

# Legal Aspects of the Formation of Electronic Contracts in Tanzania: A Case Study of Tanzania-Japan Business Relationship

Adrian .F Ndunguru

Assistant Lecturer at College of Business Education in Dodoma , Tanzania and Senior Legal Officer Clients and Corporate Affairs at Haki Kwanza Advocates in Tanzania

## Abstract

A contract is essentially the main way through which trade negotiations are implemented.<sup>1</sup> The contract normally contains rights and obligations of the parties to a business transaction.<sup>2</sup> In the context of international trade normally the parties to the contract are based in different countries.<sup>3</sup> This factor plays an important and compelling role in the choice of nature of contracts involved which in most cases, is Electronic Contract. Electronic contracts seems to be an effective<sup>4</sup> and efficient means of conducting international trade transactions for they save time and cost of paper work and traveling to meet business partners.<sup>5</sup> The use of electronic contract is also dictated by the changes in the global system of conducting business which is shifting from paper based system to electronic system / cyber market where by communication is simplified electronically ( Internet connection).<sup>6</sup> For example the contracts of purchase of vehicles concluded by Tanzanians who purchases cars from Japan through electronic contracts with the Japanese car dealers

The focus of this research is to examine the legal aspects of formation of Electronic Contracts in Tanzanian Context. The main objective is to examine some legal challenges associated with formation of electronic contract in line with the adequacy of the Tanzania Law of Contract Act in as far as formation of electronic contracts is concerned. The leading question is the extent to which the Tanzanian Laws governing contracts can accommodate the legal challenges surrounding electronic contracts

Other countries like India have already enacted a law to regulate formation of electronic contract. The law is termed The Information and Communication Technology Act.<sup>7</sup> The Act provides for the mode of communicating online offers and acceptance and other matters related to that like the mode of fixing electronic signatures.<sup>8</sup> The findings of this study revealed that Tanzania has no specific law to regulate the formation of electronic contracts.<sup>9</sup>

## I. Conceptual Overview of Electronic Contract

Before defining electronic contract, it is better to define a contract. A contract is defined as a legally binding agreement made between two or more parties.<sup>10</sup> Tanzania Law of Contract Act defines a contract as an agreement enforceable by law<sup>11</sup>

Electronic contract is defined as a contract which is created wholly or in part through communication over the internet through exchange of e-mails.<sup>12</sup> A contract is created wholly over the internet if both the offer and acceptance are made entirely by exchange of emails and it is partly made over the internet when it combines electronic communication, paper documents, faxes and oral discussion.<sup>13</sup>

Asian Legal Service Council defines electronic contract to mean a contract modeled, executed and

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<sup>1</sup>N.N. Kilekamajenga, **The Cyber-Market: Formation of Contract Under The United Nation on the Use of Electronic Communication** in *The Open University Law Journal* .Vol 2,79. "One vital criterion in international trade is the cross border transaction of goods. However such exchange of goods is done through agreements."

<sup>2</sup> S. Vivek , *supra*, note 2, p.140.

<sup>3</sup> Article 1 of CUECIC

<sup>4</sup> S. Vivek, *supra* note 2 , p.116

<sup>5</sup> N.N.N. Nditi, **The General Principals of Contract Law in East Africa**, Dar es salaam University Press, Dar es Salaam, 2009,p 15,48.

<sup>6</sup> N.N Kilekamajenga, *supra* note 3, p.179

<sup>7</sup>**Electronic Contract and the Indian Laws** by Asian School of Cyber-Law available at [www.asianlaw.org](http://www.asianlaw.org) last accessed in December, 2009.

<sup>8</sup> [www.asianlaw.org](http://www.asianlaw.org) last accessed in December 2009.

<sup>9</sup> **Tanzania Position Paper on E-Commerce** available at [http:// www.ircr.tz/documents/positionpaperone-commerceedobe.pdf](http://www.ircr.tz/documents/positionpaperone-commerceedobe.pdf) last accessed on 15 June 2010.

<sup>10</sup> R.W. Hodgins , **Law of Contract in East Africa**, Kenya Literature Bureau , Nairobi, 1975 ( New Print 2006 ), p.16.

<sup>11</sup> Section 2(1) (h) of The Tanzania Law of Contract Act.

<sup>12</sup>N.N.N. Nditi, *supra*, note 7, p.49 "where a contract is created wholly or in part through communication over the internet through exchange of e-mail, it is called cyber or electronic contract."

<sup>13</sup> N.N.N. Nditi, *supra*, note 7, p.49.

enacted by a software system.<sup>1</sup> Computer programmes are used to create, process, send and store the process of electronic contracts in electronic commerce.<sup>2</sup> This definition reflects another definition by Indian School of Cyber market which defines electronic contract simply to mean a contract which is in electronic form as opposed to paper based contracts.<sup>3</sup>

Electronic contract is also defined as an agreement drafted and signed in electronic form. The definition goes further to comment that an electronic agreement can be drafted in the similar manner in which a normal hard copy agreement is drafted, for example an agreement is drafted on your computer and sent to a business associate via e-mail and an associate business in turn emails it back with an electronic signature indicating acceptance and in that way an electronic contract is created.<sup>4</sup>

Another approach of defining Electronic Contract is by separating the meaning of the two words which make the phrase that is 'electronic' and 'contract'. Electronic means some thing which is controlled by electric current and Contract means an agreement which is enforceable by law. If read together the term Electronic Contract therefore means an agreement which is made and communicated by means of electric current.<sup>5</sup>

The meaning of Electronic Contract reflects the mode of making and communicating it. The meaning suggests that electronic contract uses electric current and internet connection to create and communicate it.<sup>6</sup> The literature shows that the most common ways of entering into electronic contract on the World Wide Web is by exchange of e-mail<sup>7</sup> or by what is known as Web-click whereby a shopper visits the website of e-merchant and selects the items or orders the service that he or she wants to shop.<sup>8</sup>

In the view of the study, an electronic contract is an agreement created, communicated and accepted wholly or in part by electronic means like internet connection and which is enforceable by law.

## II. Historical Background of the use of ICT in Business and formation Electronic Contracts in Tanzania

The historical background of electronic contracts in Tanzania is connected to the evolution of Information and Communication Technology (ICT) which eventually led to development of electronic commerce in Tanzania. Responding to those changes, the government of Tanzania came up with the National ICT Policy in 2003. It is important to examine the objectives of the ICT policy in line with the challenges of E-commerce in formation of electronic contracts because it is the one which states the obligation of the state to make laws in response to e-commerce challenges.

The history of development of ICT in Tanzania started in 1960 when the government through its Ministry of Finance introduced the first computer to facilitate financial activities within the ministry.<sup>9</sup> The story did not end there, further developments were observed in 1970s when the government imported seven computers to be used in various government sectors.<sup>10</sup>

However, there were some challenges connected with the use of the computers and ICT development in general. One of them was the remarkable challenge of lack of enough experts and laws regulating the use of computer in government departments. This problem led to great losses in the financial sectors. Consequently in 1974 the government banned the importation of computers in government sectors.<sup>11</sup>

Despite the government ban, in 1977 the need raised to restore computer use in government sectors like the railways, civil aviation, and posts and telecommunications authority. This new demand was due to the fact that these sectors had previously been under the East African Community which had electronic means of dealing with business in East Africa region. During the East Africa Community all these sectors were computerized therefore this fact compelled Tanzania to continue with the computerized system in running those sectors.<sup>12</sup> During the 1970s changes there, few Tanzanians were already experts in computer and use of ICT hence it was easy to extend the use of ICT in commerce and formation of electronic contracts in particular.

Remarkable changes were observed in 1997 when Tanzania made some changes in its ICT system. It

<sup>1</sup> <http://www.legalserviceindia.com/article/127-E.Contract.html> last accessed on 5th May .2014.

<sup>2</sup> <http://www.legalserviceindia.com/article/127-E.Contract.html> last accessed on 5th May .2014.

<sup>3</sup> [www.asianlaw.org](http://www.asianlaw.org) last accessed September , 2014.

<sup>4</sup> <http://www.legalserviceindia.com/article/127-E.Contract.html> last accessed on 5th May .2014.

<sup>5</sup> N.N Kilekamajenga, *supra*, note 3, p.178.

<sup>6</sup> N.N Kilekamajenga, *supra*, note 3, p.178.

<sup>7</sup> N.N.N. Nditi, *supra* note 7 p.49 "where a contract is created wholly or in part through communication over the internet through exchange of e-mail, it is called cyber or electronic contract .

<sup>8</sup> <http://www.legalserviceindia.com/article/127-E.Contract.html> last accessed on 5th May .2010.

<sup>9</sup> M. Andrew & L. Zakayo , *Electronic Transactions and Law of Evidence in Tanzania* , Tumaini University Iringa University College , Iringa , 2007, p.42.

<sup>10</sup> *Ibid* p. 42.

<sup>11</sup> *Ibid* p. 42.

<sup>12</sup> *Ibid* p. 43.

licensed 21 internet service companies to provide internet services in Tanzania.<sup>1</sup> This development followed the 1995 changes brought by Microsoft Corporation co-founder Bill Gate who integrated the Internet Explorer Program into the computer Windows operating system and other electronic devices like mobile phones.<sup>2</sup> Web link could now be possible between government offices, commercial entities, banking services and individual computer users who were connected with the Internet Tidal Wave.

Recognizing the Importance of ICT in various activities and its regulatory challenges, in 2003 the government came up with a National ICT Policy which contained some objectives relating to regulating ICT use in Tanzania. It required the law making authority to make laws to regulate ICT use for national development . One of the areas which required legislation was electronic contract because international law that regulates formation of electronic contracts at international level excludes the application of the Convention in domestic contracts.

However, in 1996 the United Nations Commission on Trade Law came up with an UNCTRAL Model Law on Electronic Commerce: However, the Convention does not apply to consumer electronic contracts (Contracts for selling of goods for personal or household use).<sup>3</sup> The same applies to the 2005 United Nations Convention on the Use of Electronic Communication in International Contracts (CUECIC). The Convention in its Article 2 provides that “This convention does not apply to electronic communication relating to any of the following (a) Contracts concluded for personal, family or house hold purpose.”<sup>4</sup> What regulates consumer electronic contracts is a problem that has made the researcher to study it.

### III. Statement of the Problem

The problem which prompted the author to conduct this study is to examine the legal challenges relating to formation of electronic contracts so as to come out with a comprehensive legal framework to regulate the formation of electronic contracts in Tanzania. As Tanzania enters the 21<sup>st</sup> Century which is dominated by the advanced use of Information Communication Technology in all aspects of life including business activities, Tanzania must address the legal aspects associated with the use ICT especially in electronic contracts.<sup>5</sup> A good example of the growing use of electronic contracts is in purchase of motor vehicle from Japan which majority of Tanzanians does.

The current Tanzanian Law of Contract contains principles which seem not relevant to be applied to regulate formation of electronic contracts because the law was meant to govern paper based contracts. For example 4(1) and(2), of the Law of Contract Act has contradictions in communicating offer and acceptance which differs with that of the United Nation Convention on the Use of Electronic Communication in International Contracts

Section 4(1) of the LCA states that ‘the communication of a proposal is completed when it comes to the knowledge of the person to whom its is made’ and that which govern communication of acceptance states that, communication of acceptance is complete

- a) As against the proposer , when it is put in 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<sup>6</sup>

The rules of communicating contract stated above seem to contradict with that of the the United Nation Convention on the Use of Electronic Communication in International Contracts which insists that communication of electronic offer and acceptance is not complete when it comes to the knowledge of the addressee but until when it is capable of being retrieved as a whole message because electronic communication is transmitted in segments which may be delivered as an incomplete information. The relevant provision of the CUECIC states that:

The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at the electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being retrieved by the addressee and the addressee becomes aware that electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the

<sup>1</sup> M. Andrew & L. Zakayo, *Supra*, note 24, p 43

<sup>2</sup> R.F. Jeffrey & J.J. Bernard, *E-Commerce*, Mc Graw Hill/Irwin Publishers, New York, 2000, p.331.

<sup>3</sup> [http:// www.unctral.org/pdf/english/texts/electcom/ch x 13.pdf](http://www.unctral.org/pdf/english/texts/electcom/ch_x_13.pdf) last accessed on 21 Jan 2010.

<sup>4</sup> [http:// www.unctral.org/pdf/english/texts/electcom/ch x 13.pdf](http://www.unctral.org/pdf/english/texts/electcom/ch_x_13.pdf) last accessed on 21 Jan 2010.

<sup>5</sup> Tanzania 2025 Development Vision report by the National Development Planning Committee 1995.

<sup>6</sup> S. 4 (2) (a) and (b) of the Law of Contract

addressee's address.<sup>1</sup>

The question of interest is whether the LCA can be applied in electronic communication? Despite of the challenges brought by ICT in formation of electronic contracts. In the case of *Bhagwandas Goverdhandas Kedia v. Girdharila Parshottamdas and Co.*<sup>2</sup> the court observed that:

Obvious the draftsman of the Indian Contract Act [ add Tanzania Contract Act] did not envisage use of telephone as a means of personal conversation between parties separated in space and could not have intended to make any rule in that behalf. The question then is whether the ordinary rule which regard a contract as complete only when is intimated should apply or whether the exception engrafted upon the rule in respect of offer and acceptances by post and by telegram [add internet] is to be accepted.<sup>3</sup>

The opinion of the court in the aforementioned case is a conclusive evidence that, the current Tanzanian Law of Contract has some challenges when it comes to formation of electronic contracts because it was not drafted with anticipation of the challenges brought by use of ICT in formation of electronic contracts. This study is therefore a starting point to discuss what may be the challenges of formation of electronic contract in Tanzanian context so as to influence the government an policy makers to reconsider the need of reviewing the current laws governing contracts or making new laws to accommodate the challenges of electronic contracts in Tanzania.

#### **IV. Scholarly Observation on Legal Challenges of Electronic Contracts in Tanzania**

Since this study is intended to deepen or continue from where others have ended, it is therefore important to see what other scholars have written on electronic contracts. Most of the writings try to analyse the different aspects of formation of Electronic Contracts in line with International Instruments on the use of electronic communication in international contracts. The United Nations Convention on the Use of Electronic Communication in International Contracts and the United Nations Commission on International Trade Model Law on Electronic Commerce cover only contracts at an international level while excluding domestic contracts which are now the main concern of this study.<sup>4</sup>

N.N. Kilekamajenga has written an article on the formation of Electronic Contracts. He has explained the various means for the formation of electronic contracts limiting his study to the formation of Electronic Contracts under the United Nations Convention on the Use of Electronic Communication in International Contracts.<sup>5</sup> The academic community acknowledges his contribution on this aspect of Electronic Commerce but this study too would like to top up or add to what he has discussed by connecting electronic contracts to the perspective of Tanzanian laws. Bearing in mind that International Instruments on the use of electronic communication in commerce do not apply to domestic contracts there is a need of further research on this aspect.

According to Kilekamajenga the world market in international trade is significantly changing into a cyber market (electronic market) facilitating online trade which is commonly referred to as electronic commerce and which can be conducted both domestically and internationally. Surprisingly, Kilekamajenga has limited his study to international electronic contracts leaving the fog in domestic electronic contract challenges. To quote from his article:

The world market has been transformed into cyber-market and online trade is currently possible. This phenomenon is referred to as electronic commerce which can be conducted domestically or internationally. The internet nonetheless has brought new challenges to ordinary laws and hence dictates new legislation. The efforts to control the internet and its effect have taken diverse approaches; regulating the internet, business conducted through it and e-commerce is not an exception. This study covers formation of international electronic contract under the United Nations Convention on the Use of Electronic Communication in International Contract<sup>6</sup>

Nditi has also written about instantaneous communication in electronically accepted contracts. According to him the acceptance of contracts through the internet is complete when the notice of acceptance is sent back to the offeror and as far as the place of concluding the contract is concerned, the contract is concluded

<sup>1</sup> Article 10 ( 2) of the CUECIC.

<sup>2</sup> AIR 1966 SC 543.

<sup>3</sup> S. Vivek, *supra*, note , p.138.

<sup>4</sup> N.N. Kilekamajenga, *supra* note 3, p. 179 "When does the contract become effective? where should be the place of concluding the contract? This discussion is centered on the CUECIC and limited to business contracts at an international level; because the Convention neither covers domestic contracts nor contracts for personal, family or household purpose").

<sup>5</sup> *Ibid* p.179.

<sup>6</sup> *Ibid*

at the place of acceptance. <sup>1</sup>This book has exhausted only few aspects of formation of electronic contract as part of the content.

The academic community acknowledges the contribution of Prof. Nditi, but this study would like to add more to Nditi's ideals by relating it in line of the United Nations Convention on the Use of Electronic Communication in International Contract of 2004 which seems to have a unique approach to electronic contracts. According to the Convention acceptance in electronic contract is complete when the acceptance message is capable of being retrieved by the offeror and in so far as the place of concluding the contract is concerned, the contract is presumed to be concluded at the place which is connected to the performance of the contract.<sup>2</sup> The position of United Nations Convention on the Use of Electronic Communication in International Contract contradicts with that of Prof. Nditi, in communication of electronic contracts hence the need to conduct further studies like this is inevitable.

M. Andrew & L. Zakayo<sup>3</sup> have written on the issue of electronic transactions and their admissibility in evidence as far as the Tanzania Law of Evidence Act is concerned but they have not covered aspects of formation of Electronic Contracts. However, their book may also be a stepping stone toward this study. In their book, the two authors pointed out that according to the consultation they have made with the Law Reform Commission, Tanzania lacks of legislation to regulate electronic transactions. Just to quote from their book:

Third reason is lack of legal framework. Tanzania has yet to have cyber laws.

This fact is revealed by a survey conducted at the office of the Chief Parliamentary Draft. According to this survey, Tanzania currently does not have laws that recognize electronic transaction.<sup>4</sup>

The above quotation is also proved by the Law Reform Commission paper on *the Introduction of a Legal Framework for Electronic Commerce in Tanzania* which states that 'though Electronic Commerce in Tanzania started 10 years ago there is no law to regulate this area'. Therefore according to this report, the importance of having an effective legal framework to cater for this area cannot be overemphasized.<sup>5</sup>

Therefore, the two scholars quoted above have not completely covered the detailed concept of the Legal aspects of formation of electronic contracts. This author intends to make a study on the formation of Electronic Contracts through a comparative assessment of domestic laws in relation to international instruments on the use of electronic communication.

The obvious legal concerns of formation of electronic contract that contemporary authors must exhaust includes; the making of online offer as to when is a web site considered as an offer? How is the contract accepted? When does the acceptance become complete and where will the place of concluding the contract be? How is electronic signature fixed and how does the signature guarantee the identity of the parties to the contract? Who are the main parties to the contract? Are internet service companies parties to the contract? What if there is technical fault in communicating the offer? What laws will apply and which court shall have jurisdiction to enforce the contract? All these issues are very important to be considered when forming an electronic contract and many of these aspects are not envisaged by the ordinary law of contracts.<sup>6</sup> In line with these challenges, the interesting question the authors should be answering includes 'How far have these challenges changed application of the general rules of contract contained in the state laws governing contracts ?

Nditi points out that, electronic contracts have not changed the basic rules of contracts.<sup>7</sup> The process employed in formation of ordinary paper based contracts is also used in formation of electronic contracts. There must be an offer, the offer must be clear and certain, the offer must be communicated to the offeree and the offeree must accept the offer in order to form a binding contract,<sup>8</sup> there must be a lawful consideration, lawful object and the parties must have capacity to contract.<sup>9</sup>

However some scholars like N.N Kilekamajenga are of the view that, formation of electronic contracts is a bit different from the paper based contracts bearing in mind the nature of the mode of communication used (electronic communication/ internet connection) and the nature of the parties involved in the contract ( parties from different states ).<sup>10</sup> These factors present some issues of legal concern in formation of electronic contract

<sup>1</sup> N.N.N. Nditi, *supra* note 7, p.33 -34.

<sup>2</sup> N.N. Kilekamajenga, *Supra*, note 3, p.192.

<sup>3</sup>M. Andrew & L. Zakayo, *supra* note 24, 9

<sup>4</sup> Ibid

<sup>5</sup> Ibid.

<sup>6</sup> N.N. Kilekamajenga, *supra*, note 3, p. 178, 179.

<sup>7</sup> N.N.N. Nditi, *supra*, note 7, p.49 "the internet has not changed the basic rules of contract law"

<sup>8</sup> N. Rohas, *Electronic Contract & The Indian Law*, Asian School of Cyber-Law, 2008, p.74. , available at [www.asianlaw.org](http://www.asianlaw.org) "As in every other contract an electronic contract also requires the following necessary ingredients; an offer must be made, the offer must be accepted ...."

<sup>9</sup> Section 10 of The Law of Contract Act *also see* N.N.N. Nditi, *supra*, note 3, p. 20.

<sup>10</sup> Position Paper on E-Commerce available at, <http://www.ircr.or.tz/documents/positiononpaperone-commercedobe.pdf> .

which the laws must take into consideration so as to guarantee smooth running of the business especially electronic business.<sup>1</sup>

#### V. Legal Aspects of Formation of Electronic Contract in Tanzania

The whole process of formation of electronic contracts according to the above definition of formation of electronic contract involves the following items;- Making of online offer, Communicating of online offer, Communicating the acceptance<sup>2</sup>, time and place of forming the contracts, identity of parties forming the contract, fixing and authenticity of electronic Signatures, choice of proper law to govern the contract and the issues of power of the court to decide cases relating to enforcement of the contract

##### a) Making of on line offer

The formation of electronic contracts just as in ordinary contracts begin with making of an offer.<sup>3</sup> An offer is defined as a statement by one party of his willingness to enter into a contract on stated terms, provided that those terms are in turn accepted by the party to whom the offer is addressed.<sup>4</sup> The Law of Contract Act defines an offer as a person's signification of his willingness to do or to abstain from doing some thing with a view of obtaining the assent of the other party to whom it is addressed.<sup>5</sup> Example of offer is when a person signifies his willingness to sell his car at some price rate with the aim of obtaining the assent from those who might be interested to buy.<sup>6</sup>

In e-commerce perspective an offer to form an electronic contract is made electronically and communicated to the person to whom it is made electronically through the internet.<sup>7</sup> Manufacturers and suppliers can make an offer through the internet in various ways.

The first common method is Offers made through website of the supplier of goods . Website refers to a domain in the internet used by a person or company to conduct its business. A website can be regarded as a way of making online offer by the seller, through displaying of goods labeled with price, buyers will choose the goods they want and put them in a shopping basket and thereafter fill in an order form which is then regarded as an offer.<sup>8</sup> The Asian School of Cyber law insists on website form stating that...

The seller can offer goods or services (e.g. air tickets, software etc) through his website. The customer places an order by completing and transmitting the order form provided on the website. The goods may be physically delivered later (e.g. in case of clothes, music CDs etc) or be immediately delivered electronically (e.g. e-tickets, software, mp3 etc).<sup>9</sup>

Website in itself does not amount to an offer but it is the way through which people can make offers. The CUECIC insists that display of goods in the website is not an offer but an invitation to treat. It is meant to invite customers to make offers unless the intention of the parties implies otherwise.<sup>10</sup> But sometimes website gives the buyer two options either to use the dialogue box in the website or write an email.

According to Kilekamajenga, when the buyer uses the dialogue box there are three implications: first is to accept the contents of the form, second is to agree to the price and quantity of the goods selected and third is to make an offer.<sup>11</sup>

Kilekamajenga goes further that when the website does not contain an interactive program rather a display of goods with some terms like price and description of the goods and one option requiring the buyer only to click acceptance button then the website in itself amounts to an offer.<sup>12</sup>

The issue in this case is when the website presents both options, that it contains the dialogue box and write an e-mail. How can the buyer know that this is an invitation to treat or an offer?<sup>13</sup> Under this circumstance the solution is to look at the intention of the makers of the statement in the website, if it shows the intention of enabling the buyer to accept then that is an offer but when it shows the intention of enabling the buyer to make

<sup>1</sup> A. Daniel, *supra* note 68, p.133. " these are the most common issues between buyers and sellers . In order to resolve them laws are in place to support one or another."

<sup>2</sup> N. Rohas, *supra*, note 44, p.73.

<sup>3</sup> Ibid.

<sup>4</sup> M. Ewan, Contract Law, (4<sup>th</sup> Ed), Palgrave, New York, 2000, p.32.

<sup>5</sup> S. 2 (1) of the Law of Contract Act.

<sup>6</sup> N. Rohas, *supra*, note 44, p.73. "in any transaction (whether online or conventional ) the offer is not made one-on- one. The consumer browser the available goods and services displayed on the merchants website and then chooses what hw would like" *also see* N.N .N. Nditi ,*supra* note 15, p.21

<sup>7</sup> S. 18 of the Electronic Transaction Model Law see Appendix 11 of M.Andrew & L.Zakayo, *supra*, note 2, p.128.

<sup>8</sup> N.N.N Kilekamajenga, *supra*, note 3, p. 85.

<sup>9</sup> N. Rohas , *supra*, note 93, p.73 as quoted by Asian School of Cyber Law available at [www.asianlaws.org](http://www.asianlaws.org) .

<sup>10</sup> Article 11 of CUECIC.

<sup>11</sup> N.N.N Kilekamajenga, *supra*, note 3, p. 85.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

some interaction then the information is invitation to treat.<sup>1</sup> This is in accordance with the CUECIC which provides that website is an invitation to treat unless the parties intend otherwise; Therefore the interpretation of Article 11 is that generally a web site display of goods is an invitation to treat but can be an offer depending on its designation and intention of the parties.<sup>2</sup>

Offers made through sending an e-mail is another way of making an online offer is through sending an e-mail containing the terms and important conditions for the goods like the description of the goods, price of the goods, means of payment and delivery requiring the person to whom it is sent to show his assent by accepting the e-mail and signing it.<sup>3</sup> This mode of forming a contract is well explained by Nditi in his book through his example of a person who is asked to book for rooms by way of sending an e-mail normally he will structure the e-mail in form of a proposal and send it to the hotel sales person.<sup>4</sup> Another example is when a person sends an e-mail to car dealers in Japan upon seeing their advertisement over the internet.<sup>5</sup> Nditi categorize this method of making a contract through exchange of e-mails. The Asian School of Cyber Laws states that...

Offers and acceptances can be exchanged entirely by e-mail, or can be combined with paper documents, faxes, telephonic discussions etc.<sup>6</sup>

On line advertisement can also be used to make electronic offers. This happens when an advert contains all necessary characteristics of an offer such as the description of the product, the price of the product, payment methods and mode of delivery so as to amount as final expression of the seller's intention to be bound by the content of the offer.<sup>7</sup> The position that an advertisement can qualify as an offer was stated by the court in the case of *Carlill v. Carbolic Smoke Ball Co.*<sup>8</sup> In this case the court held that an advertisement of £ 100 reward for a person who would contract cold after taking the company drugs as prescribed was an offer. Nditi goes further to state that an advertisement can amount to an offer depending on whether or not it meets the characteristics of an offer. An advertisement is an offer if it meets the standard of test of the characteristics answers the question as to what advertisements amounts to an offer or invitation to treat.<sup>9</sup>

Generally display of goods over the company's website is regarded as an invitation to treat unless otherwise stated by the website operator or owner. The particular provision of CUECIC states that;

Article 11. Invitations to make offers

A proposal to conclude a contract made through one or more electronic communications which is not addressed to one or more specific parties, but is generally accessible to parties making use of information systems, including proposals that make use of interactive applications for the placement of orders through such information systems, is to be considered as an invitation to make offers, unless it clearly indicates the intention of the party making the proposal to be bound in case of acceptance.<sup>10</sup>

The main issue in communicating an electronic offer is as to when and where is the offer said to be effectively communicated for acceptance.<sup>11</sup>

*i. Time of communicating on line offer*

It is very contradicting to determine exact time of making an online offer if a person employs old rules of communicating paper based contracts. For example in Tanzania, The Tanzanian Law of Contract Act treats communication of offer to be completed when the information of the offer comes to the knowledge of the offeree, however in internet communication this is not the case, information may come to the knowledge of the offeree as an incomplete text or email depending on the strength of network. The issue of time of communicating an offer is solved by the CUECIC when it states the time at which communication of an electronic offer is presumed to be complete. The relevant provision of the CUECIC provides that:

The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at the electronic address designated by the addressee. The time of receipt of an electronic communication at another electronic address of the addressee is the time when it becomes capable of being

<sup>1</sup> Ibid.

<sup>2</sup> Article 11 of CUECIC.

<sup>3</sup> [http://www.legalserviceindia.com/article/127\\_e-commerce.html](http://www.legalserviceindia.com/article/127_e-commerce.html) last accessed on 5<sup>th</sup> May 2010

<sup>4</sup> N.N.N. Nditi, *supra* note 7, p.48.

<sup>5</sup> N.N. Kilekamajenga, *supra*, note 3, p.179.

<sup>6</sup> N. Rohas, *supra*, note 44, p.73 as quoted by Asian School of Cyber Law available at [www.asianlaws.org](http://www.asianlaws.org).

<sup>7</sup> N.N.N. Nditi, *supra*, note 7, p. 24.

<sup>8</sup> [1892] 2 QB 484.

<sup>9</sup> N.N.N. Nditi, *supra*, note 7, p 23 "can it be said that an advertisement is a proposal? the answers would depend on whether or not it meets the characteristics we have explained above (characteristics of an offer)."

<sup>10</sup> Article 11 of the CUECIC.

<sup>11</sup> N.N. Kilekamajenga, *supra*, note 3, 179.

retrieved by the addressee and the addressee becomes aware that electronic communication has been sent to that address. An electronic communication is presumed to be capable of being retrieved by the addressee when it reaches the addressee's address.<sup>1</sup>

A similar provision is found in the Indian ICT Act and Electronic Transaction Model Law as quoted by M. Andrew and L. Zakayo in their book. Both laws provide for the time and place of communicating an offer. The Indian Act and Model Law provide for two levels of assessing the communication of an offer. The first level is when the addressee has designated the information system of receiving the communicated message and the second level is when the addressee has not designated the information system of receiving the message.

The time of receiving the electronic message according to the first level is when it has entered the particular information system designed by the addressee as to be out of the control of the originator and it becomes capable of being retrieved while in the second level the time of receipt of the message is when the addressee becomes aware of the message sent to him and it becomes capable of being retrieved and processed.<sup>2</sup> The particular provision states:

22. Time and Place of sending and receiving electronic communication

- 1) An electronic communication is sent when it enters an information system outside the sender's control or if the sender and the addressee use the same information system, when it becomes capable of being retrieved and processed by the addressee
- 2) An electronic communication is presumed to be received by the addressee,
  - a) If the addressee has designated or uses an information system for the purpose of receiving communication of the type sent, when it enters the information system and becomes capable of being retrieved and processed by the addressee; or
  - b) If the addressee has not designated or does not use an information system for the purpose of receiving communication of the type sent or if the addressee has designated or used such a system but the communication has been sent to another system, when the addressee becomes aware of the communication in the addressee's information system and it becomes capable of being retrieved and processed by the addressee.<sup>3</sup>

The proper interpretation of the above provisions is that, communication of an offer is complete when the information has come to the knowledge of the person to whom it is addressed and it is capable of being retrieved and processed. This is contrary to the rules of acceptance in conventional contract which treats communication of an offer as complete when it comes to the knowledge of the person to whom it is made.<sup>4</sup>

ii. *Place of communicating online offer*

The place of communicating an offer is also challenging since the parties connected by internet may be based in different countries. This is important in order to determine the place of formation of contract so as to know which country has powers to enforce the contract? An offer is said to be communicated where the sender and receiver have their place of business and in absence of that at the place where the communication is said to be received<sup>5</sup> or at the place with closest relationship of the underlying transaction say where the contract is intended to be performed or executed. The particular provision states that:

Article 10. Time and place of dispatch and receipt of electronic communications

3. An electronic communication is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 6.

4. Paragraph 2 of this article applies notwithstanding that the place where the information system supporting an electronic address is located may be different

<sup>1</sup> Article 10 ( 2) of the CUECIC.

<sup>2</sup> S. 22(2) (a) and (b) of The Electronic Transaction Model Law as quoted by M. Andrew and L. Zakayo , *Supra*, note 2, p.128.

<sup>3</sup> S. 22(2) (a) and (b) of The Electronic Transaction Model Law as quoted by M. Andrew and L. Zakayo , *Supra*, note 2, p.128.

<sup>4</sup> S. Vivek, *supra*, note 2, p.135.

<sup>5</sup> *Ibid*, p.137.



from the place where the electronic communication is deemed to be received under paragraph 3 of this article.<sup>1</sup>

In the case of *Entores Ltd*<sup>2</sup> Justice Denning had this to say

..The rules about instantaneous communication between the parties are different from the rule about post. The contract is only completed when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received.<sup>3</sup>

#### *b) Acceptance of an online offer*

Acceptance of an online offer is another important step to be observed in forming an electronic contract.<sup>4</sup> Acceptance can be defined as an approval of the offer by the person to whom it was intended. D. Lopez in *Business Law: An Introduction* defines acceptance of an offer as a clear manifestation of assent to the terms of an offer.<sup>5</sup> According to Sir Anson when the offer is accepted the contract is said to be formed between the two parties.<sup>6</sup>

##### *i. Method of Communicating online Acceptance*

The main legal issues in online acceptance is the application of mail box rule in communication of online acceptance of offers.<sup>7</sup> The key question is whether this principle applies also in electronic contracts and if not what principle will now guide communication of online acceptance? In the case of *Entores Ltd*<sup>8</sup> Justice Denning had this to say

..The rules about instantaneous communication between the parties are different from the rule about post. The contract is only completed when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received.<sup>9</sup>

##### *ii. Time of accepting an online offer*

An acceptance of online offer is said to be complete at the time when the communication reaches the offeror's address as being complete capable of being retrieved by the offeror or addressee.<sup>10</sup> The rationale of determining the time of acceptance is on the need to identify the time the contract is to fix the time when the contract is formed and therefore the time parties assume their contractual obligations.

Normally a contract is created on completion of acceptance. Sir Anson states that "acceptance is to an offer what a lighted match is to a train of gunpowder."<sup>11</sup> This is the main reason behind the need for identifying the time when acceptance is complete. In other cases the need for identifying the time when acceptance becomes complete arises from the fact that sometimes the offeror or offeree may wish to revoke the offer or acceptance is not possible once the communication have become complete.<sup>12</sup>

Mc Kuchhal in his book states that "a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. An acceptance may be revoked at any time before the communication of acceptance is complete as against the acceptor but not afterwards." The plain meaning of the statement by Mc Kuchhal is that acceptance of an offer once complete bars both parties from revocation.<sup>13</sup>

Another question to ask is, how the parties can know that now the message is capable of being retrieved by the other party so as to know the exact time of completion of the communication of the acceptance message. Perhaps the computer will show a delivery note in the first sender's computer. It is very important to determine all these points because it is only at the completion of acceptance that the contract becomes binding on the parties, and therefore enforceable by law against them if any of the parties attempts to breach the terms and conditions contained therein.<sup>14</sup>

In an electronic contact communication hardly takes seconds or minutes to become complete if there are

<sup>1</sup> Article 10 (3) and (4) of the CUECIC.

<sup>2</sup> (1955) 2 QB 327.

<sup>3</sup> S. Vivek, *supra*, note 2, p.137.

<sup>4</sup> N. Rohas, *supra*, note 44, p.73.

<sup>5</sup> D. Lopez, *supra*, note 119, p.96.

<sup>6</sup> N.N.N. Nditii, *supra*, note 7, p.44.

<sup>7</sup> N.N. Kilekamajenga, *supra* note 3, p.179.

<sup>8</sup> (1955) 2 QB 327.

<sup>9</sup> S. Vivek, *supra*, note 1, p.137.

<sup>10</sup> N.N. Kilekamajenga, *supra* note 3, p.192 "the CUECIC provides a clear guide that international electronic contract is concluded when the addressee is capable of retrieving the data message."

<sup>11</sup> Mc Kuchhal, *Mercantile Law*, (6<sup>th</sup> Ed) Vikas Publishing House PVT Ltd, New Delhi, 2005, p.38.

<sup>12</sup> N.N.N Nditii, *supra*, note 7, p.44 "A proposal may be terminated at any time before its acceptance is complete."

<sup>13</sup> Mc Kuchhal, *supra*, note 152, p.38.

<sup>14</sup> N.N. Kilekamajenga, *supra*, note 7, p.191.

no technical errors in the course of transmission, Do the parties have time to revoke the acceptance or proposal like in other ordinary paper based contracts? If the answer is no, is the freedom of the parties to revoke their offers or acceptance before the communication of acceptance becomes complete guaranteed in electronic contracts?

Revocation of online acceptance is well explained by Mc Kuchhal in his book when he discusses communication of acceptance by speedier means like telephone which have similar application to electronic communication. According to Mc Kuchhal there is no right of revocation in electronic communication of an acceptance. He states that “No question of revocation, when the parties negotiate a contract over telephone, no question of revocation can possibly arise, for in such instantaneous communication, a definite offer is made and accepted at one and the same time. An offer when accepted explodes into a contract and can not be revoked.” In the words of the above mentioned author, there is no right of revocation in electronic communication.<sup>1</sup>

*iii. Place of accepting an online offer*

In context of the nature of international electronic contracts which normally involve parties from different countries who can not meet physically, it is very important to determine the place of concluding the contract in order to know or determine the court which shall have jurisdiction to try any dispute over the contract and the law to be applied in enforcing the contract.<sup>2</sup>

In case a contract is concluded electronically, there is normally confusion in determining the real place of concluding the contract since the parties concluded the contract through their computers linked with internet connection other than meeting physically in a certain area to form their contract.<sup>3</sup>

The CUECIC states the place of communicating an electronic message as the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business as determined in Article 6 of the Convention.<sup>4</sup> In case the place of business of the parties is not clear, communication is said to be done at the place where it is received. In the case of *Entores Ltd<sup>5</sup> v. Miles* Justice Denning had this to say ...

..The rules about instantaneous communication between the parties are different from the rule about post... the contract is made at the place where the acceptance is received.<sup>6</sup>

*iv. Acceptance of Electronic Contracts and Application of ‘mail box rule’*

The mail box rule requires that once acceptance is put in course of transmission or posted to a proper person (that is the offeror) , a contract is completed at the point of posting or sending regardless of the message reaches the addressee or not.<sup>7</sup> In *Adams v. Lindsell<sup>8</sup>* Signer L.J argued that “the acceptor in posting the letter has put it out of his control and done an extraneous act to the matter, and shows beyond all doubt that each side is bound.”

The question is whether this rule applies in accepting online contracts where sometimes the message is broken into segments and may be delayed for some technical errors. Perhaps the answer is no. In electronic communication, acceptance is complete against the sender and receiver when the message completely reaches the addressee’s address, capable of being retrieved and processed. This is according to Article 10 (2) of the CUECIC.

*c) Signature in Electronic Contract*

Signature is very important in the formation of electronic contract in order for a contract to be enforceable although the Tanzania Law of Contract Act does not provide for this aspect. In practice all commercial contracts must be signed. If the document is a paper based document there is hand written signature but for electronic documents normally electronic signature is required.

Electronic signature is defined by different scholars but in more similar way, Andrew Mollel and Zakayo Lukumay define electronic signature to mean an electronic symbol or process logically associated with an electronic record and executed by a person with intent and full knowledge that the electronic signature constitutes a valid certification of the electronic record.<sup>9</sup> It is also defined in a similar manner as an electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.<sup>10</sup>

The two definitions quoted above are difficult to understand due to the use of some technical words or

<sup>1</sup> Mc Kuchhal, *supra*, note 152, p.37.

<sup>2</sup> S. Vivek, *supra* note 2, p. 140-141, also see N.N. Kilekamajenga, *supra* note 3 , p.191.

<sup>3</sup> N.N. Kilekamajenga, *supra*, note 3, p.191.

<sup>4</sup> Article 10 ( 3) of the CUECIC.

<sup>5</sup> (1955) 2 QB 327.

<sup>6</sup> S. Vivek, *supra*, note 2, p.137.

<sup>7</sup> N.N.N Nditi, *supra*, note 7, p.40.

<sup>8</sup> (1818) 1 B & Ald.681.

<sup>9</sup> M. Andrew and L. Zakayo, *supra*, note 24, p.80.

<sup>10</sup> [www.scc-assessors.org/dictionary\\_of\\_terms.html](http://www.scc-assessors.org/dictionary_of_terms.html) as quoted by M Andrew and L.Zakayo in their book.

key terms employed in defining an electronic signature. The key terms of the definition of electronic signature are as follows, electronic signature as a symbol, logically attached to an electronic document or record, intended to be used as a certification to a record by a person using it.

There are multiple ways of creating an electronic signature ranging from technical to ordinary methods depending on the nature of the document and the intention of the person who wants to sign it.<sup>1</sup> These methods could be adopted by the laws of Tanzania to guide people in formation of electronic contracts. The methods include;-Typing the name and address at the end of the document, digitized images of handwritten signature, the use of 'I agree' icon, the use of encrypted key

**a) Electronic signature created by typing a party's name and address**

This is a common method of signing an electronic document whereby the person who intends to sign a particular document types his name and business address at the end of an electronic document he intend to sign.<sup>2</sup> The rationale is assuring the other party about the identity of the person who has written the document and that he intend to be bound by the contents of that document.<sup>3</sup>

Supporting the method of signing an electronic signature named above, the UNCUECIC<sup>4</sup> provides that where the law requires that a communication or a contract should be signed by a party or provides consequence of the absence of a signature, that requirement is met in relation to an electronic communication if, a method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication.<sup>5</sup>

According to the above provision, the name and address typed at the end of an electronic document is enough to indicate the identity of the party signing an electronic document and his or her intention to sign the document. The question is whether this method is reliable to guarantee the security of the document from being altered after it has been signed as required by Article 9(3)(b) of the UNCUECIC. The Article provides that the method used to identify the person and his intention should also be reliable for the purpose of which the document was created and communicated (say business purpose).<sup>6</sup>

**b) Electronic signature by using digitized images of handwritten signature**

This is a signature created similar to the creation of a hand written signature. However, this method uses digital biometric based technology by adding secret codes to the signature which are referred to as Private Identification Number ( PIN ) .<sup>7</sup> This method is highly used in issuing ATM cards whereby a customers signature is electronically assigned to a PIN number as password. When required to sign at the ATM, a person is required to enter his or her password instead of his signature.<sup>8</sup>

**c) Electronic signature created by using encrypted private keys**

This is regarded as a more secure means of signing an electronic document and it is a more technical method of creating an electronic signature.<sup>9</sup> It is created by using a series of letters which are assigned with numbers containing private keys which are used in reading the encrypted message.<sup>10</sup> Only the person with private keys can read the message. For example a person who wants to send a message will write a message thus...

HNFmsE6UnBejhhyCGKOKJUXhiygSBCEiCOQYIh/Hn3xgiKBcyLK1UcYiYL  
xx21CFHDC/A" where the person with private key can read " Hey Bob , how  
about lunch at Taco Bell , I hear they have free refills."<sup>11</sup>

**d) Electronic Signature by signing 'I agree' icon**

Some website purchases contain an offer of goods with a box written 'I Agree' at the beside the items advertised.<sup>12</sup> This means that when the buyer has selected the goods he or she wishes to buy and places them into the online buying basket he or she needs to sign the acceptance by clicking the 'I Agree' button in order to express his or her intention to sign the document. Although this method does not contain enough information of

<sup>1</sup> N.N Kilekamajenga, *supra* , note 3, p. 188 " Electronic signature may be used indifferent ways ; it may involve simple means of identification like such as typing your name or e-mail address on the electronic communication. Electronic signature also covers the application of scanned hand written signature."

<sup>2</sup> M. Andrew and L. Zakayo, *supra*, note 24, p. 188.

<sup>3</sup> Article 9(3)(a) of the CUECIC.

<sup>4</sup> Article 9(3)(a) of the CUECIC.

<sup>5</sup> Article 9(3)(a) of the CUECIC.

<sup>6</sup> Article 9 (3) (a) of the CUECIC.

<sup>7</sup> M. Andrew and L. Zakayo, *supra*, note 24, p.81.

<sup>8</sup> Ibid .

<sup>9</sup> M. Andrew and L. Zakayo, *supra*, note 24, p.82 also see A. Daniel , *supra* .p.122 " with this algorithm every letter gets a number assigned."

<sup>10</sup> Ibid, p.82.

<sup>11</sup> M. Andrew and L. Zakayo, *supra*, note 24, p.82.

<sup>12</sup> M. Andrew and L. Zakayo, *supra*, note 24, p.82 "Another simple method shows a name and detail of an electronic contract on a website and then the user clicks an 'I Agree' icon."

identifying the person who buys the goods or products,<sup>1</sup> nevertheless it is much applicable in purchasing online computer programmes like anti viruses.

One may ask as to which of the above methods of executing electronic signature is appropriate. The law, particularly Article 9(3)(a) and (b) clearly adopts a neutral approach in deciding the method of effecting electronic signature. What the provision states is that the formal requirement of electronic signature in an electronic document is met by using any method which ensures the identity of the person signing the document and his intention to sign the document provided that such method is reliable to guarantee the security of the creation and communication of the information according to the purpose for which the information was intended.<sup>2</sup> Indeed, the provision does not provide for a rigid method. The provisions of Article 9(3) (a) and (b) tend to suggest that, secure methods of effecting an electronic signatures appear to be digitized image of the handwritten signature and encrypted method of signing an electronic document.

**d) Choice of proper Court with Jurisdiction in enforcing electronic contracts**

The problem of choice of proper court arises when there is a dispute between the parties as to the contract. It becomes hard in electronic contracts to point out which court will have powers to decided the case if parties are based in different countries. Daniel Amor in his book emphasizes on the need for stating the place of accepting the contract for jurisdiction purpose. According to Amor, because internet creates a global village without global laws, jurisdiction on the internet becomes very important point to be taken care of by the domestic laws and the parties when concluding an electronic contract. He goes further to insist if business is done over the internet , it is very important to know if it is caught by the jurisdiction of another country or state. The concept of extra territoriality is critical for any type of business on the Web.<sup>3</sup>

For example, if an electronic business is located in Japan and the customer is in Tanzania , it is important to know which country shall have jurisdiction in case of any court proceedings following breach of the contract by one party?. In real world where the factors for choice of proper court may be multiple, it becomes very hard to point the direct court with powers to enforce an electronic contract. If an electronic contract or agreement will not be enforceable for some reasons like uncertainty as to which court will determine the matter in question that agreement can not be regarded as a contract because it is not enforceable by the laws as required by the definition of a contract which defines it as an agreement enforceable by law.<sup>4</sup>

Daniel Amor<sup>5</sup> gives an example of the contract in which different laws were in contradiction in enforcing a contract by Amazon .com company because of difference in laws which regulates website books. Amazon.com is a company dealing in selling online books through its website, Simon Wiesenthal Centre in Germany sued the company for selling books which were banned in Germany. The banned books are those books which contain Adolph Hitler's story and other hateful stories. Therefore, to enter into a contract of selling online books which are banned in Germany with a Germany customer without stating the place of enforcing the contract may lead to non enforceability of the contract if it will fall under Germany jurisdiction where the laws bans selling those books which contain hateful stories . If the contract is said to be enforced in Germany, it is void while if it is made in Brazil where amazon.com operates its business, it is valid .Therefore in order to have the contract enforceable it is very important to state the country in which the contract is deemed to be made so that that country can have jurisdiction it enforcing the contract because its laws allows for such type of contracts.<sup>6</sup>

**e) Formation of Electronic contracts and choice of proper law to govern the contract**

Choosing a proper law of contract to govern formation of electronic contracts is very difficulty especially when there is multiplicity of connecting factors.<sup>7</sup> The problem arises from the very nature of International electronic contracts which normally involves parties from different countries. The factors which bring conflicts in choosing the proper law of electronic contracts include; the place where the contract was made, the place of performance, domicile of the parties and their place of difference and the situation of the subject matter. All these factors invites conflict of laws of different countries, it requires the parties and court to choose, the laws of which country should regulate the contract .<sup>8</sup>

The difficulty of choosing the proper law of contract also arises in case there is difference in laws

<sup>1</sup> Ibid.

<sup>2</sup> Article 9(3) of the CUECIC.

<sup>3</sup> Daniel, A., **The E- Business Revolution: Living and Working in an Interconnected World**, Prentice Hall PTR, Saddle River, 2000, 114

<sup>4</sup> Ibid.

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> P.M North & J.J Fewcett, **Cheshire and North's Private International Law**, Oxford University Press, New Delhi, 2006, p.434

<sup>8</sup> Ibid, p.534

regulating contract legal issues like formal and substantial validity of the contract. A contract may be formally valid in the laws of one country while at the same time not valid in another country. In the similar case there may arise the issue of difference in laws of interpreting the contract terms especially when the laws of the contracting parties provides for different meaning to the same terms of contract. The doubt comes as to whether one system of laws should be applied to govern all these legal issues in international electronic contracts.<sup>1</sup>

Sometimes even the nature of the types of electronic contract can also act as a decisive factor in choosing the proper law of contract. For example, can it be possible that the same law which regulates electronic sale of goods contracts to regulate paper based contracts or there is a need of choosing a special law which fits the nature of electronic contracts.<sup>2</sup> This is also another issue to be considered in formation of electronic contract in order to make it enforceable.

There are divergent approaches in determining the proper law of contract in case there is multiplicity of connecting factors; previously there was the American approach and English approach.<sup>3</sup> All these approaches are discussed in this discussion and at the end the researcher comes to the agreed current approach of choosing proper law of contract.

#### *American Approach*

In America they used to have very rigid rules in determining the proper law to govern contract matters in the event of conflict of laws. American courts used two rules, place of concluding the contract and place of performing the contract. Therefore in deciding the applicable law in contract matters, the courts would decide basing on the law of the country where the contract was concluded or the laws of the country where the contract was to be performed.<sup>4</sup>

#### *European Approach*

Most of the European countries adopted a flexible approach in determining the applicable law of contract in the event of conflict of laws. They used to have “the proper law of contract doctrine” which allows parties to choose the law to be applicable in case of any issue inviting conflict of law. Further more in absence of the party’s choice, the court would decide on the law to be applied through objective test which is based on close connecting factors leading to the application of the laws of the country which is closely connected to the contract.<sup>5</sup> For example when a contract is between a Tanzanian importer and a Japanese exporter and the contract was concluded in Tanzania, to be performed in Tanzania then that contract is connected to Tanzania consequently Tanzanian laws will apply.<sup>6</sup>

#### *Rome Convention of 1991 Approach*

In 1967, the European Commission in trade laws came up with a proposal on the choice of law of contract in the event of conflict of laws. The proposal later on led to the formation of the Rome Convention which came into force in 1<sup>st</sup> April 1991. The convention adopted uniform rules in determining choice of law of contract in the event of conflict of law. The convention provides for two rules in choosing the applicable law of contract namely freedom of choice of law by the parties and choice of law by the court in the absence of choice of law by the parties.<sup>7</sup>

##### *i) Freedom of choice of law of contract by the parties*

The Rome convention allows the parties to the contract to choose which law to govern their contract.<sup>8</sup> The particular provision is to the effect that a contract shall be governed by the law chosen by the parties. This was adopted from the former European rule of choice of the applicable law of contract which allowed the parties to make choice of law to govern their contract.<sup>9</sup>

##### *ii) Choice of law by the court in the absence of choice of law by the parties*

There are circumstances when the parties to the contract fail to choose the law to govern their contract due to some reasons say when the parties fails to reach at a consensus as to which law to govern their contract or when the parties fails to consult a lawyer to advice them in the formalities of forming their contract.<sup>10</sup>

In case parties fail to choose the applicable law, Article 4 of the Rome Convention provides for the court to choose the law to regulate the contract by looking at the closely connecting factors.<sup>11</sup> The particular point is to the effect that in case the law applicable to the contract has not been chosen in accordance with Article

<sup>1</sup> P.M North & J.J. Fewcett , *supra* , note 118, p.534.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> N.N. Kilekamajenga , *supra* note 3 , p.179

<sup>7</sup> P.M North & J.J. Fewcett , *supra* , note 118, p.552.

<sup>8</sup> Article 3(1) of the Rome Convention.

<sup>9</sup> P.M North & J.J. Fewcett , *supra* , note 118, p.552.

<sup>10</sup> Ibid

<sup>11</sup> Ibid, p.565

3(1) of the convention, the contract shall be governed by the law of the country with which it is closely connected. The connecting factors include the place of concluding the contract, the place of performing the contract and the place of business of the parties.<sup>1</sup>

However the Rome Convention provides for the limitations of the freedom in choosing the applicable law of contract in case of multiplicity of connecting factors. The convention limits the parties from ignoring mandatory elements which connects a contract to the law of a particular country. Like say when the contract is mainly made in one country, a party can not just decide to choose the laws of another country to change that contract into a foreign contract.<sup>2</sup>

The particular provision is Article 3(3) of the Rome Convention which provides that the fact that parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of choice are connected with one country, prejudice the application of the rules of law of that country which can not be derogated from one country, here in after called mandatory rules.<sup>3</sup>

## VI. Conclusion

After carefully deliberating on the legal issues revolving around formation of electronic contracts, the authors finds it fair and just to conclude that the Law of Contract Act CAP 345 is not adequate to regulate all the legal aspects of the formation of electronic contracts like the identity of the parties to contract, the formal requirements of affixing electronic signature, the time and place of communicating online offer and acceptance so as to form a binding contract.

The reason for the above conclusion is that, when Tanzania adopted the present Law of Contract Act from an Indian Contract Act the level of science and technology was very low, there was no idea of using current Information and Communication Technology like internet in the formation of electronic contracts. The introduction of ICT in the 21<sup>st</sup> Century, is the main driving force that compelled many countries like India to make a distinct law ( The Information Technology Act ) to regulate the use of electronic communication in the formation of electronic contracts.<sup>4</sup> However the efforts taken by other countries and international community in regulating electronic contracts were not adopted by Tanzania to review its contract laws.<sup>5</sup>

There is urgent need of reviewing the present Law of Contract Act to make it compatible with the changes happening in electronic communication like the use of internet in executing contracts. The areas which need fast review is the part of communication of an offer and acceptance, the identity of parties to the contracts and the method or mode of affixing an electronic signature to fulfill formal requirement of signature in some contracts.

International instruments on the use of electronic communication in contract formation are not enough to regulate both international electronic contracts and domestic contracts. A good example is CUECIC which expressly excludes domestic electronic contracts (contracts for household or personal use) in its application.<sup>6</sup> The said provision of CUECIC states that "This convention does not apply to electronic communication relating to any of the following; contract concluded for personal, family or household purpose."<sup>7</sup>

Also it should be noted that, Tanzania is bound to make review in its contract laws because of the global changes in the use of ICT in electronic transactions which is growing very fast. If these reviews will not be effected, there is likelihood of changing Tanzania into a heaven of cyber crimes. Foreigners will be using the weaknesses or loop holes available in our laws to defraud Tanzanians who wish to engage in electronic transaction conducted through electronic contracts.

The future of ICT use in Tanzania is very well stipulated in the National ICT Policy, the policy provides that Tanzania is intending to exploit the benefit of ICT use to the end of national development.<sup>8</sup> The future may turn into a myth if the ICT legal and regulatory regime will be weak. Instead of enjoying the ICT use, Tanzania will be an ICT loser.

## VII. Recommendations

The need for electronic contract cannot be over emphasized, what follows therefore is for the government and

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<sup>1</sup> Ibid

<sup>2</sup> Ibid,p.553.

<sup>3</sup> Ibid

<sup>4</sup> Indian School of Cyber Law report found at [www.google.com](http://www.google.com) last accessed in December 2009.

<sup>5</sup> M. Andrew and L. Zakayo, *supra*, note 24, p. 9 " though Electronic Commerce started roughly 10 years ago, in Tanzania there is no law to regulate the area. Therefore the importance of having an effective legal frame work can not be overemphasized."

<sup>6</sup> Article 2(a) of CUECIC.

<sup>7</sup> Article 2(a) of the CUECIC.

<sup>8</sup> The National ICT Policy.

other stakeholders of electronic business to see how can the challenges of the formation of electronic contracts be resolved so as to ensure that Tanzania is integrated in the global ICT use in electronic commerce. The following recommendations are therefore offered:

The first and foremost is that, the current Law of Contract Act which is not ICT friendly to make it compatible with the challenges of formation of electronic contracts as discussed above. The review should target on the challenges brought by internet like signing of electronic documents, guarantee over identity of the parties communicating an electronic offers, time and place of communicating electronic offer and acceptance, choice of proper courts and law to enforce electronic contracts.

There are two options open in examining the nature of the law to regulate electronic contracts, it is either through amending some provisions of the present Law of Contract Act by adding new provisions which provides for regulation of electronics contract or by making a new law which will exclusively regulate formation of electronic contracts.

However it is submitted that the best approach is that of making a distinct law to regulate electronic contracts. The case study can be taken from India who have a separate law to regulate electronic transaction called The Information Technology Act of 2000. To them, this Act provides for things like the parties to an electronic contract, time and place of concluding an electronic communication, rules of affixing electronic signature and the remedy in case of automatic errors generated by a computer.

Also an administrative mechanism of enforcing electronic transaction claims be put in place. This includes training the judges and magistrates who are enforcing electronic transaction claims so as to make them conversant with ICT challenges. This will make it easier for the enforceability of electronic contracts as required by the law of contract that an agreement is a contract if it is enforceable by laws.

On other hand, the general public be made aware of the complexity of formation of electronic contracts and the need to identify the people or companies they are dealing with before incurring expenses. People should not rely on every company claiming to be a manufacturer or dealer in a particular product or service over the internet, some of these companies do not even exist they only benefit from the loopholes explained as legal challenges of electronic contacts in this paper.

The laws of Tanzania should be changed to recognize applicability of electronic signatures. Just as in paper based contracts where signature is important, electronic contracts must be signed in order to be enforceable but the current laws like the law of Contract Act seems not to provide for application of electronic signature.

As it has been discussed in previous chapter that electronic signature is very important in electronic contracts. Electronic signature saves as a means of proving the signers intention to be bound by the document, it also act as the means of identifying the person who signed and send the document and the time it was sent. Therefore in as far as electronic contract is concerned, electronic signature is very important. Perhaps the problem of identity of the parties to an electronic communication may be solved by using electronic signature which serves as the means of identifying the person who is signing the document and his intention to be bound by the document he or she is signing. Daniel Amor in his book states that:

By adding the digital signature to the digital document, it can be easily verified who signed it, when it has been sent off and whether the document has been altered during transit.<sup>1</sup>

Finally, Tanzania may wish to incorporate rules of communicating electronic contract found in international instruments or laws in our domestic laws like the Law of Contract Act. This will make it easier for laws like the United Nations Convention on the Use of Electronic Communication in International Contracts to apply in domestic or household contracts. This comes from the fact that the law excludes domestic or household electronic contracts in its application.

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<sup>1</sup> A. Daniel, *supra*, note 76, p. 127

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