contract. Generally, there are five basic requirements that need to be satisfied in order to make a contract genuine. That is to say, there must be an agreement between the parties which entails the presence of a valid offer, acceptance, an intention to be legally bound by that agreement, certainty as to terms of the agreement, capacity to enter into a contract i.e requirement for attaining the age of majority and being mentally fit and consideration.

Trade practices and contract formation existed in Tanganyika even before the coming of the colonialists¹⁴, the indigenous had various trading activities and they formed contracts under customary rules whereby mainly barter trade through the East African long Distance trade goods were locally exchanged. On top of that, the

¹³ The concept has been well discussed in the journal mentioned above, The Columbia Science and Technology Law Review-2009, Vol.X AT P.218 as written by Amelia Rawls

¹⁴ Before her independence in 9th December, 1961 Tanganyika was colonized by The Germans and then the British colonial rule.

Eastern African slave trade stimulated trade practices and contract formation practices since as the slaves were transported through the caravan routes such as from Tabora to Bagamoyo and then to Zanzibar a lot of commodities such as honey, animal skins, ivory etc were transported and used in barter trade.

The colonialists introduced a number of laws which featured formal practices of contract formation such as the requirement for writing and signing a contract on a paper based form which was clearly a new thing.¹⁵ In 1st July, 1920 the Tanganyika order in council through the reception clause, recognized the applicability of the colonial laws in Tanganyika including laws governing contracts formation and related issues. After her independence and union with Zanzibar on 26th April, 1964 Tanzania amended a number of laws including the law of contract ordinance and the Sale of Goods Ordinance so as to suit the local environment. In 2002 these laws and many others were revised. Part II of the Law of Contract Act¹⁶ particularly under sections 3 to 9 provides for communication, acceptance and revocation of proposal. This part has been so useful for a long time from independence to date. However, the emergence of electronic communication has brought legal complexities in determining principles governing contract formation.

With the current development of science and technology, software is being sold as goods as opposed to the traditional ways of selling computer programmes in CDs or other devices. The ability of selling software online and other computer programmes,

¹⁵ Chief Mangungu of Msowero and many other Chiefs in Tanganyika signed a number of contracts unknowingly which had the effect s of vesting colonial rule in the fertile indigenous soil.

¹⁶ Ordinance No.1 of 1961 currently Cap 345 R.E 2002

has brought a number of complications in the dimension of the Sale of Goods Act¹⁷ and definition of the term “goods”. According to the Act, "goods" includes all chattels personal other than things in action and money, emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale. With this definition, the question is whether, the sale of software and other computer programmes online is covered by our laws basing on the current developments.

The revolution of ICT has transformed the contract formation processes in such a way that electronic communications can contribute in electronic contract formation in three main categories which are firstly, contracts formed through E-mails communication secondly, the web based electronic formation processes which includes the “click-wrap” or “click-through” contracts and the “web-browse” or “Browse-wrap” and thirdly, contracting through Electronic Data Interchange i.e the EDI Technology. Therefore, as opposed to the traditional paper based contracts where parties were able to seat together, negotiate and then sign the contracts, today we see how many contracts are being formed electronically by E-mails, Web based contracts and by EDI¹⁸

Among the legal complexities brought by the electronic communications in contract formation can be seen when asking the fundamental questions like identifying *who* entered into a contract i.e the offer originated from X and such an offer was dully accepted by Y and such Y communicated his acceptance, *where* was the contract

¹⁷ Cap 214 R.E 2002

¹⁸ EDIFACT (ISO 9735) is the international standard for electronic data interchange (EDI i.e Electronic Data Interchange For Administration Commerce and Transport.)

formed that is to say the issue of jurisdiction and law applicable, *what* were the terms of contract, *when* an agreement was reached. Other questions are such as authentication of the signature (i.e. digital signature) as well as the authenticity of the message sent.

1.3 Statement of Problem

According to the International Telecommunication Union Report¹⁹ innovation do not happen in vacuum. Nor do people and firms innovate alone, but instead do so within the reciprocal system of interactions and relationships with customers, vendors, external research, and development organisations and even sometimes with competitors. These networks create and move the knowledge and skills associated with new technologies and organisations. In order to insure that innovation is relevant to the developing country (such as Tanzania) it needs to be broadened to include among other things, both indigenous knowledge and the mastery of imported technologies and knowledge.²⁰

The introduction and widespread of electronic communication as a result of internet technology which originated in United States Military strategies²¹ and which now has been widely used globally including in our country as a result of ICT revolution, has brought multiple direct and indirect impacts in almost every aspects of life be it socially, politically, economically and technologically. These impacts have in turn

¹⁹ Trends in Telecommunication Reform, 2012; ITU Report on Smart Regulation for a Broadband World, the Report prepared by ITU Experts and presented by Brahim Sanou, 12th Edition

²⁰ Ibid

²¹ This can be seen in the work of Dr Dimitrios Buhalis; he is a Course Leader of the MSc in eTourism and Director of the Centre for eTourism Research (CeTR) in the school of Management, University of Surrey

gone to change the whole pattern of our legal systems particularly on aspects of contract formation. Furthermore, such technological advancement though has acquired importance to the majority of citizens especially in urban areas, has not yet been well domesticated, nor being well legislated, as well as being not well introduced to the society and that has brought a number of impacts in contract formation principles. Most of the citizens have been forming electronic contracts without having prerequisite protection of the law and protection as consumers.

The existing laws in Tanzania relating to contracts formation and related issues have not yet been transformed to incorporate important technological changes in the aspects of principles of contract formation as it can be reflected in electronic communications. ICT might have created a significant and considerable gap and also have created a number of legal risks which traditional contract formation principles and laws might not be able to tackle. It is unknowingly as to whether there have been sufficient efforts taken by the Tanzanian government to address the challenges posed by ICT in contract formation and e-commerce development in general.

1.4 Literature Review

Based on loans from Chinese government, Tanzania embarked on the USD 200m National ICT Backbone (NICTBB) facility project in 2009. The NICTBB involves rolling out 7000km of a national fibre backbone in three rings (North, South and West), as well as metropolitan ring in Dar es salaam. It provides a fibre optic transmission network that is being operated and managed to provide high speed broadband capability to all parts of the country, enabling businesses, schools, government agencies, and households to access modern high speed

telecommunications at affordable price. The national backbone also connects with the international submarine cables (SEACOM and EASSY) in Dar es salaam and provide land connectivity to Tanzania's neighbors.²²

The above analysis as described by TCRA shows the background to the current development and investment in information Technology and availability of Internet to the citizens at the affordable price. It does not provide any useful information regarding electronic contracts or legal issues brought by such internet services and telecommunication services in the country.

The United Kingdom Journal entitled; Information Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and Judiciary,²³ contains an article which show the efforts and strategies taken by Nigeria in 2004. According to it, like many other countries, Nigeria was aspiring to develop legislation to facilitate electronic commerce specifically on the use of information communications technology generally.

The Author of the said article, Dr. Gbenga Bamodu²⁴ clearly provides that, in the information and electronic commerce age, more and more Nigerians will be involved in activities that have connections to countries other than Nigeria. Surfing the Web in itself is an activity that is connected to other countries in the sense that

²² Trends in Telecommunication Reform, 2012 as p.68 as taken from www.tcra.go.tz i.e Tanzania Communication Regulatory Authority(TCRA).

²³ The Journal available at http://www.bailii.org/uk/other/journals/JILT/2004/bamodu_2.html
Cite as: [2004] JILT 14

²⁴ Lecturer, Faculty of Law, University of Essex, Colchester and Barrister & Solicitor of the Supreme Court of Nigeria.

the computers, the servers and hosts, that are accessed, as well as the providers of the services offered through them, will be overseas in many cases.

As the practice of concluding contracts electronically grows and evolves, another interesting issue that the courts are likely to encounter at some point in the future is that of whether a contract can be concluded between two computers operating at the time of the exchange without human input. In other words, can one computer make a contract with another computer and render that contract binding on the proprietors of the computers, that is, the computers being seen as electronic agents of the proprietors. A contract is of course regarded as requiring a meeting of the minds (*consensus ad idem*) of the parties concerned although of course the law has long recognised the ability to enter into contracts through agents (*qui facit per alium facit per se*) but that recognition was traditionally limited to agency capacity by human beings or recognized juridical persons such as companies and so on.²⁵

Information communications technology also poses some challenges for the courts in terms of the use of electronic documents as evidence. In ordinary circumstances, that is, without the use of certification for example, electronic documents have a particular vulnerability in that deliberate or in-deliberate modifications may be difficult to detect if not altogether undetectable. In addition, most electronic documents tendered are likely to be copies of the original data contents of the document in terms of the way information systems, especially network systems, work.

²⁵ Ibid; (The United Kingdom Journal) Information Communications Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and Judiciary.

These factors pose challenges for courts in terms of some key concepts underlying the admissibility of evidence such as reliability, the best evidence rule, the rule on hearsay and generally in terms of the authenticity and integrity of the document. Even if an electronic record satisfies the tests that may be laid down for its admissibility, there is the further question of what weight is to be attached to such evidence.²⁶

The above quoted paragraphs from the journal, are typically explaining the legal environment in Nigeria but the same is the situation in Tanzania. Furthermore, the facts narrated therein are issues of 2004 and the study was conducted while already there was a bill to be presented to the parliament to legislate the Electronic Communication Act in the country. Despite the fact that both countries are the African countries, the level of development reached by Nigeria is much more advanced compared to that of Tanzania in a number of areas including technological advancement. A number of points can be learnt there from.

According to the Paper by SANS Institute; InfoSec Reading room entitled; Electronic Contracting In An Insecure World as written by Craig S Wright,²⁷ technological developments and the advent of internet have led to new paradigms in the international as well as local commercial activity. These changes have reduced the certainty of contractual negotiations leaving a commonly held belief that the law of offer and acceptance does not readily apply to such transactions when conducted online. In the past, international commercial transactions were generally restricted to

²⁶ Ibid.

²⁷ A paper accepted on 14th Jan 2008, from SANS Institute Reading Room site, SANS Legal Issues in Information Technology and Information Security, LEG-523.

negotiations between commercial entities.

The internet has increased the scope of the business to consumer dealings, and even consumer – to consumer transactions across jurisdictional borders. For this reason, the formation of contracts using the internet creates segregation into two initial categories. These categories include both those negotiations that occur strictly within a single jurisdiction, and next, those negotiations that involve multiple legal jurisdictions.²⁸

Another concern focuses on the relationship of parties. Many Web bases transactions engines act as third parties during the process of offer and acceptance. This interaction can complicate the formation of contract. Because of this, it is necessary to determine the legal standing of the third party. In *Debenhams Retail Plc V. Customs and Excise Commissioner*²⁹ it was discussed that a third party could be a party to the contract, an agent or one of the two contracting parties, or may just be an ancillary facilitator or medium, across which, and through whom the contractual bargaining occurs.

The internet is fundamentally a means of communication. Issues with law that have arisen because of the internet are thus a result of the differences between communication in the physical world and communication using internet. Contractual negotiations are the result of a series of communications that create a legally binding agreement. For this reason, there is a little difference between contracts made online

²⁸ Ibid

²⁹(2004)

than those formed through face to face communication. The facts surrounding communication are primary difficulty. For example, the question as to whether contracts performed electronically are legalistically equivalent to writing comes more to a question of evidential weight and the application of the parole evidence rule.³⁰

From the above analysis and the consideration of how the author of the paper has written on the aspect of electronic contracts, we can see that all of the above has basically focused on the European Environment where the level of science and technology is very high. With regard to Tanzania, the question as to whether such virtual contracts are recognised by the current laws becomes more complicated. The more complex issue is on time of contract formation. Other things are such as the legality of terms of contract, and the jurisdiction if a Tanzanian concludes a contract online with a citizen from another country.

Dave Chaffey in his book e-business and e-commerce Management³¹ explains that, electronic commerce (e-commerce) is often thought simply to refer to buying and selling using the internet; people immediately think of consumer retail purposes from companies such as Amazon. But e-commerce involves much more than electronically mediated financial transactions between organizations and customers. E-commerce should be considered as all electronically mediated transaction between an organisation and any third party it deals with. By this definition, non-financial

³⁰Ibid; a paper by SANS Institute, Electronic Contracting In An Insecure World as written by Craig S Wright, from p.3 to 4.

³¹Ibid; The book based on the Strategy, Implementation and Practice of e-commerce and e-business, 4th Edition, 2009 Pearson Education at p.10

transactions such as customer requests for further information would also be considered to be part of e-commerce. Therefore, e-commerce can simply be defined to refer to all electronically mediated information exchanges between an organization and its external stakeholders.

According to Dimitrios Buhalis³² in his famous book entitled *eTourism; Information Technology for Strategic Tourism Management*³³ the Internet as an idea emerged in the 1960s as a military tool by the US army (Defence Advanced Research Projects Agency). The aim was to link together mainframes and enables them to communicate with each other and share data through a flexible system that could remain operational in a few systems were destroyed or out of order. The system was known as ARPANET and used a transmission Control /Internet Protocol (TCP/IP) for linking all computers together. Overtime its use spread from the military to other government departments to non-government organizations such as universities and research laboratories, and ultimately to the business community and the general public.

The electronic networking for organisations can be seen in three main levels which are internet, Extranet and Intranet. Internet refers to the interacting with all stakeholders and window to the world. Intranet is dedicated for internal employees and managers while Extranet deals with the interoperability with authorized partners only.³⁴ In all these three electronic networks, firewalls play a vital role in such

³²Dr Dimitrios Buhalis is a Course Leader of the MSc in eTourism and Director of the Centre for eTourism Research (CeTR) in the school of Management, University of Surrey

³³This book is accompanied by a website (www.booksites.net/buhalis)

³⁴Ibid.p18

differences.

The book is very useful in understanding the history and the current technological developments which have led to ICT revolution. However, the book has not touched directly the African context and Tanzania environment in general. Without prejudice to the foregoing, as Internet cuts across the borders regardless with geographical boundaries, the concepts relating to e-Tourism enshrined in the book can benefit Tanzania's economic growth as the country is full of beautiful natural resources which are the honey-pots for tourism.

The book entitled Marketing Management as written by Philip Kotler and Kevin Lane Keller³⁵ (on the M-Commerce Marketing Practices) describes that, the widespread penetration of cell phones and smart phones-there are currently more mobile phones than personal computers in the world-allows people to connect to the Internet and place orders on the move. The existence of mobile channels and media can keep consumers connected and interacting with a brand throughout their day-to-day lives. Although in 2009 one in five phones in the United States was a smart phone such as an iPhone or BlackBerry, sales of smartphones are forecast to exceed those of regular phones by 2011. As their penetration and adoption of 3G increases, and as ease payment options and various apps for mobile phones are developed, m-commerce will take off. By 2015, more people are expected to access the Internet with mobile phones than with PCs.

³⁵14e Global Edition, Pearson, (2012), London ,p463 the book is also available at www.pearsonglobaleditions.com/mymarketinglab

This book is not specifically dealing with contract law. It has based on marketing management and the authors have not directed themselves on issues of legal technicalities such as the aspects of offer, acceptance and revocation of offer. The book only discusses the direct impacts of technology and the use of ICT equipment such as smart phones in placing online orders and how that can expand and stimulate e-commerce.

Blackstone's Statutes on IT and e-Commerce; the work edited by Steve Hedley & Tanya Aplin³⁶ among other legislations, contains The Directive of the European Parliament and of the Council on the Protection of Consumers in respect of distance contracts.³⁷ According to recital 13 of the Directive, where information dissemination by certain electronic technologies is often ephemeral in nature in so far as it is not received on a permanent medium; whereas the consumer must therefore receive written notice in good time of the information necessary for proper performance of the contract.

It can therefore openly be seen that; this Directive was mainly designed for the purposes of protecting the consumers in respect of distance selling within the European community as the introduction of new technology increased the number of ways for consumers to obtain information about offers anywhere within the community and place orders. It is solely based on the protection of consumers within the EU and might not directly fit our local environment though it is the undisputed

³⁶New Edition (4th Edition)of Blackstone's Statutes as revised and updated to include all relevant legislations through to May 2008, Oxford University Press p341. Steve Hedley is a Professor of law at University college, Cork while Tanya Aplin is a Reader in in Intellectual Property Law at King's College London.

³⁷Directive 97/7/EC of 20May 1997

fact that the Directive is very useful for Tanzania and East African states in general, to grasp such a practical experience. As that happened in 1997 and the same characters are currently mushrooming in the East African Community and Tanzania in particular, a lot can be taken there from.

The Internet and electronic communications in general have also posed a challenge in Intellectual Property laws both locally and internationally. The essays in Honour of William R. Cornish, as compiled and found in the book entitled *Intellectual Property in the New Millennium*³⁸, explains that, unlike other areas of law; intellectual property law has been obliged by technological change to develop fairly rapidly. Consequently, the gradual evolution of international intellectual property law through the application of customary principles is not likely in this area. However, even legislative change is too slow to keep up with technological developments and thus private standard-setting is becoming increasingly important. This is particularly the case with the impact of the Internet upon intellectual property law where the regulation of domain name registrations occurs on a self-regulatory basis.

In 2007 following an alarming cries of the public and difficulties in proving criminal cases beyond reasonable doubt, the Parliament of United Republic of Tanzania passed amendments to the Evidence Act.³⁹ The said amendments were done through the Written Laws (Miscellaneous Amendments) Act.⁴⁰ According to section 33 of the Act, the principal Act (The Evidence Act) is amended by adding immediately

³⁸Essays edited by D.Vaver and L.Bently; first published 2004, Cambridge University Press p.5

³⁹[Cap 6 R.E 2002]

⁴⁰The Act of 2007, Part IX on the Amendment of the Evidence Act

after section 40 the following new section-

40A. In any criminal proceedings-

- i. An information retrieved from computer systems networks or servers; or
- ii. The records obtained through surveillance of means of preservation of information including facsimile machines, electronic transmission and communication facilities;
- iii. The audio or video recording of acts or behaviors or conversation of persons charged, Shall be admissible in evidence.

This amendment in the Evidence Act came after a number of impacts which occurred as far as cyber-crimes are concerned the fact which was purely a new thing not only to our prosecution machinery but also the judicial systems as well. It is a good thing that at least the parliament (though after a massive cry of the public) saw the importance of at least amending the Act by introducing section 40A. The shortcoming of that amendment is that it came as a pressure from different angles and it was done without having an ample time of analysing exactly what need to be done as far as cyber-crimes in Tanzania is concerned. It will clearly be seen that as the result of such circumstances, the said amendments focused solely on criminal aspects of law without considering the civil and contractual aspects as well as the commercial environment in which the electronic communications are concerned.

The Law of Contract Act⁴¹ under section 4 describes the situation as to when communication is complete. Subsection (1) of such section provides that, the

⁴¹Cap 345 R.E 2002

communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. Subsection (2) provides that, the communication of an acceptance is complete –

- i. as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor.
- ii. As against the acceptor, when it comes to the knowledge of the proposer.

Subsection 3 of section 4 provides that, the communication of a revocation is complete-

- i. As against the person who makes it ,when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;
- ii. As against the person to whom it is made, when it comes to his knowledge.

Section 5 (1) provides that:

S. 5(1) - A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

S.5 (2) – An acceptance may be revoked at any time before the communication of acceptance is complete as against the acceptor, but not afterwards.

The above provisions of the law show that the issue of communication is the hub towards the formation of any contract. The Act has shown various circumstances and principles to be followed when determined the question as to whether the contract has been successfully formed or not. The great weakness of the Act as far as the issue of communication is concerned is that, the recent technological developments and the advancement of electronic communication have not yet been taken care and that might have brought considerable impacts on the issues regarding completion of communication of an offer and acceptance in online contracts.

The study conducted in 2011 by Nyamaka, Daudi Mwita⁴² came up with among other things a conclusion that the global ecommerce transactions are increasing annually and unless a country like Tanzania whose legal environment is behind the forces of technology creates a requisite enabling legal environment on time, it will miss the opportunities which ecommerce avails to participants in the global market. The author ends up by giving a remark that, previous sound principles may need to be re-evaluated and adapted to ensure that we are upholding the fundamental goals of contract law. While the internet and electronic environment have posed challenges to traditional contracts law, these developments can also be viewed as an opportunity to improve the law and get closer to fundamental contracting principles such as *consensus ad idem*.

With much respect to the author and his valuable study on the aspects of electronic contracts in Tanzania, it will be seen that the study has not much based on the issues relating to contract-formation and elements for contract formation and describing exactly what are the noticeable differences between the traditional contracts (how are they being formed generally) and the electronic contracts (what is new and to what extent it has changed the formation aspect). It is from the understanding of the differences between the two, one can successful comment as to whether there is any gap and pinpointing the risks of not having such laws.

In the course of appreciating the existence of noticeable differences in electronic communications as opposed to the traditional ways of communication in contract

⁴²A Dissertation entitled Electronic Contracts in Tanzania; An Appraisal of the Legal Framework, A study presented in the Partial Fulfilments of the Award of Degree of Master of Laws in Economic Law of Saint Augustine University of Tanzania.

formation, the United Nations passed a special Convention for that matter⁴³. The Convention sets out criteria for establishing the functional equivalence between electronic communications and paper documents, as well as between electronic authentication methods and handwritten signatures (Art. 9). Similarly, the Convention defines the time and place of dispatch and receipt of electronic communications, tailoring the traditional rules for these legal concepts to suit the electronic context and innovating with respect to the provisions of the Model Law.

1.5 Significance of the Study

This study is of great significance to the government and its various agencies which deals with the issues relating to science and technology particularly Information and Communication Technology, various investment activities like those monitored by the Tanzania Investment Centre (TIC) particularly on issues of trade and commerce as well as investment issues in technological fields, and the government in general particularly in its mission and vision to alleviate poverty among Tanzanians and the 2025 Millennium goals.

The correct understanding of the contract formation principles in both traditional contracts and electronic contracts assists the legislation process and even the processes such as amendments of the laws basing on the current technological advancement and legal complexities in contract formation and targets to benefit from e-commerce advantages.

⁴³(2005) -United Nations Convention on the Use of Electronic Communications in International Contracts. It is available through http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html

The study intends to enable the citizens to acquire useful knowledge on the legal implications of the online transactions when using electronic devices such as mobile phones to place orders, facilitating banking transaction, and other related activities which relates to the online offer-acceptance principles. Furthermore, the members of the legal community who deals with contract issues, dispute resolutions and advocates who are facing a considerable number of complex litigations as the result of complex electronic contract formation practices will also find this study very useful.

Finally, apart from enabling the researcher to fulfill the requirements for an award of LL.M in IT &T, the study adds valuable literature review in the field of electronic contract formation and e-commerce development in the country.

1.6 Objectives of the Study

The study has been structured in light of two main categories of objectives namely general and specific objectives. Generally the study focuses on tracing the existing differences between traditional contracts and electronic contracts by pin pointing the existing legal complexities in contract formation as well as the general consequences of Internet in e-commerce development.

Specifically, the study focuses on the following issues:-

- i. Analysing the specific methods or ways under which electronic contracts can be formed. That is to say, studying specifically how Internet services and the electronic communications by using methods like e-mails, websites, Electronic Data Interchange (EDI) etc. have brought changes in

contract formation principles.

- ii. An identification of the real impacts of electronic communication and ICT revolution in general in contracts.
- iii. Studying the technological advancements in sell of goods particularly software and computer programmes online in comparison with the existing Sale of Goods laws and development of e-commerce. For example, EBay, the first virtual online business community, empowers entrepreneurial individuals to become e-commerce business owner.⁴⁴
- iv. To find out any existing legal protection to the consumers of electronic contracts and e-commerce environment in Tanzania.
- v. Studying the efforts so far taken by the government in developing ICT infrastructure and the efforts taken in the legislation process.

1.7 Hypothesis

The study has been guided by an assumption that;

- i. The Internet and electronic communications in general have brought considerable impacts in the famous and existing long celebrated principles of contract formation.

1.8 Scope of the Study

The study is limited in analysing the underlying technological advancements which have brought ultimate impacts in the aspects of contract formation. It is mainly on formation issues and matters relating to legal complexity arising there from.

⁴⁴ Taken from the book entitled; Strategic Management, concepts and Cases, Global Edition;14th Edition, as written by Fred R. David, Pearson Education, 2013 p.209

Therefore, in a nutshell, the study is centred in three main issues namely; Internet and electronic communication, contract formation and development of e-commerce in Tanzania.

1.9 Limitation and Delimitations of the Study

The limitations of the study were on time and resources. The shortage of time from the given time to prepare the proposal to the date of submitting the final dissertation to some extent was short. However, the researcher used some useful quick methods of data collection so as to go with time. It is always known that resources are scarce. Both financial and human resources limited the scope of coverage as originally expected by the researcher to go through. The limited number of experts in different fields of ICT and the difficulties in setting appointments to meet them was one of the limitations in data collection process.

Despite of the above limitations, the use of Internet and availability of the online materials and online libraries such as the free “*bailii*” website materials, afforded the researcher with useful materials in the findings as far as documentary review is concerned. However, most of the online materials are not specifically explaining the local Tanzanian environment.

1.10 Research Design and Methodology

Having a plan of action is the best practice in any formal work such as this academic study so as to make sure that a systematized investigation for the purposes of gaining new knowledge to the matter under study is obtained. In this part, the plan of action for collection and analysis of both primary and secondary data was very important.

1.11 Collection of Primary Data

Data collection by Interview: The researcher conducted interviews with a number of persons such as the IT- experts, staff working in IT companies, lawyers and persons working in the Telecommunication Regulatory Authority (TCRA). Observation was also used in data collection. Through this tool of data collection, the researcher focused on observing the behaviors and conducts of the users of mobile phones in various dealings/transactions such as Mobile –money in their daily activities, awareness of the nature of such transactions and their legal implication.

1.12 Documentary Review

This refers to the process of collecting data by reviewing several works done by the past authors. The researcher used the library at the Open University and the National library to collect relevant data relating to the study problem. As the method was cheap and assisted the researcher to collect data on time, then it was much preferred. On top of that, as the issue of development of science and technology particularly on ICT is still in its infant stage in the country, the practical reports, papers and journals presented by various authors in other jurisdictions were much considered.

CHAPTER TWO

2.0 THE DEVELOPMENT OF COMMUNICATION PROCESS

2.1 Introduction

In this chapter, the researcher shows the historical development of electronic communication in Europe by taking United Kingdom as a reference. The said historical development has been analysed by looking on how the development of science and technology in the telecommunication industry had a significant impact in electronic communication particularly through internet.

Furthermore, the transformational aspects of communication process in human history, the operation of telephone, issues of broadband and universal access in connection to the contribution of telecommunications sector in electronic communications. Each aspect will be analysed by focusing on the local environments and changes so far made in the legal and technology relating to electronic communication in Tanzania. The correct understanding of the historical background of anything normally brings a clear picture and understanding of what should be done by the relevant authorities at that time and in the future, in putting the particular situation under the right track.

2.2 Communication in the Law of Contract

Section 2 (1) (h) of the Law of Contract Act⁴⁵ provides that an agreement enforceable by law is a contract. This shows that there is a need of having the agreement between two or more parties so as to form a contract. Furthermore,

⁴⁵ Act No.55 of 1963 currently CAP 345 R.E 2002

section 4 (1) describes the issue of communication and states the criteria to be used when determining the completeness of the said communication. The section provides that the communication of proposal is complete when it comes to the knowledge of the person to whom it is made. For a communication to be complete in the knowledge of the person to whom it is made, the issue of mode of transmission of such communication becomes a factor of paramount importance.

The provisions of section 4 (2) as shown herein below is self explanatory on the aspects of communication and factors to be considered as far as the issue of course of transmission is concerned as it clearly states that:-

Section 4 (2) of the Law of Contract Act

(2) The communication of an acceptance is complete—

(a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

(b) as against the acceptor, when it comes to the knowledge of the proposer.

(3) The communication of a revocation is complete—

(a) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

(b) as against the person to whom it is made, when it comes to his knowledge.

The recent development of science and technology in the communication sector particularly by the use of internet has brought challenges in the process of

transmission of data and the factors to be determined as to when the communication is in the power of the sender and when it will be in the power of the recipient. In some areas, it has been necessary to have a middle third party such as the owner of the server as between the powers of the sender and the recipient. The Impact of ICT in Contract Formation and E-commerce Development in Tanzania can well be discussed upon having a summary of the historical development and changes in the communication ability to the modern electronic communication.

2.3 The Ability of Man to Communicate

The ability of man to communicate and his extinguishing mental capacity to control and dominate all other creatures, distinguishes him as it makes him to be referred to as the most successful creature in the history of the world. A number of writers in various history books have commented on the ability of man to make speech. Professor Ian Lloyd⁴⁶ has made recommendable comments as far as the history of man and his ability to communicate is concerned.

The ability to communicate is a basic requirement both of human society and, increasingly so, in what is generally referred to as the 'information society'. Communication can, of course, take a variety of forms. One of the major features distinguishing *homo sapiens* from other forms of life has been the ability to communicate other than through sounds or the use of body language. Cave paintings, dating back to around 25,000BC mark the oldest recorded form of non-verbal

⁴⁶ Professor Ian Lloyd has worked in the field of Information Technology Law for around 30 years. He has published a range of books including Information Technology Law (6th edition) with Oxford University Press and has recently completed the manuscript of a book on Telecommunications Law which has been published by Sweet and Maxwell in 2013. (<http://www.southampton.ac.uk/law/about/staff/il1f09.page>)

communication with the first forms of writing being found in Sumeria around 3,500BC.⁴⁷

Tanzania has a number of historical sites including the presence of Olduvai Gorge where it is believed that the skull of the first real man in the evolution process was discovered. The said skull was discovered by Doctor Louis Leakey in 1959. The ability of man to communicate through drawings can also be seen in Tanzania by referring to the cave drawings which are found at Kondoia – Irangi. The drawings were much used by the early man in various communication process as man was living in the forest and caves with other animals whereby the need to identify and distinguish dangerous animals was important. The drawings were also important for the passing of information to the next generation on hunting techniques and kinds of animals to be considered.

Professor Ian continues to show the way changes in time and as the technology developed, also there were some impacts in the communication processes. We can see this when he adds that; as time has passed and technology developed, so the speed and range of communications has increased. The invention of the printing press in the fifteenth century established the potential for creating multiple copies of a work quickly and relatively cheaply. Dissemination, however, remained a slow process. Until the development of the railways in the nineteenth century, the speed of communications was normally limited to the pace of a rider on horseback.⁴⁸

⁴⁷ Ibid

⁴⁸ Ibid p.1

Therefore in a summarized way, it can be seen that, there are six important stages to be understood as part of summary of the historical development of Telecommunication law in UK. The first stage is the ability of man to make speech, secondly the use of very old methods of communications such as caves paintings, flags and the related old methods, thirdly, the invention and use of press as the method of communication. The invention of printing press was followed by the fourth stage which was the development of railways in 19th century. The fifth stage had to do with the development of Telegraphy which was followed by the sixth stage where telephone was invented.

Professors Ian Lloyd, David Mellor OBE and Ian Walden have written useful books on this aspect. The books written by these authors have been much helpful in the understanding of the history of Telephone and Telecommunication Law. The understanding of these issues is crucial in the better understanding of the impacts of ICT in contract formation and e-commerce development in Tanzania since there is great connection between Telecommunication and internet.

2.4 The Development of Telecommunications

My perusal of the books written by the three professors mentioned above⁴⁹ found that in the historic part of telecommunications law their books have a number of points which are very similar as far as the Telecommunication Law in UK is concerned. That might be simply because even in a certain book, the two Professors joined their efforts to bring to our attention the most recent book which describes the key elements of electronic communications networks and services and explains the

⁴⁹ Professor Ian Lloyd, Professor David Mellor OBE and Professor Ian Walden

core elements of legal regulation at both UK and EU levels.⁵⁰

According to Professor Ian Walden⁵¹, the beginning of the telephone industry is in 1876 where the telephone was invented by Alexander Graham Bell. The first telephone company to be formed in the UK, later known as The United Telephone Company, opened a privately owned telephone exchange in London in 1879. Initially the GPO did not regard the telephone as a threat to their national Telegraph network and allowed telephone systems to develop in local areas. However, in 1880 it was held that a telephone conversation was a form of telegraph and therefore all telephone companies were required to have licences under the Telegraph Act.⁵²

The most celebrated case in the history of development of Telephone is that of *AG. V. Edison Telephone Company of London*⁵³ The Edison Telephone Company failed to show that the telephone and the Telegraph were technically different. As we are trying to find out the impacts of ICT in contract formation and development of e-commerce, a number of things can be learnt by the relevant authorities in Tanzania from the decision of that case. The court held among other things that:-

Indeed, though for scientific purposes it may, no doubt, be necessary to distinguish between telegraphs and telephones, it seems to us that the word ‘telegraph’, as defined in the Telegraph Acts, is wide enough to cover every instrument which may be invented which employs electricity transmitted by a wire as a means for

⁵⁰ Professor Ian Lloyd and Professor David Mellor OBE have recently issued their new book entitled *Telecommunication Law*, 2nd Edition, 2013 published by Sweet & Maxwell

⁵¹ In his book entitled *Telecommunications Law and Regulation*, 4th Edition, Oxford University Press, 2012

⁵² *Ibid* p.95

⁵³ (1880) 6 QBD 244

conveying information.

Stephen J and Pollock B are the Judges who gave such decision. They finally established the point that, the Act (i.e The Telegraph Act) covered ‘communications by any wire and apparatus connected therewith used for telegraphic communication, or by any other apparatus for transmitting messages or other communications by means of electric signals’.⁵⁴ This meant that the telephone companies were subject to the licencing and monopoly provisions of the Act. It effectively allowed the Post Office (formerly PGO) to take over the businesses, which had acted without an authority. Some immediate changes were made in the policy and that in 1882 about a year from the judgment, the policy was changed with the Postmaster General declaring that it would no longer continue to monopolize the sector as from that time onward, the relevant telephone companies including the private ones were issued the licences.

The outcomes of the above mentioned case, pose challenges to the Tanzanian Legislative Process in such a way that a lesson can fall to a number of areas namely the legislature (*i.e words used in legislation process*) the judiciary (*i.e the interpretation of the law in consideration with the technological changes, what rule of interpretation is to be taken by the court*) the government particularly the policy makers and finally the lawyers and stakeholders in general as far as electronic communication is concerned. Despite the fact that such a dilemma is no longer there, indeed what happened at the infant stage of the telephony has left a leaving lesson to date.

⁵⁴ Ibid

As the time went on, the development of mobile phones came in. The development of cellular technology opened the way to the expansion of mobile telegraph in the 1980s. The first national cellular radio network licences were granted to Cellnet (jointly owned by BT and Securicor) and Racal Vodafone (now Vodafone) in May 1983, although they did not launch the analogy services until 1985, creating another duopoly. The first mobile telephone call in the UK was made on 1 January 1985. By 2009 mobile was the most prevalent telecoms technology with the proportion of households with access to a mobile phone overtaking a proportion of households with a fixed line.⁵⁵

The above history as directly taken from the work of Professor Ian Walden has a great relation with the current development and use of mobile phones in our country. The Trend in Telecommunication Reform 2012⁵⁶ has shown that Ghana, Kenya, Philippines and Tanzania (as reported in the 2011 World Economic Forum Report,) are the countries which have demonstrated mobile financial service adoption rates above 10 percent. This shows that, Tanzania has a substantial great number of mobile phones and that various services through mobile phones are being used daily.

As it is known, broadband and mobile phones are closed linked and they are inseparable as far as the development of science and technology are concerned. There is a great achievement in the development and use of electronic communications in the country accelerated by mobile phones and broadband. With that being said, it can be concluded that there is a great connection between

⁵⁵ As written by Ian Walden in his book Telecommunications Law and Regulation 4th Edition at p.102

⁵⁶ <https://www.itu.int/ITU-D/treg/publications/trends12.html>. The annual "Trends in Telecommunication Reform" publications are key part of ITU's effort to explore and amplify the wisdom of policy-makers and regulators in the ICT sector.

Telecommunications and electronic communication because of internet services.

2.5 Nutshells of Telephone Operations

In mobile networks, the access network is the link between the mobile handset and the network base station (or BTS-Base Transceiver Station). The type of network (GSM-3G, or 4G) defines the type of transmission used over the radio link. Another radio access method that is very common is that for WLANs (Wireless Local Area Networks), often known as “*Wifi*”. The common standard for this is IEEE 802.11b but the newer version IEEE 802.11g provides about five times as much capacity over the same radio link almost all laptop computers now being produced include built – in 802.11g wireless access. Within organizations the predominant access technique for computer communications is “Ethernet” using Unshielded Twisted Pair (UTP) Cables, although WLANs are increasingly being implemented now that the security of such systems is being improved.⁵⁷

What has been written above can evidently be seen in Tanzania as the mobile phones companies have also established the type of network world wide used i.e the GSM-3G. Airtel is one of the companies which provide telecommunications services in Tanzania. As a result of the application of 3G technology, internet services have been provided by the company.

According to the company’s website,⁵⁸ Internet Access is one of the services issued. Airtel Access is a service that allows Internet connectivity via mobile phone and

⁵⁷ Ibid p.6

⁵⁸ http://www.airtel.com/wps/wcm/connect/africaairtel/Tanzania/Home/Phone_Services/Internet_Access/

computer. Airtel Access gives a customer quick and easy access to the Internet via phone and computer. Customers are encouraged to take care of business and being more productive through accessing the web. The service helps the customer to make his office everywhere as he wants it to be. The customer can get the job done by using the Airtel Modem which is available at any Airtel shop or Dealer Shop.

Radio and mobile communication have a close linked history. As far as UK is concerned, the early part of twentieth century saw the introduction of radio. This was an important technological advance which significantly expanded the scope of telecommunication activities. Initially, however, it had a minimal regulatory impact. Legally in the UK radio is referred to as “wireless Telegraph”. To the GPO, radio was just another form of telegraph. It therefore fell inside the GPO monopoly, and apart from specialized regulatory requirements, for example to deal with frequency allocation, the GPO treated radio like any other form of telecommunications. The legislation regulating radio was consolidated in to the Wireless Telegraph Act 1949.⁵⁹

The relationship between radio and mobile communication as described above has almost the same picture in our country. The Tanzania Communications Act⁶⁰ had a number of regulations made under it. One of the prominent regulations was the regulation governing radio communication and frequency spectrum i.e The Tanzania Communications (Radio communications frequency spectrum) regulations of 2005. Regulation 3 provided for among other things, the meaning of the term “mobile

⁵⁹ Ibid p.99

⁶⁰ Act No.18 of 1993

service”. Mobile service has been defined to mean radio communication service between mobile and land stations or between mobile stations themselves. On top of that, “Public mobile network” has been defined to mean any public network that enables radio communications through the use of portal or mobile stations.

The history of Electronic Communications in Tanzania changed a little bit on 2010 when the Electronic Postal Communications Act⁶¹ was enacted. This new Act repealed the Tanzania Communications Act in which its regulation has been discussed above in as far as the issue of radio communication is concerned. According to the Act, the term electronic communication has been defined to mean radio communication or, as appropriate, the communication of information in the form of speech or other sound, data, text or images, by means of guided and unguided electromagnetic energy⁶². Additionally, the Act defines radio communication as electronic communications by means of radio waves.

2.6 The Spread of Electronic Communications

Telecommunication industry has played a great role towards spreading electronic communications in East Africa and Tanzania in particular. When focusing towards identifying the impacts of ICT in contract formation and the development of electronic commerce in Tanzania, one cannot close his eyes towards making a reference to the contribution of the World Trade Organization (WTO), which has clarified the concept of Universal Service and Broadband services.

⁶¹ Briefly named as (EPOCA) Act No.3 of 2010

⁶² Section 3 of EPOCA;Ibid

The World Trade Organization's (WTO) Basic Agreement on Telecommunications' in 1997 can be seen as a definitive motive in the international community's commitment to the structural evolution of telecommunication sector from a primarily monopolistic environment to a competitive marketplace. Such acceptance has been driven by a recognition that telecommunications is a strategic economic sector, in terms of it being both a tradable service and its own right as well as the infrastructure over which other goods and services are traded and, in an age of electronic commerce, delivered⁶³.

The above paragraph shows that in 1997 the WTO found the need of taking and treating the telecommunications sector worldwide with a great care as it is a hub towards the socio-economic development in any country. On top of that, it can be seen that Telecommunications has been closely linked with electronic commerce in the world. Such an international motive and commitment towards the acceptance and development of telecommunication industry and various services mushrooming there from, has led to the significant development of electronic communication in our country.

Professor Ian Walden continues to comment that, only a few years ago, the scope of telecommunications technology would have been easy to define: telephony, fax, and mobile. However, now there is a rapidly changing technological environment, which means even systems that we use every day, like the telephone, are now regarded as being 'legacy' technology. The current drivers for change are simple: the ever

⁶³ That has been extensively written by Professor Ian Walden in his book; Telecommunications Law and Regulations, 4th Edition, p.4 (supra)

increasing use of the mobile and the internet. In many countries we are starting to see ‘fixed –mobile substitution,’ where users prefer to use their mobile telephone to make a call, even though they have a landline available; mobile is by far the most dominant technology. Voice over the internet has also meant that it is technically possible to make very cheap telephone calls from anywhere in the world by connecting over the internet to a service provider in the destination country, who then routes the telephone call locally⁶⁴.

He adds further on the aspect of universal service when he states that; Universal service is concerned with the making available of the provision of certain defined set of telecommunications services as widely as possible, both geographically and socially. Historically, such provision was seen as lying with the incumbent, however successful they were perceived to be in terms of meeting this obligation! In a liberalised market, such service provision needs to continue to be guaranteed through a mechanism that will not distort the competitive conditions under which providers operate⁶⁵.

Lastly is on the aspect of Broad band. One of the key issues for the early part of the twenty first century is broadband. Broadband is seen as a key driver of economic growth and competitiveness. For example, the UK government (*As shown in the book by Professor Ian Walden above*) has said that it wants to deliver universal broadband at speeds of 2mbps and stimulate private sector investment to deliver the best superfast broadband network in Europe by 2015. Broadband is the technology

⁶⁴ Ibid p.5

⁶⁵ Ibid P.12

that allows permanent or ‘always on’ access to electronic communications services, particularly the internet, at faster speeds than where available with the traditional dial-up narrowband connections.

The changes in technology have also brought some considerable impacts in Tanzanian socio-economic development. Being aware of the world technological development in the aspects of universal service, broadband and internet services, the Parliament enacted the Electronic and Postal Communications Act (EPOCA) of 2010 (as shown above) in which Universal Communication Services; means a defined minimum set of communications service of specified quality which is available to all users independent of their geographical location, and in the light of specific national conditions, at an affordable price.

The spread of electronic communications in Tanzania has been a result of a number of factors one being the broadband services whereby the provision of internet at a faster speed is no longer a day dream though in the rural areas the challenges in infrastructures and poverty hinders the villagers to enjoy the fruits of broadband as a whole. The Broadband access in the country has been stimulated by the presence of Digital Subscriber Lines (DSL), Cable modems, Satellites, Broadband wireless, 3G mobile and digital TV.

Joining their efforts on the history of 3G and Mobile Broadband, Professor Ian Lloyd and Professor David Mellor OBE⁶⁶ when writing on mobile broadband, have clearly indicated that, the introduction of 3G (third generation mobile) early in the 21st

⁶⁶ In their recent joint book entitled Telecommunication Law, 2nd Edition, Sweet & Maxwell (2013) p.33 supra

century created a level of confusion as we entered a new phase of communication where telephone was perceived as an element of communication rather than the only means. Over the last ten years 3G has evolved from a switched mobile telephone service to an IP (Internet Protocol) multimedia communication service.

2.7 Tanzania ICT Policy

In this last part of the chapter, a brief analysis of the ICT Policy, basically in a summarized way, has been made so as to be in a good position of identifying the impacts of ICT in contract formation and e-commerce development in the country. The government has currently invited views, comments and contributions from the ICT stakeholders and the public at large, so as to amend the current National ICT Policy⁶⁷. The 2003 ICT Policy, which is still the current policy in force, has ten pillars which are; Strategic ICT Leadership, ICT Infrastructure, ICT Industry, Human Capital, Legal and Regulatory Framework, Productive Sectors, Service Sectors, Public Service, Local Content and Universal Access.

The vision statement of the policy is based on the view that; Tanzania to become a hub of ICT Infrastructure and ICT solutions that enhance socio-economic development and accelerated poverty reduction both nationally and globally. The overall mission of the policy is; to enhance nation-wide economic growth and social progress by encouraging beneficial ICT activities in all sectors through providing a conducive framework for investments in capacity building and in promoting multi-layered co-operation and knowledge sharing locally as well as globally.

⁶⁷ The current 2003 National ICT Policy seems to be outdated and it needs to be amended accordingly so as to accommodate the current rapid changes in science and technology.

The policy takes note of the Tanzania Development Vision 2025 which has the attributes such as high quality live hood; peace, stability and unity; good governance, a well educated and learning society; and strong and competitive economy capable of producing sustainable growth and shared benefits. It can be easily noted that all of the above National Development Vision can easily be achieved by the said 2025 if there is a strong ICT base.

A quick perusal of the legal and regulatory Framework of the Policy was done for the purpose of digging some points which can be relevant to the topic at hand (*i.e the impact of ICT in contract formation and e-commerce development*). The relevant part of the policy has been subdivided into four areas which are; issues; policy objectives; policy challenges and policy statements.

The policy statement on legal and regulatory framework has taken a note that globalisation and the pervasiveness of the internet have given rise to new types of needs, rights and vulnerabilities. For secure electronic transactions to occur, an environment of trust must be created and sustained through the legal and regulatory apparatus. Any country that has inadequate cyber-law is essentially offering a safe – haven for cyber-criminals to act with impunity. Tanzania needs to create and sustain a secure cyber-law environment, in addition to the already existing legislation, before the significant new developments can emerge in ICT related services.

The National ICT Policy, being in place for about ten years now, has played a significant role in moving the country from where it was, to the current status where investment in ICT sector has been highly increasing daily. There is a number of

government projects which are ICT based such as the provision of the electronic National Identity Cards (*e-cards*) to all citizens by using the Smart Card Technology. This is currently done by NIDA i.e The National Identification Authority as it can be seen in www.nida.go.tz

Having realized the gap which is still existing between the current technological advancements in the world particularly in electronic communications, and the fact that we lack an adequate legal framework, there has been a need of some changes to be made in the National ICT Policy as it can be seen in the press release issued by the Ministry of Communications, Science and Technology.⁶⁸ According to the press, the government is inviting public views and opinion on the drafting of the new National ICT Policy for national development.

That exercise aims at getting a National ICT Policy that will be sustainable and meets the needs posed by the pace of technological advancement and change in the world. The 2003 ICT Policy is part of the implementation of a programme to build and promote the sector (TANZICT) which is funded jointly between the government and the government of Finland. The move is part of the efforts to promote science, technology, innovation and ICT sector in the country to be able to contribute to the economic and social development of the country⁶⁹.

⁶⁸ On Wednesday, July 24, 2013 the Ministry's Senior Information Officer, Ms Prisca Ulomi through press release, invited views from the stakeholders and the general public to contribute towards growth of the ICT Sector.

⁶⁹ Source; Daily News; Wednesday, July 24, 2013

CHAPTER THREE

3.0 CONTRACT FORMATION PRACTICES

3.1 Introduction

For a number of years, contract formation has been a practical legal aspect which changes as the time goes. It is the practical reality which needs to be well defined by the laws of the country despite the fact that the agreements are just being entered between two or more parties who can either be natural persons or legal persons. Commercial contracts have always been attacked by a number of fraudulent practices which also appear in the form of misrepresentation or mistakes. The Law of Contract Act⁷⁰ under sections 14, 15, 16 and 17 provides for the practices which may appear during contract formation and bring impacts to the whole contract. These issues are coercion, undue influence, fraud and misrepresentation.

Basically, there are number of issues one needs to consider before entering into the legally binding contract(s). A clear understanding of the party (s) to whom one enters with, in a legally binding contract; his general character (s); the records which that party has generally acquired; the anticipation of the true intention of the party to the contract in question are among the facts one need to be well equipped with before entering into a contract. The provision of Section 19 of the Law of Contract, shows the consequence of the contract which has been formed under coercion, undue influence, fraud and misrepresentation. The relevant part of the Act is herein below reproduced for ease of reference:-

⁷⁰ Cap 345 R.E 2002; The basic and guiding law in Tanzania in contract law and related issues

S19. Effect of agreements induced by coercion, fraud, misrepresentation or undue influence

- i. When consent to an agreement is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. Provided that if such consent was caused by misrepresentation or by silence, or fraud within the meaning of section 17, the contract nevertheless is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.
- ii. A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.
- iii. A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.
- iv. A contract, which is voidable on the ground that the consent of a party thereto was caused by undue influence, may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit there under, upon such terms and conditions as to the court may seem just.

It can be observed that, while forming contracts each of the two parties need to exercise a great care in making sure that the intended contract is being legally entered and is enforceable before the court. As most of the traditional contract formation practices have been prone to a number of fraudulent practices, the situation might be worse when the platform of contracting is changed from the traditional paper based contracts, to the current/modern online contract formation practices where electronic communication takes place between parties who are in the distant areas.

3.2 The Statute of Frauds and Contract Formation

The challenges and difficulties in contract formation exercise have a long history. The enactment of the Statute of Fraud in UK⁷¹ among other things saw the challenges and problems arisen from contract formation practices particularly in the contracts for the sale of real properties.

Some prominent legal writers have added their efforts in the aspects of transactions which can legally be referred to as “unenforceable transactions” as a result of failure to abide with some prerequisite requirements in the contract formation stage. One of the interesting comments found online is that which states that; “in all systems of contract law, certain classes of transactions are treated as unenforceable by the judicial process because they are thought to involve unusual hazards for a contracting party or to be of marginal social utility. There are, in both civil-law and common-law systems, four kinds of concern that lead the systems to treat certain

⁷¹ The Statute of Fraud of 1677 Chapter 3 29 Cha 2

types of transaction as unenforceable. These four kinds of concern may be called evidentiary, cautionary, channeling, and deterrent. The evidentiary concern springs from the desire to protect both the individual citizen and the courts against manufactured evidence and insufficient proof.⁷²

At this juncture, as we are still proceeding with our motive of indentifying the impacts of ICT in contract formation and the development of e-commerce in Tanzania, we cannot ignore to relate the current development of science and technology with what happened in the past and hence the said statute of fraud was to be enacted. The process of treating some of the contracts/transactions as unenforceable is not new in our country particularly on land transactions. There is no doubt that the spirit that there is a need for writings and signatures to appear in any contract for the sale of land as transpired in the Land Act⁷³ was borrowed from the UK Statute of frauds.

For ease of reference, the provision of section 64 of the Land Act, which provides for the writing required for enforcement of contracts relating to land, is hereby reproduced:-

- (1) A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if—
 - i. the contract is in writing or there is a written memorandum of

⁷² Comment taken from ;
<http://www.britannica.com/EBchecked/topic/135270/contract/21775/Unenforceable-transactions#ref18971>

⁷³ The Land Act, Act No.4 of 1999; Chapter 113 R.E 2002

its terms;

- ii. the contract or the written memorandum is signed by the party against whom the contract is sought to be enforced.

The rationale for having the writing requirement is due to the unusual hazards for a contracting party and the fact that land transactions are the transactions which are purely of great social utility. The concerns of the statute of Frauds and the Land Act, can simply be summarized as; *the evidentiary, cautionary, channeling, and deterrent* in nature in as far as contracts are concerned.

3.3 The Application of The Statute of Frauds

There is a say that the law is that what the court says to be the law. The law which just remains in the books without being tested before the courts can simply be referred to as the dead law. The application of the statute of Frauds in UK has been subjected to a number of cases in courts. The two cases namely; *Leoppky v. Meston*⁷⁴, and *Wasylyshyn v. Wasylyshyn*⁷⁵, are being taken as an example of a number of cases which have been taken before the court to test the application of the statute of frauds in UK.

With great appreciation to the analysis done by J.W Hamilton of ABlawg.ca⁷⁶ we can see the summary of the findings in the above two cases. I do not intend to go to the specific facts in each case but the simple consideration of the issues which are normally raised can be of great assistance. Generally, as shown by J.W Hamilton, the

⁷⁴ 2008 ABQB45

⁷⁵ 2008 ABQB39

⁷⁶ <http://ablawg.ca/2008/02/26/two-cases-concerning-the-statute-of-frauds-1677-uk/>. The same was visited on 27/07/2013

Statute of Frauds has attracted a great deal of litigation, but there tends to be only three main types of issues raised in all of these cases:

- i. Whether a transaction comes within the provisions of the statute;
- ii. Whether there is sufficient evidence in writing to comply with the provisions of the statute; and
- iii. Whether, even if a transaction is unenforceable under the statute, alternative relief is available to the person trying to enforce the transaction.

In *Wasylyshyn v. Wasylyshyn*, the defendant agreed to transfer the parcel of land with the small house to the plaintiffs and the plaintiffs accepted that land in consideration of their giving up any claim against their mother's estate. Mr. Justice Marshall doubted the application of the Statute of Frauds for two reasons. First, because it was a case about the enforcement of a settlement agreement and contract, he thought the statute was inapplicable based on the authority of *Ritland v. Ritland*,⁷⁷ and *Rimer v. Rimer*.⁷⁸

Second, Mr. Justice Marshall thought the Statute of Frauds did not apply because “the gist of the agreement was neither a contract respecting nor a sale of lands. It was an agreement to modify the terms of the will and distribution of the Estate, and the means of effecting that revised distribution was to provide for the small house to be transferred to the Plaintiffs” (at para. 32). He noted that G.H.L. Fridman in *The Law of Contract in Canada*, 5th ed., at 209, stated that an agreement to settle an action for

⁷⁷ [1980] 3 W.W.R. 577 (Alta.Q.B)

⁷⁸ (1981), 119 D.L.R. (3d) 579 (Alta. Q.B).

a declaration that certain land was held on a resulting trust was an agreement to which the Statute of Frauds did not apply.

In *Leoppky v. Meston*, an unmarried couple had purchased a home in Edmonton. After living together for six years, differences arose between them and they attempted to negotiate a settlement of their respective interests in the home and its furnishings and improvements. The Plaintiff, William Leoppky, claimed the couple did negotiate a settlement and that while he performed his side of the agreement, the Defendant, January Meston, refused to honour her part of the bargain. He asked the court to order the defendant to perform her part. The Defendant denied that any agreement had been reached and, in particular, denied that they had agreed on the value of the house. She asked the court for an order to sell the home and divide the proceeds between the couple. She also pled the Statute of Frauds as a defence to the Plaintiff's claim that an enforceable agreement had been reached.

When they separated in March of 2006, Meston had left the home. Leoppky continued to live there and make mortgage payments. Shortly after they separated, the couple began to negotiate a resolution of their financial affairs, usually via e-mail and both directly and through a mutual friend. A point can be noted here that electronic communications took place between the parties. With that note of electronic communications being involved therein, an interesting part is the decision reached by the court which is herein below shown as taken from the comments of J.W Hamilton.

Madam Justice Read, held that there was sufficient writing to satisfy its requirements, even though the writing was computer generated and in emails. There have been quite a number of decisions by this time holding that electronic correspondence can satisfy statutory writing requirements and she cites a few of them. One might think it odd that electronic equivalence has not been dealt with statutorily by this time. Alberta does indeed have an Electronic Transactions Act, S.A. 2001, c. E-5.5. However, section 7 of that statute specifically states: “This Act does not apply to . . . (e) records that create or transfer interests in land, including interests in mines and minerals . . .”.

From the above, we can see how the requirements in the Statute of Frauds have been able to be linked with the provision of The Electronic Transactions Act⁷⁹. Madam Justice Read showed clearly that electronic communications were as equivalent to the specific requirements for writing as enshrined in the Statute of Fraud. The Electronic Transactions Act excluded its application in land matters but still we see how the court, in fact basing on the circumstances of the case, reached a conclusion that the Act (i.e Statute of Frauds) was applicable and its requirements were met.

3.4 Signatures as Writing Requirement

In a very brief way, we can have a look at the requirement of signature and what was the position of the court in the above discussed case. It will be noted that, the Statute of Frauds, among other things had two important requirements which are firstly; the need for writing and secondly; the presence of signature. As it has been seen above, even the Land Act under section 64 requires the presence of both a written

⁷⁹ The Alberta Electronic Transactions Act, S.A. 2001, c. E-5.5

memorandum for the contract of sale of land and the presence of signature. The presence of signature becomes a challenging concept particularly when the records are in an electronic form i.e the writings are being retrieved from the written memorandum. The comments by J.W Hamilton as found in "*ablawg website*"⁸⁰ as seen herein-below elaborates much on the requirement for signature as the prerequisite requirement in the Statute of Frauds.

As already noted in *Wasylyshyn v. Wasylyshyn*, the Statute of Frauds also requires that the writing be signed by the party being sued. Madam Justice Read concluded that; "...the emailed signature of Ms. Meston was sufficient to meet this requirement as well." This conclusion was made easier because Ms. Meston had not argued that the emails were from anyone other than her and had not argued the typed words "January" at the bottom of the e-mails was not her signature. A signature is essentially evidence of a person's connection with a document and of the intention of that person with respect to the document.

This suggests that such evidence in electronic form could be satisfactory at common law, without a specific statutory provision. Initials, printed names and rubber stamps have all been held to satisfy signature requirements on the basis that the method achieved the same purpose as a personal signature. That was exactly the approach Madam Justice Read took to the issue.⁸¹

⁸⁰ <http://ablawg.ca/2008/02/26/two-cases-concerning-the-statute-of-frauds-1677-uk/>.

⁸¹ Ibid; comment by J.W Hamilton when commenting on the Web regarding the two cases and The Statute of Frauds.

3.5 The Postal rule and Contract Formation

As the level of science and technology acquire the rapid changes, such a technological advancement showed a significant impact in the concept of offer and acceptance as far as contract is concerned. The changes in the level of science and technology had direct impacts in the contract formation practices. With the emergence of electronic communications, the question has been whether the postal rule do apply in these types of communications as well and if the answer is in affirmative or not, what is the legal position regarding these types of communications.

According to the postal rule, where it is agreed that the parties will use the post as a means of communication, then the postal rule will apply. The postal rule states that where a letter is properly addressed and stamped the acceptance takes place when the letter is placed in the post box. With this rule at hand, the place of acceptance means is the place where the contract is formed and in case of parties are from two different jurisdictions, the issue of country with jurisdiction and the law applicable, unless otherwise specified, will be that of the place of contract formation.

According to the *e-law resources*,⁸² the general rule is that the offeror must receive the acceptance before it is effective. That is to say, a contract is formed when there is a communication of acceptance to the offeror. Contractual agreement has traditionally been analysed in terms of offer and acceptance. One party, the offeror, makes an offer which once accepted by another party, the offeree, creates a binding

⁸² <http://www.e-lawresources.co.uk>

contract.

It is important to have a clear understanding and the historical background of the postal rule as to the great extent gives the basis of understanding of the distant contract formation practices particularly in the modern world where parties have been using the electronic communications to conclude a number of contracts online. The rule emerged in the 19th Century and is still applicable in a number of circumstances even sometimes when the modern ways of communications such as e-mail.

The general rule for acceptances by post is that they take effect when they are posted, rather than when they are communicated. The main reason for this rule is historical, since it dates from a time when communication through the post was even slower and less reliable than it is today. Even now, there is some practical purpose for the rule, in that it is easier to prove that a letter has been posted than to prove that it has been received or brought to the attention of the offeror.⁸³

*Adams v Lindsell*⁸⁴ is the case which laid down the foundation of the postal rule. The brief facts of this case is that on 2 September 1817, the defendants wrote to the plaintiffs, who processed wool, offering to sell them a quantity of sheep fleeces, and stating that they required an answer 'in course of post'. Unfortunately, the defendants did not address the letter correctly, and as a result it did not reach the plaintiffs until the evening of 5 September. The plaintiffs posted their acceptance,

⁸³ www.catalogue.pearsonned.co.uk (Catherine Elliott Contract Formation, Chapter 1 pdf)

⁸⁴ (1818) 106 ER 250

the same evening, and it reached the defendants on 9 September. It appeared that if the original letter had been correctly addressed, the defendants could have expected a reply 'in course of post' by 7 September. That date came and went, and they had heard nothing from the plaintiffs, so on 8 September they sold the wool to a third party.

When the matter was brought before the court, the issue was whether a contract had been made before the sale to the third party on 8 September. The court held that the contract was concluded as soon as the acceptance was posted, so that the defendants were bound from the evening of 5 September, and had therefore breached the contract by selling the wool to the third party.

3.6 Postal rule and Instant Communications

Where an offer is made by an instant method of communication, such as telex, fax or telephone, an acceptance by post would not usually be reasonable. On the other side, when an acceptance is made by an instant mode of communication, such as telephone or telex, the postal rule does not apply. In such cases, the acceptor will usually know at once that they have not managed to communicate with the offeror, and will need to try again.

A number of cases have been decided in the course of analysing as to whether the postal rule was or was not applicable in such circumstances. Two famous cases which have been mostly cited on this aspect are *Entores v. Miles Far East Co*⁸⁵ on

⁸⁵ [1955] 2 QB 327

acceptance via telex and secondly; *Brinkibon Ltd v Stahag Stahl*.⁸⁶ The comments of Lord Wilberforce while dealing with the second case shows a number of references to the first case and that can help us to grasp the nutshells of both cases at once.

According to Lord Wilberforce⁸⁷; where there are successive telephone calls, it may be artificial to ask where the contract was made. Most people would not think of it at the time. Whether there was a contract can only be decided at the trial. However, we need to assume at this *interlocutory* stage that a contract was made, and decide where it was made. If the telex was sent from London to Vienna where is the contract made? If seen as a postal acceptance, then on posting - in London. If seen as a telephone acceptance, then on reception in Vienna.

Brinkibon Ltd v Stahag Stahl is a leading decision of the House of Lords on formation of contract by using telecommunication. The Lords largely accepted the earlier leading decision of *Entores v. Miles Far East Co* on acceptance via telex. Furthermore, Lord Wilberforce however, did not see the rule as applying in all circumstances and had the following elaborations as shown herein under:

Since 1955 the use of Telex communication has been greatly expanded, and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the

⁸⁶ [1983] 2 AC 34

⁸⁷ The comments by Lord Wilberforce in *Brinkibon Ltd v Stahag Stahl*

intention, or on the assumption that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variants may occur. No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie⁸⁸.

The brief facts in the Brinkibon case are that; the offeror, Brinkibon (based on London, England) wanted to sue the offeree, Stahag (based in Vienna, Austria) for breach of contract. Acceptance of Brinkibon's offer had been by way of telex from London to Austria. Which jurisdiction's law applied? The answer to this question depended on whether the postal rule applied - if it did the contract would have been concluded in England and English law would apply; if it did not apply then the contract would have been concluded where the acceptance was received – Vienna.

In the final decision, it was held that, the postal rule does not apply to direct/instant forms of communication (including telex) – as telex was used here the postal rule did not apply and the contract was formed in Vienna. The Court also observed that even though with telex the message may not be received by the intended recipient immediately (there may be agents or other third parties who receive the messages to be passed on to the intended recipient) a telex that goes directly from the offeree's business to the offeror's business (unlike a telegram which employs the use of a post

⁸⁸ Brinkibon v Stahag Stahl und Stahlwarenhandels-gesellschaft mbH [1983] 2 AC 34

office) should be treated as if it were an instantaneous communication. If a telex is sent to an office acceptance occurs when the telex reaches the place of business, not when it actually gets to the person it is addressed to.⁸⁹

Despite of the above analysis, it will be noted that the agreement of the parties and the conditions which may be attached with an offer, to the great extent may change the scope and the applicability of the postal rule and other rules regarding acceptance and contract formation in general. An offeror may avoid the postal rule by making it a term of their offer that acceptance will only take effect when it is communicated to them. In *Holwell Securities Ltd v. Hughes*⁹⁰ the defendants offered to sell some freehold property to the plaintiffs but the offer stated that the acceptance had to be ‘by writing’. The plaintiffs posted their acceptance, but it never reached the defendants, despite being properly addressed. The court held that ‘notice’ meant communication, and therefore it would not be appropriate to apply the postal rule.

3.7 Postal rule in e-mails and web based communications

According to Craig S. Wright⁹¹, the technological differences such as the inclusion of read and sent receipts have brought challenges in the acceptance and postal rule concepts. Further, the arguable position of e-mail as to whether it is or is not “*instantaneous*” has created a level of uncertainty in contracting as the question of applicability of the postal acceptance rule to e-mail acceptances has not been judicially settled.

⁸⁹ Ibid

⁹⁰ (1974) as cited in the book by Catherine Elliott, Chapter 1

⁹¹ In Page 9 of his Paper, Under the Sans Institute (InfoSec Reading Room) a paper entitled Electronic Contracting In An Insecure World; Accepted on 14th Jan 2008

E-mail, may be fast, but it is not instantaneous. Failed delivery, rerouting, damage in delivery or simply delayed all arise with E-mail. For this reason, e-mail, may be argued to most closely mirror a postal letter delivery. E-mail is the digital equivalent of a letter sent through the post. All normal functions of postal mail transpire through e-mail. This includes not only the ability to send advertisements or invitation to treat.⁹²The issue of invitation to treat was well discussed in the case of *Partridge v. Crittenden*⁹³

Craig S. Wright continues to show the challenges brought by the use of e-mails when he adds more that; there are a number of contractual issues associated with e-mail. There are for example, numerous debates over applicability of postal rule. When sending an e-mail, there are several potential moments of acceptance. These are:

- i. The first moment occurs when the email departs the sender's outbox controlled by the sender. In Internet –based e-mail transactions, the e-mail cannot be recall once it has left the sender's outbox. This is the situation analogous to postal rule.
- ii. The next is the instant of receipt of the e-mail into the recipient's inbox. At this point, the e-mail is accessible to the recipient.
- iii. The next possible instant that could potentially be the moment of acceptance is when the recipient collects the e-mail from the mail server into the mail client's inbox. At this point, the recipient has received the e-mail.

⁹² Ibid

⁹³ (1968)

- iv. Finally, there is an argument for defining the moment of acceptance as the point when the recipient has opened or read the e-mail.

The additional inclusion of features such as e-mail recall (in products such as Microsoft Outlook), read receipts and send receipts (in most e-mail servers and client) further obfuscate the moment that could be considered the time when acceptance was made. In the final analysis, Craig S. Wright concludes that, the postal acceptance rule as a general consideration does not apply to web-based communications. This is because most Web-based systems employ mechanisms such as check-sums to maintain constant communication between the client and server systems.

3.8 The Effects of Postal Rule

While in progress of identifying the impacts of ICT in contract formation and e-commerce development, it will be seen that the postal rule has a great contribution in the development of a number of other rules to be applied in the contract formation when electronic communication is used. There are some circumstances whereby the postal rule has been taken and considered to be applicable even in the electronic communications. While the aspects relating to postal rule and electronic communications have been discussed herein below, it is important at this juncture to summarise, the general conclusions in as far as the postal rule is concerned. According to Catherine Elliott⁹⁴ the postal rule has three main practical consequences and these are:

⁹⁴ (Catherine Elliott; in chapter one of the book) Ibid p.33

- i. A postal acceptance can take effect when it is posted, even if it gets lost in the post and never reaches the offeror.
- ii. Where an acceptance is posted after the offeror posts a revocation of the offer, but before that revocation has been received, the acceptance will be binding (posted acceptances take effect on posting, posted revocations on communication)
- iii. Where postal rule applies, it seems unlikely that an offeree could revoke a postal acceptance by phone (or some other instant means of communication) before it arrives.

It can be considered that, additionally, the other effect of the postal rule is the fact that the postal rule is an exception to the general rule regarding communication which states that offer and acceptance should be clearly communicated between the parties to the contract. The other exceptions to the requirement of communication are things like the specific terms of the offer and the conduct of the offeror. However, as earlier stated by Lord Wilberforce, there is no universal application of the rule in each and all circumstances as far as contract formation issues are concerned.

CHAPTER FOUR

4.0 ELECTRONIC CONTRACTS FORMATION

4.1 Introduction

In this chapter, the report has touched various methods under which electronic communication can be used in contract formation processes. That is to say, to analyse how e-mails, web sites and EDI are useful in electronic contract formation. Data analysis and presentation of has also been done. In all cases, the focus has been the relationship between the findings and the hypothesis guiding this study.

4.2 Electronic Contracts

The traditional contracts i.e paper based contracts where people can meet, seat together and see each other face to face, enter in the negotiation process and finally sign the contracts and shake hands peacefully, have been slowly replaced by the electronic contract formation practices from the end of 20th Century. The rapid uses of the electronic equipment such as computers, mobile phones, laptops, ipad, iPods etc have transformed the world from the paper based world into the digital world. The ease ways of accessing internet in a number of distant communications and the need to finalise all deals in a rapid speed, cheaply and efficiently have stimulated the changes from paper based world to the digital world.

Where the parties enter into a legally accepted contract by using electronic communications, then in a plain meaning, such type of contract can be termed as an electronic contract. In brief, electronic contracts are those contracts which are electronically formed. The process may not end only with entering contract but may

go further to the management of contract and all subsequent issues arising there from. Therefore, the requirement that a contract should be in writing, can be fulfilled by the traditional paper based system or electronically.

When elaborating the issues on electronic contracting, Craig S Wright⁹⁵ had this to comment; internet is fundamentally a means of communication. Issues with law that have arisen because of the internet are thus a result of the differences between communication in the physical world and communication using internet. Contractual negotiations are the result of a series of communications that create a legally binding agreement. For this reason, there is little difference between contracts made online than those formed through face-to-face communication. The facts surrounding the form of communication are the primary difficulty.

4.3 Basic ways to form Electronic Contracts

For contract to exist, parties to the contract must agree on the methods of acceptance, silence means no acceptance at all, so there is no contract. The acceptance can be done through postal mails, e-mails, facsimile/telex and that contract should be signed by parties to be legally binding. As Far as this part is concerned, the report has based on analysing three important ways of electronic communications which are e-mails, website based communications and EDI.

i. E-Mails

As a Legal officer in the firm based in Dar es salaam –Tanzania, the firm has been working in partnerships with other firms and clients from different parts of the world

⁹⁵ (craig.wright@bdo.com.au) SANS Institute; InfoSec Reading Room; Electronic Contracting In An Insecure World (supra)

especially from USA and UK on issues of trademarks and immigration services. With a number of foreign clients who are coming for different investment activities in the country, the need for partnerships with other international law firms in initiating residential permit applications processes at the immigration offices and the need for filling trademarks applications have been increasing daily. For about five years now the basis of communication has been e-mail. Through e-mails; we have been able to communicate with clients who are abroad, processing the permits and trademarks certificates and sending the relevant documents to the clients by using courier services. We cannot ignore the significant role played by the online communications services in the modern world. E-mails in particular, have been contributing a lot towards facilitating daily distant communications.

According to Dave Chaffey⁹⁶ internet refers to the physical network that links computers across the globe. It consists of the infrastructure of the network servers and communication links between them that are used to hold and transport information between the client PCs and the web servers. Furthermore, according to Andrew D. Murray,⁹⁷ Email is the digital equivalent of a letter. You type it out, sometimes attach things to it, address it and then send it to your desired recipient. E-mail can do all the things that real mail (sometimes called snail mail) can do. It can be used to make an offer or to communicate acceptance. It can be used for advertisements and circulars and can even be a source of junk mail (spam)

From the above deep definitions from the two authors and their brief analysis of the

⁹⁶ In his book entitled E-Business & E-Commerce Management; Strategy, Implementation and Practice; 4th Edn, (2009), Pearson Education at p.4.

⁹⁷ E-mail a.murray@lse.ac.uk ; Department of Law, London School of Economics in the paper entitled Entering Into Contracts Electronically: The Real W.W.W

characters of e-mail, we can find out that contract formation elements can all be executed smoothly through the internet in the same way it is done in the traditional contracts. The postal rule and the receipt rule both can apply in some circumstances depending on the terms of the offer and the prevailing conditions which may be associated with the e-mail sent.

ii. Web Based (Click Wrap and Browse Wrap)

The online transaction activities which are web-based can appear either in the form of Click-wrap contracts (which are also known as click-through contracts) or in a browse-wrap perspective. With the current alarming number of companies securing market opportunities through the available online avenues such as websites and blogs, a number of transactions have been concluded online. What happens on the web-based contracts is the acceptance of the offers and the associated terms and conditions governing a number of issues such as consideration, applicable law, and place of contract, jurisdiction and other legal matters relating to such contract. Just as one goes online and opens the website of a certain entity i.e BT for UK or TTCL for Tanzania, one need to be very careful in reading, understanding and assuring himself that by checking thoroughly in all four corners of the screen of his computer, there is no any other instruction before clicking “I accept”

Web-based transactions and the related contracts and e-commerce activities are normally being done after an individual or a company has successfully registered its domain name to be used online. The registration of such a name and its legal certification for being online, have created a number of disputes before the courts of

law particularly in the developed countries where the use of such an opportunity has been successfully taken care.

The struggle and scramble for doing business online especially by using the names of highly profiled entities has led to the *domain-name hijacking*. Elaborating on the aspect of domain- name hijacking, Professor Ian Lloyd has put a straight forward explanation on the matter. He states that, domain registries have operated (and to a considerable extent, continue to do so) on the basis of accepting the first application for registration of a particular domain name. This has been open to exploitation by street- (or Internet-) wise users, who have sought to register large numbers of popular names. Names such as Macdonalds, Hertz, and Rolex were issued to applicants with no connection with the well-known firms. The practice of seeking a domain name corresponding with a well-known organisation is generally referred to as ‘domain-name hijacking’.

As the commercial usage of the Internet has increased, so the benefit of obtaining a domain name which is readily identifiable with the owner’s business has become recognised. As evidence to what has been stated above Professor Ian, has issued a living example when he narrates that; It is reported that one domain name (pizza.com) has been sold for no less than £1.3 million, with a number of firms conducting online auctions for the sale of attractive domain names.⁹⁸

Telephone communications can directly be looked as web site communication as both are the living examples of instantaneous communications. The flow of

⁹⁸ Information Technology Law, 6th Edition, Oxford University Press; Chapter 20, p. 414

communication is instantly done and therefore the offer, its corresponding terms, conditions and the subsequent acceptance are both done immediately. With a web-communication, both parties are normally aware of the trend of the communication and the systems can assist both of them to know as to whether they are both online. It is known that there are times where machines can be used to respond some of the matters but if it can be successfully proved that such responses from the machine are the results of the actions by the owner of the web site, then still a valid contract is formed.

i. Click Wrap Acceptances and E-Mails

Despite the fact that this report has made a number of reference to the works of Professors and different other academicians, the writer finds that he cannot avoid himself from taking another part fairly, as found in the work by Andrew D. Murray as mentioned before. According to him, there are differences between communications through e-mail and the web-based communications.

He starts by explaining that, while most of the people are familiar with the first method of electronic contracting which is electronic mail, or e-mail; the second method of contracting is perhaps less familiar. This is the click –wrap method of contracting used on the World Wide Web. The World Wide Web (www) as previously seen is the most common technique for publishing information on the internet. It is accessed through web browsers which display web pages of embedded graphics and HTML/XML-encoded text.⁹⁹

⁹⁹ Dave Chaffey (supra)

The main difference between click wrap contracts and e-mail is that communications between web clients and servers, unlike e-mails, is instantaneous. The best way to differentiate the e-mail communication from the web based communication is that, the data transferred through the website is transferred like telephone communication. The HTML-based contracts use a different communications method from e-mail. In a web-based communications the sender of acceptance is in the position to determine whether the message has been successfully received, almost instantaneously and therefore, the postal rule does not apply in the click wrap acceptance.¹⁰⁰

ii. EDI

The website of United Nations Economic Commission for Europe, UNECE¹⁰¹ provides some useful information on the understanding of EDI. According to the site; as a result of efforts to bring order into the field of paper documentation, the almost universal acceptance of the United Nations (previously ECE) Layout Key for Trade Documents, besides offering substantial cost reductions in paper handling, created a sound basis for further international standardisation in trade data interchange. Through the United Nations layout key, discipline was introduced in the size and format of international trade documentation, establishing maximum dimensions of data elements to be shown on documents, defined in terms of number of characters per line and number of lines per box. The field headings to be shown on aligned documents were grouped by broad function (e.g. parties, transport

¹⁰⁰ Entering Into Contracts Electronically; The Real W.W.W by Andrew D. Murray (Supra)

¹⁰¹ Taken from UNECE website through; <http://www.unece.org/tradewelcome/areas-of-work/un-centre-for-trade-facilitation-and-e-business-uncenfact/outputs/standards/unedifact/tradeedifactrules/tradeedifactrules.html>

information, references, goods details, etc.), thus facilitating their analysis with a view to rationalization and standardization of information accompanying international trade.

EDIFACT (ISO 9735) is the international standard for electronic data interchange (EDI). The term stands for Electronic Data Interchange For Administration, Commerce and Transport. The three major components of EDIFACT are a standard syntax for structuring data, i-EDI (interactive EDI), and standard messages to accommodate interaction among various industries and countries. When data are interchanged between trade partners by means other than paper documents, e.g. by teletransmission methods including direct exchange between computer systems, a common "language" should be used with an agreed mode of expressing it, i.e. common protocols, message identification, agreed abbreviations or codes for data representation, message and data element separators, etc. If a universally-accepted standard is not used, the "language" has to be agreed bilaterally between each pair of interchange partners. Taking into account the large number of parties exchanging data for an international trade transaction and the ever increasing number of potential users of teletransmission techniques, it is obvious that such a bilateral approach is not viable.¹⁰²

4.4 Courts Analysis of Online Contracts

The online contract formation methods have attracted a number of legal disputes in the courts. In most of the cases, the main points of disputes have been the issues of jurisdiction and the existence of a legally enforceable contract. The "*Bailii*" website

¹⁰² *ibid*

has been of great assistance in searching and obtaining the useful cases on this aspect. The following are some of the important cases which explain the legal position of the contracts formed online.

In *Ryanair Ltd -v- Billigfluege.de GMBH*¹⁰³ the matter was whether or not the plaintiff's website's Terms of Use constituted a valid and legally binding contract which was entered into by the defendant's through their use of the said website. The plaintiff said, however, that in order to determine the jurisdiction issue, it was not necessary for the Court to adjudicate upon the validity of the Terms of Use but rather it should be sufficient if the Court was satisfied as to the existence of a valid exclusive jurisdiction clause set out within that document. The plaintiff in this regard relies upon paragraph 7 of the Terms of Use which provides that the courts of Ireland are to have exclusive jurisdiction in respect of any dispute.

On the other side, defendants claimed that there was no contract in existence between the parties and that the plaintiff's Terms of Use lacked contractual effect because they were never agreed or consented to by the defendants. The defendants said that, the plaintiff's website's Terms of Use could not form the basis of a contract because all of the traditional features of a legally binding contract were absent such as the date on which it may be said that a contract was entered into between the parties and the absence of any consideration. They insisted that as there was no legally enforceable contract in place between the parties to the proceedings, the plaintiff could not rely on Article 23(1) of the Brussels Regulation to confer jurisdiction on this Court because of the absence of an agreement.

¹⁰³ [2010] IEHC 47; Judgment by: Hanna J.; High Court Record Number: 2009 7959 P

When making the final analysis and the decision of the court, the Judge had this to comment; "...the defendants used the plaintiff's website. They access the site and screen-scraping activity is routinely carried out. The information gleaned therefrom is used for a commercial purpose as a result of which the defendant makes a profit or earns a fee. By using the site in this way, the defendants must be taken to have assented to the plaintiff's website's Terms of Use. In this case, we are dealing with commercial entities and the existence and effect of the website's Terms of Use are clear and unambiguous. If you use the site, you agree not to breach its terms and if you do so, the exclusive jurisdiction clause set out in the Terms of Use make is clear that Ireland is the appropriate jurisdiction for the purposes of litigating any disputes that may arise as a result."

The exclusive jurisdiction clause contained in the plaintiff's website's Terms of Use was binding on the defendants in circumstances where those Terms were at all times available for inspection by the defendants as users of or visitors to the website, the plaintiff having taken appropriate steps to ensure that the Terms were brought to the user's attention through their inclusion on the website via a clearly visible Hyperlink. As I have found that the Terms of Use formed a legally binding agreement for the purposes of Article 23 of the Brussels Convention and as the exclusive jurisdiction clause contained therein was at all times available for inspection by the defendants, I would dismiss the application for an order dismissing the plaintiff's claim for want of jurisdiction.¹⁰⁴

¹⁰⁴ Ibid

In *Caspi v. Microsoft Corporation*,¹⁰⁵ the Superior Court of New Jersey, Appellate Division, was asked to determine the validity of an exclusive jurisdiction clause contained in an online subscriber agreement of Microsoft. The clause stated that proceedings were to be heard in the State of Washington. Before subscribing to Microsoft's online service a user was required to click "I Accept". Registration could only occur after this. The Court took the view that the ordinary contract law principles ought to apply and the fact that the contract was entered through the medium of the internet made no difference. The exclusive jurisdiction clause was therefore deemed enforceable.

In *Specht v. Netscape*,¹⁰⁶ Judge Sotomayor of the United States Court of Appeals (as she then was) held that it was more likely than not that a user of the website in question would not scroll down the webpage sufficiently enough to see the software licence terms which were placed below the download button they would have to press in order to download the product they were looking for. In other words, the terms in question were not readily identifiable or sufficiently visible to the users of the website and were placed in such a position on the webpage that a user may never see or look at them before the transaction was completed by the clicking on the download button.

Furthermore, in this case (*Specht*) the Court addressed the issue of having knowledge and therefore being bound by terms of use. The Court referred to the manner in

¹⁰⁵ 323 N.J. Super. 118, 732 A.2d 528; This case was cited as one of the authorities in the case of *Ryanair Ltd -v- Billigfluege.de GMBH*

¹⁰⁶ 306 F.3d 17 this case was also one of the cases which were cited as authorities in the case of *Ryanair* (supra)

which traditional contracts are formed and then provided a useful analysis of contracts formed over the internet as follows, “These principles apply equally to the emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to ‘Download now!’” “Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.”¹⁰⁷

In *Register.com Inc. v. Verio Inc.*¹⁰⁸, a decision of the United States Court of Appeals, Second Circuit, the plaintiff company provided an internet domain search facility. A person who conducted a search for a domain name would receive a reply together with a statement of terms providing that the information only be used for lawful purposes. It was claimed that the defendants breached these terms. The court was of the view that it is not necessary to click “I Accept” in order to manifest acceptance of an offer. Rather, in keeping with traditional contract principles, conduct in the form of making repeated searches in the knowledge of the existence of the terms of use bound the offeree to the terms.

In *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*¹⁰⁹ it was held that where a condition is particularly onerous or unusual, the party seeking to enforce it must show that that condition was fairly brought to the notice of the other

¹⁰⁷ These useful comments were the comments of Judge Sotomayor in the *Specht v. Netscape* from pages 16 to 20

¹⁰⁸ 356 F.3d. 393

¹⁰⁹ [1989] QB 433 as cited in *Ryanair Ltd* case whereby both cases have been obtained through bailii website

party. As per Dillon L.J., at p. 439:

“... if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.”

Similarly, in *Thornton v. Shoe Lane*,¹¹⁰ a case involving an exclusion of liability clause and a ticket issued by an automatic machine in a car park, Lord Denning M.R. made the following observations, at p. 588:

“The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice before-hand, but not otherwise.”

Finally, the House of Lords held that the defendant’s had not taken sufficient steps to ensure that the notice containing the exclusion of liability clause was brought to the attention of customers of the car-park before they purchased their tickets and in those

¹¹⁰ [1971] 2 WLR 585; Ibid

circumstances that the clause was invalid and of no effect.

4.5 Findings

In the course of collecting the relevant data in response to the problem under discussion (i.e the Impacts of ICT in Contract Formation and E-commerce development in Tanzania), the hypothesis and the guiding questions of the study were considered as the compass direction. The following are the findings and the relevant analysis to each fact as it can be seen herein below:

4.5.1 The role of ICT in Contract Formation

From the evidence of different writers who have written on the aspects regarding online contract formation practices, it is clear that as the development of science and technology has increased rapidly, the fact that a contract has been formed online is not a ground to deny its validity. The requirements for a contract to be in writing and the signatures of the parties thereto to be seen have been well resolved through electronic communications. Save for transactions involving land where special procedures have been laid down by the Land Act¹¹¹, other transactions can be validly conducted by using electronic communications.

All elements of a traditional contract such as offer, acceptance, and consideration, intention to enter into an enforceable agreement and capacity of the parties thereto

¹¹¹ According to the Land Act, Cap 113 R.E 2002, all land in Tanzania is public land vested in the President as trustee on behalf of all citizens; by virtue of section 36 the disposition of land should be in writing and a number of requirements need to be fulfilled for a transfer of a right of occupancy to be effective. On top of that, land cannot be sold to the non-citizens directly.

can validly be established by parties who are far away from each other. The issues of jurisdiction and the applicable laws need to be well taken care before concluding any contract online.

In the current world, the role of ICT in contract formation is seen in facilitating the search of market (invitation to treat) and simplifying the rapid and efficient contract formation practices worldwide at the same time. www.amazon.com for example has been the famous website in selling books online. ICT has expanded the chances of making profit through online transactions. However, the requirement that the retrieved information from the electronic system in which the contract will be claimed to have been formed between the parties to be reliable, trustworthy, unaltered and being collected from the normal business and operation of the system, proves challenge of the use of ICT in contract formation.

4.5.2 Digital Signatures

It is dully evident that as it is possible for the parties to put their signatures on the paper based contracts i.e traditional contracts, the same can equivalently be done when the contract is formed online. Though there are some elements of recognising this position, still it is the fact that in Tanzania there is no legislation which correctly provides for that position apart from the recognition made in the amendments made in the Evidence Act in recognising the value of electronic records in criminal proceedings.

On this particular issue of digital signature, Tanzania can learn from Austria. The qualified “electronic signature” is one of the core components at the heart of

Austria's eGovernment approach. The purpose this component serves can be explained quite easily. Many application forms require a signature from the person filling it out, which until now had to be signed on paper. With the changeover to electronic services, authenticating the signature has to be carried out electronically.¹¹²

An electronic signature is not just a signature on paper that has been scanned in. It is a mathematical algorithm that is carried out by the sender and recipient, each of which has their own "signature key". Together, these two keys form a unique pair. If both keys fit together, the recipient is ensured that the content is really from the person who sent the signature. Authenticity and Integrity are the aspects which are of paramount importance for electronic signatures.¹¹³ As far as Tanzania is concerned, the contract formation process and the stipulation of the law of contract Act and the Sale of Goods Act need to be amended to accommodate these useful global changes and where necessary, the Electronic Transactions Act should be enacted.

4.5.3 Legislations

Despite the fact that Tanzania has not enacted a number of legislations dealing with Electronic Transactions, the impacts of ICT in contract formation and e-commerce development would have been implemented by using the current existing laws which on one way or another relates with the online transactions. The presence of the Electronic and Postal Communications Act¹¹⁴ and other Acts such as the Evidence

¹¹² eGovernment ; Administration on the Net; The ABC guide of eGovernment in Austria by Ebi, Herwig & others, MediaGuide VerlagsGesmbH, 1150 Vienna (2011) p.32

¹¹³ Ibid

¹¹⁴ Act No.3 of 2010; An Act which has been enacted with a view of keeping abreast with development in electronic communications industry in the country.

Act which after the amendments made on 2007 electronic evidence has been recognised in courts of law¹¹⁵, show that even with the prevailing Acts at least a number of things which are related with online transactions and e-commerce development would have been taken care.

There are a number of issues which have been occurring in the country and the problem has been not the presence of the law, but the enforcement of the law. A living example on how we have failed in a number of times in various matters has been the poor enforcement of the law. We have been having a number of laws which are not functioning as per the intention of the parliament to enact such laws. The laws have just remained as the dead laws in the books. To cement on this finding, I would like to add the comments by Professor David Mellor OBE in his classroom teaching notes when he comments that; "...In UK, legislations on Copyright, Designs and Patents are not only in place but they are practically enforced whereas in some developing countries which have legislations on Copyrights, Trademarks and Patents the same are not enforceable and abuse and infringement have been rampant.

Professor Ian Walden in one of his books, has written that, according to Stuurman, C,¹¹⁶ in our information society, more and more technical standards are used in formulating laws, regulations, decision etc..... Standards are becoming more important in drafting contractual obligations and interpreting the meaning thereof,

¹¹⁵ In 2007, The Tanzania Evidence Act; Cap 6 2002 was amended so as to recognise and accommodate the production of Electronic evidence in Courts.

¹¹⁶ 'Legal Aspects of standardization and certification of information technology and telecommunications: an overview, 'in Amongst Friends in Computers and Law (Computer/Law Series, Netherlands, No.8/1990) at 75-92,

whether or not in the court room.¹¹⁷

One of the impacts of ICT in contract formation and e-commerce development in the country has been variations of the standards put by different Acts and different government departments and projects executed yearly. The need for having the pre-defined standards in the enacted Acts and the standards in operation of the enacted law, emerge from the fact that globalisation and the use of internet which has borderless transactions necessitates such a need. The absence of technical standards in formulating laws, regulations, decision etc makes Tanzania to be isolated as an island and fail to utilise effectively the available opportunities in the global online market.

4.5.4 Sale of Software

One of the impacts of ICT in contract formation and e-commerce development is on the current situation where by softwares can be purchased online rather than the former practice of selling software as goods in CDs. The Sales of Goods Act¹¹⁸ and the Law of Contract Acts¹¹⁹ have not provided anything on the matter. It is important to have relevant legislation or amend the existing laws on issues regarding to contracts relating to sale of softwares online and the related issues.

The comments of Professor David P Mellor OBE in his class room notes and reading

¹¹⁷ Professor Ian Walden, a professor in the Institute of Computer and Communications Law, Centre for Commercial Law studies, Queen Mary, University of London of Counsel, Baker & McKenzie March 2012, In the book entitled Telecommunications Law and Regulation, 4th Edition, Oxford University Press-2012.

¹¹⁸ The Tanzania Sale of Goods Act; [Cap 214 R.E 2002]

¹¹⁹ The Tanzania Law of Contract Act; [Cap 345 R.E 2002]

materials issued at Open University of Tanzania are useful on this aspect. According to him, there are laws which protect contracts like Sales of Goods Act and Supply of Services Act in UK; however in many countries there are no laws which protect the supply of services what are there, are laws which protect the sale of goods.

There is difference between sale of goods and provision of services. This could be illustrated by Microsoft example, when one buys computer, the purchase of computer can be covered by Sale of Goods Act whereas the Microsoft programs which one installs may not be protected. The case of *St. Albans District Council v International Computers Ltd*¹²⁰ in which errors on the software that caused losses to the Council made it entitled for damages. This case somehow is an eyeopener on need to have such legislations in other countries that protect parties in contract for supply of services especially computer softwares.¹²¹

4.5.5 Government Efforts and Strategies in ICT

4.5.5.1 IT Policy Formulation

As it was previously shown, the government has initiated the process of changing and formulating an up to date National ICT Policy. The deadline for public submission of the relevant views from the stakeholders is August 15, 2013.¹²² As the country is moving with its efforts to promote science, technology, innovation and ICT sector to be able to contribute to the economic and social development, there is

¹²⁰ [1996] 4 All ER 481, An English Contract Law Case, concerning unfair terms under the Unfair Contract Terms Act, 1977

¹²¹ Edited Comments, from the lecture notes, Legal Management of IT Contract; by Professor David Mellor OBE, (class room notes) op cit.

¹²² As per the Ministry of Communication, Science and Technology, Press release issued on 15th August; source Daily News Paper.

a need of thinking on the best way to put in place relevant infrastructures in the rural areas as well.

The need to have an up to date National ICT policy, indicates that there is a wide gap between the world technological advancement and the current status in the country. As a nation, it is the truth that we have failed to effectively utilise the online platform in contributing to our economic growth. The world ICT advancement has made the country to be an island isolated with a number of global online opportunities. The outdated laws justifies on this.

4.5.5.2 Smart Partnership Dialogue 2013 Tips

It was one of the most successful Dialogues in the Movement's 18-year history. Success owed much to skilled and attentive hosting by President of the United Republic of Tanzania, Jakaya Mrisho Kikwete; this was all the more appreciated by everybody since US President Barack Obama's overlapping visit - significantly also embracing the idea of 'Partnership" - placed an exceptional extra call on the President's time. The Smart Partnership Dialogue theme, chosen by the President himself, was "Leveraging Technology for Africa's Socio-Economic Transformation - the Smart Partnership Way".¹²³

There was an 'Open Access' session in which Smart Partners from Tanzania, as election of African countries and the world beyond shared experiences and Smart advice from prominent practitioners and academic experts in four fields -

¹²³ The Smart Partnership Movement's Global 2013 Dialogue - held in Dar-e-Salaam's newly opened Julius Nyerere Conference Centre - concluded on Monday 1 July.
<http://www.globaldialogue2013.go.tz/tipsG2013.php>.

Infrastructure, Agribusiness, Extractive Industries and Social Provision (especially health and education). Among the points which came at the conclusion were:

Firstly, each country's National Vision is the necessary inspiration behind - and the thread running through - its Science, Technology and Innovation [STI] policy. Secondly, STI should capitalize on Africa's pioneering place in mobile technology application, promoting financial inclusion and other development tools. Thirdly, Anchoring and leveraging technology requires a leadership-championed strategic plan, rigorously executed and supported by top quality, strategically-placed science advice, offered without fear or favour. Lastly; Wealth creation is not itself an adequate outcome of technology deployment; which should also deliver labour market restructuring, new jobs and strengthened demand.¹²⁴

With the above findings of the dialogue concluded in Dar es salaam, it is evident that strong and champion leadership are highly needed for a country like Tanzania to prosper in the use of ICT. The need to have a significant and relevant National ICT Policy remains greatly significant. The current developments in the mobile industry to some extent has shown elements of development of ICT industry in the country as it has been the first to make the Tanzanians to see how mobile phones have been able to provide other services such as paying various bills (such as water and electricity bills), accessing bank accounts, accessing internet services, watch mobile

¹²⁴ On Monday July 1, 2013 President Barrack Obama arrived in Tanzania in his official Visit to the country hereby among other things, the issue of Electricity for Africa under the project entitled Power Africa was launched. It is meaningless to talk about the efforts to plan for uses of ICT in various socio-economic development without first put relevant plans to have reliable electric power particularly up to the rural areas.

television, mobile-money, obtaining direct information whenever the money is taken through ATM etc.

4.5.5.3 Electronic National Identity Cards

The Government of United Republic of Tanzania is currently running the project called National Identity Cards Project, which aims at among other things, managing provision of individual identity information Register, information sharing and secure National ID Register to Tanzanian citizens and eligible residents who are non-citizens in order to enhance security and peace for the socio-economic development of the Country. The National ID System is a large ICT Infrastructure that has physical presence in every district across the country.

The key technology for the implementation of the system is by using the Smart Card Technology, typically a type of chip card in a plastic card that contains an embedded computer chip –microprocessor type that stores and transacts data. Data stored in the chip is associated with the card holder demographic and biometric information. The card is designed to include sophisticated physical security features that make forgery difficult. Data in the card is secured against unauthorized access and update through a Secured Access Module (SAM) scheme.¹²⁵

4.5.5.4 Electronic Fiscal Device (EFDs)

Consideration is one of the key elements in contract formation. In our daily lives we purchase goods for our subsistence in the shops, markets, supermarkets, shopping-Malls etc. Tax collection for the value of goods sold can well be done if there is an

¹²⁵ More information about the National Identity Card is available by visiting www.nida.go.tz

effective use of ICT in collecting the proper records of the goods sold. The traditional use of paper based and hand written records has failed to assist the government in obtaining the required amount of tax and hence a need for the replacement of a paper based to electronic system of tax collection.

According to the Tanzania Revenue Authority (TRA), Electronic Fiscal Device (EFD) means a machine designed for use in business for efficient management controls in areas of sales analysis and stock control system and which conforms to the requirements specified by the laws. Types of Electronic Fiscal Devices (EFDs) are Electronic Tax Register (ETR) which is the device used by retail business that issue receipts manually; Electronic Fiscal Printer (EFP); the device used by computerized retail outlets. It is connected to a computer network and stores every sale transactions or details made in its fiscal memory and finally the Electronic Signature Device (ESD) which is the device designed to authenticate by signing any personal computer (PC) produced financial document such as tax invoice. The device uses a special computer program to generate a unique number (Signature) which is appended to and printed to every invoice issued by the user's system.¹²⁶

4.5.5.5 E-Government Agency

e-Government Agency (eGA) is established under the Executive Agencies Act¹²⁷, as a semi-autonomous institution. It effectively became operational on 1st April 2012 with the mandate of coordination, oversight and provision of e-Government initiatives and enforcement of e-Government standards to Tanzania Ministries,

¹²⁶ <http://www.tra.go.tz/index.php/e-fiscal-devices-efd>

¹²⁷ Cap. 245 of 2010

Departments, Agencies and Local Government Authorities. The agency is currently under the strategic Internet 2012/2013 – 2016/2017 plan so as to achieve the Long Term Perspective-Vision 2025.¹²⁸

4.5.5.6 National ICT Broadband Backbone

The government has recognised the importance of internet through the National ICT Broadband Backbone. The National ICT Broadband Backbone is managed and operated by the Tanzania Telecommunications Company Ltd. (TTCL) on behalf of the government of the United Republic of Tanzania, through the ministry of Communication Science and Technology (MCST)

NICTBB helps to fulfil the increasing demands of information services, strengthen competitive abilities of domestic data and voice operators as well as bridging the digital divide. It is necessary in developing high speed broadband and helps to efficiently exploit the benefits from undersea submarine cables landing in Dar es Salaam by providing high quality capacity fiber optic connectivity from Tanzania to within Africa and the rest of the world. NICTBB is redefining everything that we know in e-government, e-learning, e-health, e-commerce, etc.¹²⁹

4.5.5.7 Tanzania Law Reform Commission

Law Reform Commission of Tanzania traces its inspirational background to the landmark Judicial System Review Commission now nostalgically referred to as the Msekwa Commission. In its report filed in 1977, the Msekwa Commission underscored the need for keeping the laws of Tanzania constantly attuned to the

¹²⁸ <http://www.ega.go.tz/page3.php?p=642>

¹²⁹ <http://www.nictbb.co.tz/about.php?in=nictbb>

changing Tanzanian society. Law Reform Commission of Tanzania Act number 11 of 1980 concretised recommendations of Msekwa Commission and established Law Reform Commission as a law reform agency.¹³⁰

In 2005, the Commission started to conduct research on areas affected by the development of information communication technology (ICT). On top of that, the review of the various laws for the aim of identifying the affected laws or areas in those laws was done simultaneously. In 2006 the Commission handed over the report regarding electronic transactions to the Minister of Constitution and Legal Affairs. In that report, among other things, the commission pointed out the laws which have been affected by the changes in science and technology.

The Commission pointed out the laws touching criminal issues, evidence, trade, commerce and finance, tax laws, data protection laws, civil laws, copyright and intellectual property issues, Electronic transaction, etc. The commission recommended for a proper amendment to be made and the missing laws to be enacted. As a response to that, in 2007 the amendments were made through the Miscellaneous Amendment Act, no 7 of 2007 whereby the Evidence Act was amended so as to recognize the electronic evidence in criminal proceedings. Another action was taken in Tax laws so as to accommodate such changes through the Finance Act of 2009. Apart from those two basic changes, the other laws have not yet been worked upon to date.

4.5.5.8 Development of E-Commerce In Tanzania

¹³⁰ <http://www.lrct.go.tz/about-us/>

The Development of relevant ICT infrastructures, Presence of strong Acts on Data Protection, Electronic Transactions as well as strong public awareness; are among the factors which are crucial for the smooth growth of e-commerce. Tanzania has not successfully utilised the available opportunities in the online platform whereby a number of transactions are done worldwide daily.

E-commerce and data protection are inseparable. It will be reasonable for a country to have the Acts which among others contain the data protection principles (by even making reference to what has been done in the European Union Directives) by stating categorically that Personal Data must be;

- i. Processed fairly and lawfully;
- ii. Collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- iii. Adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- iv. Accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified; and
- v. Kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.¹³¹

CHAPTER FIVE

¹³¹ Data Protection Legislation Based upon Directive 95/46/EC

5.0 CONCLUSION AND RECOMMENDATION

5.1 Conclusion

This study has been guided by the assumption that, Internet and electronic communications in general have brought considerable impacts in the famous and existing long celebrated principles of contract formation. On top of that, the efforts so far taken by the government in developing ICT infrastructure and the efforts taken in legislation process were greatly considered so as to be in a good position of analysing the study topic i.e the role of ICT in contract formation and e-commerce development in Tanzania.

5.2 Presentation of the Conclusion

- i. ICT has simplified contract formation process as it is no longer a dispute that the contracts formed online is equivalent to the traditional paper based contracts so long as there basic elements of contracts were there and that the terms and conditions associated thereto were dully observed.

- ii. There has been a great gap between Tanzanian legal system and the current legal development in other countries where relevant laws on Data Protection and Electronic Transactions have been in place. As it has been observed that since the Law Reform Commission conducted the research on the areas and laws affected by the development in ICT, to date we have not managed to have the relevant laws in place. It is not sounding well to hear that since 2005 the relevant research was conducted and the report was handed over to the Ministry in 2006 but nothing has been done. The minor amendments made in

2007 in the Evidence Act have been based on criminal proceedings only.

- iii. The Sales of Goods Act does not recognise the sale of software online apart from the sale of software in CDs which by implication it is as good as the sale of goods. In short, one of the impacts of ICT has been the issues of services which are online based not to be legally recognised and hence to have the laws which can simply be termed as the outdated laws.
- iv. The time under which a contract is formed has been affected by the changes in technology and that has necessitated the UN through the 2005 - United Nations Convention on the Use of Electronic Communications in International Contracts¹³² to come out with that Convention. The Electronic Communications Convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents.
- v. As far as the issue of time is concerned, the Convention defines the time and place of dispatch and receipt of electronic communications, tailoring the traditional rules for these legal concepts to suit the electronic context and innovating with respect to the provisions of the Model Law on Electronic Commerce (Art. 10). The current Law of Contract as mentioned earlier is outdated as it has remained unchanged to accommodate the relevant

¹³² http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce/2005Convention.html

technological advancement which in fact has been recognised by the UN.

- vi. The rural areas have remained to be technologically backward in the use of the current available technological advancement through electronic communications. Lack of Electricity in rural areas has been a stumbling block towards effectively utilization of ICT opportunities for social and economic developments of the country. That has stimulated the gap brought by the ICT within the country between urban areas rural areas.
- vii. Lack of relevant legislations on electronic transaction and data protection has placed the Tanzanians who are dealing in a number of online transactions locally and internationally to be involved in a number of risks related with those transactions. Furthermore, the slowness and silence of the government on the issues relating to the online transactions and lack of the relevant legal framework to tackle the issues relating to the use of internet in a number of online commercial practices has made the country and its citizens almost to be undefined, puzzled and backward.
- viii. The government has initiated a number of projects which are ICT based which would have resulted into immediate results on ICT development if there would have been the guiding policy, law or guideline to coordinate all ICT based projects to be in a well systematic goal. It has been like every project is independent and is there only for its own mission and goals rather than having the common goal of raising the

socio-economic development of the country.

5.3 Recommendation

- i. Immediate actions need to be taken as proposed by the Law Reform Commission. A number of reports have been submitted to the government on the need to take immediate actions to enact relevant laws which will make the country to be able to make relevant suitable environment for the better operation and use of the online platform in various transactions. It has been a tendency of the government to wait for a certain force to act upon it so that a certain action could be taken timely. The reports which have just been put in the shelves unattended should be worked upon so as to grasp the useful comments stated therein.
- ii. Setting relevant measures to harmonise the efforts so far taken by the government in its various projects to be focused on the common goal by 2025. Despite their being scattered, the National Projects which are ICT based should be centred in terms of their supervisory actions so as to make sure that the immediate outcomes are seen by those projects. Since all of these projects are just like bricks used in building the same house. The system should be able to be connected in such a way that they could be able to speak to each other electronically and that the citizens should be well informed about these projects.
- iii. When enacting the relevant laws which will be useful in the electronic transactions, data protection, electronic signatures and other relevant matters, a proper care need to be taken so that all relevant issues and risks associated

with electronic communications to be considered. Taking a reference to e-contracting using e-mail, e-contracts can be formed by the exchange of text documents by using electronic communications. Using e-mail in contract formation is can be risk as unless digital signatures are used, e-contracts formed in this way are open to challenges in relation to the identity of the parties and the integrity of the documents.

- iv. Furthermore, the impacts of ICT in contract formation can be seen by the fact that e-mail communication does not provide a comprehensive system of logging and auditing electronic records and communications. This may diminish the evidentiary value of electronic records and may cause inefficiency in the disclosure process in the event of a dispute.¹³³ In *Chwee Kin Keong V. Digilandmall.com Pte Ltd*¹³⁴ The respondent, a Singapore company selling IT products, had established its own website to offer various products over the Internet. It also operated another website owned by Hewlett Packard ("HP") for a similar purpose. One of the products offered on both websites was a HP laser printer ("the printer"). The printer was priced at \$3,854 on both websites. An error committed by an employee of the respondent's related company, Digiland International Ltd, caused the price of the printer to be altered to just \$66 on both websites. This case shows an example of online disputes where the accuracy of data is fundamental.
- v. The government needs to enact the proper law which will govern the issues

¹³³ A project Report, Project led by Sharon Christensen; Project titled- Electronic Contract Administration- Legal and Security Issues, Research Project No:2005-025-A by CRC for Construction Innovation, Brisbane-Australia, (2007) p.8

¹³⁴ [2004] 2 SLR 594

regarding electronic signatures and digital signature as well. Electronic signatures may identify the person who has appended the signature to the document and may indicate the person's agreement to the content of the document in the same way as a handwritten signature. The type-written name of a signatory in an e-mail or document, the pasting in of a scanned version of the signer's signature, clicking an 'I Accept' button, the use of the user id and password, or the use of cryptographic technology such as digital signatures are the example of electronic signatures. These examples of electronic signatures (other than digital signatures) are not able to assure both the sender's identity and the integrity of documents. However, an advantage of these types of signatures is that, in many cases, they are in human readable form and can be easily understood by people.¹³⁵

vi. As there is difference between the two, there is a need of making sure that the coming and expected laws will cover the matter so as to avoid chaos in the society. In *Faulks v Cameron*¹³⁶ the court had to determine whether the e-mails were signed as they were written words 'Regards Angus' and others 'Regards Angus Cameron' The court held that the emails were signed as the defendant's emails identifies him and indicates his approval of the information communicated as per the Electronic Transactions (Northern Territory) Act, 2000 (NT).

vii. Other issues which will need to be taken care are the issues of risks on

¹³⁵ Ibid

¹³⁶ [2004] 32 Fam LR 417; NTSC 61

evidence on the aspect of authenticity of an electronic record as it is the general principle that record will not be admissible unless it can be proved that the record produced is an authentic copy. As far as time is concerned, it may be difficult to prove the time an electronic record was created, sent, or received. There is a risk that computer systems might not record time accurately, or there could be a dispute between the contracting parties and the provider of the service and hence being difficult to perform the intended task.

viii. The government should establish the specific court system or the specific tribunals which will specifically be dedicated for the ICT based disputes. The tribunal should be well constituted with experts in ICT field who can efficiently determine the disputes basing on the changing nature of the science and technology. The use of the normal courts in dealing with cases of this nature will attract a number of wrong decisions unless the Judges and Magistrates are well trained on the technical aspect of the ICT contracts, evidence and the related matters.

ix. Compliance with the established principles as stated in a number of international instruments even though the country has not decided to adopt those instruments. The CISG for example, is applied in compromising and harmonising both interests of the Buyer and Manufacturer. The convention applies to contracts of sale of goods between parties whose places of business are in different states'. On top of that, a number of UN Model Laws on areas such as electronic communications, Electronic signature and Electronic Commerce are available and can be useful in the plan for enacting our laws.

- x. As the Mobile Transactions and the related services have shown a tremendous success in the provision of a number services such as Mobile Money, Bill Payments, Accessing Internet, Accessing the personal bank Account and the related facilities for those who have registered themselves for such services, watching Mobile Television etc, then there is a need of having strong public awareness on the precautionary measures that need to be taken for a legal use of such services to be maintained. A strong regulation of the telecommunication industry is constantly needed so as to make sure that there is a public trust on the services issued.

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