

UNIVERSITY OF NAIROBI  
SCHOOL OF LAW  
PARKLANDS

THE CONCEPT OF INTERNATIONAL E-COMMERCE IN KENYA; AN  
APPRAISAL OF THE EXISTING POLICY, LEGAL AND REGULATORY  
FRAMEWORKS

BY

ALFRED OSEKO NYANCHOKA  
REG NO: G62/71025/2007

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR THE AWARD OF MASTERS DEGREE IN LAW

University of NAIROBI Library



0312827 9

## TABLE OF CONTENTS

Declaration.....	i
Acknowledgement .....	ii
Dedication .....	iii
Abbreviations and Acronyms.....	iv
List of Statutes.....	vi
CHAPTER ONE	
INTRODUCTION	
1.1. Introduction.....	1
1.2. Background of the Problem.....	3
1.3. Statement of the Problem.....	5
1.4. Justification of the Study.....	5
1.5. Purpose of the Study.....	7
1.6. Study Questions.....	7
1.7. Hypothesis.....	7
1.8. Theoretical Framework.....	7
1.9. Research Methodology.....	14
1.10. Chapter Breakdown.....	14
CHAPTER TWO	
THE LEGAL AND PRACTICAL ISSUES IN INTERNATIONAL E-COMMERCE	
2.1. Introduction.....	15
2.2. Scope and Definition of E-Commerce.....	16
2.3. Review of Practical Issues in International E-Commerce.....	18
2.4. Review of Legal Issues in International E-Commerce.....	23
2.5. Conclusion.....	44
CHAPTER THREE	
AN APPRAISAL OF KENYA'S POLICY, LEGAL AND REGULATORY FRAMEWORKS ON E-COMMERCE: A CASE OF NEW WINE IN OLD WINE SKINS	
3.1. Introduction.....	45
3.2. A Review of E-Commerce Policies.....	45
3.3. Review of Legislative Framework for E-Commerce.....	49
3.4. A Review of E-Commerce Regulatory Framework.....	64
3.5. Conclusion.....	66
CHAPTER FOUR	
CRITIQUE OF THE REFORM OF THE LEGISLATIVE FRAMEWORK	
4.1. Introduction.....	67
4.2. Positive Provisions of the Electronic Transactions Bill, 2007.....	68
4.3. Flaws in the Legislative Reform.....	74
4.4. Conclusion.....	75
CHAPTER FIVE	
CONCLUSION AND RECOMMENDATIONS	
5.1. Conclusion.....	76
5.2. Suggestion.....	77
Bibliography .....	81

DECLARATION

This thesis is my original work and has not been presented for an award of a degree in any other university

Signed.......... Date ..... 24/05/10 .....

Alfred Oseko Nyanchoka

G62/71025/07

Student

This proposal has been submitted with my approval as University of Nairobi, School of law supervisor.

Signed.......... Date..... 24/05/2010 .....

Dr. Wambua Musili

Supervisor

## ACKNOWLEDGEMENT

I am grateful to God for His grace and unconditional love and for granting me strength, good health and peace of mind to complete this study.

I acknowledge the Dr. Wambus Musili for his meticulous guidance and supervision of this work. Friends and family too supported me emotionally and financially to piece together this work. God bless you all!

**DEDICATION**

This piece of work is dedicated to the unity and welfare of my entire family. I remember all the member of my family who have already departed us and pray that the Almighty God my preserve you in everlasting life.

## ABBREVIATIONS AND ACRONYMS

ARIPO-African Regional Industrial Property Organization

B2B-Business-to-Business

B2C-Business-to-Consumer

C2C-Consumer-to-Consumer

CBK-Central bank of Kenya

CCK-Communication Commission of Kenya

CISG-United Nations Convention on International Sale of Goods

CUECIC-UN Convention on the Use of Electronic Communications in International Contracts

EC-DC-Electronic Commerce for Developing Countries

ECLAC-Economic Commission for Latin America and the Caribbean

EDI-Electronic Data Interchange

EU- European Union

ICT-Information Communication and Technology

IPS-Internet Service Providers

ISO-International Standards Organization

ITU- International Telecommunication Union

KEBS-Kenya Bureau of Standards

KIPI-Kenya Industrial Property Institute

LSK-Law Society of Kenya

MLEC-Model Law on Electronic Commerce

OECD – Organization for Economic Co-operation and Development

TRIPs-Trade-Related Aspects of Intellectual Property Rights

TTP-Trusted Third Parties

UK-United Kingdom

UNCITRAL- United Nations Commission on International Trade Law

UNDP-United Nations Development Programme

UNESCO-United Nations Educational, Scientific and Cultural Organization

US-United States

WCT-WIPO Copyright Treaty (WCT)

WIPO-World Intellectual Property Organization

WPPT-WIPO Performances and Phonograms Treaty

WTO- World Trade Organization

LIST OF CONTENTS

1. United States

2. United Kingdom

## LIST OF STATUTES

1. The Constitution of Kenya
2. Consumer Protection Bill, 2007
3. Copyright Act, No 12 of 2001
4. Trade Marks Act, Cap 506, Laws of Kenya
5. Industrial Property Act, No 3 of 2001
6. Extradition Act, Cap 77 Laws of Kenya
7. Law of Contract Act, Cap 23 Laws of Kenya
8. Registration of Documents Act Cap 285 Laws of Kenya
9. Electronic Transactions Bill, 2007
10. Kenya Information and Communications Act, Cap 2 the Laws of Kenya
11. Standards Act, Cap 496, Laws of Kenya
12. Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 of the Laws of Kenya
13. Kenya Communications (Amendment) Act no 1 of 2009
14. Penal Code, Cap 63 Laws of Kenya
15. Income Tax Act, Cap 470, Laws of Kenya,
16. Value Added Tax Act, Cap 476, Laws of Kenya
17. Evidence Act, Cap 80 Laws of Kenya
18. Companies Act, Cap 486 Laws of Kenya

## LIST OF CONVENTIONS

1. United Nations Convention on International Sale of Goods
2. UN Convention on the Use of Electronic Communications in International Contracts
3. MLEC-Model Law on Electronic Commerce
4. TRIPs-Trade-Related Aspects of Intellectual Property Rights
5. UNCITRAL- United Nations Commission on International Trade Law
6. WCT-WIPO Copyright Treaty (WCT)
7. WPPT-WIPO Performances and Phonograms Treaty
8. CISG-United Nations Convention on International Sale of Goods



## CHAPTER ONE

### INTRODUCTION

#### 1.1. INTRODUCTION

Rapid advancement of information technology, especially the internet, has greatly revolutionized the conduct of international trade worldwide. Traditionally, international trade was purely carried out by actual and physical communication through mail, sending of emissaries and delivery of goods and services by ship, airplane or road. With the advent of computers and internet, a new tool of trade was developed namely electronic commerce (e-commerce). E-commerce now enables parties in international trade to communicate and enter into contracts instantly, exchange information instantly, deliver goods online (without physical delivery) and even make payments online. E-commerce and the internet are poised to stimulate trade by lowering the cost of gathering and processing information from distant markets. It creates global access to specific goods and services by making it possible to send over the internet, goods and services that traditionally required physical delivery.<sup>1</sup>

E-commerce has boosted international trade globally with some countries earning substantial foreign exchange there from. International Data Corporation research shows that on a typical day, 19 million people go online to research a product. The corporation also estimated that e-commerce in services was over half a trillion US dollars globally by 2008.<sup>2</sup> According to recent surveys, Forrester Research Incorporation in its report titled 'U.S. E-Commerce Forecast: 2008 to 2012', predicts the following figures: online retail sales will reach \$235.4 billion by end of 2009, \$267.8 billion in 2010, \$301 billion in 2011, and \$334.7 billion in 2012.<sup>3</sup>

---

<sup>1</sup> United Nations Conference on Trade and Development, (2002), E-Commerce and Development Report, New York & Geneva, United Nations. Available at: [http://r0.unctad.org/ecommerce/docs/edr02\\_en/ecdr02\\_fas.pdf](http://r0.unctad.org/ecommerce/docs/edr02_en/ecdr02_fas.pdf). (Accessed on the 20th June 2009).

<sup>2</sup> International Data Corporation, n.d, Digital Market place & New Media; Ongoing Analysis, Available at: <http://www.idc.com/prodserv/maps/newmedia.jsp;jsessionid=O04JCWNK4OPBGCQJAFDCFFAKBEAVAIWD>. (Accessed on 20th June 2009).

<sup>3</sup> Aynny, (2000), E-commerce Future in Figures, Ecommerce Journal, 6<sup>th</sup> February. Available at: [http://www.ecommerce-journal.com/news/e\\_commerce\\_future\\_in\\_figures](http://www.ecommerce-journal.com/news/e_commerce_future_in_figures). Accessed 20 June 2009.

In Kenya the internet has been one of the least accessible services. For example, out of 127 licenses issued to Internet Service Providers (ISPs), only 50 are operational.<sup>4</sup> There are only 3,359,552 internet users in Kenya which is a dismal nine per cent of the entire population. Internet penetration remains low with a penetration rate of nine per cent with more penetration in towns than in rural areas.<sup>5</sup>

Communications Statistics Report Second Quarter 2008/09 further shows that during the year 2007/2008, investment in the Internet subsector decreased from Kenya Shillings 417 million in 2007 to Kenya Shillings 234 million in 2008. In the data service, investment increased from Kenya Shillings 416 Million in 2007 to Kenya shillings 937 Million in 2008. This low internet connectivity and usage has been attributed to among other factors lack of adequate Information Communication and Technology (ICT) infrastructure, lack of enabling policy, legal and regulatory frameworks, high internet connectivity and access costs and a substantial ICT illiterate population.<sup>6</sup>

The report further reveals that revenue generated in the internet and data services has improved over the years and by 2008, the internet market generated close to Kenya Shillings 2.5 billion while the data services generated Kenya Shillings 5.1 billion. Now Kenya is connected to the broadband optic cable which is hoped to offer internet users affordable, reliable and faster connectivity.<sup>7</sup> The Seacom<sup>8</sup> fibre optic cable connects South Africa, Tanzania, Kenya, Uganda and Mozambique to global networks via India and Europe.<sup>9</sup> The East Africa Marine Systems (TEAMS) fibre optic submarine cable on the other hand links Kenya to Fujairah in the United Arab Emirates.<sup>10</sup> It is hoped that this cable shall stimulate e-commerce in Kenya.

---

<sup>4</sup> Communications Commission of Kenya, (2009), Communications Statistics Report Second Quarter 2008/09. Nairobi, Communications Commission of Kenya. Available at: [http://www.cck.go.ke/UserFiles/File/SECTOR\\_STATISTICS\\_REPORT\\_Q2\\_0809.pdf](http://www.cck.go.ke/UserFiles/File/SECTOR_STATISTICS_REPORT_Q2_0809.pdf) Accessed on 20 June 2009.

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> It is, however, regrettable that several months after the arrival of the Fibre Optic cables internet affordability is still a mirage in Kenya.

<sup>8</sup> Seacom is a multinational company involved in laying the terrestrial optic cable in African countries.

<sup>9</sup> Philip Mwakio, Finally, Seacom Fibre Optic Cable Goes Live, Standard newspaper, Friday, 24<sup>th</sup> July 2009.

<sup>10</sup> Kenya Gets Undersea Broadband Fibre Optic Cable. Available at: <http://www.physorg.com/news164038045.html>. Accessed on 28 December 2009.

Despite the many good things that e-commerce brings to the market and its fast expansion, it has in many ways created a marketplace without conventional rules. It challenges existing legal frameworks, preconceived notions and practices on commerce. It is a market place that seems to defy regulation yet requiring regulation as an enabling tool. It is important that Kenya put in place an up-to-date policy, legal and regulatory frameworks for e-commerce in order to obtain a sustainable market place. This study, therefore, endeavors to critically appraise the policy, legal and regulatory frameworks for e-commerce in Kenya and recommends ways of improving it.

## 1.2. BACKGROUND OF THE PROBLEM

In Kenya, more and more businesses are embracing e-commerce. Many more are still suspicious of the security and privacy of the transactions on internet and as a result have shied away from engaging in e-commerce. But there is evidence of a steady increase in the use of ICT and now Kenya is connected to the optic cable.<sup>11</sup> Despite that steady growth of e-commerce in the country, there is no sufficient policy, legal and regulatory frameworks to create an enabling environment for its assured and sustainable growth. Though several laws exist that are relevant in regulating e-commerce, there is no specific policy or law addressing the issues raised by e-commerce directly.<sup>12</sup>

Kenya recognizes the need to specifically regulate e-commerce. It has developed a National Information and Communications Technology (ICT) Policy which clearly recognizes the important role e-commerce plays in economic development. The policy further recognizes the use of e-commerce in international trade and investments as a means of integrating Kenya into the global economy.<sup>13</sup> The policy states that the main challenge affecting the application of e-commerce in Kenya is the inadequate policy, legal and regulatory framework. It emphasizes the need for a conducive policy framework and adequate legislation to support e-commerce.

---

<sup>11</sup> Communications Commission of Kenya. *Supra* note 4.

<sup>12</sup> General rules of contracts, commercial laws, technology laws, international conventions, customs and usages are still very relevant.

<sup>13</sup> Ministry of Information and Communications, (2006), National Information & Communications Technology (ICT) Policy, Republic of Kenya. Available at: [http://www.cck.go.ke/UserFiles/File/national\\_ict\\_policy.pdf](http://www.cck.go.ke/UserFiles/File/national_ict_policy.pdf) Accessed on 21 June 2009.

In its endeavour to effect the recommendation of the policy, Kenya drafted an Electronic Transactions Bill, 2007, which addresses several issues including e-commerce. This Bill is the most recent step towards improving e-commerce regulation but it is flawed in several ways. For example, provisions on who can prosecute are missing, liability of Internet Service Providers has not been clearly demarcated, it does not protect data adequately and it is lenient on e-commerce fraud.

It is the view of this study that any effective policy, legal or regulatory framework on e-commerce should embrace certain main objectives if the ultimate goal is to promote international e-commerce. Some of these objectives are as follows;

- a. Legitimize e-commerce transactions by recognizing an electronic signature, electronic writing and original e-documents.
- b. Manage and control e-commerce risks, enhance certainty and predictability hence foster trust and confidence.
- c. Remove e-commerce barriers and promote transparency, non-discrimination, technological neutrality and equality in international trade.
- d. Ensure easy accessibility by majority of people.

Kenya is a member of the World Trade Organization and UNCITRAL but has not ratified several international instruments which are important in creating a conducive environment for e-commerce. Lack of such ratifications makes it difficult for Kenya to participate effectively in international e-commerce because it is not bound by the well set international standards.

For international e-commerce to thrive, it requires an open, predictable and transparent trading environment which operates within and across territorial borders and jurisdiction. To foster such an environment and to realize its full economic potential, progressive laws and international cooperation is indispensable. It is against this background that this study is conducted.

### 1.3. STATEMENT OF THE PROBLEM

E-commerce is in no doubt a great tool in boosting international trade but it comes with several challenges that need to be addressed. This study examines legal, regulatory and practical issues that emerge as a result of engaging in international e-commerce. Some of the key issues that have been raised and discussed herein are;

- a. Electronic contract formation challenges.
- b. How e-commerce law should address the paper based concepts and rules like originality, writing and signature.
- c. Privacy, confidentiality and security issues.
- d. Intellectual property.
- e. Taxation.
- f. Consumer protection.
- g. Accessibility to e-commerce services to all. Bridging the digital divide.
- h. Dispute resolution.

It is clear from the introduction and the background of the problem that Kenya has made some progress in her e-commerce. There is however need to enhance and develop systems that will further develop e-commerce in Kenya. One of such systems is a sound legal and regulatory framework that facilitates, regulates and manages international e-commerce in the country. Kenya's legal and regulatory framework does not contain laws that are sensitive to e-commerce. Despite the insensitivity of Kenyan laws to e-commerce this study seeks to appraise the existing legal and regulatory frameworks for e-commerce in Kenya and makes suggestions for their improvement.

### 1.4. JUSTIFICATION OF THE STUDY

E-commerce is emerging as a new way of conducting trade within and without national borders because of its benefits. E-commerce presents several benefits to the business world which make it an ideal tool for doing business in the present information era. Some of these benefits are:

- a. It allows people to carry out businesses without the barriers of time or distance. One can log on to the Internet at any point of time, be it day or night and purchase or sell anything one desires at a single click of the mouse.

- b. The direct cost-of-sale for an order taken from a web site is lower than through traditional means (retail, paper based), as there is no human interaction during the on-line electronic purchase order process. Also, electronic selling virtually eliminates processing errors, as well as being faster and more convenient for the visitor. Elimination of trade barriers and the fact that few middlemen are involved in the transaction lowers costs of transaction making e-commerce a cheap means of doing business. The strategic benefit of making a business 'ecommerce enabled', is that it helps reduce the delivery time, labour cost and the cost incurred in the following areas: Document preparation, Error detection and correction, Reconciliation, Mail preparation, Telephone calling, Data entry, Overtime and Supervision expenses.
- c. From the buyer's perspective also e-commerce offers a lot of tangible advantages. These benefits include; Reduction in buyer's sorting out time, Better buyer decisions, Less time is spent in resolving invoice and order discrepancies; and Increased opportunities for buying alternative products.

Statistics are clear on the increasing volumes of trade through e-commerce (as demonstrated in the introduction above) which further demonstrates the importance of e-commerce. Every country in the world is gearing up to adopt new technologies that will foster e-commerce.

Kenya being a member of a global community and a beneficiary of international trade has not been left behind in using e-commerce to do business. To keep in pace with advancements in e-commerce and ensure sustainability in the use of e-commerce, Kenya must be involved in extensive research to address various issues e-commerce pose. There is limited literature addressing Kenya's status on e-commerce law and providing insights on how various issues jeopardizing the growth of e-commerce should be addressed. This leaves a gap on the available information on e-commerce regulation in Kenya. This study seeks to fill this gap by providing relevant information and suggest proposals for reform on e-commerce legal and regulatory frameworks in Kenya.

## 1.5. PURPOSE OF THE STUDY

The purpose of this study is to analyze the existing e-commerce, legal and regulatory framework in Kenya with a view of discovering the extent to which it addresses legal and practical challenges that e-commerce poses and suggest reforms where necessary.

## 1.6. STUDY QUESTIONS

- a. What are the current legal and regulatory frameworks relating to e-commerce in Kenya?
- b. What gaps exist in the current policies, legal and regulatory framework on e-commerce and what challenges does Kenya face with regard to e-commerce? What relevant principles and concepts of e-commerce can be adopted by Kenya?
- c. What reforms can be made to Kenya's policy, legal and regulatory framework to address the challenges faced by Kenya with regard to e-commerce?

## 1.7. HYPOTHESIS

- a. The rapid growth of international e-commerce has posed several legal challenges to the existing e-commerce law in Kenya; these challenges relate to the formation of e-contracts, privacy and security issues, electronic signatures etc.
- b. Kenya does not have an adequate legal and regulatory framework that specifically deals with the challenges posed by international e-commerce and most existing laws are now obsolete and do not meet international best practices in e-commerce.
- c. There is an urgent need to enact e-commerce specific legislations and reform the existing ones to address challenges posed by e-commerce and incorporate international best practices.

## 1.8. THEORETICAL FRAMEWORK

The study is based on the theory of free trade economy and the broad concept of regulation. Free trade without any form of regulation may result in market failure and be harmful to public interests. To achieve a sustainable free trade, minimize market failure and protect public interest; a meaningful level of regulation is inevitable. The main rationale for regulation especially

economic regulation is to avoid market failure. Regulation is justified because an uncontrolled market for several reasons fails to produce behavior or results in accordance with the public interest.<sup>14</sup> Market failure may be caused by existence of monopolies, externalities, inadequacies of information, predatory pricing, unequal bargaining power, distributional injustice and poor social policies. What follows is a brief discussion on the theory of free trade and concept of regulation and how they relate to the problem of this study.

### **1.8.1 The Free Trade Theory**

Free trade is a system in which goods, capital, and labor flow freely between nations, without barriers which could hinder the trade process. Graham defines free trade as the absence of artificial barriers to the flow of goods and services between countries.<sup>15</sup> He identifies five types of barriers to trade in goods and services as follows;

- a. Natural barriers which include transport and communication costs, physical distance, geographical impediments etc.
- b. Cultural barriers like language, traditions, negative attitudes to trading or foreign contracts and divergent commercial practices.
- c. Market barriers which may be classified as tariff barriers like quotas or import licensing, subsidies to local producers, import bans export promotion schemes; and non-tariffs like administrative technicalities.
- d. Service regulations especially in trade in services constrained by bans and limits on entry of foreign providers or limits on the movement of Foreign Service Personnel.

Like the traditional international trade, international e-commerce is based on the comparative advantage theory as developed by David Ricardo. This theory had earlier been developed by Adam Smith as an absolute advantage theory. Smith had argued that each country would specialize in the production and export of goods in which it had an absolute advantage, that is, it could produce the goods more cheaply than any of its trading partners.<sup>16</sup>

---

<sup>14</sup> Baldwin, Robert, and Martin Cave, (1999), *Understanding Regulation: Theory, Strategy, and Practice*, New York: Oxford University Press.

<sup>15</sup> Graham D. (2004), *Free trade; Myth, Reality and Alternatives*, Bangladesh, University Press Ltd.

<sup>16</sup> Edwin Cannan, (1904), *An Inquiry into the Nature and Causes of the Wealth of Nations*, 5<sup>th</sup> ed, London: Methuen & Co., Ltd.



David Ricardo, a British Economist, extended that analysis early in the 19<sup>th</sup> century to encompass the more general case of comparative advantage. Ricardo noted that some nations lack an absolute advantage in the production of any commodity but even these nations could gain from free trade if they concentrate on producing commodities in which they had the smallest disadvantage.<sup>17</sup> This enables the nation to trade goods that are easiest to produce for goods that are more difficult to produce. When nations practice the principle of comparative advantage, more goods are produced between the trading countries, and the wealth of both countries increases. The principle of comparative advantage later formed the theoretical basis of the free trade argument. It is used to justify free trade and oppose protectionism. The theory assumes free trade, willingness to specialize and factor mobility.

E-commerce tries, in so many ways, to overcome most of the barriers discussed above. Internet characteristics enable international e-commerce to overcome most of these barriers and enhance free trade. For example, goods procured fully through e-commerce do not experience most of the natural, cultural, market and service regulation barriers. To boost Kenya's international e-commerce and formulate an enabling legal and regulatory framework, the theory of free trade should be a core guiding concept. However, absolute free trade may lead to market failures, injure consumer rights and injure competitive advantage of industries that are at their formative stages of development especially in developing countries. Developing countries argue that their emerging industries should be cushioned from international competition to enable them grow and once they are fully grown they may then compete favourably in a free trade economy.<sup>18</sup> For these reasons, developing countries and fair trade advocates, oppose absolute free trade and advocate for minimal and facilitative regulation of international e-commerce to tame any vagaries of free market.<sup>19</sup>

---

<sup>17</sup> David R. (1817), *On the Principles of Political Economy and Taxation*, London, John Murray.

<sup>18</sup> Economics Essays, n.d, Advantages and disadvantages of WTO. Available at: <http://www.economicshelp.org/2007/06/advantages-and-disadvantages-of-wto.html>. Accessed on 17 September 2009.

<sup>19</sup> House of Commons, International Development Committee, (2007), *Fair Trade and Development*, Vol1, London: The Stationery office Limited.

### 1.8.2. Theory on Regulation

Regulation refers to controlling human or societal behaviour by rules or restrictions. Regulation could occur in various sectors or areas of human activities including economic, political, academic and social sectors of human interaction. Behavior is regulated by four types of constraints or modalities namely law, social norms, markets and architecture.<sup>20</sup> These four modalities of regulation operate together to constitute a sum of forces that guide an individual to behave, or act in a given way.

Law directs behavior in certain ways especially by threatening sanctions ex post if its orders are disobeyed. The law is enforced through state agencies like the police. It is the main and formal source of regulation and shall be the main focus of this study.<sup>21</sup>

Social norms regulate behavior through community enforcement. Society condemns certain behavior and perceives people who engage in any forbidden behavior as unfit. For fear of being regarded as outcasts, people conduct themselves as required by society.<sup>22</sup>

Market regulates behavior through the device of price. The laws of demand and supply affect the price and the price in turn dictates who affords certain goods and services.<sup>23</sup>

Nature or architecture also regulates behavior. The fact that one cannot go through a wall is a restraint on behavior. Various features of the world whether natural or otherwise restrict or enables in a way that restrict or affects behavior.<sup>24</sup>

Some schools of thought, like the old Chicago School of thought, have argued that out of the four modalities, law is the less effective one. This is so because its regulations are crude; its

---

<sup>20</sup> Lawrence Lessig, (1998), The New Chicago School, The Journal Of Legal Studies, Vol. XXVII (2), University of Chicago Press.

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Ibid

response is slow, its interventions is clumsy and its effects are self defeating. Hence law should let the three modalities regulate.<sup>25</sup>

The new Chicago School counters the old Chicago School argument and views the other three modalities of regulation; social norms, markets and architecture, as being subject to law. They argues that social norms might constrain but law affects norms, architecture might constrain but law can alter architecture, and market might constrain but law constitutes and modifies the market. This view holds that law not only regulates behavior directly, but also regulates behavior indirectly by regulating the other modalities of regulation directly.<sup>26</sup>

In this study the modality of regulation that has been emphasized is law. Regulation by law can have several elements some of which include;<sup>27</sup>

- a. Public statutes, standards or statements of expectations.
- b. A process of registration or licensing to approve and to permit the operation of a service, usually by a named organization or person.
- c. A process of inspection or other form of ensuring standard compliance, including reporting and management of non-compliance with these standards: where there is continued non-compliance.
- d. A process of de-licensing whereby that organization or person is judged to be operating unsafely, and is ordered to stop operating at the expense of acting unlawfully.

Law regulates various aspects of human behavior ranging from economic, political, social behavior etc. In this study, economic regulation is the focus. Economic regulation is the imposition of rules by a government, backed with penalties that are intended specifically to modify the behavior of individuals and firms in the private sector.<sup>28</sup> Governments use economic regulation to improve the efficiency with which society's resources are allocated, to alter the distribution of income and to achieve broad social or cultural goals. By regulation the

---

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Bert-Jaap Koops et al. (2006), *Starting Points for ICT Regulations, Deconstructing Prevalent Policy One-liners*, Cambridge University Press.

<sup>28</sup> Paul S. Boyer. "Economic Regulation." *The Oxford Companion to United States History*. Oxford University Press. 2001.

government narrows choices in certain areas, including prices, supply, rate of return, disclosure of information, mode of production, standards for products or services and conditions of service.

Economists have criticized economic regulation based on several arguments. Some economists<sup>29</sup> argue that government should limit its involvement in economic activities to protecting individual rights like life, liberty and property rather than diminishing individual autonomy and responsibility for the sake of remedying any sort of putative market failure. Ludwig von Mises, an Australian Economist, sees regulation as problematic not only because it disrupts market processes, but also because it tends to bring about more regulation. According to his theory every regulation has some consequences besides those originally intended when the regulation was implemented.<sup>30</sup>

There have been, however, serious lesson learned from the recent 2009 world financial crisis that market self regulation may spell economic instability. In the area of finance, the recent 2009 crisis has cast an ominous shadow over the concept of industry self-regulation and the involvement of private firms in shaping their own regulatory environments.<sup>31</sup> These lessons counter the arguments by economists outlined above and it is now apparent that state regulation is inevitable to sustain economic growth.

E-commerce is a new innovation on the economic sector which raises critical issues that require economic regulation. There has been for a long time a debate on whether or not to regulate e-commerce. That debate has since shifted and now the debate is on the best way of e-commerce regulation. Three composite schools of thought have emerged with regard to e-commerce regulation, namely, traditional legal regulation, technological regulation and commercial self-regulation. To have a more sustainable and progressive regulation in e-commerce these three must be seamlessly employed and this study supports the approach of a concerted effort to regulation.

---

<sup>29</sup> Friedman, Milton (1990). *Free to Choose: A Personal Statement*, New York, Harcourt Brace Jovanovich, Inc.

<sup>30</sup> Ludwig, M. (1996), *a Critique on Interventionism*, New York, Foundation for Economic Education.

<sup>31</sup> Layna Mosley and David Andrew Singer, (2009), *The Global Financial Crisis: Lessons and Opportunities for International Political Economy*, available at: [http://web.mit.edu/polisci/research/singer/II\\_MosleySinger\\_June.pdf](http://web.mit.edu/polisci/research/singer/II_MosleySinger_June.pdf). Accessed on 28 December 2009.

**Traditional legal regulation:** this school of thought holds that cyberspace should be publicly regulated by a ‘top-down’ approach of hierarchical rules and arrangements, and that the regulation of commercial transactions in cyberspace is no different from other transactions. The school believes in cooperation and coordination at the international level and that international agreements should be negotiated with the prescriptive requirements which governments would be obliged to implement and in turn be administered through international organizations such as WTO.<sup>32</sup>

**Technological regulation (Digital Libertarianism):** this school of thought holds that technological capabilities and systems design choices are sufficient to impose rules on those taking part in internet transactions.<sup>33</sup>

**Commercial self-regulation (Private Ordering):** this school of thought favors market driven codes of conduct and enforcement mechanisms, with minimal government regulation. This bottom-up approach is similar to Lex Mercatoria.

This study advocates that any regulation model should embrace the three schools of thought because of the following;

- a. Laws are not always a perfect mode of regulation more especially in a fast changing sector like e-commerce and therefore other means of regulation are necessary.<sup>34</sup>
- b. Technology is a fast moving phenomena and should have its own in-built rules that match up its advancement.
- c. The players in the market best understand where problems abound and they should have a hand in their own regulation.

---

<sup>32</sup> Steele J, n.d. Global TRECs: The Regulation of International Trade in Cyberspace, Canadian Journal of Law and Technology.

<sup>33</sup> Joel R. (1998). Lex Informatica: The Formulation of Information Policy Rules through Technology, Texas Law Review Volume 76, Number 3.

<sup>34</sup> Trubeck, D, Marc G. (1974), Scholars in self-estrangement: Some reflections on the crisis in law and development studies in the United States, Wisconsin Law Review.

## 1.9. METHODOLOGY OF THE STUDY

This study is mainly a desk based research whereby secondary data are analyzed and presented to answer the research problem. Secondary data sources used include text books, journals, magazines, newspapers, articles, reports from research organizations and the internet.

## 1.10. CHAPTER PROFILE

This study is organized into five chapters. Chapter one starts off with a brief introduction on the scope of the study, background of the study, the theory underlying this study, justification, hypothesis, statement of the problem, literature review and the research methodology.

Chapter two discusses the key legal issues and challenges that international e-commerce poses. These issues range from formation of contracts, authentication of signature and requirement of writing, confidentiality, enforcement and liability. An international response in addressing these issues shall be discussed to demonstrate the standards that the international community has set and the role that individual countries are expected to play.

Chapter three identifies and discusses the relevant laws that enable international e-commerce in Kenya. It examines the challenge e-commerce poses to the existing legal and regulatory framework.

Chapter four discusses Kenya's efforts to create an enabling legal environment for international e-commerce. It analyses the provisions of the Electronic Transactions Bill, 2007. The last chapter gives conclusions and suggestions on the way forward for Kenya in so far as creating an enabling legal environment for international e-commerce is concerned.

## CHAPTER TWO

### THE LEGAL AND PRACTICAL ISSUES IN INTERNATIONAL E-COMMERCE

#### 2.1. INTRODUCTION

E-commerce is transforming the global marketplace and its impact is being felt across the full range of businesses and government. It presents many benefits to traders at the national and international level over traditional commerce. Speed and cost effectiveness is the main benefit of e-commerce. Electronic communication is instant and it links parties to a transaction instantly at very minimal cost.<sup>35</sup> For example, it would take few minutes for a party buying a digital book from a vendor in United Kingdom (UK) to download it from the internet and make payment electronically. Traditionally, the book ought to be shipped and payment made through the bank taking a long time and involving several costs.

E-commerce also improves competition and lifts barriers to trade. Under the traditional trading system, only big firms have the financial muscle to trade internationally, but with e-commerce even small entities can engage in international commerce. Competition is therefore enhanced due to e-commerce's ability to level the playing field. Customers in turn gain from reduced prices and improved quality brought about by competition.<sup>36</sup>

To fully enjoy the benefits that e-commerce presents, a country requires an open, predictable and transparent e-commerce environment which operates across territorial borders and jurisdiction. To foster such an environment and to realize full economic potential, most of the legal and practical issues that e-commerce poses must be addressed. This chapter highlights and discusses these issues in the context of the Kenyan legal and regulatory framework.

---

<sup>35</sup> Economic Commission for Latin America and the Caribbean (ECLAC). 2002. *Electronic Commerce, international trade and Employment: Review of the Issues*, Economic Commission for Latin America and the Caribbean (ECLAC).

<sup>36</sup> Business and Industry Advisory Committee (BIAC, (2006), Competition and E-Commerce, Statement of the Business and Industry Advisory Committee (BIAC) to the OECD to the OECD Committee on Competition Law and Policy on October 16. Available at: [http://www.biac.org/statements/comp/BIAC\\_Comments\\_on\\_CLP\\_and\\_E-Commerce.pdf](http://www.biac.org/statements/comp/BIAC_Comments_on_CLP_and_E-Commerce.pdf). Accessed on 4 September 2009.

## 2.2. SCOPE AND DEFINITION OF E-COMMERCE

Electronic Commerce (e-commerce) is a generic term which embraces several electronic transactions. Because of its generic nature, there has not been a universal consensus on the transactions which may be classified as e-commerce. E-commerce may include electronic data interchange, electronic mail and internet transactions, electronic money transfers etc. It may be defined as any form of business or administrative transaction or business information exchange which is executed using information or communication technology.<sup>37</sup> Zaveri defines e-commerce as anything that involves an online transaction. This ranges from ordering online, through online delivery of paid content, to financial transactions such as movement of money between bank accounts.<sup>38</sup>

Kenya has drafted an Electronic Transactions Bill, which is intended to regulate and facilitate e-commerce. The Bill defines e-commerce as the use of electronic networks to exchange or transfer business information, services, products and payments, through the internet.

Perhaps a more encompassing definition of e-commerce may be borrowed from South Africa's green paper on electronic commerce which defines e-commerce as:

*“The use of electronic networks to exchange information, products, services and payments for commercial and communication purposes between individuals (consumers) and businesses, between businesses themselves, between individuals themselves, within government or between the public and government and, last, between business and government.”<sup>39</sup>*

This definition raises five main channels of e-commerce which are business-to-business (B2B) business-to-consumer (B2C), business-to-government, government-to-public and consumer-to-consumer (C2C). Each of the channels of e-commerce draws different legal and practical issues.

---

<sup>37</sup> Murray C, Holloway D, Timson-Hunt. (2007). Schmitthooff's Export Trade: the Law and Practice of international Trade, 11 ed, London, Sweet &Maxwell, P. 859-878.

<sup>38</sup> Zaveri, B. n.d. E-commerce: Challenges and Opportunities. Baroda, M.S. University Baroda Available at: [http://www.indianmba.com/Faculty\\_Column/FC822/fc822.html](http://www.indianmba.com/Faculty_Column/FC822/fc822.html) (accessed 10 June 2009).

<sup>39</sup> A green Paper on Electronic Commerce for South Africa , Department of Communications Republic of South Africa, November 2000.



For example, there is normally more confidence in transacting with a government and established companies (B2B or Business to Government) than with individuals (B2C or C2C).<sup>40</sup>

E-commerce has been described as involving four main parts.<sup>41</sup> The first part is information provision which is the provision of pre-sales information on products and services. Typically, this may include on-line catalogues, price lists and product specifications. Under this part several legal issues arise which include; misrepresentation and identity of the supplier of the information, the authenticity of the information, consumer rights protection, fraud etc.

The second part is agreement formation which includes negotiations and formation of valid contract. All elements of contract need to be met at this stage. Electronic contracts are however marred with issues as to when an offer and acceptance may be said to be received, whether electronic communication meets the requirement of writing under contract laws, identity of the parties, execution of agreements (whether electronic signatures may be used) etc.

The third part is the settlement of transactions which includes delivery of the goods or service as per the terms of the agreement and making of payments. Electronic goods and services may be delivered on-line.

The last part is the after sale which is the provision of after sales support which may include technical support such as electronic conferencing, new product information and product upgrades. It may be used to maintain continuous contact with the customer and feed back into the information phase. This may also include dispute resolutions issues like the evidential issues of originality of electronic documents, the forum for dispute resolution etc.

Elizabeth Goldsmith et al<sup>42</sup> have reported that the general category of e-commerce can be broken down into two parts; *E-merchandise*, which includes selling goods and services electronically and moving items through distribution channels, e.g. through internet shopping for groceries,

---

<sup>40</sup> Michael Ettredge and Vernon J. Richardson, (2001), Assessing the Risk in E-Commerce, School of Business, University of Kansas.

<sup>41</sup> Zaveri Supra, Note 38.

<sup>42</sup> Elizabeth G, Ronald E. and Elizabeth B. (2002), Buying Apparel over the Internet, Journal of Product & Brand Management, Vol: 11, Issue: 2. P 89-102.

tickets, music, clothes, hardware, travel flowers etc; and, *E-finance*, which includes banking, debit cards, smart cards, banking machines, telephone and internet, insurance, financial services and mortgages on-line etc.

For the purpose of this study, e-commerce shall be defined as the use of electronic networks to exchange information, products, services and payments for commercial and communication purposes between individuals (consumers) and businesses, between businesses themselves, between individuals themselves, within government or between the public and government and, last, between business and government.

## 2.3 REVIEW OF PRACTICAL ISSUES IN INTERNATIONAL E-COMMERCE

### 2.3.1 Digital Divide

In recent years the world has witnessed a rapid improvement in science, information and technology. Information Communications Technology (ICT), for example, is rapidly becoming a way of life and soon a basic need. In this era of global economy, ICT is no doubt one of the prerequisites for economic development. As many people struggle to align themselves to the new innovations, there is an apparent relegation of certain countries, groups, age sets, genders and localities resulting in a digital divide. Digital divide is apparent between developed countries and developing countries, between towns and rural areas, between the young and the old, between the male and female, between the upper class and the lower class etc. This phenomena is replicated everywhere in the world. In Kenya, internet connectivity and usage in urban areas is several times more that in rural areas.<sup>43</sup> International Telecommunication Union (ITU) digital access index ranks Kenya among the countries with a low digital access.<sup>44</sup>

There is a correlation between bridging the digital divide and economic development. Building ICT infrastructure and securing universal access to ICT to reduce the digital divide will encourage adoption of the e-commerce which in turn will facilitate economic growth. The extent of Kenya's digital divide represents market potential and opportunities for e-commerce in

---

<sup>43</sup> Communications Commission of Kenya Report, Supra note 4.

<sup>44</sup> International Telecommunication Union, 2002, ITU Digital Access Index: World's First Global ICT Ranking Education and Affordability Key to Boosting New Technology Adoption. Available at: [http://www.itu.int/newsroom/press\\_releases/2003/30.html](http://www.itu.int/newsroom/press_releases/2003/30.html). Accessed on 31 August 2009.

Kenya. E-commerce allows local businesses to raise national and global awareness about their products and reach customers beyond their traditional market.

Since e-commerce is rapidly becoming a way of doing business nationally and internationally, it is important that there is equal opportunity in accessing ICT which is the handmaiden of e-commerce development. People of all classes, races, locations etc should have the ICT infrastructure available to them and they should be informed on how to utilize it. Everyone has a right to participate in the new digital economy. A country which is conscious in boosting its international trade should take positive steps in bridging the digital divide.

Several factors contribute to the ever widening digital divide in different sectors, locations, groups etc. Some of the factors include poor legal frameworks, poor support infrastructure, poverty, illiteracy or ignorance and poor governmental policies.<sup>45</sup> Any country wishing to bridge the digital divide should struggle to address these factors. It is the government's responsibility to remove such barriers through an integrated approach. Closing the digital divide and promoting e-commerce require more than ICT infrastructure development but also other sectors influencing ICT growth such as economy, trade, industry, legal, social-cultural and education.

At the international level, the ITU has taken a leading role in bridging the digital divide.<sup>46</sup> One of the main purposes of ITU is to promote the extension of the benefits of the new ICTs to all the world's inhabitants. ITU is mandated to foster and offer technical assistance to developing countries and to promote the mobilization of the material, human and financial resources needed to implement these goals. ITU's mandate, further, includes promoting international co-operation and partnerships between government members and the growing number of private sector members who have joined ITU. ITU has initiated the Electronic Commerce for Developing Countries (EC-DC) programme which brings on board more than 140 ITU Member States that

---

<sup>45</sup> Maryke Silalahi Nuth, Indonesia's Digital Divide and E-commerce: Opportunities and Challenges, Norway, Norwegian Research Center for Computers & Law Faculty of Law, University of Oslo. Available on: <http://www.tiimi2008.com/9.pdf>. Accessed on the 29 August 2009.

<sup>46</sup> See <http://www.itu.int/ITU-D/digitaldivide/>. Accessed on 30 August 2009.

are either developing or least developed.<sup>47</sup> Through the EC-DC, several activities are being undertaken by the ITU based on four objectives of this special development initiative. These four objectives include;

- a. Infrastructure Development-where they coordinate the establishment of e-transaction infrastructure.
- b. Human Resources Development-they develop local capacity in e-transaction technologies.
- c. Policies and strategies-they address policy and strategy issues related to e-transactions.
- d. Partnership with industry-they forge neutral and non-exclusive partnerships with industry.

United Nations Development Programme (UNDP) and United Nations Educational, Scientific and Cultural Organization (UNESCO) have also put in place various programmes to bridge the digital divide.

In Kenya, the Government is taking certain initiatives to bridge the digital divide. In the 2009/2010 fiscal budget the government allocated 1.3 billion Kenya shillings to install mobile computer laboratories for each constituency for use by high schools.<sup>48</sup> The government also launched a one million laptop/computer campaign countrywide in conjunction with broadband providers by undertaking to underwrite part of the interest payments on funds borrowed to purchase these laptops and computers. Since the budget was presented in June 2009, no implementation has taken place and many constituencies do not have access to computer laboratories.

The government, to enhance optic cable connectivity, allowed the internet service providers to offset against their taxable income the cost incurred in acquiring the right to use the fibre optic cable over a period of twenty years; increased wear and tear on telecommunication equipment

---

<sup>47</sup> About EC-DC. Available on: <http://www.itu.int/ITU-D/ecdc/about.html>. Accessed on 30 August 2009. Kenya is among the developing countries under the programme.

<sup>48</sup> Refer to Kenya's Finance Bill, 2009. Available at: [http://www.treasury.go.ke/index.php?option=com\\_docman&task=cat\\_view&gid=88&Itemid=86](http://www.treasury.go.ke/index.php?option=com_docman&task=cat_view&gid=88&Itemid=86). Accessed on 27 September 2009.

including the fibre optic cable from 12.5% to 20% and provide tax deduction of 5% on computer software.<sup>49</sup> Despite these tax breaks optic cable connectivity still remains low and internet access fees are still high several months after the optic cable landed in Kenya.

Bridging the digital divide is a practical issue that any state that wishes to enhance its e-commerce should address. Kenya has no option but to put in place relevant policy measures to address digital divide. Certain laws are also essential in bridging the digital divide. Since information and communication technology is a key factor in the development and distribution of e-commerce, there is need for right to information laws that would compel government to avail information and communication facilities to all citizens. In Kenya, there is no right to information in our constitution and no single legislation that provide for such a right.<sup>50</sup> Further, there is need for laws that ensures devolution of resources to marginalized regions or sectors of the population. Such laws shall ensure even distribution of resources including ICT.

### 2.3.2 Identification of e-contract Parties and their Capacities

Identification and establishing the contractual capacity of parties is usually the first step towards entering into a valid contract. You cannot enforce a contract against someone who does not exist or who is incapable of being bound by a contract like a minor or people of unsound mind. When transacting on internet, in most cases, you do not get to know the other party and this exposes one to contracting with people who lack capacity or who cannot even be traced.

All commercial transactions rely on trust between the purchaser and the seller. One of the factors that enhance the trust is the physical knowledge of the party one is transacting with. In electronic transaction, especially in international electronic commerce, the parties know each other through the internet. There is lack of real-time visual or oral interaction, and this creates a number of concerns like: How can I be sure that I am dealing with the right person? How can I determine whether the party I am dealing with is trustworthy? Does the other party have capacity to contract? How can I be sure that the messages I receive during the transaction are genuine and have not been tampered with in transit? How can I generate evidence for use in the event of a

---

<sup>49</sup> Ibid

<sup>50</sup> The Draft Constitution of Kenya, 2004 and the Freedom to Information Bill, 2007 has been drafted but they lack a force of law.

dispute (digital equivalents of signatures, receipts, warranties, etc)? Who would I seek redress against in case of breach of contractual terms?<sup>51</sup>

Since electronic transactions are not face-to-face, a means of identifying individuals is needed. The use of 'trusted third parties' (TTPs) like banks, credit card companies, estate agents, financial advisors, certification authorities and lawyers may help allay some of the identity concerns raised above and enhance trust. Trusted Third Parties are established, reputed, and responsible fiduciary entity accepted by all parties to an agreement, deal or transaction as a disinterested and impartial intermediary for settlement of payments and post-deal problems.<sup>52</sup> Construction of an institutional framework of TTPs is one important focal point for expanding the market of electronic commerce.

In particular, TTPs have important roles to play in enabling the transacting parties to:

- a. authenticate one another's identities,
- b. check one another's credentials,
- c. guarantee the integrity and confidentiality of the messages passing between them,
- d. settle disputes.

In e-commerce, certification authorities, time-stamping authorities and digital notaries are all examples of 'new' TTPs that have arisen to address e-commerce needs.<sup>53</sup> Companies that have been certified by the certification agencies are given a certificate and a signature for use in international e-commerce. This makes identification of parties easy if e-transactions are amongst certified companies. The challenge, however, remains when transacting with individuals and companies that are not certified.

Many countries in the world have enacted laws providing for the licensing of certification authorities. The Digital Signature and Electronic Authentication Law (SEAL) of 1998 provides

---

<sup>51</sup> P J Skevington and TP Hart (1997) Trusted third parties in electronic commerce, Springer Netherlands, BT Technology Journal, Vol 15, No 2, April.

<sup>52</sup> Definition of Trusted Third parties is borrowed from an online Business directory. Available at: <http://www.businessdictionary.com/definition/trusted-third-party.html>. Accessed on the 19 September 2009.

<sup>53</sup> VeriSign Website: <http://www.verisign.com/>. Accessed on 3 September 2009. VeriSign is one of the renowned certification authorities in the World.

for the licensing procedure of certification authorities in US. Since its enactment several certification authorities have been licensed and they include VeriSign and Global Sign.<sup>54</sup> In Kenya, section 83 E of the Kenya Communications (Amendment) Act no 1 of 2009 empowers the Communications Commission of Kenya to grant licences authorizing a person to provide electronic certification services. The Commission is yet to license electronic certification services providers in Kenya.

## 2.4 REVIEW OF LEGAL ISSUES IN INTERNATIONAL E-COMMERCE

International e-commerce poses numerous economic, social, practical and legal issues. The discussion here focuses on a few of the legal issues that the international community should be preoccupied with in their endeavour to improve international e-commerce. The issues discussed here include issues of e-contracting parties, e-contracts, privacy, security, dispute resolution, intellectual property and taxation.

### 2.4.1 Privacy, Confidentiality and Security

One of the main differences between e-commerce and traditional commerce is that electronic transactions are largely impersonal, anonymous and sometimes instant. These e-commerce characteristics pose privacy, confidentiality and security concerns which include:<sup>55</sup>

- a. Unsolicited marketing or advertisement-users have concern that information they provide for use in e-commerce may be used to send them targeted advertisements or sold to other companies that may advertise to them.
- b. Users are concerned that computers might be used to make predictions about their habits and interests. They fear that people may know information about them that was not in public domain.
- c. Users are concerned that companies will profile them in order to facilitate price discrimination. Individuals may be concerned not only about the possibility of being

---

<sup>54</sup> Read about the VeriSign and GlobalSign in their following websites, <http://www.verisign.com/> and <http://www.globalsign.com/> respectively.

<sup>55</sup> Stephen E. Fieberg, (2006) Privacy and Confidentiality in an e-Commerce World: Data Mining, Data Warehousing, Matching and Disclosure Limitation, *Statistical Science*, Vol. 21, No. 2, 143–154. Available at: [http://projecteuclid.org/DPubS/Repository/1.0/Disseminate?view=body&id=pdfview\\_1&handle=euclid.ss/1154979817](http://projecteuclid.org/DPubS/Repository/1.0/Disseminate?view=body&id=pdfview_1&handle=euclid.ss/1154979817). Accessed on 5th September 2009.

charged higher prices because of information in their profile, but also about the fact that they may be treated differently from other people.

- d. The users fear that they may inadvertently reveal personal information to other users of their computer. This information may be available to the people not intended and such information may be used in criminal and civil cases. Other types of profile information may reveal interests, habits, or personal preferences which information may be used to challenge the character of a party in a case.
- e. Companies and businesses are concerned that their business secrets and confidential information may be accessed by hackers and be used by competitors.

The confidence of customers engaged in e-commerce depends on how e-commerce channels have addressed these concerns.<sup>56</sup> Business and consumers require assurance that transactions that occur in an online environment are secure and private.

To address the privacy and confidentiality issues the Organization for Economic Co-operation and Development (OECD) has developed Guidelines on the Protection of Privacy and Transborder Data Flows of Personal data upon which many other sets of guidelines and some privacy laws are based. The OECD guidelines provide for eight principles that provide a useful framework for analyzing privacy, confidentiality and security issues related to e-commerce personalization. These principles include;<sup>57</sup>

- a. Data Quality Principle-Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.
- b. Purpose Specification Principle-The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfillment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

---

<sup>56</sup> Lorrier Faith Cranor, (2003), 'I Didn't Buy for Myself' Privacy and E-commerce Personalization, Washington DC, AT &T Labs Research. Available at: <http://lorrie.cranor.org/pubs/personalization-privacy.pdf>. accessed on 01 September 2009.

<sup>57</sup> OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.



- c. Use Limitation Principle-Personal data should not be disclosed, made available or otherwise used for purposes other than those specified except with the consent of the data subject by the authority of law.
- d. Security Safeguards Principle-Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification or disclosure of data.
- e. Openness Principle-There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.
- f. Individual Participation Principle-An individual should have the right to obtain their data from a data controller and to have incorrect data erased or amended.
- g. Accountability Principle-A data controller should be accountable for complying with measures which give effect to the principles stated above.

Some countries have enacted privacy, confidentiality and security laws based on the OECD guidelines. The United States, for example, has enacted the Electronic Communications Privacy Act of 1986 and the Children Online Privacy Act of 1998 to address various privacy issues in the internet. The Electronic Communications Privacy Act of 1986 was designed to prevent unauthorized government access to private electronic communications and prohibit access to stored electronic communications. Many states have generally recognized the right to privacy in their national constitutions and enumerated several offences against privacy. Despite these efforts to address privacy and confidentiality issues, the victims of privacy transgressions have no clear legal recourse internationally and in most countries especially with relation to e-commerce.<sup>58</sup>

Further to the foregoing discussion, security concerns also emanate from the fact that hackers may corrupt personal or company information to destroy a competitor or just for fun. Thieves, terrorists or any criminal may access information and use it for criminal activities. The problem

---

<sup>58</sup> Danice Kowalczyk, (2000), Avoiding Intellectual Trespass in the Global Marketplace: Encryption & Privacy in E-Commerce, Virginia Journal of Law and Technology.

of identification of parties to an e-contract is prevalent in e-commerce and therefore a person trading on internet may lose money or goods when orders and payments are made through the internet.

These principles are, in the view of this study, technology neutral and if properly implemented may address to some extent privacy, confidentiality and security issues. Kenya should strive to incorporate them in her laws and implement them to boost the confidence of players in e-commerce.

More specifically to security issues in e-commerce, European Countries under the auspices of the Council of Europe, has adopted the Convention on Cybercrime, the first international treaty, to address criminal law and procedural aspects of various types of criminal behavior directed against computer systems, networks or data.<sup>59</sup> The Convention requires countries that ratify it to adopt similar criminal laws on hacking, infringements of copyright, computer-related fraud, and child pornography.<sup>60</sup> It also contains provisions on investigative powers and procedures, such as the search of computer networks and interception of communications, and requires cross-border law enforcement cooperation in searches, seizures and extradition. The Convention has been supplemented by an additional protocol making any publication of racist and xenophobic propaganda via computer networks a criminal offence.<sup>61</sup>

In Kenya there is no comprehensive policy and, legal and regulatory framework addressing privacy, confidentiality and security issues brought about by e-commerce. Certain provisions of the ICT Policy and the Kenya Communications (Amendments) Act address these issues from the periphery and there is therefore need to have a law that directly addresses these issues. The National Information and Communications Technology (ICT) Policy recognizes that there is need for a such a comprehensive policy, legal and regulatory framework to address inter alia, issues of privacy, e-security, cyber crimes, ethical and moral conduct, copyrights, intellectual

---

<sup>59</sup> Dan Robel, (2006), International Cybercrime Treaty: Looking Beyond Ratification, SANS Institute. Available at: [http://www.sans.org/reading\\_room/whitepapers/incident/international\\_cybercrime\\_treaty\\_looking\\_beyond\\_ratification\\_1756](http://www.sans.org/reading_room/whitepapers/incident/international_cybercrime_treaty_looking_beyond_ratification_1756). Accessed on 1 September 2009.

<sup>60</sup> Preamble to the Convention on Cybercrime, Budapest, 23.XI.2001.

<sup>61</sup> Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems.

property rights and piracy.<sup>62</sup> Section 83R of the Kenya Communications (Amendment) Act, 2008 provides that the Minister in consultation with the Communications Commission of Kenya may make regulation on the control of electronic signature processes and procedures to ensure adequate integrity, security and confidentiality of electronic records or payments. No such regulations have been enacted.

#### **2.4.2 Electronic Contract Formation**

There are two types of electronic commerce contracts namely, contracts of physical goods and services; and contracts for electronic materials like software, music, images, voice, text etc. In the first contract the internet is being used as the medium to communicate and sometimes to conclude a contract but in the second contract the internet represents the place where the performance takes place.<sup>63</sup>

The internet is fundamentally a means of communication in international e-commerce. Legal and contractual issues that arise because of e-commerce are as a result of the differences between communication in the physical world and communication using internet. Contractual negotiations are the result of a series of communication that create a legally binding agreement. For this reason, there is little difference between contracts made online and those formed face to face. The general contract laws that apply to elements of a contract in physical contracts also apply to electronic contracts.<sup>64</sup> The legal doctrines of offer, acceptance and consideration coupled with intention of parties to create a legally binding relation define the necessary elements for creation of a contract in e-commerce just as in traditional commerce. There are however, certain legal and contractual issues that arise because of electronic contracting which merit discussion.

---

<sup>62</sup> Refer to page 4 of the National Information and Communications Technology (ICT) Policy.

<sup>63</sup> Jacob Consulting Pty Ltd, n.d, Online Contracts: How To Make Ecommerce Work, Available at: [http://www.djacobson.com/technology\\_business/jacobson\\_online\\_contracts\\_0603.pdf](http://www.djacobson.com/technology_business/jacobson_online_contracts_0603.pdf). Accessed on the 01 September 2009.

<sup>64</sup> Craig S Wright, (2008) Electronic Contracting in an Insecure World, SANS Institute. Available at: [http://www.sans.org/reading\\_room/whitepapers/legal/electronic\\_contracting\\_in\\_an\\_insecure\\_world\\_2088?show=2088.php&cat=legal](http://www.sans.org/reading_room/whitepapers/legal/electronic_contracting_in_an_insecure_world_2088?show=2088.php&cat=legal). Accessed on the 3 September 2009.

#### 2.4.2.1 Offer and acceptance

The law on offer and acceptance applies to e-contract in the same way that it applies to traditional contracts. For example, the offer must be definite and sufficient, the acceptance must be effectively communicated, and other rules like the postal acceptance rule apply. There are, however, unique issues that arise in e-contracts in so far as offer and acceptance is concerned.

One key issue relate to the time and place of dispatch and receipt of electronic communications of offer and acceptance. The times of dispatch and receipt of an electronic communication become important to the determination of contract-related time deadlines.<sup>65</sup> The place of dispatch and receipt of electronic communications determine where the contract was formed hence the law governing the contract in case the parties did not chose the law applicable.

Sometimes it is not clear what constitutes an offer especially when a communication is posted on a website. Does it constitute an offer or invitation to treat? This study holds the view that websites should be considered as electronic billboards or goods on display and therefore an invitation to treat. This view is based on the ruling in *Fisher v Bell*<sup>66</sup> where the requirements of offer and acceptance in the formation of a contract were discussed. The case established that, where goods are displayed in a shop together with a price label, such display is treated as an invitation to treat by the seller, and not an offer. The offer is instead made when the customer presents the item to the cashier together with payment. Acceptance occurs at the point when the cashier takes payment. Taking the website as the shelves, then goods advertised on it are merely an invitation to treat and an offer is made when a customer orders either electronically or otherwise. It is however important that the facts of the individual case be considered separately in solving contractual issues involving a website.

The General Rule is that a contract is formed at the time and place that the acceptance is received, unless accepted by post, in which case the postal acceptance rule applies. The postal acceptance rules states that where an acceptance is to be sent by post, the contract associated

---

<sup>65</sup> Wolfgang Hahnkamper, (2005), Acceptance of an Offer in Light of Electronic Communications Journal of Law and Commerce, Vol. 25.

<sup>66</sup> (1961) 1 QB 394.

with the acceptance is considered as concluded at the moment of posting the letter and not when the letter is received except the offeror provides otherwise.<sup>67</sup>

This general rule and postal rule on acceptance face a lot of challenge when it comes to electronic contracts. For example when contracting by way of e-mail there are several potential moments of acceptance which are;<sup>68</sup>

- a. The first moment occurs when the e-mail departs the sender's outbox controlled by the sender. In Internet-based e-mail transactions, the e-mail cannot be recalled once it has left the sender's outbox. This is a situation analogous to the postal rule.
- b. The next is the instant of receipt of the e-mail into the recipient's inbox. At this point, the e-mail is accessible to the recipient.
- c. The next possible instant that could potentially be the moment of acceptance is when the recipient collects the email from the mail server into the client's mail inbox. At this point, the recipient has received the e-mail.
- d. Finally, there is an argument for defining the moment of acceptance as the point when the recipient has opened or read the e-mail.

The international community and several countries have negotiated or enacted legal instruments to address the many issues that offer and acceptance on e-contracts pose. The most remarkable instrument in international contracts is the Convention on the Use of Electronic Communications in international contracts (CUECIC). This Convention, spear headed by the United Nations Commission on International Trade Law (UNCITRAL), was adopted by the General Assembly on 23 November 2005, the Convention aims to enhance legal certainty and commercial predictability where electronic communications are used in relation to international contracts. It addresses the determination of a party's location in an electronic environment; the time and place of dispatch and receipt of electronic communications and the use of automated message systems for contract formation.<sup>69</sup> Article 10(2) provides for a point of acceptance outlined in (b) above

---

<sup>67</sup> Adams v Lindsell [1818] EWHC KB J59

<sup>68</sup> Craig S Wright, Supra Note 64.

<sup>69</sup> United Nations Convention on the Use of Electronic Communications in International Contracts Summary. Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html). Accessed on the 2 September 2009.

i.e. it defines a moment of acceptance as the instant of receipt of the e-mail into the recipient's inbox and is accessible to the recipient.

The CUECIC establishes the following rules regarding the time of dispatch and receipt of electronic communications in article 10:

- a. The time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator or, if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator, the time when the electronic communication is received.
- b. The time of receipt of an electronic communication is the time when it becomes capable of being retrieved by the addressee at an 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 at that address and the addressee becomes aware that the 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 electronic address.
- c. 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. Determination of place of business is prescribed in Article 6 of CUECIC

The CUECIC has been signed by 18 countries but it requires three ratifications, accession or approval to enter into force. No single country has accede, ratified or approved the convention and therefore it is not in force. Kenya has not signed the convention.

To fill the gap brought about by e-commerce in relation to rules of offer, acceptance and other contractual issues in international contracts, the United Nations Convention on Contracts for the International Sale of Goods (CISG) has been opined by the CISG Advisory Council to apply to international e-commerce. The convention was adopted by a diplomatic conference on 11 April 1980, establishing a comprehensive code of legal rules governing the formation of contracts for

the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract.<sup>70</sup>

CISG does not expressly address the issues that e-commerce poses and it was negotiated before e-commerce was a reality. However, the CISG Advisory Opinion on Electronic Communications under CISG<sup>71</sup> has interpreted several provisions of the CISG as being able to support an electronic transaction. Article 15 of CISG provides that an offer becomes effective when it reaches the offeree and that an offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. The Council interpreted the term “reaches” to correspond to the point in time when an electronic communication has entered the offeree’s server. An offer, even if it is irrevocable, can be withdrawn if the withdrawal enters the offeree’s server before or at the same time as the offer reaches the offeree. A prerequisite for withdrawal by electronic communication is that the offeree has consented, expressly or impliedly, to receive electronic communications of that type, in that format and to that address.<sup>72</sup>

Article 18(2) of CISG provides that an acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed, or, if no time is fixed, within a reasonable time, due to account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise. The Council opined that an acceptance becomes effective when an electronic indication of assent has entered the offeror’s server, provided that the offeror has consented, expressly or impliedly, to receiving electronic communications of that type, in that format, and to that address. The term “oral” includes electronically transmitted sound in real time and electronic communications in real time. An offer that is transmitted electronically in real time communication must be accepted immediately

---

<sup>70</sup> United Nations Convention on Contracts for the International Sale of Goods Summary. Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html). Accessed on 2 September 2009.

<sup>71</sup> CISG Advisory Council (2003) Electronic Communications under CISG, Nordic Journal of Commercial Law. Available at: [http://www.njcl.fi/1\\_2003/commentary3.pdf](http://www.njcl.fi/1_2003/commentary3.pdf). Accessed on 2 September 2009.

<sup>72</sup> Ibid

unless the circumstances indicate otherwise provided that the addressee consented expressly or impliedly to receiving communications of that type, in that format, and to that address.

The CISG Council opinions are authoritative but not binding interpretations or opinions of the state of a particular area of law. Often referred to as “soft law” because they are non-binding, advisory opinions nevertheless encourage states or individuals to behave in a certain way.<sup>73</sup>

It is clear from the opinion of the Advisory Council that the CISG can be applied in governing international e-contracts. When the CUECIC finally enters into force it will no doubt supplement the provisions of the CISG.

There are other types of e-contracts that pose new challenges to the CISG. An example is the click-wrap kind of contracts. These contracts may start with a web-based advertisement or some other collateral offer for consideration. There are two main ways to enter into a click-wrap agreement, a party may type and click where the consumer must type "I accept" or something similar in an on-screen box, and then a send button of some sort to signify acceptance of the contract. The second way to enter into click-wrap agreements is through icon clicking, where the consumer clicks an "I accept" button on an application screen or web site. In common with both of these methods is that the user may not proceed beyond that point unless they agree to accept the contract agreements presented.<sup>74</sup> Establishing the time and place of dispatch and receipt of offer and acceptance becomes a problem. This form of contractual negotiations is different from e-mail and deserves separate consideration.

Kenya has not signed the CUECIC and the CISG and it is not therefore bound by the obligation in the conventions.<sup>75</sup> Parties contracting electronically may however, relying on the freedom of contract, incorporate provisions of CUECIC and CISG in their contractual terms.

---

<sup>73</sup> Lorraine de Germiny & Joshua Karton, n.d. The CISG Advisory Council Comes of Age, Available at: [http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=joshua\\_karton](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=joshua_karton). Accessed on 19 September 2009.

<sup>74</sup> The Benefits of Click-Wrap Contracts over Shrink-Wrap Contracts. Available on: [http://www.designireland.net/index.php?http%3A//www.designireland.net/alpha/controller/view\\_article.php%3Foid%3D00000000015](http://www.designireland.net/index.php?http%3A//www.designireland.net/alpha/controller/view_article.php%3Foid%3D00000000015). Accessed on 5 September 2009.

<sup>75</sup> Refer to the UNCITRAL Texts and Status. Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts.html](http://www.uncitral.org/uncitral/en/uncitral_texts.html). accessed on 19 September 2009.



#### 2.4.2.2 Execution of Electronic Contracts

Execution of contracts is not one of the elements of a valid contract. Execution is however, crucial in agreements to evidence the intention of parties to be contractually bound by the terms of the contract. In traditional contract formation, execution is done by parties signing the document containing the terms of the agreement. Since there are no physical documents in electronic agreements, the execution is not done by writing. To surmount the requirement of execution, especially in contracts that require writing, several ways have been employed to signify execution in electronic contracts. The common methods used include the use of electronic signatures or exchange of e-mails. Electronic signatures means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.<sup>76</sup>

These electronic signatures are associated with a unique numerical code or value which when associated with the correct cryptographic algorithm allows one to verify the authenticity of an electronically signed document with extremely low probability of error. To be held valid the signature must provide the identity of the party who signed the document and demonstrate the intention to sign.

UNCITRAL, on 5 July 2001, adopted the Model Law on Electronic Signatures with Guide to Enactment, 2001. This model law aims at bringing additional legal certainty to the use of electronic signatures in national legislations. It establishes a criterion of technical reliability for the equivalence between electronic and hand-written signatures. The Model Law follows a technology-neutral approach, which avoids favouring the use of any specific technical product. It further establishes basic rules of conduct that may serve as guidelines for assessing possible responsibilities and liabilities for the signatory, the relying party and trusted third parties intervening in the signature process.<sup>77</sup>

---

<sup>76</sup> Refer to the definition provided by the UNCITRAL Model Law on Electronic Signatures with Guide to Enactment, 2001.

<sup>77</sup> Summary on UNCITRAL Model Law on Electronic Signatures with Guide to Enactment, 2001. Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2001Model\\_signatures.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html). accessed on the 2 September 2009.

So far, nine countries have enacted laws in compliance with this model law. These countries include Cape Verde (in 2003), China (in 2004), Guatemala (in 2008), Mexico (in 2003), Thailand (in 2001), United Arab Emirates (in 2006) and Viet Nam (in 2005) and Costa Rica (in 2005).<sup>78</sup> Kenya has not even drafted a Bill on electronic signatures based on the Model law on signatures. A few provisions on electronic signature exist in the Electronic Transactions Bill 2007 which is drafted in compliance with MLEC.<sup>79</sup>

#### 2.4.2.3 Paper Based Concepts

Various paper based concepts have hampered the development of e-commerce and there is need for legal certainty in the area. The paper based concepts include; originality of documents, writing requirement in contracts and signature.

Certain admissible evidence carries more evidential weight or value than others. With regard to paper-based documentation, the “best evidence” rule requires that the content of a writing should be proven by introducing the original document to court. In the electronic environment, the distinction between original and copy becomes blurred. Documents created electronically have different attributes than paper-based documents. Even though admissible, the evidential weight of electronic documents may be adversely affected by their ease of alteration without leaving any trace.<sup>80</sup>

Contract laws also require that certain types of contracts, especially contracts for sale of immovable property should be in writing.<sup>81</sup> It is contentious whether electronic contracts meet the writing requirement. Associated with the writing requirement, is the requirement of signature. Are electronic signatures sufficient in executing contracts?

---

<sup>78</sup> Refer to the Status of the UNCITRAL Model Law on Electronic Signatures with Guide to Enactment, 2001.

<sup>79</sup> Section 10 and 11 provide for electronic signatures.

<sup>80</sup> Green Paper, Supra note 39.

<sup>81</sup> Section 3 of the Law of Contracts Act, Cap 23, Laws of Kenya, provides for contracts that ought to be in writing..

To address the above concerns, various international instruments have incorporated what is called electronic equivalency rules to recognize electronic documents as originals, electronic writing and signatures.<sup>82</sup>

Besides CUECIC which has a few provisions providing for the equivalency rules, UNCITRAL has enacted the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (MLEC) which was adopted by UNCITRAL on 12<sup>th</sup> day of June 1996. This model law was enacted with the intention of facilitating the use of modern means of communications and storage of information. It is based on the establishment of a functional equivalent in electronic media for paper-based concepts such as "writing", "signature" and "original". By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication. The Model Law also contains rules for electronic commerce in various areas.<sup>83</sup>

Articles 6, 7 and 8 of MLEC provides that where the law requires; information to be in writing, signature of a person and information to be presented or retained in its original form, then such requirements are met by electronic forms of the same and there is reliability in the writing, signature or document.

Over hundred countries have taken steps to enact laws that are styled in the provisions of MLEC.<sup>84</sup>

In Kenya section 83 G of the Kenya Communications (Amendment) Act No. 1 of 2009 provides for legal recognition of electronic records, section 83 I provides for the originality of electronic documents and section 83 P recognizes the electronic signature. Kenya has also drafted the Electronic Commerce Bill, 2007 which is styled in the provisions of MLEC.

---

<sup>82</sup> Charles H. M. 2006, The UNCITRAL Electronic Contracts Convention: Will it be used or Avoided? Pace International Law Review, Vol 17, 261.

<sup>83</sup> Summary on Model Law on UNCITRAL Model Law on Electronic Commerce with Guide to Enactment. Available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html). accessed on 19 September 2009.

<sup>84</sup> Refer to the Status of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment.

### 2.4.3 Dispute Resolution

In dispute resolution, the main concern for e-commerce players revolves around jurisdiction of the court to try a matter and choice of law applicable to a dispute. Jurisdiction and choice of law is a crucial matter when internet transactions are involved because individuals and businesses that operate websites face the danger of potentially being sued in any jurisdiction from which the site was accessed.<sup>85</sup> Further, a trans-boundary transaction concluded on the internet is not clear where it took place hence raising jurisdiction and choice of law issues. In passive sales which involves customers responding to unsolicited sales the jurisdiction and choice of law problems abound. Parties to a transaction may carry out a transaction on the soil of another country without setting foot there. One may therefore break the law of another country without his physical presence. Such a situation is common in electronic gambling with a resident of a country which has outlawed gambling.<sup>86</sup>

Businesses and individuals engaged in e-commerce, especially in active sales, may surmount this problem by inclusion of choice of law and forum provisions in their online contracts and agreements. Clauses seeking alternative dispute resolution mechanisms like arbitration clauses in online contracts and agreements can also solve most of the forum and choice of laws problems.

The 1980 Rome Convention on the Law Applicable to Contractual Obligations contains rules of determining the member state's laws applied to disputes arising from cross border e-commerce consumer transactions. The Rome Convention provides for a country of origin principle with respect to determining applicable law for agreements. Article 3 of the Convention provides for freedom of contract and states that a contract shall be governed by the law chosen by parties. Article 4 provides for the closest connection rule that states that if the parties have not chosen the applicable law, the contract shall be governed by the law of the country with which it is most closely connected.

---

<sup>85</sup> Tim Brightbill and Sarah Dylag, n.d, Barriers to International Electronic Commerce: Recent Issues and Developments. Available at: <http://www.wileyreinandfielding.com/docs/publications/11623.pdf>. Accessed on the 4th September 2009.

<sup>86</sup> Mbasi Fredrick, (2007), Emerging Legal Issues Arising from Online Gambling; A Framework for Future Legislation in Kenya, LLB Dissertation submitted to the University of Nairobi, school of Law.

The country of closest connection is to be determined with reference the presumption that a contract is closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the contract, his habitual residence, or, in case of a body corporate, its central administration. In most cases, business-to-business in e-commerce contract is most closely connected with the country of the establishment of the provider of the product or service.

Article 5 provides that in consumer contracts, the parties may choose the applicable law but such a law made chosen by parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has habitual residence.

These provisions though negotiated in the 1980 when e-commerce was not a reality in the world, they contain general principles applicable in the choice of law and forum in e-commerce. Despite establishing the choice of law and forum in accordance to the formula proposed by the convention, the challenge still remains when it comes to submission of contract parties to the established jurisdiction. For example, contract parties from developed countries may have a problem submitting to jurisdiction in developing countries and vice versa.

The most elaborate provision on e-dispute resolution is the EU E-commerce Directive which contains mandatory rules applicable to the choice of law for electronic commerce contracts. The Directive applies to information society providers (ISPs) and the providers of such services. As a general rule, the E-commerce Directive takes a country of origin approach where information society's services must comply with the laws in their home state. Recital 19 of the EU Directive provides that information society service providers (ISPs) are subject to the law of the Member State in which they are established. As long as ISPs comply with this law, they are free to pursue their activities throughout the community. This directive does not supersede other aspects of EU legislations that require the application of country of destination principle including consumer

contracts.<sup>87</sup> These two instruments offer a useful precedent to Kenya in the enactment of a good law on electronic dispute resolution especially relating to choice of law and forum.

#### **2.4.4 Consumer Protection**

The electronic market place offers consumers unprecedented choice, accessibility and convenience benefits. With these benefits also comes the challenge of ensuring that the electronic marketplace is safe and secure for a customer to purchase goods, services and access electronic information. Consumers must be confident that the goods and services offered online are fairly represented and that the merchants with whom they are dealing, will deliver their goods in a timely manner and are not engaged in illegal business practices such as fraud or deception.

Consumer confidence is a key element in international e-commerce development. Consumption is the sole end and purpose of all production and or trade and therefore the welfare of the consumer is paramount.<sup>88</sup> Consumer satisfaction is the ultimate economic goal and ideally the economy should be fundamentally ruled by consumer desires under the theory of consumer sovereignty. To enhance consumer confidence, consumers requires that they have access to fair and effective redress if they are not satisfied with some aspects of the transaction. To ensure strong and effective consumer protection in an online environment and obviate the need for a long and arduous litigation process, alternative and easy-to-use mechanisms for consumer dispute resolution, redress and enforcement mechanisms are required.

The MLEC requires states to enact consumer protection laws. The model law does not provide for consumer protection but states that in countries where consumer protection laws are available, then they shall take precedence over the model law in consumer issues.

Kenya does not have concrete consumer protection laws not only in electronic laws but in other areas as well. Kenya has only drafted the Consumer Protection Bill, 2007 which provides for

---

<sup>87</sup> Norman Solovay and Cynthia K. Reed, (2003), *The Internet and Dispute Resolution: Untangling the Web*, New York, Law Journal Press.

<sup>88</sup> Smith, A. *Wealth of Nations*, edited by C. J. Bullock. Vol. X. *The Harvard Classics*. New York: P.F. Collier & Son, 1909–14.

consumer protection in internet agreements. Section 43 to 45 of the Bill provides for disclosure of information and cancellation of internet agreements.

Perhaps the most elaborate international effort addressing consumer protection in e-commerce is the Guidelines for Consumer Protection in the Context of Electronic Commerce.<sup>89</sup> These guidelines were approved on 9<sup>th</sup> of December 1999 by the OECD Council and they are designed to ensure that consumers are no less protected when shopping online than they are when they buy from their local store or order from a catalogue. By setting out the core characteristics of effective consumer protection for online business-to-consumer transactions, the guidelines are intended to help eliminate some of the uncertainties that both consumers and businesses encounter when buying and selling online.

The guidelines reflect existing legal protection available to consumers in more traditional forms of commerce; encourage private sector initiatives that include participation by consumer representatives; and emphasize the need for co-operation among governments, businesses and consumers. The aim of these guidelines is to encourage;

- a. Fair business, advertising and marketing practices.
- b. Clear information about an online business's identity, the goods or services it offers and the terms and conditions of any transaction,
- c. A transparent process for the confirmation of transactions,
- d. Secure payment mechanisms,
- e. Fair, timely and affordable dispute resolution and redress,
- f. Privacy protection
- g. Consumer and business education.

Kenya is not a member of the OECD community and therefore she does not have any obligations in observing the Guidelines for Consumer Protection in the Context of Electronic Commerce. The Guidelines, however, form a good basis for enacting e-commerce sensitive consumer protection laws in Kenya.

---

<sup>89</sup> Organization for Economic Co-operation and Development, 2000, Guidelines for Consumer Protection in the Context of Electronic Commerce, OECD Publishing.

#### 2.4.5 Intellectual Property Protection

The internet poses fundamental challenges to the concept of who owns and controls intellectual property. The internet makes it possible for authorized users to copy and re-transmit intellectual property to millions of people. In an international context, it is particularly important for businesses to protect their copyrights, domain names, trademarks and other intellectual property when conducting transactions or doing business abroad. One way of protecting intellectual property is by drawing an internet services agreement that carefully delineates the intellectual property of the parties involved as well as intellectual property created while the services are being provided.<sup>90</sup>

There is currently no sufficient international agreement on various issues fundamental to the protection of intellectual property rights in the electronic environment. To date multilateral and bilateral treaties prove to be the most feasible way to deal with trans-boarder intellectual property related issues.

World Intellectual Property Organization (WIPO) arbitration and mediation centre has established an internet based, online dispute resolution system that can provide a neutral, speedy and inexpensive means of resolving disputes without the physical movement of persons and things. On December 1996, WIPO adopted two treaties namely, WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These treaties address issues of the definition and scope of rights in the electronic environment, and some of the challenges of online enforcement and licensing.<sup>91</sup>

Under World Trade Organization structure (WTO), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), adopted in 1994, provide a framework for trade related aspects of Intellectual property rights and e-commerce. It provide rules concerning trade related intellectual property rights, basic principles of previous intellectual property conventions,

---

<sup>90</sup> Franklin Pierce Law Center, n.d., Intellectual Property in E-Commerce, World Intellectual Property Organization. Available on: [http://www.ipmall.info/hosted\\_resources/pubspapers/WIPO.pdf](http://www.ipmall.info/hosted_resources/pubspapers/WIPO.pdf). Accessed on 5 September 2009.

<sup>91</sup> International Bureau of WIPO. Available at: [http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html). Accessed on 4 September 2009.



standards regarding availability, scope, and use of intellectual property rights. Appropriate enforcement, multilateral dispute settlement procedures and transitional arrangements for countries are also included in the agreement.

Debates relating to intellectual property rights are ongoing in international forums such as the World Intellectual Property Organization, the World Trade Organization, the European Union and the Organization for Economic Cooperation and Development and the Internet Corporation for Assigned Names and Numbers, with the purpose of finding a suitable and more relevant framework for intellectual property rights in e-commerce.

Kenya is a member of WIPO and WTO and therefore obligated by the WIPO treaties and WTO's TRIPs discussed above. Kenya has enacted several laws addressing intellectual property including the Copyright Act, No 12 of 2001, Trade Marks Act, (Cap 506, Laws of Kenya) and the Industrial Property Act, No 3 of 2001. These laws shall be considered in detail in the next chapter, which discusses the legal and regulatory framework for e-commerce in Kenya.

#### **2.4.6 Taxation**

There is a legitimate concern that the development of the internet may have the effect of shrinking the tax base and hence reducing fiscal revenue of many developing governments. The reasons behind these concerns are on the one hand the difficulties inherent in defining jurisdiction in cyber world and on the other hand the problem of administration and enforcement of tax.<sup>92</sup> In addressing these problems and in developing a taxation framework, it is important to ensure that the taxation systems are fair, neutral, predictable and do not distort the conduct of business. E-commerce also gives rise to an issue concerning the characterization of income in arising from transactions.<sup>93</sup>

---

<sup>92</sup> Refer to a Report by the Technical Advisory Group on Treaty Characterization of Electronic Commerce Payments on Tax Treaty Characterization Issues Arising from E-Commerce made to the Working Party No. 1 of the OECD Committee on Fiscal Affairs on 1 February 2001.

<sup>93</sup> The WTO remains divided on the question of whether to treat electronic commerce transactions and digitally delivered goods as goods or services. Such classification is important in determining whether tariffs are applicable or not.

Many international organizations and individuals throughout the world have done substantial research on the impact of e-commerce on taxation.<sup>94</sup> Among the many books, reports, articles and papers produced on this topic however, the work of Organization for Economic Co-operation and Development (OECD) stands out as the most significant, given its commitment to consulting broadly with government worldwide as well as with the business community to develop an integrated and comprehensive approach to taxation of e-commerce. To address tax concerns, OECD has adopted a principles-based approach and agreed that general tax principles should apply to the taxation of e-commerce.<sup>95</sup> These general tax principles are neutrality, efficiency, certainty, simplicity, effectiveness, fairness and flexibility.

- a. Neutrality-Taxation should seek to be neutral and equitable between forms of e-commerce and between conventional and electronic forms of commerce. Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation. This principle of neutrality, for several reasons, may not be appropriate in e-commerce and hence need to have a different tax regime for e-commerce. It has been argued that taxing e-commerce would discourage its future developments and therefore there should be a moratorium on e-commerce taxation. The technology sector invests billions in supporting the growth of high-speed Internet access. Taxes that impede consumer demand for access will undermine new investments. The Moratorium keeps the Internet more affordable, helping low-income people get access to the online world. Another possible reason for granting tax preferences to e-commerce could be the existence of some form of positive network externalities associated with e-commerce. For example, the Internet is an important catalyst for entrepreneurship and is directly responsible for the creation of thousands of small businesses. Higher taxes will stifle the ability of small businesses to operate, grow, and create new jobs.<sup>96</sup>
- b. Efficiency, effectiveness and fairness-compliance costs for taxpayers and administrative costs for the tax authorities should be minimized as far as possible. Taxation should produce the right amount of tax at the right time. The potential for evasion and avoidance

---

<sup>94</sup> Examples include Butler et al, (2000 July), *The Taxation of Global E-commerce*, Asia-Pacific Tax Bulletin, Doernberg and Hinnekens, (1999), *Electronic Commerce and International Taxation*, Kluwer Law International etc.

<sup>95</sup> Report by the Technical Advisory Group. Supra note 92.

<sup>96</sup> **Bo Sandermann Rasmussen**, *On the Possibility and Desirability of Taxing E-commerce*, Working Paper No. 2004-2008, University of Aarhus, Denmark.

should be minimized and counter-acting measures should be proportionate to the risks involved. These principles may not be easy to apply in e-commerce. Taxation of any economic transaction requires that it can be legally verified that a transaction between the buyer and the seller has taken place, implying that the administrative procedures needed to generate the required verification are important. Verification can either be direct through observation of the transaction by a representative of the tax authorities or indirect through auditing of the parties involved in the transaction. Implementing any of these two verification mechanism in e-commerce is costly and some instances not possible since trading in e-commerce can be either in physical or digitalized goods.

- c. Certainty and Simplicity-The tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where and how the tax is to be accounted.
- d. Effectiveness and Fairness-Taxation should produce the right amount of tax at the right time. The potential for evasion and avoidance should be minimized and counter-acting measures should be proportionate to the risks involved.
- e. Flexibility-The systems for taxation should be flexible and dynamic to ensure that they keep pace with the technological and commercial developments.

Kenya's tax laws have not however been reformed to capture electronic commerce transactions and therefore any e-commerce taxation would take place under the current tax regime. Administratively, Kenya Revenue Authority has undertaken positive moves in embracing e-commerce. The introduction of Electronic Tax Registers (ETR) and the fact that one can register as taxpayer and make returns online are such administrative steps that would boost the government revenue as the world gears up for electronic commerce.<sup>97</sup> The introduction of ETR by Kenya Revenue Authority received a lot of resistance leading to a court case.<sup>98</sup>

---

<sup>97</sup> Kenya Revenue Authority, Online Services. Available at: <http://www.kra.go.ke/portal/index.html>. Accessed on 19 September 2009.

<sup>98</sup> Republic v. Minister of Finance, Kenya Revenue Authority and Commissioner of domestic Taxes (2006) eKLR. For a summary of this case refer to literature review.

## 2.5 CONCLUSION

This chapter has established and analyzed some of the practical and legal issues that e-commerce raises. These issues include contract formation, digital divide, privacy, security, confidentiality, consumer protection, taxation, dispute resolution and intellectual property. In order to facilitate e-commerce, international community has made efforts to address these issues. The International Telecommunications Union, World Intellectual Property Organization, Organization for Economic Co-operation and Development, World Trade Organization, United Nations Commission on International Trade Law are some of these international organizations that have taken positive steps to address e-commerce.

Several conventions have been negotiated and internationally acceptable principles formulated under the auspices of the above organizations to address the issues posed by e-commerce. Key conventions and principles include WIPO Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT), UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, Model Law on Electronic Signatures with Guide to Enactment and Convention on the Use of Electronic Communications in international contracts, OECD Guidelines for Consumer Protection in the Context of Electronic Commerce. Some countries have taken lead in enacting national laws to reflect those internationally accepted standards. To ensure certainty and uniformity in international e-commerce, national legislation should reflect the set international standards encapsulated in the discussed conventions and principles. The next chapter analyses the Kenya legal system to establish how it has dealt with the e-commerce phenomenon.

## CHAPTER THREE

### AN APPRAISAL OF KENYA'S POLICY, LEGAL AND REGULATORY FRAMEWORKS ON E-COMMERCE: A CASE OF NEW WINE IN OLD WINE SKINS

#### 3.1. INTRODUCTION

Information technology especially with regard to e-commerce has grown rapidly in Kenya like in many other countries of the world. Its rapid advancement has rendered obsolete most laws regulating commerce. This chapter reviews all relevant policies, legal and regulatory frameworks that concern e-commerce regulation under three main themes namely, policy review, legal review and regulatory review. This chapter reviews the policy, legal and institutional frameworks in Kenya.

#### 3.2. A REVIEW OF E-COMMERCE POLICIES

In Kenya, there are two main policy documents that provide for the facilitation of E-commerce: the National Trade Policy and the Kenya National Information & Communications Technology (ICT) Policy.

##### 3.2.1 Trade Policy

The National Trade Policy was formulated in April 2009, with the intention of facilitating Kenya's transformation into a competitive export led economy, enhance regional integration and widen participation in both domestic and international trade.<sup>99</sup> The National Trade Policy has evolved through several distinct policy orientations.<sup>100</sup> Currently it is guided by the market driven principles of liberalization under the WTO and increased efforts in the regional economic integration.

The policy lays strategies to enhance export growth through value addition in export oriented manufactures and in the services sector as well as diversification to fully exploit the export

---

<sup>99</sup> Refer to the National Trade Policy's Mission.

<sup>100</sup> Some of these policy orientations include: Import Substitution Policies (1960s-1980s), Trade Liberalization through Structural Adjustments Policies (SAPs of 1980s and Export Oriented Policies of 1990s).

opportunities in the emerging markets. One of the strategies identified by the policy is the use of e-commerce to stimulate trade. Chapter nine of the policy is therefore dedicated to e-commerce.

The policy states that to stimulate trade through e-commerce, there is need for a comprehensive policy, legal and regulatory framework to support ICT development, investment, competition in the industry, ensure affordability and access to ICT nationally, address privacy issues, e-security, ICT legislation, cyber crimes, ethical and moral conduct, copyrights, intellectual property rights and support research and development in ICT.

The policy further identifies the main challenges in the development of E-commerce in the country as follows:

- a. The formulation and implementation of national ICT strategy given the complexity and cross cutting nature of ICT and the need for a holistic approach.
- b. Promotion of use of e-commerce by business community taking into consideration their low levels of awareness, low level of access and usage of ICT; and relatively high Internet access costs.
- c. Promoting the use of credit cards considering the level of sophistication of the telecommunication system, security of card transaction and literacy of the population.

The policy, in addressing the challenges proposes an infrastructure Development Strategy which proposes the installation of fibre optic cables, liberalization of network infrastructure, local assemblage of computer hardware and software and roll out of affordable quality broadband. It also proposes the development of an E-commerce policy that integrates e-commerce to the overall economy. These measures if properly implemented may go a long way in bridging the digital divide which is a big setback e-commerce development in the country.<sup>101</sup>

On implementation, the policy proposes that the Ministry of Trade coordinates the proposed policy programme and projects by mainstreaming e-commerce within the overall economy. In particular, the Ministry of Information and Communication will lead in facilitating the infrastructural development, Market improvement, Skills and technology upgrading, promoting

---

<sup>101</sup> Refer to the earlier discussion on digital divide.

and facilitating Public Private Partnership to enable innovations and competition to accelerate the growth of ICT industries.

The Ministry of Planning and National Development, Ministry of Finance, Ministry of Immigration & Registration of Persons, Ministry of Transport, Communication Commission of Kenya (CCK), Cabinet Office (Directorate of E-Government), Postal Corporation of Kenya (PCK), Telecom Kenya, Department of Remote Sensing and Remote Surveys and Private sector are other ministries and agencies identified in aiding implementing the e-commerce aspect of the National Trade policy. This multi-ministry approach to implementing the national Trade policy in e-commerce is laudable since e-commerce is multi-sectoral in nature.

The policy fails to provide solutions to the practical and legal issues raised in this study despite identifying them as impediments to e-commerce. It does not have a comprehensive provision on e-commerce hence leaving critical issues raised in this study unaddressed. It however tries to address the practical issue of bridging the digital divide in the manner discussed below.

### **3.2.2 Information Communication Technology (ICT) Policy**

The Information Communication Technology (ICT) Policy was formulated in January 2006. It is a product of the Economic Recovery Strategy for Wealth and Employment Creation (2003-2007). The Economic Recovery Strategy identified several ICT-related goals which included investing in adequate ICT education, training, review of legal framework and use of e-commerce.

The policy's mission is to improve the livelihoods of Kenyans by ensuring the availability of accessible, efficient, reliable and affordable ICT services. It is based on four guiding principles namely infrastructure development, human resource development, stakeholder participation and appropriate policy and regulatory framework. The policy is formulated generally in the promotion of ICT development in Kenya with minimal attention to e-commerce. It is appreciative to note that, ICT is the handmaiden of e-commerce but there is need for a specific policy on e-commerce.

The policy identifies main challenges to ICT development in the country as among others; lack of ICT infrastructure, poor human resource development on ICT, lack of a policy framework on e-learning, inadequate policy regulatory and legal and regulatory framework on e-commerce.

To overcome the challenges posed to e-commerce development, the policy proposes the enactment of appropriate legislations to support e-business, raise public awareness on potential opportunities of e-commerce and international cooperation on development of a framework for e-commerce. The policy however does not provide in detail how and who spear heads the enactment of e-commerce laws, public awareness and international cooperation.

### **3.2.3 Use of Policies to address the Digital Divide**

In Kenya there are no laws to ensure equal distribution of ICT resources in various parts of the country.<sup>102</sup> Information Communication Technology (ICT) as noted earlier is an important economic resource that underpins e-commerce but it is not evenly distributed throughout Kenya. Access to ICT services is limited to a few major towns leaving out the rural areas of the country where most Kenyans live. Further, people of the upper and middle class also easily access internet services than people of lower class.<sup>103</sup> The Kenya National Information & Communications Technology (ICT) Policy has identified poor legal and regulatory framework, poor ICT infrastructure, and poor human resource development in ICT as the main causes of the digital divide in Kenya. The policy does not however seek to provide any mechanism for even distribution of ICT services in Kenya. Any new law intending to breach the digital divide should therefore tackle these causes.

The digital divide has been slightly addressed by the Kenyan government by implementing various budgetary and tax policies.<sup>104</sup> But the government needs to do more by enhancing

---

<sup>102</sup> The Draft Constitution of Kenya, 2004 provides for the right to information (Bomas Draft). The provision on right to information if it is passed it may compel government to make ICT services available to a larger majority in Kenya. The Constituencies Development Fund Act, Act No. 10 of 2003 provides for the distribution of resources to the constituencies, but the local leaders have not fully appreciated the fact that ICT is a very essential resources at the local level.

<sup>103</sup> Refer to the discussion on digital divide in chapter two above.

<sup>104</sup> Refer to the budgetary measure being undertaken by the government discussed under digital divide in chapter two above.



universal access through provision of adequate resources to the ICT sector, developing the requisite ICT infrastructure, creating incentives for service providers to deploy services in rural and under-served areas, establishing a Universal Service Fund for ICT development, creating awareness of benefits of ICT to the public and developing knowledge-sharing networks at grassroots level. To be able to do this, a favourable policy, legal and regulatory framework is inevitable.

The National Trade Policy identifies low access to digital facilities as one of the main constraints of e-commerce. To tackle this problem the policy seeks to ensure ICT infrastructure development by undertaking the following measures.

- a. Finalize the installation of the fibre optic cable in all urban centres in Kenya to increase access and connectivity to the international telecommunication network
- b. Liberalize network infrastructure, promotion of broadband competition and liberalization in network services and applications.
- c. Assemble computer hardware and software locally to ensure availability of quality computer goods and services.
- d. Integrate rollout of affordable quality broadband networks in the development of industrial clusters and special economic zones to promote B2B e-commerce

### 3.3. REVIEW OF LEGISLATIVE FRAMEWORK FOR E-COMMERCE

There are several laws in Kenya that address various issues that e-commerce poses. These laws are discussed under various legal issues to demonstrate how they endeavour to address them.

#### 3.3.1 Privacy, Confidentiality and Security Issues

Kenya does not have adequate laws to address privacy, confidentiality and security issues posed by e-commerce. Network security problems and insufficient security safeguards are identified by the National Trade Policy as constraints to the use and growth of e-commerce. Kenya, e-commerce users may receive unsolicited advertisements, be conned on internet and have their websites or data interfered with by hackers but may not have an avenue of redress. The few provisions on privacy, confidentiality and security that exist in the Constitution, Penal Code and the Kenya Communications (Amendment) Act are weak and do not incorporate any

internationally recommend standards. For example the OECD has recommended very important principles on privacy, confidentiality and security but Kenya is yet to incorporate them in her laws as shall be revealed in the appraisal of the these laws.<sup>105</sup>

### 3.3.1.1 The Constitution of Kenya

The Constitution of Kenya does not have clear provisions for the protection of privacy, confidentiality and security in e-commerce. Section 76 and 79 of the Constitution of Kenya are the closest provision on privacy. Section 76 prohibits entry into someone's premises without his or her consent. It is not clear however if the word premises can include websites. Section 79 of the Constitution also states that except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence. Thus, Kenya's Constitution under this section certainly seeks to safeguard an individual's privacy rights. This section has not been applied in the protection of privacy rights over the internet. The Kenya courts are yet to interpret these sections as protecting privacy on e-commerce.

The draft Constitution of Kenya 2004<sup>106</sup> provides quite expressly on the right to privacy. Section 47 of this draft Constitution provides that every person has the right to privacy, which includes the right not to have their person or home searched, their property searched, their possessions seized, information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed. This provision is clearer on the protection of privacy than it is in the current Constitution. It even protects the privacy of communications and information which is a key element in e-commerce. It is hoped that since this provisions in not contentious it may be part of the proposed new Constitution.<sup>107</sup>

---

<sup>105</sup> OECD Principles Supra footnote 57.

<sup>106</sup> Draft Constitution of Kenya 2004 (Bomas Draft) circulated to delegates and commissioners on 23rd March 2004.

<sup>107</sup> Currently an appointed committee of experts are draft a constitution after apparently discussion with various stakeholder on the various contentious issues.

### 3.3.1.2 Communications (Amendment) Act

The Kenya Communications (Amendment) Act No 1 of 2009 has some provisions on protection of privacy, confidentiality and security issues in electronic transactions. Section 83E mandates the Communications Commission of Kenya to grant licenses authorizing a person to provide electronic certification services. The licence granted under this section may require a licensee to adhere to procedures that ensure that the secrecy and privacy of the electronic signatures are assured. If complied with this provision guarantees the integrity of electronic signature system and shall restore more confidence in electronic contract formation.

In section 83R the Minister for Communication is required to prescribe regulations on, *inter alia*, the control of the processes and procedures to ensure adequate integrity, security and confidentiality of electronic records or payments in electronic commerce. The Minister has however not prescribed such regulations and this is a big blow to the protection of security, confidentiality and security in e-commerce. Section 83N further seeks to ensure security by providing that where any security procedure has been applied to an electronic record at a specific point of time, then such record shall be deemed to be a secure electronic record from that point of time of verification.

Section 83 V to section 84 I provides for various offences which are intended to protect the privacy and confidentiality of user of electronic transactions. They also seek to ensure security of the users. Section 83V criminalises any activity by any person who causes a computer system to perform any function for the purpose of securing access to any program or data held in any computer system, with intent to commit an offence under any law. For example, Section 83W criminalizes any activity by any person who by any means knowingly secures access to any computer system for the purpose of obtaining, directly or indirectly, any computer service or intercepts or causes to be intercepted any data within a computer system. Section 83X criminalizes unauthorized modification of data held in any computer system. Section 83 Y criminalizes the damaging or denying access or doing something that degrades or interrupts a computer system.

This Act amends Kenyan Penal Code by inserting the definition of an “electronic record.” It defines electronic record as a record generated in digital form by an information system which can be transmitted within an information system or from one information system to another, and stored in an information system or other medium. It also amends sections 267 of the Penal Code by insert new subsection (9) which provides that information is capable of being stolen. The Act further amends section 347 of the Penal Code which outlaws making of false documents. The Penal Code now recognizes making and transmitting of false electronic record or affixing of digital signature or making any mark denoting the authenticity of a digital signature a criminal offence. It also recognizes electronic documents and seeks to protect the public from fraudulent activities over the internet.

### 3.3.2 Electronic Contract Formation Issues

Electronic contact formation is a critical issue in e-commerce and it poses several questions that the Kenyan legal and regulatory framework should address. As discussed in the previous chapter dispatch and receipt of offer and acceptance in contract formation, execution of electronic signature, identification of parties to a contract and paper based concept are some of the issues that relate to electronic contract formation. In Kenya, the relevant laws that address contracts formation on e-commerce are the Law of Contracts Act and Communications (Amendment) Act No 1 of 2009. These laws are discussed below to show how they try to solve some of e-contract formation issues discussed in the previous chapter.

#### 3.3.2.1 Law of Contracts Act

The Law of Contract Act, Cap 23 Laws of Kenya, is an archaic legislation that came into force on the 1<sup>st</sup> day of January 1961. It has never been amended to reflect the changes in contract formation especially e-contracts. It applies the English Common law of Contract with certain modifications.<sup>108</sup> Section 3 provides that certain contract must be in writing to ensure their enforceability. These contracts are;

- a. Any special promise to answer for the debt, default or miscarriages of another person.

---

<sup>108</sup> See the preamble and section 2 of the Law of Contract Act.

- b. Any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods.
- c. Contract for the disposition of an interest in land.

The rationale behind this section is two pronged; to ensure compliance to the Statutes of Frauds and meet the requirement of parole evidence rule. The statute of frauds refers to the requirement that certain kinds of contracts be memorialized in a signed writing. This was meant to discourage fraud.<sup>109</sup> The parole evidence rule is the legal application of a rule of substantive law in contract cases that prevent a party to a written contract from contradicting the terms of the contract by seeking admission of evidence extrinsic to the contract.

Section 3 was drafted several years ago when paper was the only medium of documentation. With the advancement of in technology and new medium of documentation, the section is obsolete. It does not recognize electronic record or writing and therefore any contract formed electronically under the three forms of contracts above may not be enforceable. This paper based concept of writing greatly hinder the development of e-commerce in the transactions listed under the Act.

Section 3 further defines a sign in relation to a contract to include making one's mark or writing one's name or initial on the instrument as an indication that one intends to bind himself to the contents of the instrument. In relation to a body corporate, a sign includes a signature by an attorney of the body corporate duly appointed by a power of attorney registered under the Registration of Documents Act<sup>110</sup> or the affixing of the common seal of the body corporate in accordance with the constitution or the articles of association of the body corporate. The definition of a sign in the Act also excludes electronic signatures. On the face of the provisions of Law of Contract Act, execution of contracts electronically is not is not contemplated.

The Law of Contract Act, as it is currently structured, greatly hampers the development of e-commerce in Kenya. This is so because it does not recognize electronic writing and signatures

---

<sup>109</sup> Mawji Vs. US International University & another (1976-80) 1KLR

<sup>110</sup> Cap 285 Laws of Kenya.

which are the hallmark of electronic contracts formation. Being the key legislation on contract formations it should be reformed to reflect the dynamics of contract formation in this era of information technology.

Besides the express provisions of the Law of Contract Act, it incorporates some common law doctrines and general rules of contract which in one way or the other hinder or facilitates e-commerce.<sup>111</sup> Some of these include freedom of contracts, elements of contract, specific performance, common law remedies and postal rule of acceptance of offer. In this discussion I shall only consider the freedom of contract doctrine with relation to formation of electronic contracts.

### 3.3.2.2 Common Law Doctrine of Freedom of Contract

The applicability of common law in Kenya brings into operation, the common law doctrine of freedom of contract in the formation of contract. Freedom of contract means the capacity of individual autonomy to create a relationship or legal effect and also refers to the existing contractual autonomy to choose between different formal arrangements to produce the desired economic results.<sup>112</sup> It is noteworthy; however, that freedom of contract is not absolute in every contract. Several factors, like the inequality in bargaining power, hinder freedom of contract doctrine and calls for the clear regulation by the state.

This doctrine enables parties to a contract to include any term that they think will be in their best interest. Such terms should, however, be legal and should not be affected by any vitiating factors. In *Pelican Investment Ltd vs National Bank of Kenya Ltd (HCC 570 of 1998)* the court held that in commercial dealings there is freedom of contract which should be respected. The courts can only intervene when there are vitiating factors in a transaction. The vitiating factors that would warrant the court's intervention on freedom of contract are such as when it is plain in any particular case that there was fraud when the contracts were entered into or where one party used its superior position to force another into contractual obligations which were oppressive.

---

<sup>111</sup> Refer to section 2 of the Law of Contracts Act, Cap 23 Laws of Kenya.

<sup>112</sup> Laurence Koffman and Elizabeth Macdonald,( 2007) Introduction to the study of Contract law, Oxford University Press.

Under freedom of contracts parties in international e-commerce may decide to employ the applicability of international conventions like the Model Law on Electronic Signatures, MLEC, CUECIC and CISG. These conventions provide very useful provisions on various contentious issues in e-commerce.<sup>113</sup>

Since the freedom of contract is not absolute and it is hampered by the reasons discussed above there is need for the government to reform the Law of Contract Act to reflect the realities of e-commerce and not just leave it to common law regulation.

### 3.3.2.3 Communications (Amendment) Act

The Communications (Amendments) Act No 1 of 2009 was enacted to amend the Communications Act No 2 of 1998 with the objectives, inter alia, of promoting e-commerce by increasing public confidence in electronic transactions. The Act amends the principal Act, Communications Act No 2 of 1998, by inserting a whole new part on electronic transactions. Contrary to its objectives, section 83 B of the Communications (Amendments) Act excludes the application of the new part to any rule or law requiring writing or signatures in the creation or execution of a will, negotiable instruments and documents of title. This exclusion means that the old rules requiring writing or signatures like section 3 of the Law of Contract Act discussed earlier shall continue to be in force.<sup>114</sup> Under this section, negotiable instruments are contemplated to be always in paper form and not in any electronic form. Since international e-commerce involves electronic transfers of money, electronic cheques, credit cards and debit cards which are paper based, section 83 B discourages international e-commerce.

The Amendment Act, despite the above provision, contains other provisions that positively address several electronic contract formation issues. Section 83 E of the Kenya Communications (Amendment) Act No 1 of 2009 provides for the licensing of the electronic certification services. Electronic certification service providers are important because they certify various parties

---

<sup>113</sup> Refer to discussions in chapter two above on the applicability of Model Law on Electronic Signatures, MLEC, CUECIC and CISG on the dispatch and receipt of offer and acceptance, execution of contract and paper based concepts.

<sup>114</sup> See presentation made by Michael M. Murungi on Electronic Cash: Time For A Paradigm Shift In E-Commerce Legislation – A Presentation at the AITEC Africa “*Banking & Payment Technologies*” Conference, East Africa, 17-19 February, Kenyatta International Conference Centre, Nairobi – Kenya.

involved in e-commerce hence restoring confidence. Certified parties are easily identified in electronic transactions and this makes identification of parties to a contract much easy. There are however, no provisions in the Act stipulating on the criteria for certification. It is important that before a party is certified, the certification authority should be satisfied as to the integrity and capacities of the applicants.

Section 83 G, 83 H, 83I and 83 P provides for the electronic equivalency of paper based concepts. Section 83 G provides that an electronic form of documents meets the requirement of writing. Section 83 H states that where any law provides that documents, records or information shall be retained for any specific period, then that requirement shall be deemed to have been satisfied where such documents, records or information are retained in electronic form. Section 83I recognizes electronic documents to have met the originality requirements. Finally section 83P recognizes the use of electronic signatures.

Although the above provisions recognize electronic forms of documents to be meeting paper based requirements whenever paper based requirements are needed in other laws, it does not seek to repeal those laws except the Evidence Act.<sup>115</sup> This means that, notwithstanding the above provisions, the paper based requirements in other laws still subsists leading to a clear conflict between the provisions of this Act and various other laws on this issue.

The Act amends several provisions of the evidence Act that embody paper based concepts. The definition of banker's book in section 3 of the Evidence Act is amended by the Act to include bankers book kept whether in written form or printouts or electronic form. It further inserts part VII to the Evidence Act which provides for the admissibility of electronic documents in court, proof of electronic signature, and presumption on electronic agreements, signatures and messages.<sup>116</sup> This amendment clearly seeks to surmount the best evidence rule which informs the court procedure in the admission of evidence.

---

<sup>115</sup> Other laws applying paper based concepts include the Law of Contract Act.

<sup>116</sup> Refer to sections Sixth Schedule of the Communications (Amendments) Act No 1 of 2009.



The Amendment Act does not provide for the moments of dispatch of offer and acceptance. Section 83M only provides for acknowledgement of receipt of electronic records where the originator and the addressee have not agreed on the acknowledgement of receipt of electronic documents. This section does not however deal with acknowledgement of receipt of offer and acceptance which is essential in the formation of e-contracts. Under the freedom of contract parties may therefore opt to agree on the applicability of international instruments like, CUECIC, CISG and MLEC on the issue of time and place of dispatch and receipt of offer and acceptance.

### 3.3.3 Dispute Resolution

The legal position in Kenya is that parties to a contract are free to choose the laws of any country as the governing law for their contract.<sup>117</sup> As a general rule and subject to some specified restrictions, Kenyan Courts recognize governing law clauses in agreements providing for the applicable law and jurisdiction. The selection of such law must, however, be reasonable and in good faith.<sup>118</sup>

In *Raytheon Aircraft Credit Corporation & another V. Air Al-Faraj Limited*<sup>119</sup> the appellant, a company incorporated in Kansas, United States, entered into agreement with the respondent, a company incorporated in Kenya. In their agreement, they chose the applicable law to be that of Kansas, United States. In the High Court, the Respondent had sued the appellant in a Kenya court in disregard of the choice of law clause. The appellant raised a preliminary objection arguing that the suit was filed in the wrong court since the parties had agreed on the jurisdiction in their agreement. The respondent argued that such choice of jurisdiction sought to oust the jurisdiction of the High Court contrary to section 60 of the Constitution that grant parties original jurisdiction in civil and criminal matters.

The High Court in overruling the preliminary objection raised by the appellants held that it had jurisdiction based among other reasons the provisions of section 60(1) of the Kenyan Constitution. The Court of Appeal in upholding the appeal referred to the statement by a High Court judge, Kuloba J, who had correctly stated that convenience of the plaintiff, alone, in

---

<sup>117</sup> In accordance with the common law doctrine of Freedom of Contract.

<sup>118</sup> Anne Kiunuhe and Karim Anjarwalla, (2009), What Makes Judicial System Unfavourable? Business daily, 28th July 2009.

<sup>119</sup> (2005) eKLR.

choosing his forum cannot by itself oust a jurisdiction and applicable law clause. Strong cause must be shown to justify a departure from the jurisdiction and applicable law clause, and the onus of showing such strong cause lies on the plaintiff.

The Court of Appeal went further to state that section 60 does not authorize the High Court to disregard private international law on the status of the choice of law and exclusive jurisdiction clauses in international commercial agreements and assume jurisdiction over persons outside Kenya. The Court of Appeal emphasized the general rule in Kenya, that where parties have bound themselves by an exclusive jurisdiction clause, effect should ordinarily be given to that obligation unless the party suing in the non-contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum.

Where the parties have not chosen the applicable law, the law with which the transaction has the closest and most real connection is applicable. In the case of a contract, the courts of Kenya will assume jurisdiction, inter alia, if the contract is made in Kenya or if the proper law of the contract is Kenya law or if a breach is committed within Kenya.<sup>120</sup>

The choice of law and forum guidelines discussed above may apply whenever parties are engaged in international e-commerce in Kenya. Kenya has not enacted any law that deals with the choice of law or forum. She has not even ratified the 1980 Rome Convention on the Law Applicable to Contractual Obligations and as a result a party may decide to use section 60(1) of the Constitution of Kenya to delay or subvert resolution of disputes. This poses a lot of uncertainty to the common law principles on choice of law discussed above and calls for clear provisions on choice of law in such circumstances.

Kenya has however enacted the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 of the Laws of Kenya, which enables the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya.<sup>121</sup> This legislation may be used

---

<sup>120</sup> Roberta Macclendon Fonville Vs James Otis Kelly III ,John James Klein, Eati Devi Mascarenhas & John Ruggieri, (2002) eKLR.

<sup>121</sup> Refer to the Preamble to the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 of the Laws of Kenya.

in enforcing judgments obtained in disputes relating to e-commerce but does not resolve the choice of law uncertainties experienced in international e-commerce.

### 3.3.4 Consumer Protection

Kenya does not have a comprehensive consumer protection law. Consumer protection provisions are scattered in various laws. In so far as consumer protection in electronic e-commerce is concerned, only the Kenya Information and Communications Act, Cap 2 of the Laws of Kenya and the Standards Act, Cap 496 Laws of Kenya have relevant provisions.

#### 3.3.4.1 The Kenya Communications (Amendments) Act, No 1 of 2009

Section 23 of the Act requires the Commission to ensure that communication services are provided throughout Kenya and that the interests of all users of these services are protected with respect to prices, quality and variety of services, amongst other responsibilities. This section provides for consumer protection on communication services but does not address the unique issues affecting e-commerce. E-commerce use communication services and therefore to some degree this provision may guarantee consumer protection in e-commerce.

#### 3.3.4.2 Standards Act, Cap 496 Laws of Kenya

The Standards Act promotes the standardization of the specification of commodities and services; and provide for the standardization of commodities, services and codes of practice in Kenya. Section 3 of the Act establishes the Kenya Bureau of Standards (KEBS) with several functions. To enhance consumer protection, the bureau carries out the following functions;<sup>122</sup>

- a. To develop Standards and Codes of Practice for use in Trade and Industry.
- b. To carry out continuous surveillance activities to ensure conformity and compliance with Standards and Codes of Practice.
- c. To test both locally and imported goods for compliance with Kenyan Standards or any other standards approved by the Kenya Bureau of Standards.
- d. To carry out quality inspection on imports into the Kenyan market (to eliminate sub-standard goods and counterfeits) and training industry on standardization matters as a way of technology transfer to industry.

---

<sup>122</sup> Section 4 of the Standards Act, Cap 496 Laws of Kenya.

- e. To manage both product and systems certification schemes i.e. Diamond Mark of Quality Scheme, ISO 9001 (2000) Quality Management System, ISO 14001 on Environmental Management, Hazard Analysis Critical Control Point (HACCP) and Occupational Health and Safety (OHSAS). These schemes are intended to create confidence in Kenyan goods locally and internationally and thereby spur trade.
- f. Provides information on standardization.

KEBS carries out these functions in compliance with the internationally approved measures and in accordance with International Standards Organizations requirements to which it is a member. KEBS' certification body is one of the leading certification bodies in East and Central African Region.

Though the Act does not provide specifically for protection of consumer rights in e-commerce, the functions of KEBS, in more than one way ensures consumer protection especially when dealing with companies that have been certified. KEBS restores confidence among the e-commerce consumers when they purchase goods and services with certification marks or when dealing with certified e-commerce traders.

### **3.3.5 Intellectual Property Protection**

There are several intellectual property laws that address various intellectual property issues raised in the previous chapter. Some of these laws shall be reviewed to demonstrate their adequacy in protecting intellectual property in e-commerce.

#### **3.3.5.1 The Industrial Property Act**

The Industrial Property Act provide for the establishment of Kenya Intellectual Property Institute (KIPI) and sets out its statutory functions to include the grant of original industrial property rights, screening technology transfer agreements and licences, provide to the public industrial property information for technological and economic development and promote inventiveness in Kenya. The scope of intellectual property covered under this Act includes patents, utility models, industrial designs and technovations.

The Act defines utility model to mean any form, configuration or disposition of element of some appliance, utensil, tool, electrical and electronic circuitry, instrument, handicraft mechanism or other object etc.<sup>123</sup> The functions of KIPI as outlined above and the definition of utility model captures intellectual property in electric and electronic natures like domain names and websites.

The Act was revised in 2001 to align it to the provisions of the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). This move has raised the protection of intellectual property in Kenya to the international level and ensured uniformity in protection of intellectual property.

Kenya is a member of the World Intellectual Property Organization and African Regional Intellectual Property Organization. It therefore observes its obligations in these organizations.

#### 3.3.5.2 The Copyright Act

In 2001, a new Copyright Act was passed by Parliament and came into force in February 2003 and repealed the earlier 1966 Copyright Act. It incorporates the provisions of the TRIPs Agreement<sup>124</sup> and 1996 WIPO Treaties.<sup>125</sup> The new law also provides for the setting up of more efficient administrative structure and enforcement mechanisms. Section 22 provides that literary, artistic and musical works, as well as audio-visual works, sound recordings and broadcasts shall be eligible for copyright protection if they are original and have been expressed in material form. Originality is presumed where it has been determined that a sufficient effort has been made to give a work an original character.

In the case of computer programs, the legitimate owner of a computer program shall be able to do the following acts without the authorization of the author: to make copies for the purposes of correcting errors, to make a backup copy, to use the copy for the purposes of testing the usability of the program and for any other purpose not prohibited by the licensing agreement. Section 26

---

<sup>123</sup> Section 2 of the Industrial Property Act, Cap 3 of 2001, Laws of Kenya.

<sup>124</sup> Kenya is a member of The World Trade Organization (WTO) and is thus bound by the provisions of the TRIPs Agreement.

<sup>125</sup> The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Though Kenya has yet to ratify the two treaties, the 2001 Act incorporates the key provisions from the two treaties.

(5) allows for the de-compilation of a program. The Act is clear that any of the copies made under this Section should be destroyed once the purpose has been achieved or the owner ceases to be the lawful owner of the program.

Part I contains the interpretation and definitions of various terms used by the Act. It includes, more particularly, a new definition of literary works that encompasses computer programs, as well as tables and compilations of data. Section 2 of the Act contains definitions and incorporates terms that previously did not exist in the repealed Act, especially terms that have come into existence with the advances in digital technology and the Internet. With the advent of the new technologies, provisions on anti-circumvention measures and rights management systems had to be included in the Act.<sup>126</sup> Section 35 (3) makes illegal the circumvention of any technical measure that has been put in place to protect the work, as well as the manufacturing and distribution of anti-circumvention devices, the removal or alteration of any rights management system, as well as the making available to the public of works that have been obtained by way of removing the electronic rights management system. This means that one can breach copyright by interfering with whatever technology employed to protect copyright. In e-commerce, a lot of intellectual property is involved and it is protected by use of technology. Hackers however find a way of breaching such protection and benefiting out of the works of others. Such hackers can be charged in Kenya for breach of copyright under section 35 of the Act.

The 2001 Copyright Act is definitely a step in the right direction in the protection of intellectual property in e-commerce. Yet, the success of the new law can only be seen if it is effectively enforced; a good law without the proper enforcement is of no use to those it seeks to protect. Along with the new law, Kenya needs to have strong mechanisms to fight piracy, a well educated population on matters of copyright and related rights, strong and efficient collective management societies, and a functional administrative infrastructure.<sup>127</sup>

---

<sup>126</sup> Articles 18 and 19 of the (WIPO Performances and Phonograms Treaty) WPPT and articles 11 and 12 of the WIPO Copyright Treaty (WCT). Although Kenya has yet to ratify these two treaties, the Act has incorporated provisions from the two treaties.

<sup>127</sup> Marisella Ouma, (2004), The Copyright Act 2001: A New Era for Copyright Protection in Kenya, UNESCO e-Copyright Bulletin, July- September. Available at: [http://portal.unesco.org/culture/en/files/23854/11515050351Kenya\\_e.pdf/Kenya\\_e.pdf](http://portal.unesco.org/culture/en/files/23854/11515050351Kenya_e.pdf/Kenya_e.pdf). Accessed on the 25 September 2009.

### 3.3.5.3 Trademarks Act, Cap 504 of the Laws of Kenya

Trademarks Act is an old legislation which come into force on the 1<sup>st</sup> day of January 1957.<sup>128</sup> The Trademark provisions may be used in trademark infringement on e-commerce but the challenge is the identification of infringers when people display their marks on websites. In 2002 the Trade mark Act was amended by insertion of Part VII B, section 40 B, 40 C and 40 D which incorporated international application of Trademarks to Kenya. In 2003 the Trade Marks (International Registration) Rules were enacted and they recognized African Regional Industrial Property Organization (ARIPO) and MADRID registrations.<sup>129</sup> The principal advantages of using the Madrid System are that the trademark owner can protect his trademark in all the countries party to the System by filling: a single international application; in one language and subject to one set of fees and deadlines. Thereafter, the international registration can be maintained and renewed through a single procedure.

Now registration of trade marks in Kenya provides protection of the same in other jurisdiction which are members of the WIPO and ARIPO. Such universal recognition of trademark is ideal for the protection of Intellectual property in e-commerce since Kenya now observes international standards in so far as trade mark protection is concerned.

### 3.3.6 **Taxation**

Determining jurisdiction in cyber world and administration/enforcement of tax are the main challenges that most governments face in e-commerce. This is so because e-commerce is borderless and yet taxation is territorial. The administration of tax in Kenya is carried out under several laws which include; Income Tax Act, Cap 470, Laws of Kenya, Value Added Tax Act, East Africa Customs Management Act, Road Transport Act, Custom and Excise Act. The Income tax and Value added tax are the main sources of revenue in Kenya.

---

<sup>128</sup>Refer to: [http://www.kenyalaw.org/kenyalaw/klr\\_app/frames.php](http://www.kenyalaw.org/kenyalaw/klr_app/frames.php). Accessed on 27 September 2009.

<sup>129</sup> The Madrid system for the international registration of marks (the Madrid system) established in 1891 functions under the Madrid Agreement (1891), and the Madrid Protocol (1989). It is administered by the International Bureau of WIPO located in Geneva, Switzerland.

### 3.3.6.1 Income Tax Act

The current basis of taxation of income tax is territorial which means that income tax is tax imposed on the income accruing in or derived from Kenya. According to section 3 of the Income Tax Act, income tax is chargeable for the year of income upon all the income of a person, whether resident or non-resident which accrued in or was derived from Kenya. It is extremely difficult to tell where the income was derived from if transactions happened on the internet. The Internet has no physical boundaries and this make it very difficult to know which income to tax and which one not to tax. For example, it is difficult to tell where a transaction happened in cases where a buyer in Kenya accesses a website of a company based in United Kingdom and downloads a book and makes payment online. Section 3 of the Income tax above if strictly applied may not enable Kenya Revenue Authority levy income tax because it is not clear where the money accrued or derived. This poses a danger of double taxation. Further, assuming that the transaction happened in Kenya and therefore the income is derived from Kenya, KRA may have a difficult moment to enforce the payment of tax against a foreign company. The Income Act therefore remains deficient in the administration and enforcement of income tax.

### 3.3.6.2 Value Added Tax, Cap 476, Laws of Kenya

The Value Added Tax like the Income tax is territorial and section 5 states that value added tax is charged on the supply of goods and services in Kenya and on the importation of goods and services into Kenya. Supply of certain goods and services is not physical and may be done without any detection by the authorities. One may import a good or service through the internet without the tax authority detecting. This provision may be in vain in cases where somebody trades in goods and services on the internet.

## 3.4 A REVIEW OF E-COMMERCE REGULATORY FRAMEWORK

E-commerce is a phenomenon which in one way or the other affects various socio-economic-political sectors. For example, E-commerce relies on Information and Communication Technology as a mode of communication, Trade department (Ministry of Trade) to facilitate trade, Treasury (Ministry of Finance or Central Bank of Kenya) because money is still the medium of exchange etc. It regulation therefore necessarily require an integrated approach where various regulatory bodies are involved.



Currently e-commerce is legally regulated by the Communications Commission of Kenya as provided under the Kenya Information and Communications Act, Cap 2 of the Laws of Kenya As amended by the Kenya Communications (Amendments) Act No 1 of 2009. Section 2 of the Kenya Communications (Amendments) Act No 1 of 2009 amends the Kenya Information and Communications Act, Cap 2 of the Laws of Kenya by adding the following words after the words ‘Communication Commission of Kenya’:

*“to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce”.*

This amendment effectively mandates the Communications Commission of Kenya to regulate e-commerce in Kenya. Section 83 C provides for the functions that the Commission should carry out in discharging its mandate under the Act which are to:

- a. Facilitate electronic transactions by ensuring the use of reliable electronic records.
- b. Facilitate electronic commerce and eliminate barriers to electronic commerce such as those resulting from uncertainties over writing and signature requirements.
- c. Promote public confidence in the integrity and reliability of electronic records and electronic transactions.
- d. Foster the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium.
- e. Promote and facilitate efficient delivery of public sector services by means of reliable electronic records.
- f. Develop sound frameworks to minimize the incidence of forged electronic records and fraud in electronic commerce and other electronic transactions.

Under section 83 E the commission is also mandated to issue licenses to electronic certification services. The Commission by grant of a licence may require the licensee to meet the following requirements;

- a. Make use of hardware, software and procedures that are secure from intrusion and misuse.

- b. Provide a reasonable level of reliability in its services which are reasonably suited to the performance of intended functions.
- c. Adhere to procedures that ensure that the secrecy and privacy of the electronic signatures are assured.
- d. Observe such other standards as may be specified by regulations.

This section clearly mandates the CCK to regulate e-commerce but its regulation is technology based i.e. to use technology to ensure reliable electronic records, eliminate barriers to electronic commerce and security.

The approach contemplated in the Act is not integrated with other regulatory bodies, leaving many other aspects of e-commerce unregulated. For example it does not provide for the regulation of trade related issues that may arise like consumer protection, dispute regulation and intellectual property.

### 3.5 CONCLUSION

Kenya's legal and regulatory system is not adequate to address all the issues that e-commerce pose. Various statutes analyzed in this chapter are old and were enacted before e-commerce was born. It is clear though, that Kenya has endeavoured to amend some laws to ensure that they address various practical and legal issues. The recently enacted Kenya Communications (Amendments) Act No 1 of 2009 is the main legislation addressing e-commerce currently. The Act's main target is communication and not electronic trade. It lacks very vital provision on the various issues raised above. For example, it does not have provisions addressing consumer protection, security, contract formation etc. Kenya has also taken useful steps by formulating the National Trade Policy and Information and Communications Technology policies with provisions promoting e-commerce. Despite these efforts, there is need to formulate a comprehensive e-commerce policy and laws in Kenya. Towards that end, the government has put in place reforms to address e-commerce and the most notable one is the drafting of the Electronic Transactions Bill, 2007. The next chapter discusses various reform agenda that are being undertaken in Kenya.

## CHAPTER FOUR

### CRITIQUE OF THE REFORM OF THE LEGISLATIVE FRAMEWORK

#### 4.1 INTRODUCTION

It is clear from the discussion in chapter three above that the legal and regulatory frameworks in Kenya does not adequately address some legal and practical issues that e-commerce poses. The Kenya's ICT policy and the recent efforts being undertaken by the Kenyan government also emphasizes the fact that Kenya's legal and regulatory mechanism need to be reformed to accommodate e-commerce transactions.

The government has undertaken several legal and regulatory reforms to ensure a favourable environment for e-commerce. So far the government has enacted the Kenya Communications (Amendments) Act No 1 of 2009 which has amended the Evidence Act. The Act has marked a major milestone in the use of paperless documents in transactions and in evidence.

The government is also spearheading further reforms and has now drafted the Electronic Transactions Bill, 2007 which is still pending in Parliament. The main aim of this Bill is to facilitate and promote the use of electronic transactions in Kenya by creating legal certainty and public trust around transactions which are conducted with various forms of information and communications technologies.<sup>130</sup> The Bill also endeavours to address several issues raised in previous chapter.

The Electronic Transactions Bill is drafted in line with the UNCITRAL Model Law on Electronic Commerce.<sup>131</sup> It is therefore intended to reflect internationally acceptable rules as to how a number of legal obstacles may be removed, and how a more secure legal environment may be created for electronic commerce. The Bill is based on the principles of functional equivalence, party autonomy and uniformity. This chapter critiques the Electronic Transactions

---

<sup>130</sup> See preamble to the Electronic Transactions Bill, 2007.

<sup>131</sup> Refer to the Memorandum of Objects and Reasons, Objective (f).

Bill, 2007 to establish its favorability in facilitating international e-commerce by addressing various legal issues.

#### 4.2 POSITIVE PROVISIONS OF THE ELECTRONIC TRANSACTIONS BILL, 2007

The Electronic Transactions Bill, 2007 contains several positive provisions which seek to address some of the issues raised in earlier chapters. Notably, it addresses privacy and security issues, contract formation issues on offer and acceptance, identification of parties to contract and paper based concepts. The Bill fails to address issues of bridging the digital divide, execution of electronic contracts, dispute resolution, consumer protection, intellectual property and taxation.

##### 4.2.1 The Regulatory Framework Intended under the Bill

Part II of the Bill provides for the proposed regulatory framework and the functions that it is expected to carry out. Section 4 of the Bill proposes an integrated regulatory framework proposing the Central Bank (CBK), the Communications Commission of Kenya (CCK) and other bodies to be involved. Electronic Transactions is a new phenomenon in Kenya which cuts across many sectors of the economy. Because of this fact it is logical that various players be involved in the regulation of e-commerce in their field of operation. The Central Bank and Communications Commission of Kenya are however key institutions in e-commerce transactions. The Central Bank of Kenya must be involved because in e-commerce, money still remains a key medium of exchange and CBK is responsible for monetary issues. Communications Commission of Kenya is also important because e-commerce essentially relies on Information and Communication Technology (ICT) which CCK has relevant expertise and experience.

The Bill proposes that in order to administer the functions of the Act outlined in section 5(1) of the Bill, the regulatory body should have its membership drawn from Ministry of ICT, Ministry of Finance, Ministry of Trade, Ministry of Tourism, Communications Commission of Kenya, Central Bank of Kenya, national communications Secretariat, the Directorate of e-government and other relevant stake holder.

Such an integrated approach to regulation is laudable but the Bill does not explain how the regulatory body should be constituted. The concern that remains is whether there should be an established independent body whose membership is drawn from officers in various relevant ministries and government bodies; or should we have different relevant ministries and government bodies overseeing the implementation of sections of the Bill which are applicable in their area of operation. That dilemma is obvious from the provisions of the Bill and it is an area which the Bill should provide with clarity. Any regulatory mechanism established must be formidable enough to deal with novel legal and practical issues of e-commerce like privacy and security, taxation, intellectual property, content control etc.

#### **4.2.2 Functional Equivalent Approach**

The Electronic Transactions Bill is based on the recognition that legal requirements prescribing the use of traditional paper-based documentation constitute the main obstacle to the development of modern means of communication. In the preparation of the Bill, consideration was given to the possibility of dealing with impediments to the use of electronic commerce posed by such paper based requirements in other laws. Part III of the Bill addresses paper based notions such as “writing”, “signature” and “original”, with a view to encompassing computer-based techniques.

The Bill relies on the ‘functional equivalent approach’, which is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques.<sup>132</sup> For example, section 6 provides a general provision by stating that information shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic version. Section 8, 10 and 12 more specifically applies the functional equivalency approach to writing, signature and originality. The wording of these sections is similar and to the effect that where the law requires information to be in writing, requires a signature of a person on a document or requires information to be presented or retained in its original form, the requirement of the law is fulfilled if the information is contained in electronic version that is accessible and intelligible so as to be usable for subsequent reference. The electronic signature

---

<sup>132</sup> Refer to article 15 of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996).

must adequately identify and indicate the person's approval of the information to which the signature relates and be reliable.

The functional equivalency approach incorporated in the Bill help in surmounting the paper based concepts with regard to writing, signature and originality found in other laws. It also makes execution of electronic contracts possible. Further, the Bill, based on functional equivalency approach, amends several other laws to accept electronic technology. Some of the amendments are discussed below.

#### **4.2.3 Time and Place of Contract Formation**

In contract formation the time and place of contract formation are critical. As discussed earlier, because of the instantaneous nature of electronic communications, the place and time of offer and acceptance is blurred. To address the problem of determining the place and time of offer and acceptance, the Bill has expressly provided for such moments. Contract is formed at the time and place where the acceptance of the offer has become effective. Section 17 and 18 provides that an offer in electronic form is effective at the time and place it is received by the offeree while an acceptance of an offer is effective at the time and place the electronic version sent by the offeree confirming acceptance of the offer is received by the offeror. The Bill therefore does not apply the Postal rule which contemplates acceptance the moment a letter of acceptance is posted. These provisions on time and place of offer and acceptance in the Bill are critical because they remove controversies posed by instantaneous communications in e-commerce.

#### **4.2.4 Trusted Third Parties**

Trusted third parties are key agents in electronic commerce as they play an intermediary role hence boosting trust. They provide banking, legal, insurance and other services necessary to facilitate e-commerce. Trusted third parties will only be trusted by players if there is a well established certification mechanism. Players would be more comfortable trading with trusted third parties duly certified by a government.

To facilitate the certification of trusted third parties, section 21 of the Electronic Transactions Bill mandates the regulator of e-commerce to grant licenses authorizing any particular person to

provide electronic certification services. Any licence granted under this section should require the licensee to do the following;

- a. Make use of hardware, software and procedures that are secure from intrusion and misuse.
- b. Provide a reasonable level of reliability in its services which are reasonably suited to the performance of intended functions.
- c. Provided procedures to ensure that secrecy and privacy of the electronic signatures are secure.
- d. Observe any other standards that the licence may prescribe.

The implementation of this section would go a long way in boosting trust in e-commerce. It will ensure that there is easy identification of parties in international e-commerce.

Part IV provides for limitation of liability of service providers who are trusted third parties. Section 22, 23 and 24 states that a service provider shall not be subject to any civil or criminal liability in respect of third party material, in form of electronic versions, to which he/she acted merely as a conduit, store or host. Section 26 obliges the service providers to notify the authorities of any unlawful activity in writing but under section 27, the service providers do not have general obligation to monitor data which is in transit.

The limitation of liability of service providers especially in criminal activities is not appropriate. It should be the duty of service providers, since they possess the ICT expertise and experience, to notify the state of such criminal activities that may be perpetuated on the internet. If they fail to reasonably identify the criminals and notify the authorities, they should be liable. If service providers cannot investigate cybercrime, then there should be an established government entity that works closely with service providers to investigate cyber crime.

#### **4.2.5 Privacy and Security**

As illustrated earlier, to fully reap the benefits of e-commerce, security and privacy issues must be addressed. Part V of the Bill specifically deals with privacy and security issues. Section 29 of the Bill empowers the Minister to declare any computer system or network as a protected

information system. The Minister may also prescribe minimum security standards or prohibitions for protected information systems in respect of, *inter alia*, physical security, access, control or transfer of information.<sup>133</sup> Certain information technology resources will require legal protection against unauthorized entry due to the sensitivity and dependence of the country on such resources.<sup>134</sup> The Bill also seeks to protect personal information from unauthorized access or destruction. It further amends Kenya's Penal Code by introducing several cybercrimes which is implemented would ensure security in e-commerce. The Bill therefore recognizes the need to protect privacy and ensure security in e-commerce as a way of bestowing confidence amongst the players.

#### **4.2.6 Proposed Amendments to other Laws**

The provision of Electronic Transactions Bill, 2007 when finally enacted into law shall have an overriding effect over any other provisions contained in any other law in force relating to electronic transactions.<sup>135</sup> This therefore makes the Bill, once it becomes law, the main legislation on e-commerce in Kenya. This means that provisions of any other law, except the Constitution, which is in conflict with the Electronic Transactions Act, shall be null and void. To ensure that there is no apparent conflict between the Bill and the various relevant laws, the Bill seeks to amend several provisions in various laws.

##### Amendments to the Extradition Act

The Extradition Act shall be amended by introducing all crimes mentioned under the Electronic Transactions Act, 2007.<sup>136</sup>

##### Amendments to the Evidence Act, Cap 80 Laws of Kenya

The Bill amends the Evidence Act provisions on admissibility. Information contained in an electronic record which is printed on a paper, stored, recorded or copied, optical or electromagnetic media produced by a computer are deemed a document hence admissible in court as original documents.

---

<sup>133</sup> Section 30 of the Bill

<sup>134</sup> See commentary to the section on privacy and security contained in the Bill.

<sup>135</sup> Section 41 of the proposed Electronic Transaction Bill.

<sup>136</sup> See Schedule A of the Electronic Transactions Act, 2007.



The Bill introduces a rebuttable presumption to electronic records and digital signatures. The court shall presume, unless contrary is proved, that the secure electronic record has not been altered since the specific point at the Secure Digital Signature was affixed.

#### Amendments to the Penal Code

The Electronic Transactions Bill seeks to amend the Penal Code by introducing several cybercrimes and impose penalties. The amendment seeks to criminalize among others the following:

- a. Unauthorized access to the whole or part of an electronic system with or without infringing security measures, with intent to infringe privacy.
- b. Causing any electronic system to perform any function for the purpose of gaining unauthorized access to any data held in electronic system.
- c. Data interference with intent to make an illegal gain or cause harm to the public.
- d. System interference with intention to cause damage to the public or any person or interrupt or obstruct the functioning, reliability or usefulness of an electronic system by inputting, transmitting, damaging, deleting, altering, deteriorating or suppressing data or services.
- e. Electronic fraud and electronic forgery
- f. Misuse of electronic systems by using it to do any of the crimes listed above.
- g. Unauthorized access to password
- h. Misuse of encryption and transmission of malicious code
- i. Cyber stalking, spamming, spoofing
- j. Unauthorized interception of data
- k. Cyber terrorism.

The introduction of these crimes would further bestow confidence amongst the players in international e-commerce.

### 4.3 FLAWS IN THE LEGISLATIVE REFORM

#### 4.3.1 Shortfalls in the Electronic Transactions Bill, 2007

Despite the good provisions of the Electronic Transactions Bill, 2007, it fails to address several key issues that dog e-commerce in Kenya. The Bill does not address issues raised in previous chapters which are;

- a. Bridging the digital divide,
- b. Dispute resolution,
- c. Consumer protection,
- d. Intellectual property, and;
- e. Taxation.

#### 4.3.2 Electronic Signatures

Execution of electronic contracts is a very important requirement just like in paper based contracts. Electronic signatures therefore play a vital role in electronic contract formation. The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures has suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use modern techniques.

The Electronic Transactions Bill provides for the recognition of electronic signatures but does not elaborately provide for various issues concerning electronic signatures. The UNCITRAL, has apart from the Model law on Electronic Signatures, recognized the need to have a separate legislation addressing electronic signatures in e-commerce. UNCITRAL has therefore recommended a model law on Electronic Signatures against which countries are supposed to enact their laws. In Kenya, no efforts have been taken to enact an Electronic Signatures law.

The Electronic Signatures law gives electronic contracts the same legal status as written agreements and sets a uniform legal standard for electronic signatures and records. It ensures that transactions in the electronic marketplace are as enforceable as those created with paper and pen.

#### 4.4 CONCLUSION

In its reform agenda, Kenya has drafted the Electronic Transactions Bill, 2007 which is a very progressive law that seeks to introduce internationally acceptable principles in the regulation of e-commerce in Kenya. It contains provisions which address several e-commerce issues and if enacted into law it may facilitate e-commerce in the country. The Bill, however, does not address several other issues raised in chapter two above that are critical in the conduct of electronic commerce in Kenya.

## CHAPTER FIVE

### CONCLUSIONS AND SUGGESTIONS

#### 5.1 CONCLUSIONS

This study has demonstrated that e-commerce is expanding very fast in the world and in Kenya. The government has put up a mechanism to ensure expansion of ICT which is the handmaiden of e-commerce in Kenya. With the arrival of the optic cable in Kenya, e-commerce is bound to be more stimulated since internet shall be more accessible. E-commerce being a new form of doing business, has posed several legal and practical problems that any country should strive to surmount. There are issues ranging from the bridging of the digital divide, contract formation, intellectual property, taxation and consumer protection. These issues curtail the expansion of e-commerce if not addressed.

Kenya's legal and regulatory framework reveals several weaknesses in so far as electronic commerce is concerned. It is clear though, that Kenya has endeavoured to amend some laws to address various practical and legal issues. The Main existing legislation that handles most of the issues is the Communications (Amendments) Act No 1 of 2009. Kenya has also taken useful steps by formulating the National Trade Policy and Information and Communications Technology policies with provisions promoting e-commerce. There is however, need for formulation of comprehensive e-commerce policy in Kenya.

There are ongoing reforms in Kenya to ensure that the law is sufficiently facilitative. The drafting of Electronic Transactions Bill, 2007 is the only comprehensive proposed reform on e-commerce legal and regulatory reform. This draft Bill is however impaired in several ways and calls for further negotiation on it to make it more facilitative. Other cross cutting legislations are also inevitable to ensure a more integrated approach to e-commerce.

At the international level, several conventions have been negotiated and internationally acceptable principles formulated to address issues of contract formation, intellectual property,

consumer protection, taxation, privacy, confidentiality and security issues, digital divide. Kenya has enacted some national laws, especially on intellectual property, to reflect the internationally accepted standards.

## 5.2 SUGGESTIONS

In light of the various shortcomings of the legal, regulatory and policy in e-commerce regulation in Kenya, there is need for various measures to be undertaken to boost e-commerce. This study recommends various measures that need to be undertaken to ensure adequate regulation of e-commerce.

### 5.2.1 Enactment of the Electronic Transactions Act and the Electronic Signatures Act

The Electronic Transactions Bill pending in Parliament needs to be enacted to have a force of law. If enacted into law, it shall comprehensively provide for various issues including privacy and security, contract formation issues like time and place of dispatch and receipt of offer and acceptance. The Bill has to be reformed however to provide for electronic dispute resolution mechanisms, Consumer protection, Intellectual property and Taxation.

Further, there is need for enactment of Electronic Signatures Act modeled alongside the UNCITRAL Model on Electronic Signatures to eliminate any uncertainty that surround electronic signatures. The Act should clearly define what amounts to an electronic signature. Such a definition should be technologically neutral and broad enough to include 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 a record.<sup>137</sup>

### 5.2.2 Formulation of E-commerce Policy

Kenya needs to formulate a comprehensive e-commerce policy. The policy should clearly provide the manner in which the issues raised in this study are to be handled. It should also clearly outline the regulatory and implementation mechanism of e-commerce. Several areas of law crosscut e-commerce. Some of these areas include intellectual property, criminal, contract,

---

<sup>137</sup> Lauren Bright and Jerald Jacobs, 2001, Implications of Electronic Signatures Act, American Society of Association Executives. Available at: <http://www.nrwa.org/2001/publications/articles/ElectronicSignatures.htm>. Accessed on 5 October 2009.

monetary issues, taxation and consumer protection. Because of its multifaceted nature of e-commerce, any policy on e-commerce should harmonize all concerned areas.

### **5.2.3 E-Commerce Regulatory Authority**

The growth of electronic commerce has created the need for vibrant and effective regulatory mechanisms, which would further strengthen the legal infrastructure that is crucial to the success of electronic commerce. To be able to harmoniously address all the multi-sectoral issues, there should be an E-Commerce Regulatory Authority dedicated to e-commerce regulation. The authority should *inter alia* be charged with the following duties;

- a. Facilitate and promote electronic commerce
- b. Promote public confidence in the integrity and reliability of electronic records and electronic commerce.
- c. Foster the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium.
- d. To facilitate coordination between and among the various Ministries and government agencies so as to ensure effective development of harmonized regulation of e-commerce.

### **5.2.4 Self regulation**

The major players in e-commerce are private corporations and individuals. They possess the relevant technology necessary in e-commerce. Given the complexity of e-commerce regulation, there is an urgent need to involve the players themselves who may come up with technology based and technology neutral forms of regulation. However, such form of regulation should be used alongside government regulation. Recent world financial crisis as learned in chapter one, has shown that a lot of self regulation may be counterproductive. The private sector should form an umbrella association to oversee the transactions carried out through electronic means.

### **5.2.5 Amendment of Certain Laws**

The Evidence Act, the Law of Contract Act, the Penal Code and the Companies Act are some of the key laws that need to be amended to appreciate e-commerce.

### Penal Code, Cap 63 Laws of Kenya

The Penal Code must be amended to recognize a record generated in digital form by an information system which can be transmitted within an information system or from one information system to another, or stored in an information system or other medium. Recognition of electronic documents and amendment of provision that outlaws uttering of documents would curb electronic uttering of documents. Further, the Penal Code should be amended to provide that information is capable of being stolen.

### Law of Contract Act, Cap 23 Laws of Kenya

Section 3 which provide that certain contract must be in writing to ensure their enforceability should be amended to allow for enforceability of electronic writing.<sup>138</sup>

### Evidence Act, Cap 80 Laws of Kenya

The Evidence Act should be amended to recognize electronic documents in the same level as paper based documents. The best evidence rule should include use of electronic documents. The evidence Act should also be amended to provide for various presumptions regarding electronic documents. For example, the court has to presume, unless the contrary is proved, that the secure electronic record has not been altered since the specific point of time the secure electronic signature was affixed.

### Companies Act, Cap 486 Laws of Kenya

The Companies Act should be amended to allow for the following;

- a. Electronic filing of returns,
- b. Recognition of electronic documents,
- c. Electronic payment of dividends etc.

---

<sup>138</sup>These contracts are: Any special promise to answer for the debt, default or miscarriages of another person; Any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods; and, Contract for the disposition of an interest in land.

### **5.2.6 International Cooperation**

Global cooperation is critical in the regulation of e-commerce because of its transboundary nature and the fact that e-commerce is generally a global phenomenon. Kenya must therefore join other countries in their efforts in boosting e-commerce, regionally and internationally. Certain issues that e-commerce raises like taxation, intellectual property and consumer protection can only be effectively regulated through international cooperation. Kenya should enter into several bilateral and multilateral instruments to ensure sustainable international cooperation. Such international cooperation should be gradual and based on internationally acclaimed trade principles of Non-discrimination, National Treatment and Transparency. This is important to ensure that there is fair play in e-commerce internationally.

### **5.2.7 Dispute resolution**

Dispute resolution is one of the key concerns of the players in e-commerce. Since each country has different laws and differing judicial capacity levels, there is need for uniformity in dispute resolution. To ensure uniformity and certainty, this report recommends that the proposed Electronic Transactions Act should provide for arbitration as a form of dispute resolution. Arbitration allows parties to choose the law applicable to their contract, choose qualified people to arbitrate, and limit the time frame for arbitration. Such discretion to parties makes arbitration an ideal dispute resolution mechanism in e-commerce than litigation.



## BIBLIOGRAPHY

1. A green Paper on Electronic Commerce for South Africa, Department of Communications Republic of South Africa, November 2000.
2. Anne Kiunuhe and Karim Anjarwalla, (2009), What Makes Judicial System Unfavourable? Business daily, 28th July 2009.
3. Attiya Waris, (2007), Taxation without Principles: A Historical Analysis of the Kenyan Taxation System, Kenya Law Review, Vol 1.
4. Aynny, (2000), E-commerce Future in Figures, Ecommerce Journal, 6<sup>th</sup> February. Available at: <http://www.ecommerce-journal.com/news/e-commerce-future-in-figures>.
5. Baldwin, Robert, and Martin Cave, (1999), Understanding Regulation: Theory, Strategy, and Practice, New York: Oxford University Press.
6. Bert-Jaap Koops et al. (2006), Starting Points for ICT Regulations, Deconstructing Prevalent Policy One-liners, Cambridge University Press.
7. Business and Industry Advisory Committee (BIAC, (2006), Competition and E-Commerce, Statement of the Business and Industry Advisory Committee (BIAC) to the OECD to the OECD Committee on Competition Law and Policy on October 16. Available at: [http://www.biac.org/statements/comp/BIAC\\_Comments\\_on\\_CLP\\_and\\_E-Commerce.pdf](http://www.biac.org/statements/comp/BIAC_Comments_on_CLP_and_E-Commerce.pdf).
8. Charles H. M. 2006, The UNCITRAL Electronic Contracts Convention: Will it be used or Avoided? Pace International Law Review, Vol 17, 261.
9. Communications Commission of Kenya, (2009), Communications Statistics Report Second Quarter 2008/09. Nairobi, Communications Commission of Kenya. Available at: [http://www.cck.go.ke/UserFiles/File/SECTOR\\_STATISTICS\\_REPORT\\_Q2\\_0809.pdf](http://www.cck.go.ke/UserFiles/File/SECTOR_STATISTICS_REPORT_Q2_0809.pdf).
10. Craig S Wright, (2008) Electronic Contracting in an Insecure World, SANS Institute. Available at: [http://www.sans.org/reading\\_room/whitepapers/legal/electronic\\_contracting\\_in\\_an\\_insecure\\_world\\_2088?show=2088.php&cat=legal](http://www.sans.org/reading_room/whitepapers/legal/electronic_contracting_in_an_insecure_world_2088?show=2088.php&cat=legal).
11. Dan Robel, (2006), International Cybercrime Treaty: Looking Beyond Ratification, SANS Institute. Available at:

- [http://www.sans.org/reading\\_room/whitepapers/incident/international\\_cybercrime\\_treaty\\_looking\\_beyond\\_ratification\\_1756](http://www.sans.org/reading_room/whitepapers/incident/international_cybercrime_treaty_looking_beyond_ratification_1756).
12. Danice Kowalczyk, (2000), Avoiding Intellectual Trespass in the Global Marketplace: Encryption & Privacy in E-Commerce, Virginia Journal of Law and Technology.
  13. David R. (1817), On the Principles of Political Economy and Taxation, London, John Murray.
  14. Department of Trade and Industry, Building Confidence in Electronic Commerce: a Consultation Document, Unique Reference Number 99/642. Available at: <http://www.cyber-rights.org/crypto/consfn1.pdf>.
  15. Economic Commission for Latin America and the Caribbean (ECLAC), (2002), Electronic Commerce, International Trade and Employment: Review of the Issues, Economic Commission for Latin America and the Caribbean (ECLAC).
  16. Economic Commission for Latin America and the Caribbean (ECLAC). 2002. *Electronic Commerce, international trade and Employment: Review of the Issues*, Economic Commission for Latin America and the Caribbean (ECLAC).
  17. Economics Essays, n.d, Advantages and disadvantages of WTO. Available at: <http://www.economicshelp.org/2007/06/advantages-and-disadvantages-of-wto.html>.
  18. Edwin Cannan, (1904), An Inquiry into the Nature and Causes of the Wealth of Nations, 5<sup>th</sup> ed, London: Methuen & Co., Ltd.
  19. Elizabeth G, Ronald E. and Elizabeth B. (2002), Buying Apparel over the Internet, Journal of Product & Brand Management, Vol: 11, Issue: 2. P 89-102.
  20. Ernesto H. (2001), Trade in Electronic Commerce Services under the WTO; The Need to Clearly Classify Electronic Transmission as Services and Not Tariff-Liable, The Journal of World Intellectual Property, Vol. 4. pp. 557-580.
  21. Franklin Pierce Law Center, n.d., Intellectual Property in E-Commerce, World Intellectual Property Organization. Available on: [http://www.ipmall.info/hosted\\_resources/pubspapers/WIPO.pdf](http://www.ipmall.info/hosted_resources/pubspapers/WIPO.pdf).
  22. Friedman, Milton (1990). Free to Choose: A Personal Statement, New York, Harcourt Brace Jovanovich, Inc.
  23. Graham D. (2004), Free trade; Myth, Reality and Alternatives, Bangladesh, University Press Ltd.

24. Gregory E. Maggs, (2001), Regulating Electronic Commerce, Washington, Public Law and Legal Theory Working Paper No. 378.
25. House of Commons, International Development Committee, (2007), Fair Trade and Development, Vol1, London: The Stationery office Limited.
26. International Data Corporation, n.d, Digital Market place & New Media; Ongoing Analysis, Available at: <http://www.idc.com/prodserv/maps/newmedia.jsp;jsessionid=O04JCWNK40PBGC.QJAFDCFFAKBEAVAIWD>.
27. International Telecommunication Union, 2002, ITU Digital Access Index: World's First Global ICT Ranking Education and Affordability Key to Boosting New Technology Adoption. Available at: [http://www.itu.int/newsroom/press\\_releases/2003/30.html](http://www.itu.int/newsroom/press_releases/2003/30.html).
28. Jacob Consulting Pty Ltd, n.d, Online Contracts: How To Make Ecommerce Work, Available at: [http://www.djacobson.com/technology\\_business/jacobson\\_online\\_contracts\\_0603.pdf](http://www.djacobson.com/technology_business/jacobson_online_contracts_0603.pdf).
29. Joel R. (1998). Lex Informatica: The Formulation of Information Policy Rules through Technology, Texas Law Review Volume 76, Number 3.
30. Lauren Bright and Jerald Jacobs, 2001, Implications of Electronic Signatures Act, American Society of Association Executives.
31. Laurence Koffman and Elizabeth Macdonald, ( 2007) Introduction to the study of Contract law, Oxford University Press.
32. Lorraine de Germiny & Joshua Karton, n.d. The CISG Advisory Council Comes of Age, Available at: [http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=joshua\\_karton](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=joshua_karton).
33. Lorrier Faith Cranor, (2003), 'I Didn't Buy for Myself' Privacy and E-commerce Personalization, Washington DC, AT &T Labs Research. Available at: <http://lorrie.cranor.org/pubs/personalization-privacy.pdf>.
34. Ludwig, M. (1996), a Critique on Interventionism, New York, Foundation for Economic Education.
35. Marisella Ouma, (2004), The Copyright Act 2001: A New Era for Copyright Protection in Kenya, UNESCO e-Copyright Bulletin, July- September.

36. Maryke Silalahi Nuth, Indonesia's Digital Divide and E-commerce: Opportunities and Challenges, Norway, Norwegian Research Center for Computers & Law Faculty of Law, University of Oslo. Available on: <http://www.tiimi2008.com/9.pdf>.
37. Mbasi Fredrick, (2007), Emerging Legal Issues Arising from Online Gambling; A Framework for Future Legislation in Kenya, LLB Dissertation submitted to the University of Nairobi, school of Law.
38. Michael Ettredge and Vernon J. Richardson, (2001), Assessing the Risk in E-Commerce, School of Business, University of Kansas.
39. Ministry of Information and Communications, (2006), National Information & Communications Technology (ICT) Policy, Republic of Kenya. Available at: [http://www.cck.go.ke/UserFiles/File/national\\_ict\\_policy.pdf](http://www.cck.go.ke/UserFiles/File/national_ict_policy.pdf).
40. Murray C, Holloway D, Timson-Hunt. (2007). *Schmitthooff's Export Trade: the Law and Practice of international Trade*, 11 ed, London, Sweet &Maxwell, P. 859-878.
41. Norman Solovay and Cynthia K. Reed, (2003), *The Internet and Dispute Resolution: Untangling the Web*, New York, Law Journal Press.
42. OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.
43. Organization for Economic Co-operation and Development, 2000, Guidelines for Consumer Protection in the Context of Electronic Commerce, OECD Publishing.
44. P J Skevington and TP Hart (1997) Trusted third parties in electronic commerce, Springer Netherlands, BT Technology Journal, Vol 15, No 2, April.
45. Piazzolo D. (2001). E-Commerce and the Multilateral Framework, *Wirtschaftspolitische Blatter*, Vol. 48, Nr. 6:625-634.
46. Report by the Technical Advisory Group on Treaty Characterization of Electronic Commerce Payments on Tax Treaty Characterization Issues Arising from E-Commerce made to the Working Party No. 1 of the OECD Committee on Fiscal Affairs on 1 February 2001.
47. Smith, A. *Wealth of Nations*, edited by C. J. Bullock. Vol. X. The Harvard Classics. New York: P.F. Collier & Son, 1909–14.
48. Steele J, n.d. Global TRECs: The Regulation of International Trade in Cyberspace, *Canadian Journal of Law and Technology*.

49. Stephen E. Fieberg, (2006) Privacy and Confidentiality in an e-Commerce World: Data Mining, Data Warehousing, Matching and Disclosure Limitation, *Statistical Science*, Vol. 21, No. 2, 143–154. Available at: [http://projecteuclid.org/DPubS/Repository/1.0/Disseminate?view=body&id=pdfview\\_1&handle=euclid.ss/1154979817](http://projecteuclid.org/DPubS/Repository/1.0/Disseminate?view=body&id=pdfview_1&handle=euclid.ss/1154979817).
50. Tim Brightbill and Sarah Dylag, n.d, Barriers to International Electronic Commerce: Recent Issues and Developments. Available at: <http://www.wileyreinandfielding.com/docs/publications/11623.pdf>.
51. Trubeck, D, Marc G. (1974), Scholars in self-estrangement: Some reflections on the crisis in law and development studies in the United States, *Wisconsin Law Review*.
52. United Nations Conference on Trade and Development, (2002), E-Commerce and Development Report, New York & Geneva, United Nations. Available at: [http://r0.unctad.org/ecommerce/docs/edr02\\_en/ecdr02\\_fas.pdf](http://r0.unctad.org/ecommerce/docs/edr02_en/ecdr02_fas.pdf).
53. *Wolfgang Hahnkamper*, (2005), Acceptance of an Offer in Light of Electronic Communications *Journal of Law and Commerce* , Vol. 25.
54. Zaveri, B. n.d. E-commerce: Challenges and Opportunities. Baroda, M.S. University Baroda Available at: [http://www.indianmba.com/Faculty\\_Column/FC822/fc822.html](http://www.indianmba.com/Faculty_Column/FC822/fc822.html).