

Is the Zanzibar Contract Decree Cap 149 Appropriate for this Era? Issues and Challenges

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Abstract

Contracts have become so common in daily life that most of the time we do not even realize that we have entered into one. Right from taking a public transport (*Daladala*) to buying foods, innumerable things in our daily lives are governed by contracts. All of these transactions are regulated by laws. In Zanzibar, the law governing contractual relation is the Contract Decree Cap 149. However, this law needs to be reviewed due to the advancement of Science and Technology, lack of some important issues in sale of goods and partnership. This is to say the Contract Decree appears to be insufficient and inefficient in solving some of the issues. Due to those reasons this paper makes a critical analysis on the suitability of the Contract Decree Cap 149 of Zanzibar in the current commercial era. To achieve that goal, the paper will address the legal challenges of the current provisions of the Contract Decree over the current commercial issues in Zanzibar and recommend on how to bridge those gaps between the law and the different current commercial issues which are not addressed into the Decree. The paper will analysis the provisions of the Decree and some literature to come up with gaps and solutions.

Keywords: Contract, E-contract, Partnership, Sale of goods, Contract Decree, Unfair terms, Zanzibar.

1. Introduction

In Zanzibar, the law governing contractual relation is the Contract Decree Cap 149. However, due to the advancement of Science and Technology the Contract Decree appears to be insufficient and inefficient in solving some of the issues. For instance, currently the internet has increased the scope of business to consumer dealings, and even consumer-to-consumer transactions across jurisdictional borders.¹ People have been contracting electronically for some time in Zanzibar whether within Zanzibar or outside Zanzibar. Airlines are now using Internet sales and e-tickets as a means of reducing distribution costs and serving money in terms of ticketing paperwork and staffing, The said travelling area needs to be regulated to protect the customers or consumers and other beneficiaries.² As a result, it is unable to keep pace with time in society due to new technologies which are being used in the formation of contract. The present law has no provision to regulate the contracts based on these advancement.³ Therefore, the law must keep abreast of technological changes as they affect the way of doing business.⁴ The Decree embodies some issues like Sale of Goods and Partnership, but these issues are not well explained in the Decree. The provisions which deal with sale of goods are not enough, there are some issues which are not included in the Decree which regulate the contract of sale of goods, and the definition of the word good in the Decree is another area which prove the Decree is outdated. Partnership is also not well explained in the Decree there are a lot of issues of partnership which required to be embodied in the Decree but unfortunately not.

This paper is divided into the introduction and the origin of contract law in Zanzibar. The paper will further define the word contract and then it will examine the possible legal challenge of the contract decree by looking into the electronic contract, unfair terms, sale of goods and partnership while the last part the paper will makes conclusion and recommendation.

2. The origin of contract law in Zanzibar

The law which governs contract transaction in Zanzibar is Contract Decree Cap 149 of 1917. The history of the Zanzibar Contract Decree dates back when Zanzibar became a British protectorate. The Zanzibar Order in Council of 1897 provided for the application of law of British India and of the United Kingdom.

Among the law introduced by this order are India Lunacy Act; India Post Office Acts relates to offence against the Post Office; the India Divorce Act except so much as relate to Divorce and nullity of marriage; Bombay Civil Court Act; the Indian Evidence Act; The Indian Contract Act; The India Limitation Act, The

¹ Department of Communications, Republic of South Africa (1999) "Discussion Paper on Electronic Commerce Policy" <http://www.polity.org.za/html/govdocs/discuss/ecom.html?rebookmark=1> accessed 11/07/2014

² Position Paper on e-commerce - Law Reform Commission available at www.lrc.go.tz/download/.../Positionpaperone-COMMERCEadobe.pdf accessed on 20/07/2014

³ Formation & Validity Of E - Contracts <http://drgokuleshsharma.com/pdf/formation%20&%20validity%20of%20e-contracts.pdf> accessed on 19/07/2014

⁴ The Trust Bank Of Tanzania Vs. Le-Marsh Enterprises Ltd And Two Others, Commercial Case No.4 of 2000 (Unreported)

Indian Penal Code, the Indian Code of Criminal Procedure, the Indian Evidence Act and others.

The reason for this, of course, is that in India much of the English law had been reduced, down the centuries, to the form of statutory enactments, many of these admirable codifications were adopted, initially at least, in the East African Colonies, which were at first regarded juridical as an extension of the Presidency of Bombay.¹

On 10th December 1963, Zanzibar became independent under **The Zanzibar Act, 1963**, but on 12 January 1964 the Afro-Shirazi Party headed by Abeid Karume took over the Government and established a Revolutionary Council to govern the country.

Immediately after the Revolution, the Legislative Powers Law, 1964 was proclaimed. The first law to be made was the **Legislative Powers Law, 1964**, to which the Revolutionary Council in conjunction with the cabinet of Ministers declared itself to be the Supreme Authority in the People's Republic of Zanzibar and empowered itself with the legislative power.²

Subsequently, after the proclamation of the **Legislative Powers Law, 1964**, the **Existing Laws Decree** no. 1 of 1964 was passed which provided that all laws in force before 11 January 1964, were to continue to be in force and were to be read with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the republican status of Zanzibar. This means that the **Existing Laws Decree** no. 1 of 1964 legalised the application of colonial laws in Zanzibar. The Contract Decree being one of those colonial laws is still continues to be applicable today without any reform at all since when it was adopted in Zanzibar 1917.

3. What is a contract

A contract is an agreement which is enforceable by law.³ Again, a contract can be defined as a legal binding agreement made between two or more parties.⁴ However, the idea of a contract being an agreement between two parties is subject to accusation that standard form contract allows for little or no agreement.⁵ Due to that accusation American Restatement of Contract avoid the concept of agreement and says "a contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."⁶ For a contract to have a legal enforcement it must fulfil the following elements as per the Contract Decree (i) Consensus ad idem (consensus of minds on the subject matter) by way of offer and acceptance,⁷(ii)The proposal must be supported by consideration,⁸ (iii) The parties must be competent to contract,⁹(iv)The agreement must be made by the free consent of the parties,¹⁰(v)The object must be lawful,¹¹and (vi)The agreement must not be expressly declared to be void.¹²

4. The Possible Legal Challenges of Contract Decree

As I have pointed above the Contract Decree appears to be insufficient and inefficient in solving some of the current commercial issues, these issues are seen in the following

4.1 Electronic contract.

Electronic contracts (e-contracts) can be defined as legally enforceable promises or set of promises that are concluded using electronic medium.¹³ This contract can be made by exchanging data messages and when a data message is used in the formation of contract, the validity of such contract should not be denied.¹⁴ This means that the e-contracts are contract that are not paper based but rather in electronic form. This contract created wholly or

¹ Anderson, J.N.D (1960) "Colonial Law in Tropical Africa: The Conflict between English, Islamic and Customary Law," *Indiana Law Journal*: Vol. 35: ISS. 4, Article 2.

² See Section 2 of the Legislative Powers Law, 1964; in Legal Supplement (Part II) to the Zanzibar Gazette Extraordinary Vol. LXXIII, No. 4337 of 6th February, 1964.

³ Section 2(h) of the Contract Decree Cap 149.

⁴ R.W. Hodgkin (1997) *Law of Contract in East Africa*, Kenya Literature Bureau, Nairobi. Page 12.

⁵ *Ibid*.

⁶ Willis, Hugh E. (1932) "Restatement of the Law of Contracts of the American Law Institute," *Indiana Law Journal*: Vol. 7: ISS. 7, Article 2 page 430.

⁷ Section 2(a) and (b) of the Contract Decree.

⁸ Section 2(d) of the Contract Decree.

⁹ Sections 11 and 12 of the Contract Decree.

¹⁰ Section 13 to 22 of the Contract Decree.

¹¹ Section 23 to 25 of the Contract Decree.

¹² Sections 26 to 30 of the Contract Decree.

¹³ Kidd, L., Donnie, Jr., H. Daughtery, Jr., 2000. *Adapting Contract Law to Accommodate Electronic Contracts: Over view and Suggestions*. Rutgers Computer and Tech L.J, 12: 225.

¹⁴ Article 11 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce.

in part through communications over computer networks. A cyber-contract can be created entirely by the exchange of e-mails where an offer and an acceptance are evident or be made by a combination of electronic communications, paper documents, faxes and oral discussions.¹

E-contracts are getting increasingly popular due to its advantages to mention few here; it is cost and time saving, increase in productivity, increase in profitability, and access to customers anywhere anytime and access to huge market.² These advantages are the reasons as to why many people nowadays prefer e-contract not only in Zanzibar but in the world at large. Despite of these advantages e-contract also has some shortcomings to mention few here; Ordering the wrong product, receiving the wrong item, difficulty in returning the product, security issues, privacy issues, the goods are not delivered, the goods delivered do not match the online description, the goods are not delivered on time, the seller failed to disclose all relevant information about the product or terms of sale, the goods are damaged in transit and scamming.³

Despite of its importance, there is a challenge attributed to electronic contracts in Zanzibar. The Contract Decree is incomplete in governing online contracts especially relating to the basic elements of contracts namely offer, invitation to treat, acceptance, subject matter, consideration and the enforceability of contract. The challenge is that when rules of contract formation, if any, are not complied with Contract Decree, then such agreements may not constitute contracts and therefore become unenforceable by courts of law at the end of the day the party may lose his right. These can be seen by many provisions as described below:

4.1.1 Parties to the contract

A contract must be formed by legal persons. This persons are known as parties to the contract. According to section 2 (1) (a), (b) and (c) of the Contract Decree parties to a contract, promisor and promisee are referred to as persons. The question may be raised as to whether the term person as is construed under this provision includes e-agents.⁴ As such the term person in Zanzibar does not include a machine like an e-agent, consequently, a contract formed by an e-agent in Zanzibar seems to be outside the ambit of section 2 (1) (a) and (b) of the Contract Decree. Here we can find that the parties to the contract are not a legal parties as per Contract Decree.

4.1.2 Offer and invitation to an offer

One impact of the Internet is that the line between advertisements and legal offers has been blurred. Thousands of websites advertise their products but they also make offer that are legally binding if a customer clicks the 'Yes' or 'I Accept' button, signifying the assent to the offer.⁵ When it comes to our law, it is silent on what constitute an invitation and offer in terms of e-contract. The Contract Decree Cap 149 does not provide any assistance to determine whether certain advertisement on the Net is invitation to treat or offer.

4.1.3 Communication of offer and acceptance

A further important issue that surrounds e-contracts is the general rule of law that, for an acceptance of an offer, it must be "communicated" to the offeror under normal circumstances, the offeror must actually receive the acceptance before a contract will come into existence.⁶ Looking at the manner in which an e-contract communication operates one may say that the communication is like which is stated in section 4(2) (a) and 4(2) (b) of the Contracts Decree. The offeror is bound by the acceptance once the acceptance is put in a course of transmission to the offeror so as to be out of the power of the acceptor. However, the issue of communication of acceptance needs to be revisited as regards to e-mails and web based acceptance.

4.1.4 Revocation of offer and acceptance

Revocation is a method of terminating an offer. As a general rule, an offer can be revoked any time before acceptance. It is a requirement that the notice of revocation must actually reach the offeree. The Contract Decree provides revocation of offer for traditional basis. The law provides that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. Also an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.⁷ Where notice is sent electronically, the question arises is what constitutes actual notice? Is the offer revoked when a message arrives at the offer's Internet Service Provider (ISP), when the offeree collects his/her mail from the ISP or when the offeree actually reads the notice?⁸

¹ John S. Foster Electronic Contracts And Digital Signatures, esq. 1997-2000.

² Formation & Validity Of E - Contracts <http://drgokuleshsharma.com/pdf/formation%20&%20validity%20of%20e-contracts.pdf> accessed on 11/07/2014.

³ Position Paper on e-commerce - Law Reform Commission available at www.lrc.tz/download/.../Positionpaperone-COMMERCEadobe.pdf accessed on 20/07/2014.

⁴ Jeff C. Dodd and James A. Hernandez Contracting In Cyberspace Computer Law Review and Technology Journal, Summer 1998 page 4.

⁵ Naemah Amin and Roshazlizawati Mohd Nor Issues on Essential Elements of Formation of E-Contract in Malaysia: E-Consumers' Perspective *J. Appl. Sci. Res.*, 7(13): 2219-2229, 2011.

⁶ McKendrick, Ewan (2005) "Contract: Text and Materials" 2nd Edition, Oxford: Oxford University Press, UK (Pp43- 44).

⁷ Section 5(1) Contract Decree.

⁸ Lar Davies (1997) Contract Formation on the Internet: Shattering a Few Myths. In Edwards and Waelde, Law and the

4.1.5 Time of accepting an offer

Nothing has been explained in our law of contract relating to lapsing of time when it comes to e-contract affairs. According, to the Contract Decree the offer lapses after the time stipulated in it expires before it was accepted. If no time is specified, then the offer lapses within a reasonable time.¹ Therefore, we can find that it is not covered the time of acceptance for e-contract.

4.1.6 Capacity to contract

According to the Contracts Decree every person is competent if he is major, of sound mind and not disqualified from contracting by any of the existing law.² The main concern in an online contract is the possibility of minors entering into commercial contracts. This is due to the fact that different countries have different laws, and thus, different age of majority.

4.1.7 Writing and signature requirements

As we have pointed above a contract without consideration is not a contract at all, however there are some exception to this general principles. The Contract Decree requires a contract with no consideration to be in writing and be signed and registered.³ Again, the same law requires a contract of sale of any goods of the value of one hundred and fifty shillings to be in writing and be signed by the party to be charged or by his agent in that behalf for it to be enforceable.⁴ According to the Interpretation of Laws and General Provision Act⁵ "Writing" is defined to include words printed, type written, painted, engraved, lithographed, photographed, or represented or reproduced by any mode of representing or reproducing words or figures in visible form. The statutory definition of writing did not explain the matter in cyber world. On the other hand, signature is the writing of some name or identifying mark on a document. Contrarily, digital signature is not a signature but a process that uses encryption and algorithms to encode documents.⁶ Therefore, we can find that the Contract decree is silent on the applicability of digital signature.

4.1.8 Jurisdiction problem

It is well known that there are two connecting factors that have been suggested as being appropriate to govern the law of a contract in relation to jurisdiction (i) *Lex loci contractus* (law of the place where the contract was made); and (ii) *Lex loci solutionis* (law of the place where performance of the contract was due.)

The determination of the applicable jurisdiction where parties are in dispute can also be a problem to the courts as to which law will apply in case of dispute caused by electronic contract. This is due to the fact that e-contract business seems to be that contracting parties and customers are likely to be from overseas and neither the current contract decree nor any law in Zanzibar law can be applicable due to the fact that no provision which govern e-contract in Zanzibar.

4.2 Unfair terms

It is the general rule of contract law that the parties are bound by whatever they agree. As we have seen above the Decree requires consent of the parties to the contract,⁷ however, it is silent on unfair terms of contract, it is evident that some contractual terms cause a significant imbalance in the parties' rights and obligations which arising under the contract. Let we take a good example is standard form contract. A standard form contract is a written contract prepared in advance by one party to the contract, the other party is expected to accept or reject the terms in the contract as presented to him or her. We can think of many contract of this type for instance mobile phone companies, water and electricity services cooperation and transport. Now let see some example, being an island most people in Zanzibar they have to use flights or ferries to come in or go out of Zanzibar. It is usual to find one transport company to provide a clause(s) in a ticket which limit liability in their party. Though sometime that clause is detrimental to the other party who use the transport. For instance, this clause is common in ferry ticket *the company shall not be liable for any damage of the property or loss of luggage of a passenger in the ferry.*⁸

Therefore, there is a need to ensure that there is a fairness and equity in contracts especially where the bargaining power of the parties is not equal.⁹ Since, some people may enter into a contract though freely but for

Internet: Regulating Cyberspace. Hart Publishing, pp: 106.

¹ Section 6 (b) of the Contract Decree.

² section 11 of the Contract Decree.

³ Section 25 (1) (a) of the Contract Decree.

⁴ Section 78 (1) of the Contract Decree.

⁵ Section 4 of Act no. 7 of 1984.

⁶ Naemah Amin and Roshazlizawati Mohd Nor Issues on Essential Elements of Formation of E-Contract in Malaysia: E-Consumers' Perspective *J. Appl. Sci. Res.*, 7(13): 2219-2229, 2011.

⁷ Section 14 of the Contract Decree.

⁸ A ferry ticket of Costal Fast Ferries Ltd issued on 27.07.2014 in Zanzibar.

⁹ Naemah Amin, Protecting Consumers Against Unfair Contract Terms In Malaysia: The Consumer Protection (Amendment) Act 2010 [2013] 1 MLJ. Page 1.

sole reason that they have no option.

4.3 Sale of Goods

The law relating to the sale of goods is governed by Part VII of the Contract decree. However, the decree embodies the simple and elementary rules relating to the sale of goods. The developments of modern business relations and technology suggest that the decree is inadequate to deal with those challenges. To mention few, the definition of the word 'goods' means and include all kinds of movable property¹ it has further been defined as all chatters personal other than things in action and money, and all 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.² From this definition one can see that it doesn't include some goods which are part and parcel of our current life for instance water, gas, electricity and computer software.³ These things are sold and purchased by people in Zanzibar, but they are not covered by the law, in case of any dispute on these goods the parties may have no way to go. The writing requirement is another thing which is challenging in this decree, the decree requires that a contract for the sale of goods for value one hundred and fifty shillings or more has to be in writing if it is to be enforceable.⁴ This provision is very limiting due to the fact that in Zanzibar today one hundred and fifty shillings doesn't buy anything of value includes soda. Again, the provision is not fair because due to the nature of Zanzibar most of the contract for sale of goods are not in writing someone may buy a television set, radio, crops or anything but they never put in writing. So according to this provision if someone buys a defective goods may fail to enforce the breach in a court of law because the contract of sale was not in writing.⁵ Similarly the law is silent on the status of a sale for a perished good prior to sale. This means that, if parties made a sale and later on they have discovered that, the goods were perished before the sale was concluded, the aggrieved party would have no remedy as the Decree is silent on this issue. Moreover, it is a general principles of the law of contract that, the terms of a contract may either be express or implied; *Express terms* are those which are inserted in the contract at the will of the parties, while *implied terms* are those presumed to exist in a contract by operation of law even though they have not been provided for by the parties in the contract.⁶ In the Contract Decree, there is no provision which relates to the implied condition of sale by sample rather it contains implied warranty of sale by sample.⁷ This means that if buyer failed to mention something as a condition under the contract to sale by sample, the buyer will have no right to claim anything, and consequently, will be required to accept the goods though it was not of his choice.

4.4 Partnership

Partnership means the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them.⁸ Part XI of the Contract Decree covered the laws of Partnership in Zanzibar, however, the provisions are not exhaustive. There is no place in the Decree which requires partnership agreement to be in writing. This may cause a big trouble when two partners seek court verdict on a conflict between them in relation to their rights and duties. Requiring partnership to be in writing it will help the court to reach into a good decision just by looking into their written agreement.

Moreover, the law doesn't provide a provision in case when one partner became insolvent, this means that a person may continue to be a partner though he is an insolvent. This might cause a big problem to the co-partner and people who work with that partnership. If the partner who incurred the liability is bankrupt, the other partners will remain liable to the outsider with no prospect of compensation from the bankrupt partner. The only place whereby insolvent person is mentioned is when one partner seek the court order to dissolve a partnership.⁹ There is a need for insolvent to be a ground for compulsorily termination of partnership. The problem of not having this provision are as follow, one as it is known one among the duty of partner is to indemnify the other partner in case of loss, in this situation it will be difficult for an insolvent to indemnify his co-partner, two the person who works with a partnership will lose his right of being compensated by that partnership in case of any damage or loss.

¹ Section 76 of the Contract Decree.

² Section 78(4) of the Contract Decree.

³ Bradgate R, 'Beyond the Millennium - The Legal Issues: Sale of Goods Issues and the Millennium Bug', 1999 (2) *The Journal of Information, Law and Technology (JILT)* Page 3.

⁴ Section 78(1) of the Contract Decree.

⁵ Uganda Law Review Commission , A Study Report on Selected Trade Laws-Consumer Protection(2004) available at www.ulrc.go.ug/?wpdmact=process&did=Ni5ob3RsaW5r accessed on 20/07/2014.

⁶ Kelly, D, Holmes, A and Hayward, R (2005) *Business Law* 5th Edition Cavendish Publishing Limited UK. Page 217.

⁷ Section 112 of the Contract Decree.

⁸ Section 234 of the Contract Decree.

⁹ Section 245(a) of the Contract Decree.

5. Recommendation and Conclusion

This paper was looking on whether the Contract Decree of Zanzibar is appropriate for this era. The information which has been collected in this paper have revealed that the decree is not appropriate law for this era. This was evidenced by many reasons among them are, the decree is total silent on e-contract, the provisions which deal with the sale of goods and partnership are not enough they have left many issues which are very important today. The law doesn't say anything about unfair contract which is very crucial today.

Lord denning in one of his judgement was quoted to have said that "*... if we never do anything which has never been done before, we shall not get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both.*"¹

From that spirit, it is recommend that, there is a need to review the Contract Decree to accommodate e-contract in Zanzibar, however my opinion is that there is a need to formulate a new legal framework that adequately covers transactions concluded electronically.

The provisions of the Sale of Goods and partnership in the Decree need to be reformed to comply with the current commercial environment. It is a time now for Zanzibar to have a separate legal frameworks for Sale of Goods and Partnership. It can be remembered that the origin of the Contract decree was in India. Today India has separate laws which deals with Sale of goods² and Partnership,³ Zanzibar can follow suit.

¹ Packer V Packer [1954] P 15.

² Sale of Goods Act, 1930.

³ Indian Partnership Act, 1932.

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